IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RASHAD BABBS, Petitioner.	No. 102456-8 CoA No. 55776-2 PETITION FOR REVIEW

I. IDENTITY OF PETITIONER

Rashad Babbs, Petitioner, seeks the relief designated below.

II. COURT OF APPEALS DECISION

The Court of Appeals affirmed Mr. Babbs' sentence in an opinion dated September 12, 2023. A copy is attached.

III. ISSUES PRESENTED FOR REVIEW

A. Does Mr. Babbs' de facto life sentence for crimes committed as a late adolescent violate the state constitutional cruel punishment clause?

B. Did the imposition of mandatory terms that totaled 30 years violate the individualization requirement of the state constitution as applied to a late adolescent?

C. Did the sentencing judge apply an overly strict standard when she required Babbs to prove that his neurodevelopmental immaturity *substantially* impaired his ability to conform his conduct to the law?

D Is extraordinary rehabilitation following a crime a mitigating circumstance that justifies a departure below the standard range?

III. FACTS

Rashad Babbs was convicted of first-degree murder and attempted murder, as well as unlawful possession of a firearm. The two homicide counts had firearm enhancements. Babbs was 21 years old at the time of the crimes. His original sentence included a scoring error. As a result, his judgment was vacated. CP 8-9.

At resentencing, Mr. Babbs sought both a sentence below the mandatory terms (20 years for murder and two 5 year consecutive terms for the firearm), as well as an "exceptional" sentence below the

standard ranges. In support, Babbs presented evidence of how his still developing brain contributed to the crime, including evidence of his childhood history of trauma and neglect, as well as providing the court with citations to a number of peer reviewed articles explaining the characteristics of neurodevelopment that continue into the mid-20's, including impulsivity especially in the presence of peers. CP 10-186. He also presented voluminous evidence of his rehabilitative efforts since the crime. That evidence is found in his sentencing memorandum and summarized in his opening and reply brief.

Considered as a whole, Babbs argued that these factors lessened his ability to consider and weigh options and most significantly to control his actions, especially in the presence of a peer. At the time of the crimes, Mr. Babbs "was a follower, and I was reckless." He also described his hypervigilance, a common symptom of PTSD. RP 25.

Mr. Babbs took responsibility for his actions, testifying: "I shot my gun at Chica Webber and Jonathan Webber which I'm really sad and remorseful for that because they didn't reserve it. There was no reason for that act at all, and I reacted on impulse and being stupid and not thinking, not being able to understand nothing other than being

basically loyal by fault. And I reacted when I shouldn't have… RP 21.

Later, Babbs explained that after the victims walked away after being threatened, Babbs also began walking away, when suddenly

> RASHAD BABBS: The shots was fired.
> JEFFREY ELLIS: By?
> RASHAD BABBS: Mr. Hicks.
> JEFFREY ELLIS: What did you do?
> RASHAD BABBS: And I instantly turned around and fired too.
> JEFFREY ELLIS: Why?
> RASHAD BABBS: Because I was trained -- like, I mean, when you come up in the lifestyle when I was coming up that you was taught to react when someone else reacts on impulse….

RP 26. He added:

> RASHAD BABBS: Well, my mind, I -- it was just all over the place. I -- I really couldn't tell you exactly where my mind was at that time, you know, other than just reacting.

RP 27.

In addition, Babbs presented voluminous evidence of his extensive rehabilitative efforts in prison. CP 10-186. A summary of the courses he has completed is attached to this brief as Appendix A. Babbs also presented numerous letters attesting to the depth of Babbs' transformation. Picking only one sample, Bailey deIongh wrote that Babbs has his mental illness under control, has made significant efforts and shows insight into his substance abuse history and need for

continued abstinence, his need for a structured environment, and an understanding of his relapse triggers. CP 67. A list of Mr. Babbs' accomplishments demonstrates his constant journey to take advantage of avenues available to him to better understand himself and others and to apply that knowledge as a leader and mentor in his incarcerated community through the Pathway to Freedom Program and other groups.

Mr. Babbs explained:

> RASHAD BABBS: …But I didn't learn that just from these classes. I learned them through share stories of other inmates as well as my own accounts of my life and being able to train myself to learn how to change my behaviors and where I would normally react on impulse and to regress instead of progress.
> JEFFREY ELLIS: Have you tried to further the rehabilitation or improve the lives of other inmates?
> RASHAD BABBS: Yes.
> JEFFREY ELLIS: Can you describe to the Judge a little bit about that?
> RASHAD BABBS: Well, what I do is, every day, I see, like, the youngest -- the young people that was my age coming in with long sentences from doing senseless crimes such as what I been incarcerated for. And I would help them and sit down with them and teach them and give them different ways of thinking from my own experience and where it was.

RP 29.

The prosecutor opposed Babbs' request for an exceptional sentence, arguing that the court's sentencing discretion was "far more

structured" than with a juvenile, "and that's largely through 9.94A.535." RP 48.

The sentencing court agreed with the prosecutor's statement of the legal standard. RP 56. "However, after age 18, the Court has more constraints, and departing must be limited to exceptional circumstances where the defendant did not know his behavior was wrong or he was significantly impaired in controlling his behavior." Per the prosecutor's argument, the judge considered the facts presented as deserving of a low end of the range sentence but insufficient to authorize a sentence below the range or the mandatory minimums. RP 57-62. Consequently, she sentenced Babbs to 570.75 months (47.5 years), including 360 months of mandatory flat time.

