No. 99638-5

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON ENGLISH,

Petitioner, and

CALVIN QUICHOCHO,

Petitioner.

Court of Appeals Cause No. 53188-7-II
Appeal from the Superior Court of Clark County

The Honorable John Fairgrieve, Judge

PETITION FOR REVIEW

Peter B. Tiller, WSBA No. 20835 Of Attorneys for Quichocho The Tiller Law Firm 118 North Rock Street P. O. Box 58 Centralia, WA 98531 (360) 736-9301 ptiller@tillerlaw.com	Kevin Hochhalter, WSBA No.43124 Attorney for English Olympic Appeals PLLC 4570 Avery Ln SE #C-217 Lacey, WA 98503 360-763-8008 kevin@olympicappeals.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES **Page**

UNITED STATES CASES **Page**

OTHER AUTHORITIES **Page**

REVISED CODE OF WASHINGTON **Page**

RAP **Page**

A. IDENTITY OF PETITIONER

Petitioners, Brandon English and Calvin Quichocho, appellants below, ask this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

English and Quichocho seeks review of the unpublished opinion of the Court of Appeals in cause number 53188-7-II, 2021 WL 876916, filed March 9, 2021. A copy of the decision is in the Appendix A at pages A-1 through A-9.

C. ISSUES PRESENTED FOR REVIEW

1. Under State v. O'Dell,[1] trial courts have discretion to consider an exceptional sentence downward when an adult defendant demonstrates mitigating factors of youth. Under ***State v. Houston-Sconiers***,[2] a trial court's discretion extends to reducing otherwise mandatory sentencing enhancements when juvenile defendants demonstrate mitigating factors of youth. Under ***In re Pers. Restraint of Monschke,***[3] the constitutional protections underlying ***Houston-Sconiers*** also apply to youthful defendants. English and Quichocho, age 20 and 21 respectively, at the time of the offenses, demonstrated mitigating factors of youth. Did the trial court have discretion

---

[1] 183 Wn.2d 680, 688–89, 358 P.3d 359 (2015).
[2] 188 Wn.2d 1, 37, 391 P.3d 409 (2017).
[3] No. 96772-5, 482 P.3d 276 (March 11, 2021).

to reduce the firearm enhancements or order the enhancements to be served concurrently as part of its ruling granting an exceptional sentence downward?

D. STATEMENT OF THE CASE

English and Quichocho were found guilty of two counts of first-degree robbery of two counts of first-degree kidnapping, and two counts of second-degree assault in 2014. Each of the charges had firearm sentencing enhancements. At the time of the offenses, English was 20 years old and Quichocho was 21 years old. ***State v. English***, at *2.

The trial court sentenced English to 360 months, which included 240 months for the mandatory firearm sentencing enhancements that were imposed consecutively to the sentence for the underlying offenses and to each other, and the trial court sentenced Quichocho to a total 389 months, which included 240 months for the mandatory firearm sentencing enhancements that were imposed consecutively to the sentence for the underlying offenses and to each other. ***English,*** at *2.

In their first appeal, the Court of Appeals affirmed the robbery and kidnapping convictions but held that the second-degree assault convictions merged with the first-degree robbery convictions and remanded for the superior court to vacate the second-degree assault conviction, ***State v. English***, No. 46921-9-II, 198 Wn.App. 1019, 2017 WL 1066847 (Mar. 21, 2017) (unpublished).

On remand, the sentencing court heard argument on whether English and Quichocho's youth was a mitigating factor justifying an exceptional sentence below the standard range based on the holding of ***O'Dell***. English and Quichocho provided evidence supporting their claim that their youth mitigated their culpability for their offenses and justified an exceptional sentence below the standard range and the trial court found that an exceptional sentence below the standard range was justified. The sentencing court ruled that while it could consider an exceptional sentence below the standard range on the base offenses, it did not have discretion to modify the firearm enhancements. ***English***, at *6.

