No. 99619-9

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

PHILLIP VICTOR HICKS,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 53822-9-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 01-1-02238-7
The Honorable Gretchen Leanderson, Judge

STEPHANIE C. CUNNINGHAM
Attorney for Petitioner
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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I. IDENTITY OF PETITIONER

The Petitioner is PHILLIP VICTOR HICKS, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 53822-9-II, which was filed on March 16, 2021. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Where youthfulness can diminish a young offender's culpability and can constitute a mitigating factor justifying the imposition of an exceptional sentence, did the trial court meaningfully consider youth and its attributes when it failed to consider whether 20-year old Phillip Hicks' behavior and decision making were a product of his youthful immaturity?

2. Where the differences between young offenders and adult offenders can constitute a mitigating factor justifying the imposition of an exceptional sentence, did the trial court meaningfully consider youth and its attributes when it failed to address the differences between 20-year old Phillip Hicks and older adult offenders?

IV. STATEMENT OF THE CASE

In 2001, the State charged a then-20 year old Phillip Victor Hicks and Rashad Babbs for the murders of Chica and Jonathan Webber. (CP 1-3, 6-9) The facts are contained in this Court's

written opinion from Hicks' direct appeal:

> On the night of March 21, 2001, two men approached Jonathan Webber and his wife Chica as they were walking from a friend's house and asked the couple if they had drugs. The Webbers told the men that they did not and kept walking. The two men followed the Webbers, demanding several times that they empty their pockets. The Webbers continued walking, and the two men started shooting at them. Jonathan sustained wounds to his leg, wrist, and the left side of his back, but survived. Chica died. The autopsy of Chica's body revealed that she had been shot three times in the head—twice by a .22 revolver and once by a 9 mm handgun. Jonathan and another witness, Wayne Washington, also testified that the shots came from two firearms. Jonathan identified Hicks in a photomontage as one of his assailants but was unable to identify Babbs as the second assailant.
>
> After the attack, the shooters ran off through an alley. A search of the area recovered a .22 revolver, a brown glove, a black leather jacket, a knit stocking cap, and a sweatshirt. The sweatshirt had DNA (deoxyribonucleic acid) that later testing found to be consistent with Babbs's DNA. The jacket also contained items linked to Babbs's sister and cousin.
> …
> On April 24, 2001, the police arrested Hicks for unrelated drug dealing charges. Hicks made statements implicating himself in the Webber shootings[.]

See *State v. Hicks*, 163 Wn.2d 477, 481-82, 181 P.3d 831 (2008).

Hicks was found guilty of first degree felony murder of Chica, of attempted murder of Jonathan, and of unlawful possession of a firearm. (CP 6-9, 16) At sentencing, the court imposed a term of

confinement totaling 776 months. (CP 20)

Hicks' convictions were affirmed on direct appeal. See *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008). Hicks later filed a Personal Restraint Petition, arguing that the trial court miscalculated his offender score. (CP 27-28) The Court of Appeals agreed, and remanded his judgment and sentence to the Superior Court for resentencing.[1] (CP 29)

On remand, Hicks asked the court to "consider his youth, immaturity and mental illness at the time of the offense and impose a downward departure in sentencing[.]" (CP 30, 33; RP 15) Hicks relied on *State v. O'Dell*, which was decided after Hicks' original sentencing hearing, and which held that a defendant's youthfulness can support an exceptional sentence below the standard range.[2] (CP 32-33, 35-43; RP 15)

In his sentencing memorandum, Hicks asserted that his "upbringing and child development was plagued by abrupt separations and abuse." (CP 37) Hicks presented evidence detailing the difficulties he faced in childhood and adolescence, and asserting that he has matured significantly since his original

[1] See *Matter of Hicks*, 51831-7-II, 2018 WL 6705522, at *2 (2018).
[2] See *State v. O'Dell*, 183 Wn.2d 680, 698-99, 358 P.3d 359 (2015).

sentencing in 2004. (CP 37-78) To summarize, Hicks' mother was 16 years old and drug-addicted when she gave birth to Hicks. The delivery was difficult because the umbilical cord was wrapped around Hicks' neck. Medical personnel also believed Hicks suffered from fetal alcohol syndrome. (CP 37, 48)