IV. ARGUMENT

A. A De Facto Life Sentence Imposed on a Late Adolescent Violates the State Constitutional Protection Against Cruel Punishment.

Introduction

The Court of Appeals rejected this and the next assignment of error because there was no precedent compelling relief on the grounds asserted by Babbs. *Opinion*, p. 11 (*Monschke* applies only to defendants

under 21 years old, convicted of aggravated first-degree murder, and sentenced to mandatory LWOP," citing *In re Pers. Restraint of Davis*, 200 Wn.2d 75, 77-78, 514 P.3d 653 (2022)).

Under that standard, the standards of decency will no longer "evolve." Because this is a direct appeal, the lower court's reliance on time barred post-conviction cases is inapposite. This Court should take review of these two important constitutional issues where current precedent supports, if not compels, relief.

Late adolescents share the same "mitigating qualities of youth" that have resulted in several new sentencing rules for juveniles. Here, Babbs asks this Court to extend the prohibition against de facto life in cases where the sentencing judge finds that the mitigating qualities of youth apply. In the next assignment, Babbs asks this Court to extend the individualization requirement to significant mandatory sentences but which are less than life

Babbs' Crimes Reflect the Mitigating Qualities of Youth

Mr. Babbs, who was 21 at the time of the instant crimes and whose development was impaired due to a constellation of factors, was resentenced to 47 years. 30 years of that sentence are not subject to

earned early release. If a sentence of 46 years imposed on a juvenile amount to a *de facto* life sentence because "it leaves the incarcerated individual without a meaningful life outside of prison," the same must be true when a greater sentence is imposed on an individual who was three years older at the time of the crime. *State v. Haag*, 198 Wash. 2d 309, 327, 495 P.3d 241 (2021).

This Court concluded Haag's de facto life sentence was "unconstitutional under article I, section 14." *Id.* While Haag was a juvenile, the reasoning of the decision applies with equal force to late adolescents. Haag was premised on the fact that juveniles are not fully mature, neurodevelopmentally speaking. See also *State v. Ramos*, 187 Wash. 2d 420, 438, 387 P.3d 650 (2017). By logic, this rule should extend to any youthful defendant who was sentenced to a *de facto* life term where a judge has found that the mitigating qualities of youth apply. *State v. Anderson* (*Tonelli*), 200 Wash. 2d 266, 516 P.3d 1213 (2022)

Like the Eighth Amendment's bar against cruel and unusual punishment, article I, section 14 of the Washington State Constitution protects against cruel punishment. M*onschke*,

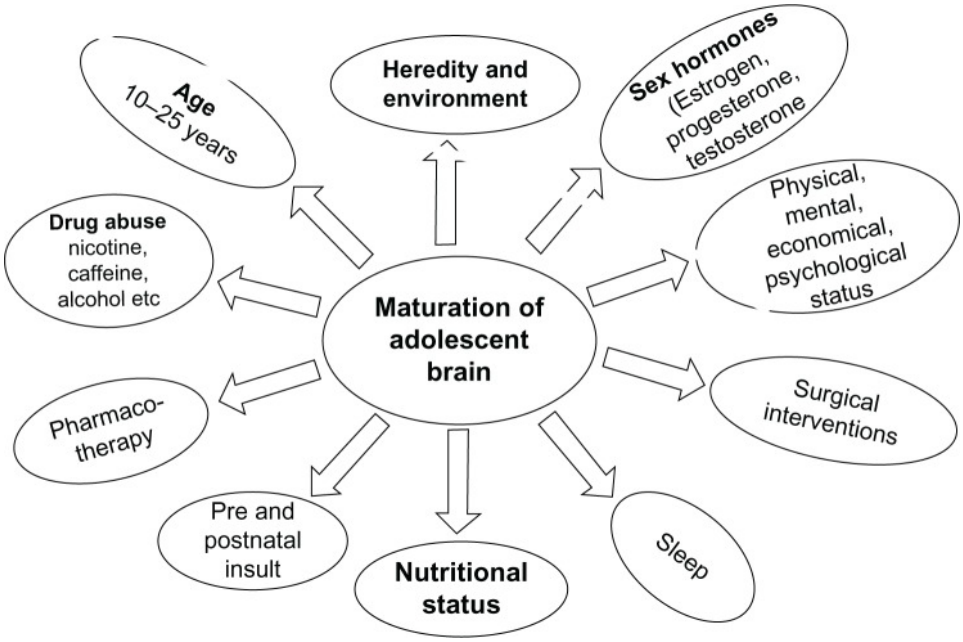
197 Wash.2d at 311. In the context of juvenile and late adolescent sentencing, article I, section 14 provides greater protection than the Eighth Amendment. It prohibits the imposition of certain mandatory sentences for juvenile and late adolescent offenders, and it "requires courts to exercise 'complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant,' even when faced with mandatory statutory language." *Id*. at 323 (quoting *Houston-Sconiers*, 188 Wash.2d at 21).