By unpublished opinion filed March 9, 2021, the Court of Appeals, Division II, affirmed the trial court's ruling, holding that the trial court "properly followed the controlling law" of ***State v. Brown***,[4] which held that firearm enhancements are mandatory and must be imposed consecutively. ***English***, at *1-2, 5. The Court of Appeals viewed ***Houston-Sconiers*** as overruling ***Brown*** only with regard to juvenile offenders---not youthful adults. ***English,*** at *5-7, 9. The Court noted, "[W]e recognize that the current science, as well as evolving case lase, demonstrate that there is no meaningful difference between offenders under age of 18, tried as adults, and

[4] 139 Wn.2d 20, 983 P.2d 608 (1999), overruled in part by ***Houston-Sconiers***, 188 Wn.2d at 21.

those between 18 and 25 who demonstrate that youthfulness contributed to their offense, justifying an exceptional sentence down." ***English***, at *6, n. 6. Nevertheless, the Court held "Regardless of the strength of this reasoning, we do not have the authority to overrule the Supreme Court's decision in *Brown* as it applies to adult offenders." ***English***, at *6 (footnote omitted).

English and Quichocho now petition this Court for discretionary review pursuant to RAP 13.4(b).[5]

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). This case involves a significant question of law under the Constitution of the State of Washington or of the United States." RAP 13.4(b)(3).

1. *State v. Brown* has been significantly eroded by Supreme Court decisions holding that the SRA's "mandatory" sentencing provisions are subject to a court's discretion to impose an exceptional sentence downward based on mitigating factors and must be overturned.

The Sentencing Reform Act (SRA) gives broad discretion to sentencing

---

[5] RAP 13.4 (b) provides: A petition for review will be accepted by the Supreme 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.

courts to impose a sentence below the SRA's presumptive standard sentence range when a court finds the existence of mitigating circumstances. RCW 9.94A.535 permits a court to impose an exceptional sentence below the standard range if "substantial and compelling reasons [justify] an exceptional sentence" and "mitigating circumstances are established by a preponderance of the evidence." However, RCW 9.94A.533(3)(e) provides that "[n]otwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." In ***State v. Brown***, the Supreme Court held that this "absolute language" deprives a sentencing court of discretion to impose an exceptional sentence regarding deadly weapon enhancements. 139 Wn.2d 20, 29, 983 P.2d 608 (1999) *overruled on other grounds* by ***State v. Houston-Sconiers***, 188 Wn.2d 1, 391 P.3d 409 (2017).

In this case, the Court of Appeals cited ***Brown*** and noted that the case is still binding authority and that the Court has no choice but to follow precedent, notwithstanding the "strength of the reasoning" of the appellants' argument that the constitutional protections underlying ***Houston-Sconiers*** —which held that to comply with the Eighth Amendment, sentencing courts must consider the mitigating qualities of youth and have discretion to impose a proportional punishment based on those qualities—should apply with equal force to any defendant who establishes the mitigation factor of youthfulness regardless of

whether the crime was committed before or after the entirely arbitrary line of the defendant's eighteenth birthday. The Court stated that "[o]nce our Supreme Court "has decided an issue of state law, that interpretation is binding on all lower courts" until it is overturned by our Supreme Court." ***English***, at *6, (quoting ***State v. Gore***, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)).

In ***Brown***, the question was whether a standard range sentence that includes enhancements under the former version of RCW 9.94A.533 was subject to modification when there were "substantial and compelling reasons justifying an exceptional sentence" as currently codified in RCW 9.94A.535. ***Brown***, 139 Wn.2d at 25. Brown was convicted of assault and had an offender score that included a 3-to-9-month standard range, along with a 12-month deadly weapon enhancement under RCW 9.94A.310(4)(b), establishing a "total standard range of 15 to 21 months." ***Brown***, 139 Wn.2d at 23. The trial court imposed a total exceptional sentence downward that was less than the 12-month enhancement. The Supreme Court stated that the language of the Hard Time for Armed Crime Act, as codified by former RCW 9.94A.310(4)(e), provided that a deadly weapon enhancement is "mandatory" and shall not run concurrently with any other sentencing provisions. ***Brown***, 139 Wn.2d at 26 (citing statute). The ***Brown*** Court concluded that former RCW 9.94A.310(4)(e)'s requirement of mandatory, consecutive sentencing enhancements, "[n]otwithstanding any other provision of law" was the "more specific language." ***Brown***, 139 Wn.2d at 28. ***Brown*** held that judicial discretion to impose an exceptional sentence does not extend to a

deadly weapon enhancement in light of this "absolute language." *Id.* at 29. Therefore, the 12-month enhancement could not be run in part concurrently with any sentence in the 3-to-9-month base standard range, because compared to the enhancement, the base sentence range was an "other sentencing provision[.]" 139 Wn.2d at 29.