Hicks did not have a stable or secure living environment, as he was shuffled between his mother, her relatives or friends, and foster care. When living with his mother, Hicks was neglected and abused, both physically and sexually. (CP 37-38, 48-50) At one point, Hicks was removed from a positive foster care placement and made to live with his mother in her drug rehabilitation facility. A few days later, he witnessed a drug-related shooting near the rehab center. A few weeks after that, his mother abandoned Hicks and never returned. (CP 38-39, 50)

Now, for the first time, Hicks began acting out at school and engaging in reckless behaviors. At the age of 13, Hicks started using marijuana and engaging in criminal behavior. (CP 29, 51) And at the age of 20, he committed the crimes that are the subject of this case. (CP 35)

According to psychologist Dr. Robert Halon, who reviewed and evaluated Hicks' case:

> Hicks' background reveals fundamental early life experiences that deterred, prevented and delayed development of maturity in the areas of understanding, anticipating and assessing risks and consequences, impulse control, pro-social behavior and resistance to peer pressure. Mr. Hicks is a classic example of a man who, because of destructive family and environmental conditions in his developmental and later adolescent years, lacked normally developing neurological maturity, conscience-morality, the ability to control his emotions and to identify, anticipate and negotiate consequences and make reasoned decisions[.]

(CP 53)

Hicks also presented declarations and described how, in the years since he committed these offenses, he has matured and taken responsibility both for his own past actions and for his future. (CP 41-43, 51-53, 70-78; RP 17-19)

The sentencing court found that an exceptional sentence downward was not warranted because Hicks "knew right from wrong when [he was] committing those crimes." (RP 40) The court imposed a new term of confinement totaling 728 months. (CP 184; RP 41-42) Hicks filed a timely Notice of Appeal. (CP 170-71) The Court of Appeals affirmed Hicks' sentence.

V. ARGUMENT & AUTHORITIES

The issues raised by Hicks' petition should be addressed by this Court because the Court of Appeals' decision conflicts with

settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2). The Court of Appeals misapplied the Supreme Court's holding in *Alabama v. Miller* and this Court's holding in *State v. O'Dell* when it found that the trial court did not abuse its discretion when it denied Hicks' request for an exceptional sentence based on the mitigating qualities of youth.

Under the SRA, a sentencing court must generally sentence a defendant within the standard range. *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014); RCW 9.94A.505(2)(a)(i). But "[t]he court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1).

A. YOUTHFULNESS IS A SUBSTANTIAL AND COMPELLING BASIS FOR A MITIGATED SENTENCE.

Children are "constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012); see also *State v. Houston-Sconiers*, 188 Wn.2d 1, 18, 391 P.3d 409 (2017). They are categorically less blameworthy and more likely to be

rehabilitated. *Miller*, 132 S. Ct. at 2464; *Roper v. Simmons*, 543 U.S. 551, 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). The principles underlying adult sentences—retribution, incapacitation, and deterrence—do not to apply to juveniles in the same way as they do adults. *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

Children are less blameworthy because they are less capable of making reasoned decisions. *Miller*, 132 S. Ct at 2464. Scientists have documented their lack of brain development in areas of judgment. *Miller*, 132 S. Ct at 2464. Also, children cannot control their environments. *Miller*, 132 S. Ct at 2464, 2468. They are more vulnerable to and less able to escape from poverty or abuse. *Miller*, 132 S. Ct. at 2464, 2468. Most significantly, juveniles' immaturity and failure to appreciate risk or consequence are temporary deficits. *Miller*, 132 S. Ct. at 2464. As children mature and "neurological development occurs," they demonstrate a substantial capacity for change. *Miller*, 132 S. Ct. at 2465.

Recognizing that "youthfulness" is more than merely chronological, *State v. O'Dell* extended these principles to circumstances where youthful offenders commit offenses as adults. 183 Wn.2d 680, 695-95, 358 P.3d 359 (2015). Examining

decisions like *Miller* and the science underlying them, this Court held that youthfulness, by itself, is a valid mitigating factor upon which a court may impose an exceptional sentence. *O'Dell*, 183 Wn.2d at 696.

B. HICKS MAY APPEAL THE SENTENCING COURT'S FAILURE TO COMPLY WITH THE SUPREME COURT'S DIRECTION TO MEANINGFULLY CONSIDER YOUTHFULNESS AS A MITIGATING FACTOR.

