No. 92454-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOEL RAMOS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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2. Whether the Court of Appeals decision in this case conflicts with the Division One's decision in State v. O'Dell?
3. Whether the Court of Appeals decision in this case conflicts with this court's decision in State v. Ronquillo?
4. Whether the prosecution breached the plea agreement by arguing facts to sustain the bargained for sentence in the face of the defense's request for less than one half the time which had previously been bargained for?

II. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The Sentencing Reform Act (SRA) is not unconstitutional for having presumptive sentences, even for juvenile tried and sentenced as adults, when there are means to seek a lesser sentence by way of mitigating factors as set forth in RCW 9.94A. 535 due to youth and its effect on the defendant's capacity to appreciate the wrongfulness of his conduct.

2. The Court of Appeals decision in this case does not conflict with Division One's decision in State v. O'Dell.

3. The Court of Appeals decision does not conflict with this court's decision in State v. Ronquillo.

4. The State did not breach its obligation under the plea agreement by arguing facts to sustain the bargained for sentence in the face of the defendant's request for less than one half that which had been previously bargained for.

III. STATEMENT OF THE CASE

The facts regarding the murders can be found in the unpublished case involving the codefendant. State v. Gaitan, 1996 Wash. App. LEXIS 1159, as well as the Court of Appeals decision located at 189 Wn. App. 431, 357 P.3d 680 (2015).

IV. ARGUMENT

A. THE APPELLANT HAS FAILED TO ESTABLISH THAT THE SENTENCING REFORM ACT (SRA) IS UNCONSTITUTIONAL AS APPLIED TO JUVENILES TRIED AS ADULTS.

As recently stated by the Washington State Supreme Court,

> The *Miller* decision holds "that *mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S.

> Ct. at 2460. In order to comply with the Eighth Amendment, n2 sentencing bodies must engage in "individualized consideration" of juvenile offenders facing life in prison without the possibility of parole, and specifically to "take into account how children are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 2469-70. at 2469-70. Thus, the Miller decision does not categorically bar a penalty for a class of offenders or type of crime--as, for example, we did in *Roper* [v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005),] or *Graham* [*v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)]. Instead, it mandates only that a sentencer follow a certain process--considering an offender's youth and attendant characteristics--before imposing a particular penalty. (emphasis added).

In re Pers. Restraint of Russell Duane McNeil, 181 Wn.2d 582, 588, 334 P.3d 548 (2014).

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments," and article I, section 14 of the Washington State Constitution prohibits the infliction of "cruel punishment." A sentence violates Article I, Section 14 of the Washington State Constitution when it is grossly disproportionate to the crime for which it is imposed. State v. Morin, 100 Wn. App. 25, 29, 995 P.2d 113 (2000). The state constitution provides greater protection than the federal constitution; thus, if the state provision is not violated, the statute violates neither constitution. Morin, 100 Wn. App. at 29. A punishment is grossly disproportionate "if the punishment is clearly arbitrary and shocking to the sense of justice." State v. Smith, 93 Wn.2d 329, 344-45, 610 P.2d 869 (1980). To determine whether a sentence is grossly disproportionate, courts consider the

following factors: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment imposed for other offenses in the same jurisdiction. State v. Fain, 94 Wn.2d 387, 397, 617 P.2d 720 (1980).

Ramos fails to apply the Fain factors to his sentence or otherwise demonstrate that his sentence is so grossly disproportionate to the gravity of his offense as to be arbitrary and shocking to the sense of justice. He also ignores the fact that a sentence within the guidelines provided by law is not arbitrary and shocking to the sense of justice. See State v. Farmer, 116 Wn.2d 414, 434, 805 P.2d 200, 812 P.2d 858 (1991). Instead, Ramos argues that juveniles are less blameworthy because they are less capable of making reasoned decisions. And that because of his age, sentencing him to consecutive sentences is cruel and unusual punishment. Our Supreme Court has rejected this proposition. State v. Cornejo, 130 Wn.2d 553, 569-70, 925 P.2d 964 (1996) (Eighth Amendment is not violated simply because a juvenile offender is tried as an adult and receives an adult sentence). Thus Ramos has failed to demonstrate that his sentence is cruel and unusual punishment.

B. THE COURT OF APPEALS DECISION IN THIS CASE DOES NOT RUN COUNTER TO THIS COURT'S DECISION IN STATE V. O'DELL.

In State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), this court held that "[f]or the reasons given below, we agree with much of the State's interpretation of *Ha'mim* [132 Wn.2d 834, 940 P.2d 633 (1997)]. . That decision did not bar trial courts from considering a defendant's youth at sentencing; it held only that the trial court may not impose an exceptional sentence automatically on the basis of youth, absent any evidence that youth in fact diminished a defendant's culpability. But we also conclude that the trial court in this case improperly interpreted *Ha'mim* just as O'Dell does: to bar any consideration of defendant's youth at sentencing. Thus, we find that the trial court did not meaningfully consider youth as a possible mitigating factor in this case, and we remand for a new sentencing hearing." Id at 689.

This court further stated that "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18. It remains true that age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence. In this respect, we adhere to our holding in *Ha'mim*, 132 Wn.2d at 847. But, in light of what we know today about adolescents' cognitive and emotional development, we conclude that

youth may, in fact, 'relate to [a defendant's] crime,' Id. At 847 (quoting RCW 9.94A.340); that it is far more likely to diminish a defendant's culpability that this court implied in *Ha'mim*; and that youth can, therefore, amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range." O'Dell at 695-696.