The ***Brown*** decision was significantly split, however, with several justices stating they would hold that RCW 9.94A.370 provided that enhancements are added to a base sentence to determine a presumptive range, from which the court may depart under the exceptional sentence provisions of RCW 9.94A. ***Brown***, 139 Wn.2d at 36-37 (Madsen, J., dissenting) (citing Washington Sentencing Guidelines Commission, Adult Sentencing Guidelines Manual, at 1-16 (1997)). As Justice Madsen subsequently explained in ***State v. Houston-Sconiers***, *supra*, ***Brown*** misconstrued the relevant statutory language. 188 Wn.2d 1, 35, 391 P.3d 409 (2017) (Madsen, J., concurring). Justice Madsen explained the critical point that "[a]n enhancement increases the presumptive or standard sentence; it is not a separate sentence." *Id.* (citing ***State v. Silva-Baltazar***, 125 Wn.2d 472, 475, 886 P.2d 138 (1994)). Justice Madsen concluded

> There is no reason why a sentencing court, which has the discretion to depart from a standard range sentence, loses that discretion when imposing an exceptional sentence that increases the standard range. Even with the enhancement, the sentence is still simply a standard range sentence. The enhancement does not transform that sentence into a mandatory minimum. Indeed, it may amount to cruel and unusual punishment to misinterpret the statutory scheme in this fashion.

Id. at 36-37.

The majority's holding in ***Brown*** has been steadily and consistently eroded in recent years.

State v. O'Dell, 183 Wn.2d 680, 689-96, 358 P.3d 359 (2015) opened addressed the issue for adults in terms of mitigation of sentences. In ***O'Dell***, this Court held that youth may justify an exceptional sentence below the standard range if the defendant's youth mitigated the defendant's culpability. *Id.*, at 689. This Court held that even in the case of a defendant who was ten days past his eighteenth birthday at the time of the offense and thus was technically an adult, still youth is a mitigating circumstance that can support an exceptional sentence below the sentencing guidelines under the SRA. *Id.* at 688-89; see also ***State v. Ronquillo***, 190 Wn. App. 765, 780-83, 361 P.3d 779 (2015); ***Matter of Light-Roth***, 191 Wn.2d 328, 336, 338 n.3, 422 P.3d 444 (2018).

Two years after ***O'Dell***, the Supreme Court overruled the holding of ***Brown*** insofar as the case is applied to juveniles. ***Houston–Sconiers***, 188 Wn.2d at 18-22. ***Houston-Sconiers*** followed a line of United States Supreme Court cases holding "that the Eighth Amendment to the United States Constitution compels us to recognize that children are different." 188 Wn.2d at 18, 391 P.3d 409 (citing ***Miller v. Alabama,*** 567 U.S. 460, 480, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); ***Roper v. Simmons***, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)); see also ***In re Personal Restraint of Ali,*** 196 Wn.2d 220, 4 231-32, 74 P.3d 507 (2020). "An offender's age is relevant to the Eighth

Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." ***Graham v. Florida***, 560 U.S. 48, 76, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). This Court reaffirmed the principle of consideration of the neurological development of youthful offenders in ***Houston-Sconiers*** when it concluded sentencing courts have discretion to depart from purportedly mandatory firearm enhancements when sentencing juveniles. 188 Wn.2d at 24. In ***Houston-Sconiers***, this Court overruled ***Brown*** insofar as it applies to juvenile offenders who were tried and sentenced in adult court. The ***Houston–Sconiers*** Court based its rejection of ***Brown*** entirely on the Eighth Amendment prohibitions against cruel punishment. In a concurrence, Justice Madsen would have held that courts have authority to waive firearm enhancements even for adults, such as O'Dell, who qualify for an exceptional sentence downward on the basis of youth. ***Houston-Sconiers***, 188 Wn.2d at 38 (Madsen, J., concurring).