Generally, a standard range sentence may not be appealed. RCW 9.94A.585(1). That statute, however, does not place an absolute prohibition on the right of appeal. A defendant may challenge the procedure by which a sentence within the standard range is imposed. *State v. Mail*, 121 Wn.2d 707, 712-13, 854 P.2d 1042 (1993).

When a defendant has requested a mitigated exceptional sentence, review is available where the court refused to exercise discretion or relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. S*tate v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative

considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis in original).

C. THE TRIAL COURT DID NOT MEANINGFULLY CONSIDER THE MITIGATING VALUE OF YOUTHFULNESS.

A sentencing court must consider an offender's "youth and attendant characteristics" before determining the penalty, and not simply examine his acts during the incident. *Miller*, 132 S. Ct. at 2471. Thus, a youthful defendant's culpability is not defined by their participation in the offense.

Among the relevant factors the judge should consider as mitigation are: (1) immaturity, impetuosity, and failure to appreciate risks and consequences; (2) lessened blameworthiness and resulting diminishment in justification for retribution; and (3) the increased possibility of rehabilitation. *O'Dell*, 183 Wn.2d at 692-93. Each of these "differences" between adults and young offenders could justify a mitigated sentence. *O'Dell*, 183 Wn.2d at 693.

The judge must "meaningfully consider youth as a possible mitigating circumstance." A court's failure to fully consider youthfulness as a mitigating factor is an abuse of discretion. *O'Dell*, 183 Wn.2d at 697. The sentencing court here failed in its duty to fully consider Hicks' youthful characteristics and potential for

rehabilitation.

In its oral ruling denying Hicks' request for a mitigated sentence, the trial court acknowledged that Hicks had a difficult childhood but focused primarily on the facts of what the judge called "heinous, callous, and selfless crimes." (RP 38-41) The trial court focused on Hicks' past behavior and the consequences of that behavior, and did not meaningfully consider Hicks' ability to appreciate those consequences or to make mature decisions about his life when he was just 20 years old.

The court failed to consider that immature judgment and impetuousness—classic traits of youth—may have contributed to Hicks' choices that fateful night. The court did not consider how Hicks' youth and traumatic upbringing may have impacted his ability to make good choices. And at no point did the court consider how Hicks' maturity, culpability, and decision making compared to adult offenders, the vast majority of which are older than him. In doing so, the trial court did not give effect to *O'Dell*'s mandate.

The trial court also failed to give effect to the Supreme Court's caution that the hallmark attributes of youth are transient. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals

mature, the impetuousness and recklessness that may dominate in younger years can subside." *Roper*, 543 U.S. at 570. The trial court never assessed Hicks' likelihood for rehabilitation brought about simply by maturation, which does not apply to older adult offenders.

The trial court "did not meaningfully consider youth as a possible mitigating circumstance" and therefore failed to properly exercise its discretion at sentencing. *O'Dell*, 183 Wn.2d at 696-97. Hicks' case should be remanded for a new sentencing hearing. *O'Dell*, 183 Wn.2d at 697.

VI. CONCLUSION

For the reasons argued above, this Court should accept review, and remand this matter for a new sentencing hearing..

DATED: April 1, 2021

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Phillip V. Hicks

CERTIFICATE OF MAILING

I certify that on 04/01/2021, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Phillip V. Hicks, DOC# 793210 A-104, Monroe Correctional Complex – TRU, Post Office Box 888, Monroe, WA 98272-0888..

STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

Court of Appeals Opinion in *State v. Hicks*, No. 53822-9-II

Filed
Washington State
Court of Appeals
Division Two

March 16, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PHILLIP VICTOR HICKS, Appellant.	No. 53822-9-II UNPUBLISHED OPINION

CRUSER, J. – Phillip Victor Hicks appeals from his resentencing on his first degree murder, attempted first degree murder, and first degree unlawful possession of a firearm convictions. Hicks, who was 20 years and 5 months old when he committed the crimes, argues that the resentencing court failed to give meaningful consideration to his request for an exceptional mitigated sentence based on his youth and brain development at the time of the commission of the crimes. Hicks raises additional arguments in a Statement of Additional Grounds for Review[1] (SAG). Because Hicks does not show that the court abused its discretion when it denied his request for an exceptional sentence and his SAG arguments fail, we affirm.

[1] RAP 10.10.

