FILED
SUPREME COURT
STATE OF WASHINGTON
2/22/2019 3:58 PM
BY SUSAN L. CARLSON
CLERK

No. 96709-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

CRISTIAN DELBOSQUE,

Respondent.

ON MOTION FOR DISCRETIONARY FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR MASON COUNTY

ANSWER

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A. INTRODUCTION

Cristian Delbosque was sentenced to die in prison for crimes he committed as a child.

Eighteen years after Cristian's crimes, the United States Supreme Court found mandatory life sentences, such as the one Cristian received, violated the Eighth Amendment. The Washington Legislature responded by ordering new sentencing hearings for juveniles sentenced to life in prison.

Here, the trial court conducted the required hearing and entered findings purporting to consider the mitigating qualities of youth. In the end the court sentenced Cristian to 48 years in prison.

The Court of Appeals reversed that sentence, concluding the trial court's findings of fact were not supported by substantial evidence. *State v. Delbsoque*, __ Wn. App. 2d __, 430 P.3d 1153 (2018).

B. <u>ISSUES PRESENTED</u>

1. Did the Court of Appeals properly determine the trial court's findings were not supported by substantial evidence?

2. Does Article I, section 22 guarantee an individual the right to appeal a sentence imposed for a criminal offense?

C. <u>STATEMENT OF THE CASE</u>

Cristian was the tenth of ten children in a poor family in Saltillo, Mexico. RP 211-14. Cristian's mother drank throughout her pregnancy, giving birth after only 6 months. RP 333-34. Cristian weighed only 4 pounds. RP 415-16. As a result of his premature birth, Cristian suffered from congenital strabismus, an abnormal alignment of his eyes. RP 415-16. Despite eye surgery as a young child, Cristian's eyes remained noticeably crossed causing blurred vision, pain, and eye inflammation. *Id*.

Cristian and his siblings suffered from malnutrition throughout childhood. RP 271-72. The family's home lacked electricity, water, and toilets. RP 231-33, 266-69.

Cristian's dad physically abused the children. RP 235-37. Their mother was frequently absent for extended periods. RP 400-01.

When he was 6 or 7, Cristian's mother died. RP 215-16. His father sent Christian, a brother and sister to live with an aunt. RP 279. Their aunt ran a brothel in a nearby city. RP 20-81. While with their aunt, Cristian and his sister were physically and sexually abused. RP 346, 407-09, 490-91. Cristian later learned he, his brother and sister probably had a different father than their siblings; likely explaining why their father sent them away. RP 327-28.

After several years with their aunt, the three siblings returned to their village. RP 346, 407-09, 490-91. There they lived with a older sister who suffered from schizophrenia. RP 329, Ex. 5. Cristian quit school to begin working. RP 285-86. He also began drinking heavily. *Id.*

A few years later, when he was 16, Cristian moved to Shelton to live with a brother. RP 294-96. Rather than enroll

in school, Cristian took a job as a dishwasher. *Id.* His abuse of alcohol continued. RP 256-60, 301.

Soon after Cristian's arrival, Filiberto Sandoval, a friend from Mexico joined Cristian in Shelton. RP 26, 249.

In October 1993, 17-yar-old Cristian went to the apartment Filiberto shared with his 16-year-old girlfriend. RP 15-17. Filiberto and Cristian drank throughout the night and got into an argument. *Id.* Cristian shot Filiberto killing him. RP 25, 32, 42. Cristian then stabbed Filiberto's girlfriend. RP 25, 35, 42, 179.

Cristian was convicted of aggravated first degree murder and received a sentence of life without parole.

Following the enactment of RCW 10.95.030 and RCW 10.95.035 Cristian was resentenced.

At that resentencing, Dr. Manuel Saint Martin offered his diagnosis that at the time of his offense Cristian suffered with borderline intellectual functioning and alcohol dependence. RP 423. Dr. Martin testified Cristian IQ is 76-77, placing him in the 6th percentile. RP 397-98.