Recently, in ***In re Pers. Restraint of Monschke***, No. 96772-5, 2021 Wash. LEXIS 152 (March 11, 2021), the reasoning of ***Houston-Sconiers*** was further expanded. In ***Monschke,*** this Court considered whether the state constitutional provision prohibiting cruel punishment prohibited mandatory life sentences for 19-year-old and 20-year-old convicted of aggravated murder entitled the defendants to present mitigating evidence of youth. This Court held that the offenders were entitled to a new sentencing hearing at which the trial court would have to consider whether each offender was subject to the mitigating

qualities of youth. ***Monschke***, at *23. Observing that "[n]euroscientists now know that all three of the 'general differences between juveniles under 18 and adults' recognized by *Roper* are present in people older than 18," this Court determined that sentencing courts must extend ***Miller***'s protections to those aged 18 through at least age 20. ***Monschke,*** at *24, 25.

2. Requiring a "mandatory" sentence for firearm enhancements where the sentencing court found youthfulness as a mitigating factor justifying a sentence below the standard range violates the Eighth Amendment requirement that the court must consider the mitigating qualities of youth at sentencing in order to protect the constitutional guaranty of punishment proportionate to culpability

In this case, the Court of Appeals held that it is constrained by the holding of ***Brown*** but appears to agree with the argument that there is no logical impediment to extending ***O'Dell*** and ***Houston-Sconiers*** to allow trial courts the discretion to impose concurrent firearm enhancements or otherwise modify enhancements for youthful adult offenders. The Court affirmed the trial court only because it lacked the authority to overrule ***Brown***. The Court noted that English and Quichocho argued that the "logical extension of *O'Dell* and *Houston-Sconiers* is to provide trial courts with the discretion to modify otherwise mandatory firearm enhancements as part of an exceptional sentence for youthful offenders." ***English***, slip op. at 6. The Court noted that "[r]egardless of the strength of this reasoning, we do not have the authority to overrule the Supreme Court's decision in *Brown* as it applies to adult offenders." Slip op., at

6. Nevertheless, the Court recognized that the result that English and Quichocho seek logically flows from the principles delineated in ***Houston-Sconiers*** and its progeny:

> [W]e recognize that the current science, as well as evolving case law, demonstrate that there is no meaningful difference between the offenders under the age of 18, tried as adults, and those between 18 and 25 who demonstrate that their youthfulness contributed to their offense, justifying an exceptional sentence downward.
>
> ***English***, opinion at 6, n. 6.

In addition to the Eighth Amendment bar against "cruel and unusual punishments," the Eighth Amendment requires courts to exercise "complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant," even when faced with mandatory statutory language. ***Houston-Sconiers***, 188 Wn.2d at 21. Article I, section 14 of the Washington constitution contains a similar provision that prohibits "cruel punishment." The Eighth Amendment to the United States Constitution requires the criminal justice system to address the edict that "[c]hildren are different,' " announced in ***Miller v. Alabama***, 567 U.S. 460, 480, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). As a general rule under Washington precedent, sentencing courts, in order to comply with the Eighth Amendment, must consider the mitigating qualities of youth in order to impose a proportional punishment based on immature qualities. ***Houston-Sconiers***, 188 Wn.2d at 19 n. 4.

In this case, English was 20 and Quichocho was 21 at the time of their crimes. Science and evolving caselaw recognize that the cognitive traits that

distinguish juveniles from adults do not disappear when an individual turns 18. ***Roper v. Simmons***, 543 U.S. 551, 574 (2005); ***United States v. Chavez***, 894 F.3d 593, 609 (4th Cir. 2018). Immaturity and childishness do not end one day for a defendant turns age eighteen. As noted in ***O'Dell***, the parts of the brain involved in behavioral control continue to develop well into a person's twenties. ***O'Dell***, 183 Wn.2d at 692, n.5.