This Court has further recognized that "all three of the 'general differences between juveniles under 18 and adults'" recognized by recent caselaw "are present in people older than 18." In a section with the heading

> OUR CONSTITUTION'S PROTECTION AGAINST LIFE WITHOUT PAROLE SENTENCES EXTENDS TO YOUTHFUL DEFENDANTS OLDER THAN 18

this court stated "we deem these objective scientific differences between 18- to 20-year-olds (covering the ages of the two petitioners in this case) on the one hand, and persons with fully developed brains on the other hand, to be constitutionally significant under article I, section 14. *Monschke*, 197 Wash. 2d at 324–25.

Neurodevelopment does not end at 18 and it does not end at 20. It continues into the mid-20's. Particularly significant changes occur in the limbic system, which may impact self-control, decision making, emotions, and risk-taking behaviors. The brain also experiences a surge of myelin synthesis in the frontal lobe. The frontal lobe is implicated in cognitive processes during adolescence. Moreover, environmental factors like those present in Babbs' case, can delay, or impede normal development, as the chart below illustrates.



See Mariam Arain, et al, *Maturation of the Adolescent Brain,* Neuropsychiatric Disease and Treatment (2013). Just as "a crime committed by a juvenile is inherently different from a crime committed by an adult, due to juveniles' decreased culpability," a crime committed

by a late adolescent is similarly inherently different, especially where that late adolescent has been previously diagnosed with developmental disabilities and has been exposed to trauma. *Haag*, at 313.

Logic, fairness, consistency, and the constitution all dictate that this Court should extend the rule prohibiting the imposition of a *de facto* life sentence to individuals ages 18 to 21.

B. The Mandatory Sentence Provisions Violate the Individualization Requirement of the Cruel Punishment Clause.

Monschke held that late adolescents are "different" in the same way that children are "different" and deserve individualized consideration at sentencing notwithstanding mandatory statutory provisions. While *Monschke* involved life without parole, the focus of the decision was not on the uniqueness of that penalty or even on the combination of mandatory life imposed on a late adolescent. As a result, the rule of *Monschke* applies to other mandatory punishments that are less than life.

This is not novel or unprecedented. *Houston-Sconiers* applied the *Miller* rule, which involved mandatory life in prison, to sentences far less than life.

Here, Babbs faced multiple mandatory terms. His conviction for murder had a 20-year minimum. The firearm terms were statutorily required to be 5-years each in length and to run consecutively to each other and to the underlying crimes. All of these terms are ineligible for earned early release. Consistent with the statutory requirements, the court imposed each of these minimums.

If the mandatory sentence provisions are unconstitutional as applied to the late adolescent class, Babbs has shown prejudice because the law is void as applied to members of that class, Moreover, the court imposed what it viewed as the lower limit of its discretion.

C. The Sentencing Court Erred When It Imposed a Too Strict Test for One Proposed Mitigating Factor and Failed to Recognize the Other as Legally Available.

The trial court rejected Babbs' request for a departure below the range by concluding that Babbs failed to show that he "did not know his behavior was wrong or [that] he was significantly impaired in controlling his behavior" such that an exceptional sentence was warranted. RP at 56-57. Babbs concedes this point. He instead contends that he need only show impairment, which he did. "Significant" impairment sets an overly strict standard at odds with the

recognition that the deficits of neurodevelopment reduce culpability, even if they do not rise to the level required by the sentencing judge and the statutory mitigator.

A trial court errs when it refuses categorically to impose an exceptional sentence below the standard range under any circumstances or when it operates under the mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which a defendant may have been eligible. *State v. McFarland*, 189 Wash. 2d 47, 56, 399 P.3d 1106 (2017). Mr. Babbs contends that the trial court misapprehended its discretion to sentence him more leniently in two respects.

Mr. Babbs claimed two mitigating factors: impaired ability to reflect before acting, a categorically recognized deficit of an immature brain, as well as significant and lengthy rehabilitative efforts. The sentencing judge considered both as they applied to sentences within the range, rejecting both factors as not constituting a legal justification for a downward departure—below the range or below the mandatory minimums.

Babbs acknowledges that the statutory mitigator requires proof of "substantial" impairments in either the ability to determine right from wrong or in the ability to conform one's conduct to the requirements of the law. This standard constitutes insanity in a number of states, including our neighbors in Oregon. Under this rule, the defense of insanity is available if the defendant lacked substantial capacity either to appreciate the criminality of his act or to conform his conduct to the requirements of law. Model Penal Code § 4.01. The rule was rejected in *State v. Reece*, 79 Wash. 2d 453, 486 P.2d 1088 (1971), and *State v. White*, 60 Wash. 2d 551, 579–93, 374 P.2d 942, 959–67 (1962). It is a much higher standard than the one recognized previously in the caselaw regarding juveniles and late adolescents, which holds that these cohorts are "generally less culpable at the time of their crimes" due to deficits in impulsivity and decision-making, not that they meet the requirements of insanity in several jurisdictions. *State v. Houston-Sconiers*, 188 Wash. 2d 1, 22, 391 P.3d 409 (2017) (emphasis removed).