FACTS

I. BACKGROUND, TRIAL, AND ORIGINAL SENTENCING

The background facts in this case were succinctly summarized by our supreme court in Hicks's original appeal:

> On the night of March 21, 2001, two men approached Jonathan Webber and his wife Chica as they were walking from a friend's house and asked the couple if they had drugs. The Webbers told the men that they did not and kept walking. The two men followed the Webbers, demanding several times that they empty their pockets. The Webbers continued walking, and the two men started shooting at them. Jonathan sustained wounds to his leg, wrist, and the left side of his back, but survived. Chica died. The autopsy of Chica's body revealed that she had been shot three times in the head—twice by a .22 revolver and once by a 9 mm handgun. Jonathan and another witness, Wayne Washington, also testified that the shots came from two firearms. Jonathan identified Hicks in a photomontage as one of his assailants . . . .
>
> . . . .
>
> On April 24, 2001, the police arrested Hicks for unrelated drug dealing charges. Hicks made statements implicating himself in the Webber shootings.

State v. Hicks, 163 Wn.2d 477, 481-82, 181 P.3d 831 (2008) (footnotes omitted). Hicks was convicted of first degree murder with a firearm sentencing enhancement, attempted first degree murder with a firearm sentencing enhancement, and first degree unlawful possession of a firearm.

At the 2004 sentencing hearing, Hicks argued that the trial court should consider his difficult upbringing, traumatic background, and mental health issues and impose sentences at the low-end of the standard ranges. The court acknowledged that Hicks's mental health issues and background were significant factors and that they were "legitimate sentencing considerations." Clerk's Papers (CP) at 117. But it found that the "shocking" and "senseless" nature of the crimes, the resulting impact on the community's sense of security, and the danger Hicks posed to the

community "strongly outweighed" those considerations to the point the court was not "swayed by them." *Id.*

The court sentenced Hicks to 416 months for the first degree murder conviction, 240 months for the attempted first degree murder conviction, and 89 months for the first degree unlawful possession of a firearm conviction. It also imposed two 60-month firearm sentencing enhancements. The court ran the first degree murder sentence, the attempted first degree murder sentence, and the two firearm enhancements consecutively. It ran the first degree unlawful possession of a firearm sentence concurrent to the murder and attempted murder sentences. The total term of confinement was 776 months.

II. APPEAL, PERSONAL RESTRAINT PETITIONS, AND REMAND FOR RESENTENCING

Hicks appealed his convictions. In 2008, our supreme court affirmed. *Hicks*, 163 Wn.2d at 494. In 2009, Hicks filed a personal restraint petition (PRP) that we dismissed. Order Dismissing Petition, *In re Pers. Restraint of Hicks*, No. 39310-7-II (Wash. Ct. App. Dec. 8, 2015).

Hicks filed a second PRP in 2018. *In re Pers. Restraint of Hicks*, No. 51831-7-II (Wash. Ct. App. Dec. 18, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2051831-7-II%20Unpublished%20Opinion.pdf. This time, Hicks argued, and the State conceded, that the trial court had applied incorrect sentencing ranges and used incorrect offender scores when determining the sentences for the first degree murder and attempted first degree murder convictions. *In re Hicks*, No. 51831-7-II, slip op. at 2-3. We accepted the State's concession that Hicks was "entitled to be resentenced under [*State v. Weatherwax*, 188 Wn.2d 139, 156, 392 P.3d 1054 (2017)]."[2] *Id.*

[2] *Weatherwax* addressed the calculation of offender scores and standard ranges for multiple current offenses that include two serious violent offenses when the two serious violent offenses share the same seriousness level but one of the offenses is an anticipatory offense. 188 Wn.2d at 142-44.

at 3. Accordingly, we granted the petition, and "remand[ed] his judgment and sentence for resentencing." *Id.*

III. RESENTENCING

At the resentencing hearing, the parties agreed that the court needed to resentence Hicks under the corrected offender scores and sentencing ranges. The State asked the court to sentence Hicks to the high end of the sentencing range for each offense. It requested that the court run the first degree murder and attempted first degree murder sentences consecutively and the first degree unlawful possession of a firearm concurrently, which would result in a new total base sentence of 632 months. It further requested that the court run the two firearm sentencing enhancements consecutive to each other and to the first degree murder and attempted first degree murder sentences. The new total term of confinement the State requested was 752 months, 24 months less than the original total term of confinement.