Dr. Sara Heavin testified, as compared to adults, youthfulness impacts children's executive functioning resulting in greater risk-taking behavior and susceptibility to peer influence and approval. *Delbosque*, 430 P.3d at 1156. Christian's traumatic childhood and low intellectual functioning resulted differentiated Cristian from even typical children. *Id.* Dr. Heavin opined Cristian had even greater deficits in brain development than the norm. *Id.*

In the first 13 years of his imprisonment, Christian had 10 infractions. In the six years preceding his resentencing he had none. *Id.*

The trial court nonetheless concluded Cristian's was irreparably corrupt, permanently incorrigible, and irretrievably depraved. CP 31.

The Court of Appeals reversed the trial court concluding its findings of fact were not supported by substantial evidence. The court also found the trial court had failed to specifically consider the mitigating qualities of youthfulness as required by RCW 10.95.030.

D. <u>ARGUMENT</u>

1. The Court of Appeals conclusion that the trial court's findings of fact are not supported by the evidence does not create an issue of substantial public importance and does not warrant review by this Court.

The Court of Appeals employed the proper standard, asking whether substantial evidence supported the trial court's findings. *Delbosque*, 430 P.3d at 1158 (citing *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). The conclusion that factual support was lacking is not a misapplication of the law and does not call for review from this Court. Contrary to the State's claim, the court did not "substitute its own judgment" nor "override the trial court's finding." Instead the Court of Appeals found the findings simply lacked support in the record.

The State also contends a trial court may properly presume a child is irreparably corrupt, permanently incorrigible, and irretrievably depraved and require the child to prove otherwise. Petition at 7. The State insists this is so contending youthfulness does not necessarily "entitle" a

person to an exceptional sentence. *Id*. (citing *State v. O'Dell,* 183 Wn.2d 680, 698-99, 358 P.3d 359 (2015)). That claim has little relevance to this case. First, *O'Dell* concerned adult sentencing and not the sentencing of juveniles. Adults do not enjoy the same protections at sentencing under the Eighth Amendment and Article I, section 14. Second, and relatedly, this assertion presupposes that sentencing rules apply equally to adults and children. This Court's decision in *State v. Houston-Sconiers* made clear they do not. 181 Wn.2d 1, 21, 391 P.3d 409 (2017).

The normal child is not as culpable as an adult. *Miller v. Alabama*, 567 U.S. 460, 471-72, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). When a sentencing scheme is applied to a child in the same fashion as an older offender, the scheme is "the same in name only." *Id*. at 475 (Internal citations and ellipses omitted.) *O'Dell* addressed only the question whether the relative youthfulness of an adult offender could warrant a mitigated sentence. While *O'Dell* draws on much of the same science as *Houston-Sconiers*, it is not a constitutional ruling

and instead simply addresses the reach of the SRA when sentencing an adult. Cristian is not being sentenced for an adult offense.

To require a child to satisfy the same standard under the SRA as an adult ignores the observation in *Miller* that "a sentencer misses too much if he treats every child as an adult." 567 U.S. at 477. Instead, it is only the rare or "exceptional" child who is as culpable as an adult. *Graham v. Florida*, 560 U.S. 48, 72-73, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Normal is not exceptional. Requiring a child to prove their culpability lies within the norm turns the basic premise of the SRA on its head.

The SRA does not require an adult offender to prove they are a typical adult offender in order to receive a presumptive sentence. Yet the State contends the SRA must require children to prove they fall within the norm, that they are a typical child, in order to trigger the discretion that *Houston-Sconiers* requires. By the State's logic a child must prove they are a child in order to be treated as a child. The

opinion of the Court of Appeals properly complied with the requirements of *Miller*.

2. Just as it does for every other felony sentence, Article I, section 22 guarantees Christian the right to appeal the sentence imposed by the trial court in this case.

The Court of Appeals wrongly concluded Cristian could only seek review of his sentence by way of a personal restraint petition. As with any sentence, Article I, section 22 guarantees a right to appeal. Cristian properly raised this argument below yet the court refused to address it. Pursuant to RAP 13.4(d) Cristian may raise this issue in his Answer. Because it is a significant constitutional issue this Court should accept review under RAP 13.4(b)(3).

a. Article I, section 22 guarantees the right appeal the sentence imposed.