This Court should accept review and overturn ***Brown***. ***Brown*** is deeply flawed because it does not address the Eighth Amendment protection recognized in ***Miller*** and ***Houston-Sconiers***, and now ***Monschke***. See ***State v. Otton***, 185 Wn.2d 673, 678, 374P.3d 1108 (2016) (court will reject its prior holdings upon "a clear showing that an established rule is incorrect and harmful"). The continued adherence to ***Brown*** is harmful because it requires courts to impose sentences far longer than what a sentencing judge may believe is justified where, as here, a court believes youthfulness reduces the defendant's culpability.

The legislatively created "bright line" age of eighteen[6] that purports to note that difference between childhood and adulthood fails to comply with the protections contained in the Eighth Amendment. As noted in ***Monschke***, all three of the "general differences between juveniles under 18 and adults" recognized by *Roper* are present in people older than 18. ***Monschke***, at *28. (quoting ***Roper***, 543 U.S. at 569, 125 S.Ct. 1183.) The trajectory of advancements in the study of neurological science and adolescent development

[6]RCW 26.28.010, RCW 13.40.020(15).

indicates that there is no meaningful developmental difference between the brain of a seventeen year old and that of an eighteen year old. It "flows straightforwardly from" this Court's prior rulings that ***Brown*** must be abandoned to permit sentencing courts in order to comply with Eighth Amendment protections and exercises discretion when addressing "mandatory" enhancements for youthful offenders oever the age of eighteen.

The lower court was compelled to follow ***Brown***, but the continued adherence to ***Brown*** is fundamentally flawed because it requires courts to impose sentences involving "mandatory" sentencing enhancements far longer than what a sentencing judge may believe is justified when, as here, a court believes youthfulness reduces the defendant's culpability, in violation of the Eighth Amendment. Accordingly, this Court should accept review under RAP 13.4(b)(3).

//

//

//

//

//

//

//

//

F. CONCLUSION

This case involves a significant question of law under the state and federal constitutions. For the reasons contained above, this Court should grant review.

DATED: April 7, 2021.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Calvin Quichocho

and

OLYMPIC APPEALS PLLC

Approved via email 4-7-2021

KEVEN HOCHHALTER-WSBA 43124
kevin@olympicappeals.com
of Attorneys for Brandon English

CERTIFICATE OF SERVICE

The undersigned certifies that on April 7, 2021, that this Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 909 A Street, Ste. 200, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

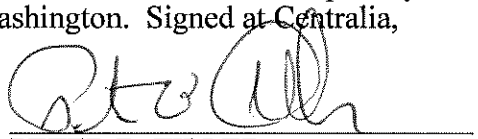
Aaron Bartlett
Clark County Prosecuting Attorney's Office
PO Box 5000
Vancouver, WA 98666-5000
Aaron.barlett@clark.wa.gov

Mr. Derek M. Bryne
Clerk of the Court
Court of Appeals
909 A Street, Ste.200
Tacoma, WA 98402

Kevin Hochhalter
Olympic Appeals PLLC
4570 Avery LN SE #C 217
Lacey, WA 98503
kevin@olympicappeals.com

Mr. Calvin Quichocho
DOC# 359459
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on April 7, 2021.



PETER B. TILLER

Filed
Washington State
Court of Appeals
Division Two

March 9, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRANDON MICHAEL ENGLISH and CALVIN JAMES QUICHOCHO, Appellants,	No. 53188-7-II Consolidated with
STATE OF WASHINGTON, Respondent, v. CALVIN JAMES QUICHOCHO, Appellant.	No. 53198-4-II UNPUBLISHED OPINION

LEE, C.J. — Brandon M. English and Calvin J. Quichocho appeal the sentences imposed by the trial court following resentencing. English and Quichocho argue that the trial court erred by concluding that it did not have the discretion to impose an exceptional sentence downward on their mandatory, consecutive firearm sentencing enhancements. Specifically, they contend that the logical extension of our Supreme Court's rulings in *State v. O'Dell*[1] and *State v. Houston-Sconiers*[2] require trial courts to have the discretion to impose an exceptional downward on otherwise mandatory sentence enhancements for "youthful" offenders. However, because we do

[1] 183 Wn.2d 680, 698-99, 358 P.3d 359 (2015).