Caselaw acknowledges the categorical existence of mitigating circumstances related to the defendant's youth—including age and its

"hallmark features," such as the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences." *Houston-Sconiers,* 188 Wash. 2d at 23. The complete discretion referenced in *Houston-Sconiers* is not unavailable unless the court finds "substantial" impairment. Instead, it formulated the test as including "immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* Put another way, caselaw directs a sentencing court to consider and weigh "the particular vulnerabilities" of youth—"for example, impulsivity, poor judgment, and susceptibility to outside influences." *State v. O'Dell*, 183 Wash. 2d 680, 691, 358 P.3d 359 (2015). These were precisely the impairments advanced by Babbs as meriting a downward departure. In fact, *O'Dell* conspicuously leaves out the modifier of "substantial," but instead holds that an exceptional sentence may be justified when the court finds "an impairment of the 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.'" *O'Dell*, 183 Wash. 2d at 694. The test is whether youth *diminished* [a defendant's] capacity to appreciate the wrongfulness of his conduct or conform that conduct to the requirements of the law. *O'Dell*, 183 Wash. 2d at 696 (emphasis added).

Because the sentencing judge imposed a standard higher than required by law, Babbs is entitled to be resentenced.

Additionally, the sentencing judge found that it could consider post-crime rehabilitation for purposes of a sentence within, but not below the range. This Court should accept review because the caselaw conflicts. Compare *State v. Dunbar*, __ Wn. App. __, 532 P.3d 652, 656 (2023); *State v. Wright*, __ Wn. App. __, 493 P.3d 1220 (2021).

The SRA now features numerous provisions which justify departures from the standard range based on personal factors with little or no nexus to the facts of the crime. This is consistent with long held views about what information can be considered by a sentencing judge. American criminal law requires a judge to consider every convicted person as an individual and every case as a "unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States,* 518 U.S. 81, 113 (1996). Underlying this tradition is the principle that "the punishment should fit the offender and not merely the crime." *Williams v. New York,* 337 U.S. 241, 247 (1949; see also *Pennsylvania ex rel. Sullivan v. Ashe,* 302 U.S. 51, 55 (1937) ("For the determination of

sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender"). This principle was most recently reaffirmed by the United States Supreme Court in *Pepper v. United States*, 562 U.S. 476, 487–88 (2011).

Consistent with this principle, the United States Supreme Court has observed that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams,* 337 U.S. at 246. Permitting sentencing courts to consider the widest possible breadth of information about a defendant "ensures that the punishment will suit not merely the offense but the individual defendant." *Wasman v. United States,* 468 U.S. 559, 564 (1984). While the SRA may not have fully embraced this tradition when first adopted, it never repudiated that tradition and has, in the years since adopted, more fully embraced it.

The Recent Passage of SB 6164

Senate Bill 6164, codified at RCW 36.27.130 (felony resentencing), expressly allows a court to consider a defendant's post-conviction rehabilitation at a resentencing hearing where there has been a determination the "original sentence no longer advances the interests of justice." Subsection 3 provides:

> The court may consider postconviction factors including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated; evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence; and evidence that reflects changed circumstances since the inmate's original sentencing such that the inmate's continued incarceration no longer serves the interests of justice.

Implicit in these provisions is the recognition that post-conviction rehabilitation can serve as a reason to depart below the bottom of the sentence range. Otherwise, at least some, if not all the "injustices" that the law seeks to remedy would not be correctable.

It is correct that the statute gives only prosecutors—and not defendants—the right to seek resentencing under that statute. However, the resentencing procedure does not and could not give prosecutors actual sentencing authority. Moreover, it does not restrict and, as mentioned previously, encourages consideration of personal

factors when imposing a new sentence that eliminates the previous unfairness. If personal factors do not justify a downward departure, then not only does the law contain language that is irrelevant, SB 6164 is rendered a "toothless tiger," unable to correct the identified injustice.

Other Provisions of the SRA

The statutory list of mitigating and aggravating factors is non-exclusive. The State argues that all the enumerated factors have a clear and direct nexus to the crime and, as a result, any judicially recognized factor must also have this nexus.

This argument is clearly erroneous. Moving from mitigating to aggravating, here are the statutorily enumerated factors in RCW 9.94A.535 that relate to the offender and not the conduct of the offense:

> (b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained;
>
> (q) The defendant demonstrated or displayed an egregious lack of remorse;
>
> (t) The defendant committed the current offense shortly after being released from incarceration.

The existence of these factors is inconsistent with the line drawn in this case. It is clear that the SRA allows consideration of various types of

facts which focus on the defendant's actions and state of mind either before or after the crime. The key is whether that fact differentiates the defendant from others convicted of the same crime and whether that difference increases or decreases culpability. Extraordinary rehabilitation meets that test. If anything, it is the conceptual opposite of rapid recidivism.

Judges not only can but *must* consider the prospects for change when sentencing a juvenile. In *Houston-Sconiers*, the Washington Supreme Court employed the doctrine of constitutional avoidance and construed the SRA to require consideration of a juvenile's prospects for change in every case. *State v. Houston-Sconiers*, 188 Wash. 2d 1, 21, 391 P.3d 409, 420 (2017) ("To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled."). If late adolescents share the same qualities that make juveniles "different" from adults and if the SRA can be construed to *mandate* consideration of the ability to change for juveniles, that construction must extend to *permitting* a sentencing court to consider actual rehabilitation as a reason to depart below the range or to unlock unlimited sentencing discretion.