Hicks asked the court to consider a downward departure[3] based on his immaturity and youthfulness at the time of the crimes, his "fractured upbringing," his mental health issues, and his "positive development since the offense and the age of twenty." CP at 30. Hicks argued that even though he was over 18 when he committed the crimes, the court could consider these mitigating factors under *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), *State v.*

[3] Specifically, Hicks requested concurrent sentences of 240 months for the first degree murder conviction, 234 months for the attempted first degree murder conviction, and 67 months for the unlawful possession of a firearm conviction, for a new base sentence of 240 months. He further requested that the two 60-month firearm sentencing enhancements run concurrent to each other but consecutive to the substantive offenses, for a total term of confinement of 300 months, or 25 years.

Gilbert, 193 Wn.2d 169, 438 P.3d 133 (2019), and *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

In support of his request for a mitigated sentence, Hicks presented the court with a declaration from Robert Halon, Ph.D., discussing Hicks's "shattered and unstable childhood" which, which Hicks asserted had "retarded his maturation." CP at 36. In this declaration, Dr. Halon described the recent scientific understanding of brain growth and development in terms of both the brain's neurological maturation and the external factors that influence brain development. Dr. Halon also described the numerous biological factors (such as family history of addiction and mental health issues, the possibility that Hicks suffered from fetal alcohol syndrome, and possible issues with his birth) and the numerous sociological/experiential factors (such as a history of severe neglect and abuse and extraordinary traumatic experiences that Hicks suffered as a child) that could have influenced Hicks's brain maturation and development.

Additionally, Dr. Halon described Hicks's history of escalating delinquent or criminal behavior starting in the sixth grade. Dr. Halon stated that Hicks had been diagnosed with posttraumatic stress disorder and explosive intermittent disorder during evaluations conducted in 2003 to investigate the possibility of a not guilty by reason of insanity plea. Dr. Halon noted that these diagnoses led to Hicks obtaining therapy and mental health treatment while in prison that had since enabled Hicks to recognize and take responsibility for his crimes and to "improve[e] his coping methods and maturity." *Id.* at 52. Dr. Halon also commented on Hicks's continuing maturation, growth, and development during his incarceration.

Dr. Halon concluded his declaration with the following statement,

> Hicks'[s] background reveals fundamental early life experiences that deterred, prevented and delayed development of maturity in the areas of

> understanding, anticipating and assessing risks and consequences, impulse control, pro-social behavior and resistance to peer pressure. Mr. Hicks is a classic example of a man who, because of destructive family and environmental conditions in his developmental and later adolescent years, lacked normally developing neurological maturity, conscience-morality, the ability to control his emotions and to identify, anticipate and negotiate consequences and make reasoned decisions; that is, maturation that 17 years of formal and informal remedial experiences and a close partner relationship now makes possible.

Id. at 53 (emphasis omitted).

Hicks also presented written statements from his family members and friends describing how Hicks had matured and changed and was now a positive influence in their lives, and describing his lack of stability as a child.[4]

The State responded that because Hicks was 20 years old when he committed the crimes and not a juvenile, the court did not have "unfettered discretion" when imposing the sentence. Verbatim Report of Proceedings (VRP) at 22. The State argued that the sentence Hicks requested required the court to find mitigating circumstances and that Hicks had not established such circumstances. The State contended that the court had "nothing before" it that established that Hicks "was significantly impaired in his capacity to appreciate the wrongfulness of his conduct and to conform to the law." *Id.* at 25.

After hearing argument, the court discussed "the facts of the crime[s]" and characterized the crimes as "very heinous, callous, and selfless (sic)." *Id.* at 38. The court then stated,

> No doubt you had a difficult childhood. *I reviewed everything that was presented to this Court*. And you did spend much of your childhood and your youth in the dependency system. I read it all.

[4] Hicks did not include an affidavit or statement from himself addressing whether he understood the wrongfulness of his actions or whether he lacked the ability to conform to the law at the time he committed the crimes.

You gained a significant amount of maturity, though, during these past 17 years in prison. And you've had counseling and therapy, and you serve as a mentor to other prisoners. And now you even have a wife and a young child.

But you were 20 years and five months old at the time you committed the murder of Ms. Webber and the attempted murder of Mr. Webber. So *Houston-Sconiers*[5] drew the line at age 18 for the Court to have pretty much unfettered discretion with sentencing for youthful offenders.