[2] 188 Wn.2d 1, 37, 391 P.3d 409 (2017).

not have the authority to overrule our Supreme Court's opinion in *State v. Brown*,[3] we hold that the trial court properly followed the controlling law. Accordingly, we affirm English's and Quichocho's sentences.

Quichocho also appeals certain legal financial obligations (LFOs) imposed by the trial court. The State concedes the challenged LFOs were improper. Therefore, we reverse the improper LFOs and remand to the trial court to strike the jury demand fee, community supervision costs, and interest on nonrestitution LFOs from Quichocho's judgment and sentence.

In a Statement of Additional Grounds (SAG),[4] English claims prosecutorial misconduct and that opinions made in the victim impact statement presented at the resentencing hearing were improper. We decline to review English's SAG claims.

FACTS

In 2014, English and Quichocho were found guilty of two counts of first degree robbery, two counts of first degree kidnapping, and two counts of second degree assault. All the charges had firearm sentencing enhancements. English was 20 years old at the time, and Quichocho was 21 years old at the time. They appealed, and we affirmed the convictions. *State v. English*, No. 46921-9-II, slip op. at 1 (Wash. Ct. App. Mar. 21, 2017) (unpublished).[5] However, we held that the second degree assault convictions merged with the first degree robbery convictions and

---

[3] 139 Wn.2d 20, 983 P.2d 608 (1999), *overruled in part by Houston-Sconiers*, 188 Wn.2d at 21.

[4] RAP 10.10.

[5] http://www.courts.wa.gov/opinions/pdf/D2%2046921-9-II%20Unpublished%20Opinion.pdf

remanded for the superior court to vacate the second degree assault convictions. *English*, No. 46921-9-II, slip op. at 5.

On remand, the trial court expanded the scope of the proceeding and allowed the parties to provide evidence and argument on the issue of whether English and Quichocho's youth was a mitigating factor to justify an exceptional sentence below the standard range based on *O'Dell*. At the resentencing hearing, English and Quichocho provided evidence supporting their claim that their youth mitigated their culpability for their offenses and justified an exceptional sentence below the standard range. One of the victims provided a written victim impact statement that was read to the sentencing court during the resentencing hearing. The trial court found that an exceptional sentence below the standard range was justified. However, the trial court ruled that while it could entertain an exceptional sentence below the standard range on the base offenses, it did not have discretion to modify the sentencing enhancements:

> 1. Threshold issue: deadly weapon enhancements
>   a. Defense argues that the court has the ability to not run such enhancements consecutive to the underlying sentence and each other pursuant to *State v. Houston-Sconiers*, 188 [Wn].2d 1 (2016).
>   b. However, the State argues that *Houston-Sconiers* applies only to juveniles. The focal quote is "sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not."
>   c. The Supreme Court could have, as the state notes, referred to youthful offenders as opposed to juveniles. It did not. The court finds this was an intentional decision by the Supreme Court. Consequently the court does not find that it was their intent to extend their decision in *Houston-Sconiers* as it relates to the mandatory application of weapon enhancements to youthful adults.

Clerk's Papers (CP) at 507; Quichocho CP at 204.

The trial court sentenced English to a total 360 months confinement, which included 240 months for the mandatory firearm sentencing enhancements that were imposed consecutively to the sentence for the underlying offenses and to each other. The trial court sentenced Quichocho to a total 389 months confinement, which included 240 months for the mandatory firearm sentencing enhancements that were imposed consecutively to the sentence for the underlying offenses and to each other.

The trial court found that both defendants were indigent. The trial court imposed a $500 crime victim assessment, a $250 jury demand fee, and $460 restitution. The trial court also ordered English and Quichocho to pay the cost of supervision while on community custody. Both judgments and sentences included a provision imposing interest on all the legal financial obligations.