The trial court in O'Dell was addressing a different situation than in Ramos. In O'Dell, the defendant was over that age of 18 and was seeking an exceptional sentence. The trial court misinterpreted State v. Ha'mim to the extent that it held that could not consider age. O'Dell at 685. In Ramos, the trial court fully considered the defendant's age and circumstances surrounding his upbringing, as well as evidence of postconviction behavior as it relates to maturity. Thus the defendant had a full and fair opportunity to put forth his youth and personal experiences as it affected his culpability.

C. THE COURT OF APPEALS DECISION IN THIS CASE DOES NOT RUN COUNTER TO DIVISION ONE'S DECISION IN STATE V. RONQUILLO.

In State v. Ronquillo, 2015 WL 6447740 at *11 n.7., the court stated "After oral argument in this case, and contemporaneously with our Supreme Court's opinion in O'Dell, Division Three of this court issued an opinion affirming an 85-year aggregate sentence imposed at resentencing of an

offender who was 14 years old when he committed four murders. *State v. Ramos*, No. 32027-8-III, 2015 WL 4760496 (Wash. Ct. App. Aug. 13, 2015). Unlike here, the trial court in *Ramos* acknowledged its discretion to: (1) adopt a mitigated sentence in light of *Miller*, and (2) let the separate sentences on each count run concurrently. Because of this diffenence, the issues in *Ramos* are not the same as here and we conclude *Ramos* does not indicate that *Ronquillo's* sentence should be affirmed. To the extent *Ramos* might be interpreted as reasoning that *Miller* does not apply in cases of nonlife sentences or aggregate sentences, we respectfully disagree."

The *Ronquillo* court recognized the significant differences between their case and that of *Ramos*. The only dispute that the *Ronquillo* court had with the *Ramos* court was the extent to which *Miller* applied to the sentence in each of their respective case. Regardless of how the *Ramos* court's interpretation of the application of *Miller*, the trial court in this case considered and applied the U.S. Supreme Court's ruling in *Miller* by taking into consideration the defendant age.

D. THE PROSECUTION DID NOT BREACH ITS OBLIGATION UNDER THE PLEA AGREEMENT.

The petitioner claims that the prosecution violated its plea agreement by telling the court that Mr. Ramos could have received an

exceptional sentence above the standard range for his conduct. [Petition for Review, pg. 17-20]. Contrary to the petitioner's claim, the prosecutor made it quite clear that it was not seeking an exceptional sentence. As the record reflects that the prosecutor was not advocating for an aggravating sentence based upon the death of Bryan Skelton. (10/15/2013 RP 141). The prosecutor recommended a sentence of 80 years pursuant to the plea agreement. (10/15/2013 RP 143). This was acknowledged by the sentencing court. (10/15/2013 RP 176).

In addressing questions posed by the court, the prosecutor explained the statutory authority of the court, fulfilling its obligation of being candid with the court pursuant to RPC 3.3(a)(1). In State v. Talley, 134 Wn.2d 176, 949 P.2d 358 (1978), the court stated that,

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

Talley, 134 Wn.2d at 183.

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

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

The prosecutor at numerous times during the resentencing asked the court to follow the recommendation for 80 years from the previous

sentencing hearing in 1993. (10/15/2013 RP 143, 144). The prosecutor even spoke to a middle ground sentence of 411 to 548 months (34.25 to 45.66 years), a period of time between the 320 months sought by the defense and the 80 years in the plea agreement. (10/15/2013 RP 143, 144). Clearly the prosecutor's arguments were necessary to counter the attempt by the appellant to reduce his sentence to 1/3 of the original sentence.

As the Court of Appeals held, "[i]n this case, the prosecutor's presentation in its entirety reflects compliance with the plea agreement. As set forth above, at the time he discussed the fact that an aggravating factor could apply, he emphasized, "[a]lthough we're not advocating that you give him an aggravated sentence based upon that." RP at 141. Turning later to the State's requested sentence, he said, "So in this case, the State is asking that the Court continue the sentence of 80 years, which was what was bargained for." Id. At 143. When asked by the court whether the prosecutor wished at a later point to make the State's recommendation, or would just as soon "do that now," the prosecutor responded, "Well, the recommendation is to deny the exceptional sentence and just reaffirm the sentence of 80 years." Id at 144. His only reference to the aggravating characteristics of the crime was in opposing Mr. Ramos's argument that mitigating factors justified an exceptional *downward* sentence. As Judge Korsmo had observed in his concurring opinion in *Ramos* IV, "There is

nothing to prohibit the prosecutor from arguing against an exceptional sentence (while maintain its 80-year recommendation)." 2013 WL 1528255 at *18 n.4, 2013 Wash. App. LEXIS 816, at *55 n.4." State v. Ramos, 189 Wn. App. 431, 464, 357 P.3d 680 (2015).

IV. CONCLUSION

Based upon the foregoing argument, this Court should deny the Petition for Review.

Respectfully submitted this 14th day of December, 2015.

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Good Afternoon,

Please find attached for filing State's Answer to Petition for Review in State v. Joel Ramos, No. 92454-6.

Sincerely,

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