Because the sentencing judge viewed rehabilitation as a factor that could only be considered in determining where to sentence within the range and did not justify a sentence outside of the range, Mr. Babbs is entitled to be resentenced.

V. CONCLUSION

This Court should grant review.

CERTIFICATE OF WORD COUNT

This Petition for Review has 3789 words.

DATED this 8th day of October 2023

s/Jeffrey E. Ellis
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Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RASHAD DEMETRIUS BABBS, Appellant.	No. 55776-2-II UNPUBLISHED OPINION

CHE, J. — In 2003, Rashad Babbs pled guilty to one count of second degree unlawful possession of a firearm and proceeded to a jury trial on first degree murder and attempted first degree murder charges, both with alleged firearm sentencing enhancements. A jury convicted Babbs of first degree murder with a firearm sentencing enhancement. The trial court declared a mistrial on the attempted first degree murder with a firearm sentencing enhancement count; later, Babbs was convicted as charged. Babbs was 21 years old at the time of the crimes. The trial court sentenced Babbs to the high end of the sentencing ranges for a total of 734 months of confinement.

In 2018, the sentencing court granted Babbs's motion to vacate his judgment and sentence due to a change in the law. In 2021, the sentencing court resentenced Babbs to the low end of the standard sentencing ranges, imposing a sentence of 570.75 months of confinement. Babbs appeals his standard range sentence. Babbs also raises additional claims in a statement of additional grounds (SAG).

We hold that Babbs cannot appeal his standard range sentence. We further hold that Babbs's SAG challenge to his offender score fails. We do not reach the remainder of Babbs' arguments. Accordingly, we affirm.

FACTS

In March 2001, Rashad Babbs and Phillip Hicks stopped Jonathan Webber and his wife, Chica Webber, as they were walking. *State v. Hicks*, noted at 134 Wn. App. 1026, 2006 WL 2223807, at *1 (Wash. Ct. App. Aug. 4, 2006) (unpublished). The two men asked the Webbers if they had drugs and the Webbers told the men that they did not. *Id.* The Webbers walked away and the two men followed them, demanding that the Webbers empty their pockets. *Id.* As the Webbers continued to walk away, the two men shot at them. *Id.* Jonathan Webber sustained several wounds and Chica Webber died. *Id.* Chica was pregnant and the mother of a two-year-old. Babbs was 21 years old at the time.

The State charged Babbs with aggravated first degree murder and, in the alternative, first degree felony murder (count I), attempted first degree murder (count II), and second degree unlawful possession of a firearm (count IV). The State alleged firearm sentencing enhancements on counts I and II. Babbs pled guilty to the second degree unlawful possession of a firearm charge before trial. After trial on the remaining charges, a jury convicted Babbs of one count of first degree felony murder with a firearm sentencing enhancement and a mistrial was declared on the attempted first degree murder charge. A second trial resulted in a conviction for first degree

attempted murder with a firearm sentencing enhancement. The trial court sentenced Babbs to 734 months of total confinement.[1] Babbs appealed his convictions and we affirmed. *Id*.

In 2021, after our Supreme Court's decision in *State v. Weatherwax*,[2] Babbs was resentenced. Prior to his resentencing, Babbs submitted a presentencing report and numerous addendums, agreeing with the State's offender score recalculation[3] and requesting an "exceptionally lenient sentence." Clerk's Papers (CP) at 11. Babbs requested that the trial court "impose two, concurrent 300-month terms (240 months, plus 60 months for the firearm enhancements)." CP at 11. Babbs further requested that his unlawful possession of a firearm conviction run concurrent with his other convictions.

Babbs argued that "an exceptionally lenient sentence [was] justified because [his] ability to conform his conduct to the requirements of the law was substantially diminished due to a combination of neurodevelopmental deficits, a history of frontal lobe injuries, and mental illness." CP at 11. Babbs explained that he "had endured numerous adverse and traumatic experiences as a child; sustained multiple significant injuries to his head; his brain was not fully mature; he suffered from mental illness; and he appears to be borderline intellectually disabled." CP at 10-11. Babbs further explained that "[c]ombined these factors significantly lessened his

[1] The court sentenced Babbs to 374 months of confinement on count I, 240 months of confinement on count II, and 22 months of confinement on count III. Babbs's sentence included two 60-month firearm sentence enhancements on counts I and II.

[2] 188 Wn.2d 139, 392 P.3d 1054 (2017). Under *Weatherwax*, where "the seriousness levels of two or more serious violent offenses are identical, the trial court must choose the offense whose standard range is lower as the starting point for calculating the consecutive sentences." *Id*. at 156.

[3] The State recalculated Babbs's offender score as 0 points for the completed murder, 4 points for the attempted murder, and 5 points for the second degree unlawful possession of a firearm.

ability to consider and weigh options and most significantly to control his actions, especially in the presence of a peer." CP at 11.

Babbs submitted evidence of his academic achievements and certificates demonstrating his participation in programs while incarcerated. Babbs also submitted numerous supportive letters from community members requesting leniency and consideration for Babbs's youth at the time of the crime. Several letters emphasized Babbs's role as a mentor.

Babbs's codefendant, Hicks, acknowledged that he initiated the crime and requested leniency for Babbs. Babbs submitted a declaration from a developmental psychologist, Laurence Steinberg, outlining, among other topics, "the current understanding of neurobiological and psychological development during adolescence." CP at 37. The declaration did not specifically address Babbs.