English and Quichocho appeal their sentences.

ANALYSIS

A. EXCEPTIONAL SENTENCE

English and Quichocho argue that the trial court erred by concluding that it did not have the discretion to modify firearm sentencing enhancements as part of their sentences. However, because binding Supreme Court precedent makes consecutive firearm sentencing enhancements mandatory for adult offenders, the trial court properly ruled it did not have the discretion to modify the imposition of consecutive firearm sentencing enhancements.

When a defendant requests an exceptional sentence below the standard range, "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), *review denied*, 136 Wn.2d 1002 (1998). Defendants are not entitled to an exceptional sentence, but "every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis omitted). Failure to consider an exceptional sentence downward or the erroneous belief that the trial court lacks the authority to consider an exceptional sentence downward is an abuse of discretion that warrants remand. *Grayson*, 154 Wn.2d at 342, *Garcia-Martinez*, 88 Wn. App. at 329-31.

In *State v. Brown*, 139 Wn.2d 20, 28-29, 983 P.2d 608 (1999), *overruled in part by State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), our Supreme Court held that firearm and deadly weapon sentencing enhancements are mandatory and must be imposed consecutively, regardless of whether an offender receives an exceptional sentence below the standard range on the underlying offense. Therefore, *Brown* clearly establishes that the sentencing court did not have the authority or discretion to modify the firearm sentencing enhancements that were part of English's and Quichocho's sentences. However, English and Quichocho argue that recent case law, shows that trial courts should have the discretion to modify otherwise mandatory, consecutive firearm sentencing enhancements for youthful offenders.

In *State v. O'Dell*, 183 Wn.2d 680, 689-96, 358 P.3d 359 (2015), our Supreme Court held that youth may justify an exceptional sentence below the standard range if the defendant's youth mitigated the defendant's culpability. And in *State v. Houston-Sconiers*, 188 Wn.2d 1, 18-22, 391 P.3d 409 (2017), our Supreme Court overruled *Brown* as it applies to juvenile offenders who were tried and sentenced in adult court. Specifically, the court held,

> In accordance with *Miller* [*v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed. 2d 407 (2012)], we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any *juvenile defendant*, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion *with regard to juveniles*, they are overruled. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.

Houston-Sconiers, 188 Wn.2d at 21 (emphasis added) (footnotes omitted).

English and Quichocho recognize that *Houston-Sconiers* involved juvenile defendants and did not specifically address adult offenders who were youthful at the time of the offense. However, they argue that the logical extension of *O'Dell* and *Houston-Sconiers* is to provide trial courts with the discretion to modify otherwise mandatory firearm sentencing enhancements as part of an exceptional sentence for youthful adult offenders. Regardless of the strength of this reasoning, we do not have the authority to overrule the Supreme Court's decision in *Brown* as it applies to adult offenders.[6]

Once our Supreme Court "has decided an issue of state law, that interpretation is binding on all lower courts" until it is overruled by our Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). The Supreme Court was clear in *Houston-Sconiers* that it was addressing "any juvenile defendant" and overruling *Brown* "with regard to juveniles." *Houston-Sconiers*, 188 Wn.2d at 21. Therefore, *Brown* is still binding authority for adult offenders. We do

[6] Although we agree that the trial court properly followed the controlling law, we do so because we, too, are similarly constrained to follow our Supreme Court's precedent. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). But we recognize that the current science, as well as evolving case law, demonstrate that there is no meaningful difference between offenders under the age of 18, tried as adults, and those between 18 and 25 who demonstrate that their youthfulness contributed to their offense, justifying an exceptional sentence downward.

not have the authority to overrule *Brown* and hold otherwise. *Gore*, 101 Wn.2d at 487; *see also State v. Brown*, 13 Wn. App. 2d 288, 291, 466 P.3d 244 (2020) (Division I holding that it does not have the authority to overrule *Brown* as it applies to adult offenders); *State v. Mandefero*, 14 Wn. App. 2d 825, 831-32, 473 P.3d 1239 (2020) (holding *Houston-Sconiers* does not apply to youthful offenders who were over 18 at the time of their offense, sentencing enhancements are mandatory under *Brown*, and the appellate court does not have the authority to overrule *Brown*).