Sentencing proceedings, like that proscribed by RCW 10.95.030, are subject to the accused's constitutional rights under the Washington Constitution. Article I, section 22 enshrines the accused's "right to appeal in all cases." This provision "grants not a mere privilege but a 'right to appeal in

all cases'. . . it is to be accorded the highest respect by" our courts. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

The Court of Appeals in *State v. Bassett*, Division Two interpreted this subsection to mean there is no right to direct appeal from a sentencing under RCW 10.95.035. 198 Wn. App. 714, 721-22, 394 P.3d 430 (2017) *affirmed on other grounds*, 192 Wn.2d 67, 428 P.3d 343 (2018). Division Two reached this decision based on language in RCW 10.95.035 that an order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986. *Id*. at 721 (citing RCW 10.95.035(3)). Division Two reasoned, parole board decisions setting a minimum term could be reviewed only through a personal restraint petition. *Id*. While this Court affirmed the conclusion in *Bassett* that a child may never be sentenced to life without parole, the Court did not address the appealability question.

In Cristian's case, the Court of Appeals, relying on its decision in *Bassett*, again concluded Christian could not

appeal the sentence imposed. Instead the court reasoned his only avenue was a Personal Restraint Petition (PRP).

The imposition of a sentence by the superior court pursuant to RCW 10.95.035 is patently distinct from the parole board's administrative setting of a minimum term. Prior to the SRA, the superior court did not set the minimum term, but instead only imposed a sentence equal to the maximum term provided by statute. Following the defendant's transfer to the Department of Corrections, the parole board "fixed" the minimum term. Laws 1986, ch 224, §9 (former RCW 9.95.040). The administrative setting of a minimum term was not appealable of right. *In re the Personal Restraint of Rolston,* 46 Wn. App. 622, 623, 732 P.2d 166 (1987). However, the court's imposition of its sentence and the procedure for doing so has always been subject to direct appeal. *In re the Personal Restraint of Sinka*, 92 Wn.2d 555, 565-66, 599 P.2d 1275 (1979) (noting setting of minimum term is unlike the other parts of a criminal prosecution in terms of due process); *see also State v. Williams*, 149 Wn.2d

143, 146-47, 65 P.3d 1214 (2003) (even under the SRA, "underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision" are appealable); *State v. Ammons*, 105 Wn.2d 175, 182-83, 713 P.2d 719 (1986) (even under the SRA, "appellant, of course, is not precluded from challenging on appeal the procedure by which a sentence within the standard range was imposed").

Unlike the sentencing court in Cristian's case, the parole board was an administrative agency. D. Boerner, *Sentencing in Washington*, 1-1 (1985). The administrative setting of a minimum term was not a part of the criminal proceeding and the State was not a party. *In re Matter of Bonds*, 26 Wn. App. 526, 529-30, 613 P.2d 1196 (1980). It was not an adversarial proceeding. *Id*. ("the setting of a minimum term [by the parole board] is not part of a criminal prosecution and the full panoply of rights due a defendant in such a proceeding does not apply to a minimum term setting." *Id*.; *Sinka*, 92 Wn.2d at 561 ("The actual setting of a minimum term occurs at a meeting between the inmate and a

two-person panel of the Parole Board; that meeting averages 15-20 minutes in length. . . . counsel, family and friends are not allowed to attend.").

The analysis in *Bonds* rested on the idea that under parole sentencing system a person had no expectation in anything other than maximum term. *Lindsey v. Superior Court,* 33 Wn.2d 94, 104, 204 P.2d 482 (1949). The law required the trial court to impose the maximum term. A minimum term, set by a parole board, was merely an act of administrative grace. *January v. Porter*, 75 Wn.2d 768, 774, 453, P.2d 876 (1969). That is no longer the case.

A child sentenced as an adult to life without parole has a constitutional right to be resentenced and to have the court consider a lesser minimum term. In fact, in this Court has concluded Article I, section 14 prohibits imposing the maximum term in any case. *State v. Bassett*, 192 Wn.2d 67, 90, 428 P.3d 343 (2018). Instead, a sentencing court must exercise discretion whenever sentencing children as adults. *Houston-Sconiers*, 188 Wn.2d at 21. Unlike sentencing prior to

1986 where only one sentence was permissible, sentencing under RCW 10.95.o35 requires a court to exercise a substantial amount of discretion.