The State submitted a sentencing memorandum requesting high-end sentences. Specifically, the State recommended a sentence of "280.5 months for Count I [felony murder in the first degree] plus the 60-month [firearm enhancement], consecutive to a sentence of 320 months for Count II [attempted first degree murder] plus the 60-month [firearm enhancement], with those two sentences concurrent to the 22-month sentence for Count I[V] [second degree unlawful possession of a firearm]."[4] CP at 367.

In May 2021, the sentencing court held a resentencing hearing. During the hearing, Chica Webber's mother and sister addressed the court. Chica's family emphasized the

[4] At the sentencing hearing, the State recommended a different sentence. The State recommended 320 months of confinement on count I plus the 60-month firearm enhancement, 256.5 months of confinement on count II plus the 60-month firearm enhancement, and 22 months of confinement on count III. The State further recommended that counts I and II run consecutively and that count IV run concurrent to the other counts.

importance of both forgiveness and consequences for Babbs's actions. Babbs's sister and cousins also addressed the court. Babbs's sister described Babbs as having "made a lot of changes in his life." Rep. of Proc. (RP) at 14. She recounted his efforts to improve himself and expressed her confidence in his ability to contribute to the broader community upon release.

Defense counsel questioned Babbs concerning the circumstances of his conviction. Babbs said he was "remorseful" and felt "ashamed that [he] caused this harm." RP at 21-22. Babbs recounted his traumatic childhood and experience with mental illness. Babbs described his rehabilitative efforts since incarceration, stating that he has "worked tireless[ly] over the years to dedicate [himself] to formal education, self-education, spiritual awareness, and mentor[ship]." RP 35. Babbs explained that since his incarceration, he obtained his GED (general equivalency diploma), became a barber, engaged in educational opportunities, and mentored other inmates.

Babbs argued for a downward departure from the standard range citing the following: (1) the multiple offense policy, (2) rehabilitation as a mitigating factor, and (3) Babbs had a diminished ability to conform his conduct to the law due to neurodevelopment factors. Babbs argued,

> it's not a question of knowing right from wrong. He knew right from wrong. . . . It's not a question of his cognitive ability. Certainly somebody at 21 is—has the ability to think and know the differences between right and wrong.
>
> It's more what the law speaks to in terms of impaired ability to conform your conduct. In that instant, he reacted on instinct, and it was an instinct tied to his brain. It was an instinct from growing up in the streets. It was an instinct from the trauma that he learned. . . .
>
> And that's a mitigating circumstance.

RP at 42-43.

In response, the State argued that although the court has "unfettered discretion when [sentencing] juvenile offenders," such discretion does not extend to offenders older than 18. RP at 47. The State acknowledged that the court "can still account for youthfulness and brain maturation . . . but in a far more structured way . . . largely through RCW 9.94A.535." RP at 47. In addressing Babbs's ability to discern right from wrong, the State recited his criminal history, explaining that he "knew from his history what was wrong and what was right, and [that] he had to know based on those experiences that what he was doing that night was absolutely wrong." RP at 51.

In delivering its oral ruling, the sentencing court made clear that it had "reviewed everything that ha[d] been submitted in this case, and [that the court] spent plenty of time going through the file." RP at 55. The court acknowledged Babbs's difficult childhood, substance abuse history, gang affiliation, criminal conduct, academic record, and mental health issues. The court also acknowledged that Babbs "[was] successful in Job Corp., and [was] trained . . . [in] masonry." RP at 55. The court described its familiarity with changes to the understanding of brain development and its familiarity with *Houston-Sconiers*.[5] The court explained that the case "draws the line at age 18 for the Court to have pretty much unfettered discretion in the sentencing [of] youthful offenders." RP at 56. However, the court explained that "after age 18, the Court has more constraints, and departing must be limited to exceptional circumstances where the defendant did not know his behavior was wrong or he was significantly impaired in controlling his behavior." RP at 56-57.

[5] *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

After reiterating that it had reviewed everything, the sentencing court declined to impose an exceptional sentence. The court explained that it

> is finding no support for those conclusions and is denying [Babbs's] request for an exceptional sentence.
>
> The Court's not saying that there aren't mitigating circumstances for [Babbs's] sentence. [Babbs does] claim a low IQ, yet [he was] able to complete Job Corp[s] with a trade. . . .
>
> This was not [Babbs's] first criminal offense, as we've gone through [his] criminal history, and it was not [Babbs's] first felony. [Babbs] actually had nine felonies and . . . ten misdemeanors in 16 criminal cases, many from threats and assaultive conduct. And [Babbs] knew well by 21 years and approximately nine months the consequences of stealing and the consequences of acting out violently.

RP at 57. The court repeated that it "considered the increased understanding of brain development and" Babbs's "personal circumstances, the trauma in his upbringing, and the lack of positive role models . . . in his youth and also the rehabilitative efforts in prison." RP at 58.