After 18, the Court is very constrained, and *departures from that standard sentencing range 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*.

I'm finding that there's absolutely no support for these conclusions, and the Court is denying your request for an exceptional sentence downward.

Yes, you were in the dependency and foster care system. Yes, your parents let you down. Every child should have a good childhood. No, it was not easy for you. So *I am considering your circumstances*, sir. I am considering.

I'm also considering that you were 20 years and five months old, but you knew right from wrong when you were committing those crimes.

You had a lengthy criminal history prior to March 22, 2001. You had nine felonies; you had four misdemeanors in 12 criminal cases. Seven were for theft-related offenses so *you were very familiar with the justice system and knew fully the consequences of committing criminal acts*.

Again, you told Jonathan to empty his pockets or he was going to die. But [C]hica died. And Jonathan, as you've heard, continues to have significant problems . . . .

So I am sentencing you to the high end of the new sentencing range for the murder first degree. I'm sentencing you to 320 months. I'm also sentencing you to the 60 months for the firearm sentencing enhancement.

For the attempted murder, *I am acknowledging that you have had rehabilitative efforts while in prison and that you are working hard towards rehabilitation and to help others, and I think that that is commendable.* I am taking

[5] *State v. Houston-Sconiers*, 188 Wn.2d 1, 9, 391 P.3d 409 (2017) (courts sentencing juveniles have the discretion to impose any sentence below the standard range and enhancements and must take the defendant's age into account at sentencing).

> 24 months off of the high end -- the highest end of count two, the attempted murder first degree. I'm giving you 288 months, again, with 60 months for the firearm sentence enhancement.
>
> So the base counts are to run consecutive, not concurrent. Consecutive. And the firearm sentencing enhancements are also to run consecutive. So both will count 60 months for the firearm sentencing enhancements. And, again, running consecutive, not concurrent.
>
> . . . .
>
> As to the unlawful possession of a firearm first degree, I am adding 89 months for count three. That, however, will run concurrent with counts one and two.
>
> . . . .
>
> Again, it's a very difficult case. Community needs to feel safe when they're walking down the street. *And I know that there was trauma that you experienced, but there's also been a significant amount of trauma that your actions have imposed on others and we're very clear on where that is right now*.

Id. at 39-42 (emphasis added).

The court sentenced Hicks to 320 months on the first degree murder conviction, 288 months on the attempted first degree murder conviction, and 89 months on the first degree unlawful possession of a firearm conviction. Running the first degree murder, attempted first degree murder, and two firearm enhancements consecutively, and running the unlawful possession of a firearm sentence concurrently, resulted in a total term of confinement of 728 months.

Hicks appeals the denial of his request for an exceptional sentence.

ANALYSIS

I. DENIAL OF REQUEST FOR EXCEPTIONAL SENTENCE

Hicks argues that the resentencing court abused its discretion when it refused to grant his request for an exceptional sentence downward. Hicks argues that the court erred because it failed to meaningfully consider his youth as a possible mitigating factor.[6] We disagree.

"A defendant may appeal a standard range sentence [only] if the sentencing court failed to comply with procedural requirements of the [Sentencing Reform Act[7]] or constitutional requirements." *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). "The court may impose a sentence outside the standard sentence range for an offense if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.[8]

Youthfulness is a mitigating factor that may justify an exceptional sentence below statutory sentencing guidelines, even when the defendant is a legal adult. *O'Dell*, 183 Wn.2d at 688-89. The court may consider whether youth diminished the defendant's capacity to "appreciate the

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[6] The State argues that Hicks was not entitled to request a downward departure based on his youth at the resentencing hearing because the case was remanded solely for resentencing under the corrected offender scores. Thus, the State contends, Hicks's new standard-range sentence is not appealable. We disagree.

When an appellate court remands a defendant's case for only a ministerial correction, the trial court does not have discretion to conduct a full resentencing. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). But when an appellate court remands a defendant's case for resentencing, the trial court has discretion to resentence the defendant on all counts. *Id.* at 793. Here, we remanded Hicks's case for resentencing under the corrected offender scores and standard ranges, not just for a ministerial correction, and we did not limit the scope of the resentencing. *In re Hicks*, No. 51831-7-II, slip op. at 3. Accordingly, Hicks's sentence is appealable.