Because *Brown* continues to apply to adult offenders, the trial court properly concluded it did not have the authority to modify the consecutive, mandatory firearm sentencing enhancements as part of an exceptional sentence. Therefore, we affirm English's and Quichocho's sentences.

B. QUICHOCHO'S LFOS

Quichocho argues that the sentencing court erred when it imposed the $250 jury demand fee, community custody supervision fees, and interest on nonrestitution LFOs. The State concedes that these LFOs were improper.

Currently, the LFO statutes prohibit trial courts from imposing a criminal filing fee, jury demand fee, and interest accrual on nonrestitution LFOs on an indigent defendant. *See* RCW 36.18.020(2)(h); RCW 10.46.190; RCW 10.82.090(1); *State v. Ramirez*, 191 Wn.2d 732, 746-47, 426 P.3d 714 (2018). And trial courts have the discretion to waive community custody supervision fees. RCW 9.94A.703(2)(d).

Here, the trial court found that Quichocho was indigent and not anticipated to be able to pay legal financial obligations in the future. Therefore, we accept the State's concession, reverse imposition of the challenged LFOs, and remand for the trial court to strike the $250 jury demand

fee, the community supervision costs, and interest on nonrestitution LFOs from Quichocho's judgment and sentence.

C. ENGLISH'S SAG

In his SAG, English makes two claims regarding the victim impact statement presented at the resentencing hearing. First, English claims that the victim impact statement shows the prosecutor committed misconduct by disclosing facts about the resentencing and the defendants to the crime victim. Second, English claims that the crime victim impact statement presented an improper opinion on the defendants' maturity. We decline to address these claims.

First, English claims that, because the victim referenced the defendants' having a criminal history and recognized that the resentencing was addressing how youth affected the defendants' culpability, the prosecutor must have improperly disclosed information to the crime victim. But there are no facts in the record that establish how the crime victim obtained the information she referenced in her victim impact statement. More importantly, there are no facts in the record that establish the prosecutor shared any specific information with the crime victim. We will not consider matters outside the record on appeal. *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018). The appropriate means of raising issues based on evidence or facts outside of the existing record is through a personal restraint petition. *Id.*

Second, English claims that the victim impact statement presented an improper opinion on the defendants' maturity. However, English did not object to the victim impact statement at the resentencing hearing. We do not review issues raised for the first time on appeal. RAP 2.5(a). Therefore, we decline to review English's claim that the victim impact statement offered an improper opinion on the defendants' maturity.

CONCLUSION

Because the Supreme Court's decision in *Houston-Sconiers* did not overrule *Brown* as it applies to adult offenders, the trial court properly concluded that it did not have the discretion to modify the imposition of firearm sentencing enhancements as part of an exceptional sentence. We accept the State's concession that the trial court improperly imposed the LFOs that Quichocho challenges. And we do not review English's SAG claims. Accordingly, we affirm English and Quichocho's sentences. We also reverse the LFOs that Quichocho challenges and remand to the trial court to strike the jury demand fee, community supervision fee, and interest on nonrestitution LFOs from Quichocho's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, C.J.

We concur:

Maxa, J.

Sutton, J.

THE TILLER LAW FIRM

April 07, 2021 - 4:55 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington, Respondent v. Brandon English and Calvin Quichocho, Appellants (531887)

The following documents have been uploaded:

- PRV_Petition_for_Review_20210407165506SC911393_3075.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- aaron.bartlett@clark.wa.gov
- cntypa.generaldelivery@clark.wa.gov
- kevin@olympicappeals.com
- rhonda@olympicappeals.com

Comments:

Sender Name: Kayla Paul - Email: kpaul@tillerlaw.com
Filing on Behalf of: Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: Kelder@tillerlaw.com)

Address:
PO Box 58
Centralia, WA, 98531
Phone: (360) 736-9301

Note: The Filing Id is 20210407165506SC911393