Noting that it could not "disregard that these were heinous, callous, selfish acts," the court sentenced Babbs at the low end of the standard range. RP at 58. The court ordered 240 months of confinement for the first degree murder conviction, 210.75 months for the attempted first degree murder conviction, and 22 months for the second degree unlawful possession of a firearm conviction. The court further ordered 60-month firearm sentencing enhancements for both the murder and attempted murder convictions. Babbs's standard range sentences and firearm sentencing enhancements for the murder and attempted murder convictions ran consecutively to each other while Babbs's unlawful possession conviction ran concurrent with his other convictions.

Babbs appeals.

ANALYSIS

Babbs argues that his de facto life sentence violates the Washington constitution's prohibition against cruel punishment. Babbs contends that he is entitled to a resentencing hearing that places an emphasis on forward looking factors. Babbs further contends that individualized sentencing requirements to consider youth extend to adult offenders. Finally, Babbs argues that the sentencing court misapprehended its discretion to impose a mitigated sentence by imposing too strict a test in considering his impaired ability to reflect before acting and failing to consider his rehabilitative efforts as a mitigating factor for a sentence below the standard range. Because Babbs cannot appeal his standard range sentence, we do not reach the merits of Babbs's arguments.

I. APPEALABILITY

The State argues that "Babbs may not appeal his standard range sentence" because the "trial court properly recognized its discretion to impose an exceptional sentence and followed the proper procedures" in declining to impose such a sentence. Br. of Resp't at 17. We agree.

A sentence that is within the standard range for an offense is not appealable. RCW 9.94A.585(1). A sentencing court's "decision regarding the length of a sentence within the standard range is not appealable because 'as a matter of law there can be no abuse of discretion.'" *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993) (quoting *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719 (1986)). However, such a prohibition does not bar a defendant's "'right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision.'" *State v. Mandefero*, 14 Wn. App. 2d

825, 833, 473 P.3d 1239 (2020) (quoting *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003)).

Where a defendant requests a sentence below the standard range, 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. *Refusal To Exercise Discretion*

A court refuses to exercise its discretion where "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." *Id.* "[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.*

Here, the sentencing court did not categorically refuse to consider Babbs's request for an exceptional sentence. Instead, the trial court "reviewed everything that ha[d] been submitted" and determined that an exceptional sentence was not warranted. RP at 55. The court elaborated that it "considered the increased understanding of brain development and [Babbs's] personal circumstances, the trauma in his upbringing, and the lack of positive role models . . . in his youth and also the rehabilitative efforts in prison." RP at 58.

In light of its review, the court sentenced Babbs to the low end of the standard range despite having characterized his crimes as "heinous, callous, selfish acts." RP at 58. The court discussed the limitations of its sentencing discretion, acknowledged that departure from the standard sentencing range was limited to exceptional circumstances, and declined to find the existence of such circumstances after its review of the record.

The record makes clear that the sentencing court was aware of its discretion to impose an exceptional sentence, considered the evidence submitted, and declined to exercise its discretion. Accordingly, the trial court did not categorically refuse to exercise its discretion in imposing Babbs's standard range sentence.

B. *Reliance on an Impermissible Basis*

A court relies on an impermissible basis for refusing to impose an exceptional sentence where, for example, "it refuses to consider the request because of the defendant's race, sex or religion." *Garcia-Martinez*, 88 Wn. App. at 330. Babbs argues that the sentencing court imposed a de facto life sentence onto a late adolescent, which violated the state constitutional prohibition against cruel and unusual punishment.

Article I, section 14 of the Washington Constitution prohibits the imposition of "cruel punishment." Our constitution "further 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." *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 311, 482 P.3d 276 (2021) (quoting *Houston-Sconiers*, 188 Wn.2d at 21). A court has discretion to impose any sentence below the applicable SRA (Sentencing Reform Act of 1981, chapter 9.94A RCW) range when sentencing a juvenile defendant. *Houston-Sconiers*, 188 Wn.2d at 21. But when sentencing adult defendants, sentencing courts are "*allowed* to consider youth as a mitigating factor." *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015) (emphasis added).

In *Monschke*, two petitioners were convicted of aggravated first degree murder. 197 Wn.2d at 307. The trial court sentenced the 19- and 20-year-old defendants to mandatory life

without parole (LWOP) sentences under RCW 10.95.030(1). *Id.* at 307-08. Our Supreme Court held that because the aggravated murder statue required "LWOP for *all* defendants 18 and older, regardless of individual characteristics, [the statute] violates the state constitution." *Id.* at 326.

The court explained that "the variability in individual attributes of youthfulness are exactly why courts must have discretion to consider those attributes as they apply to each individual youthful offender." *Id.* at 323. The court emphasized that because "no meaningful neurological bright line exists between age 17 and age 18 . . . sentencing courts must have discretion to take the mitigating qualities of youth—those qualities emphasized in *Miller* and *Houston-Sconiers*—into account for defendants younger and older than 18." *Id.* at 326. *Monschke* left "it up to sentencing courts to determine which individual defendants merit leniency for [mitigating] characteristics" of youth. *Id.*

Recently, our Supreme Court held *Monschke* applies only to defendants under 21 years old, convicted of aggravated first-degree murder, and sentenced to mandatory LWOP. *In re Pers. Restraint of Davis*, 200 Wn.2d 75, 77-78, 514 P.3d 653 (2022).