[7] Chapter 9.94A RCW.

[8] The legislature has amended RCW 9.94A.535 several times since the date of the offenses, but this section has not changed, so we cite to the current version of the statute.

wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law." RCW 9.94A.535(1)(e); *O'Dell*, 183 Wn.2d at 689.

"While no defendant is entitled to an exceptional sentence below the standard range, 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). When a defendant requests review of an exceptional sentence, the question is not whether we agree with the court's judgment. Rather, our review is limited to circumstances where either the court "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); *State v. Khanteechit*, 101 Wn. App. 137, 140, 5 P.3d 727 (2000). Impermissible bases for declining a request for an exceptional sentence include race, sex, or religion. *Garcia-Martinez*, 88 Wn. App. at 330. "A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." *Id.* A "failure to exercise discretion is itself an abuse of discretion subject to reversal." *O'Dell*, 183 Wn.2d at 697. But, "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." *Garcia-Martinez*, 88 Wn. App. at 330.

In *Grayson*, the court, rather than considering the facts of the offender's case, denied the motion for a drug offender sentencing alternative (DOSA) because the "'State no longer has money available to treat people who go through a DOSA program.'" 154 Wn.2d at 337 (emphasis omitted) (quoting Report of Proceedings at 152-53). Our supreme court held that the court's failure "to exercise any meaningful discretion in deciding whether a DOSA sentence was appropriate" was

an abuse of discretion. *Grayson*, 154 Wn.2d at 335-36. Similarly, in *O'Dell*, our supreme court determined that the court's mistaken belief that it did not have the ability to consider youth as a mitigating factor was a failure to exercise, and therefore an abuse of its discretion. 183 Wn.2d at 697.

But here, unlike in *O'Dell* and *Grayson*, the record demonstrates that the court was aware that it had the ability to consider Hicks's youth, brain development, and personal circumstances. In fact, the record shows that the court considered those factors. It acknowledged Hicks's difficult upbringing, his efforts and success at rehabilitation, and stated that it had "reviewed everything that" Hicks had presented to the court before finding that there was no basis for an exceptional sentence below the standard range. VRP at 39. The court exercised its discretion by considering the facts and concluding that no basis for an exceptional sentence existed. Accordingly, Hicks does not show that the court abused its discretion when it declined to impose the exceptional sentence.

II. SAG

Hicks presents three additional claims in his SAG. These claims fail.

Hicks first claims that the resentencing court considered only his age and his "previous exposure to the criminal justice system" and that it did not meaningfully consider the brain science evidence demonstrating that he may have had impulse control issues and an inability to appreciate the consequences of his action. SAG at 1. Although the court did not discuss the brain science evidence in detail in its oral ruling, the court stated that it had considered all of the materials Hicks had provided. Accordingly, the record does not support this claim.

Hicks next claims that because Dr. Halon concluded that he (Hicks) endured experiences as a youth that prevented or delayed his development and the State did not refute these findings,

the court was required to order an assessment by a trained professional rather than come to its own conclusions regarding whether mitigating circumstances existed. But Hicks did not request an additional evaluation prior to resentencing, and there is nothing in the record regarding whether an additional evaluation would have assisted Hicks.

Furthermore, in *O'Dell*, our supreme court held "that despite the scientific and technical nature of the studies underlying the [decisions supporting the *O'Dell* court's decision], a defendant need not present expert testimony to establish that youth diminished his capacities for purposes of sentencing" and that "lay testimony" was all that was required. 183 Wn.2d at 697. Requiring an assessment by an expert in lieu of the court's own conclusion would be inconsistent with that holding. Accordingly, this claim has no merit.

Finally, Hicks contends that his sentence of more than 60 years violates the state constitution's prohibition of cruel punishment[9] because his sentence is the equivalent of a life sentence without "parole" based on "crimes that [he] lacked the ability to understand and comprehend the consequences of." SAG at 2-3. But the court did not find that Hicks lacked the ability to understand or comprehend the consequences of his acts. Thus, Hicks does not show that his punishment amounts to cruel punishment.

Because Hicks does not show that the resentencing court abused its discretion when it denied his request for an exceptional sentence and his SAG arguments fail, we affirm.

[9] Article I, section 14 of the state constitution provides: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."

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.

CRUSER, J.

We concur:

MAXA, J.

SUTTON, A.C.J.

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