Sentencing under RCW 10.95.030 is not merely an administrative act. Instead, it is an adversarial proceeding at which the sentencing court will exercise its discretion to impose a sentence. Unlike parole proceedings, a sentencing hearing under RCW 10.95.035, as well as the resulting sentence, implicates several substantive and procedural constitutional rights. A sentence imposed under RCW 10.95.035 does not exist merely as an exercise of administrative grace but rather by constitutional mandate.

This Court has already recognized that an absolute statutory prohibition on the right to appeal a sentence imposed likely violates Article I, section 22. *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); *Williams*, 149 Wn.2d at 147. RCW 10.95.035(3) purports to do exactly that. Under the statute, children previously convicted of aggravated first degree murder and resentenced are the only individuals

in Washington who do not have a right to appeal the sentence imposed or even the manner in which that sentence is imposed. Not only does that provision deny them their right to appeal under Article I, section 22, it casts substantial constitutional uncertainty under the Equal Protection Clauses of the State and Federal constitutions. As every other criminal defendant, Christian has an unqualified right to appeal the sentence imposed in his case. To the extent RCW 10.95.035(3) purports to limit the right, it is unconstitutional.

The opinion of the Court of Appeals is contrary to this Court's opinion and presents a significant constitutional issue. If this Court grants the State's petition, it should grant review ofthis issue to make clear Article I, section 22 guarantees the right to appeal the sentence imposed in a criminal matter.

b. *Cristian argued treating this matter as a PRP violated his right to appeal under Article 1, section 22.*

Following the imposition of his sentence, Christian filed a notice of appeal. The State did not object nor did the Court of Appeals comment. This Court sent appointed counsel a perfection schedule directing counsel to perfect the matter pursuant the Rules of Appellate Procedure pertaining to direct appeals. The State did not object. Over the next several months Cristian perfected his direct appeal pursuant to the Rules of Appellate Procedures as directed by the court. The State did not object nor did the Court of Appeals comment. Cristian filed his Brief of Appellant.

More than 10 months after he filed his notice of appeal and three months after Cristian filed his brief, the State argued for the first time that RCW 10.95.035 barred Cristian from appealing his sentence. Cristian filed a supplemental brief in which he contended RCW 0.95.035(3) violates Article I, section 22. The Court of Appeals refused to address

Cristian's argument because it was raised in a supplemental brief, a brief which the court itself invited.

But at no point prior to the State's brief did Cristian have reason to argue his direct appeal was properly treated as a direct appeal. That is what the court had done to that point. That is what the parties had done to that point. And as set forth above, that is in fact what Article I, section 22 required. There is no reason for any litigant to proactively argue the unconstitutionality of a statute which no party or court has even suggested bars their case. Cristian did address the unconstitutionality of the statute after the State contended it barred his appeal.

The Court of Appeals treated this matter as a direct appeal up to the issuance of its opinion. Even though the court's view of the correct procedural posture of this case changed midcourse, it refused to address or consider Cristian's argument as to why the procedural posture could not change.[1]

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[1] Interestingly, despite having argued Cristian's sentence is only reviewable as a minimum term decision prior to 1986, the prosecutor has never acknowledged much less addressed what that

Cristian properly raised his challenge to the constitutionality of RCW 10.95.035. As discussed earlier, this Court should review that challenge if it is to grant the State's request for review.

E. CONCLUSION

The Court of Appeals properly concluded the court's findings were unsupported by the evidence. Too, the trial court did not comply with the RCW 10.95.030. This Court should deny review of the State's petition. The Court should, however, grant review of the question of whether Cristian may appeal his sentence.

Respectfully submitted this 22nd day of February, 2018.

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means for the State's participation in this case. Prior to 1986, a county prosecutor was not a party to either the administrative hearing at which the minimum term was set, nor was a prosecutor a party to any personal restraint petition filed challenging that administrative decision. Instead, the Parole Board, represented by the attorney general, was a party to the review of its administrative decision. Neither the State's brief below nor its petition address these limitations on the prosecutor's involvement in this case.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 96709-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: February 22, 2019

WASHINGTON APPELLATE PROJECT

February 22, 2019 - 3:58 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Cristian Delbosque
Superior Court Case Number:	93-1-00256-4

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