In *Anderson*, 17-year-old Anderson was convicted for two counts of first degree murder and sentenced to just over 61 years of confinement. *State v. Anderson*, 200 Wn.2d 266, 272, 516 P.3d 1214 (2022). Anderson was resentenced under *Miller v. Alabama*.[6] *Anderson*, 200 Wn.2d at 272. At Anderson's resentencing hearing, the court explained that Anderson "'planned and initiated this attack'" and that there "'was nothing impetuous about it.'" *Id.* at 276. The resentencing court concluded that "Anderson had not shown that immaturity was a factor in his commission of [the] murders." *Id.* Despite those statements, the resentencing court considered

[6] 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

Anderson's rehabilitative efforts while incarcerated. *Id*. at 277. The resentencing court imposed the original sentence. *Id.* at 278.

On appeal, our Supreme Court affirmed the sentence and held "that the resentencing court appropriately considered Anderson's youthful characteristics and that substantial evidence supports the court's conclusion that Anderson's crimes did not reflect those characteristics." *Id*. at 280.

Here, the sentencing court did not rely on an impermissible basis in refusing to impose an exceptional sentence. *Monschke* does not extend to Babbs's circumstance as he was 21 when he committed the crimes. *Monschke*'s holding is limited to defendants between 18- to 20-years-old and does not extend to 21-year-old defendants. Furthermore, Babbs did not face a mandatory LWOP sentence like in *Monschke*; here, the sentencing court had discretion to impose an exceptional sentence. Also, after reviewing the entire record, the sentencing court expressly found no support for the conclusions that Babbs "did not know his behavior was wrong or [that] he was significantly impaired in controlling his behavior" such that an exceptional sentence was warranted. RP at 56-57.

Rather than rely on an impermissible basis in declining to impose an exceptional sentence, the sentencing court properly considered the facts of Babbs's case. The sentencing court "reviewed everything that [was] . . . submitted" by the parties, including a declaration by Babbs's codefendant and letters submitted on Babbs's behalf. RP at 55. The court considered Babbs's low IQ, "the increased understanding of brain development and . . . Babbs'[s] personal circumstances, the trauma in his upbringing, and the lack of positive role models . . . in his youth and also [Babbs's] rehabilitative efforts in prison." RP at 58. The court further recounted

Babbs's "heinous, callous, selfish acts" that caused the death of Chica Webber and her unborn child. RP at 58. The court explained that in light of its review, it was denying Babbs's request for an exceptional sentence and imposing a sentence at the low end of the standard sentencing range. Although Babbs may not agree with the sentencing court's decision, such disagreement is not premised on an appealable basis.

Accordingly, after considering the facts and concluding that there was no basis for an exceptional sentence, the sentencing court properly exercised its discretion and imposed a standard range sentence. Thus, we conclude that Babbs may not appeal his standard range sentence.

STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Babbs argues that (1) the State engaged in prosecutorial misconduct where it "presented . . . Babbs' criminal history incorrectly during the resentencing," resulting in a higher sentence and miscalculated offender score, and (2) the court erred "in using . . . Babbs'[s] criminal history to conclude that . . . [his] brain was developed, and he knew right from wrong when he committed the crime as a young adult." SAG at 2.

We address Babbs's challenge to the calculation of his offender score; however, having determined that Babbs may not appeal his standard range sentence, we decline to address his remaining arguments.

Babbs argues that the State misrepresented his criminal history during his resentencing hearing, that the sentencing court miscalculated his offender score, and sentence length as a result. Specifically, Babbs argues that his offender score should be calculated as 3, not 4, on his attempted murder conviction. Babbs contends that the presentation of criminal history caused

the court to decline imposing concurrent sentences and that such misrepresentation amounted to prosecutorial misconduct.

To the extent Babbs is arguing that the trial court incorrectly calculated his offender score, this claim fails. While Babbs is correct that his juvenile offenses committed prior to him turning 15 years old should not be used in calculating his offender score, there is no evidence that they were. Under *Weatherwax*,[7] the trial court correctly calculated Babbs's offender score as 0 on his first degree murder conviction. RCW 9.94A.589(1)(b). In calculating Babbs's offender score as 4 for his first degree attempted murder conviction, the trial court correctly included one point for each prior adult nonviolent felony conviction and half a point for each prior qualifying juvenile nonviolent felony conviction. RCW 9.94A.589(1)(b); RCW 9.94A.525(9). In calculating Babbs's offender score as 5 for his unlawful possession conviction, the trial court correctly included one point for each adult prior felony conviction, half a point for each qualifying juvenile prior conviction, and one point for his current violent adult felony conviction. RCW 9.94A.589(1)(a); RCW 9.94A.525(7).

Accordingly, the trial court correctly calculated Babbs's offender score. Having determined that Babbs may not appeal his standard range sentence and that the trial court correctly calculated Babbs's offender score, we decline to consider his remaining SAG claims.

CONCLUSION

We affirm Babbs's sentence.

[7] 188 Wn.2d at 156 (holding "that for purposes of RCW 9.94A.589(1)(b), (1) anticipatory offenses have the same seriousness level as their target crimes and (2) when the seriousness levels of two or more serious violent offenses are identical, the trial court must choose the offense whose standard range is lower as the starting point for calculating the consecutive sentences.").

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.

Che, J.

We concur:

Lee, P.J.

Price, J.

ALSEPT & ELLIS

October 08, 2023 - 9:08 AM

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