NO. 48877-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN PHET, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 98-1-03162-1

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should the defendant's appeal be considered a personal restraint petition where the aggravated murder sentencing statute requires that review of ***Miller*** hearing resentencings be through a personal restraint petition?

2. Does the aggravated murder sentencing statute apply to an aggravated murder minimum term resentencing to the exclusion of the Sentencing Reform Act?

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4. Where the trial court applied the Eighth Amendment standard upheld by the Supreme Court in ***Ramos,*** and where ample evidence supported its decision that concurrent sentences were not warranted by the defendant's youth, did the trial court abuse its discretion by sentencing the defendant to consecutive sentences?

B. STATEMENT OF THE CASE.

1. *Procedural History.*

On June 27, 2002, Appellant John Phet (the "defendant") was convicted by a jury of ten crimes, five counts of aggravated first degree murder and five counts of first degree assault. CP Sentencing Exhibit 1,

Appendix B. A sentencing hearing was held the next day. The defendant's date of birth was September 15, 1981, making him two months shy of his twenty-first birthday during the trial. *Id.*

The offenses of which the defendant was convicted stemmed from the worst mass shooting in Pierce County's history. It took place in the early morning hours of July 5, 1998, at the Trang Dai café. RP 12-14, 20-30[1]. At the time of the shooting the defendant was approximately two months shy of his 17th birthday. CP Sentencing Exhibit 1, Appendix B.

The defendant was sentenced to five consecutive life sentences for five counts of aggravated first degree murder and five consecutive mid-range, determinate sentences for five counts of first degree assault. CP Sentencing Exhibit 1, Appendix B. He also received 600 months for sentence enhancements, also to run consecutive. *Id.* The trial court stated that the actual number of months of total confinement would equate to "life plus 1,100" months. *Id.*

The defendant appealed. In an unpublished opinion this Court affirmed his convictions and sentences in 2005. ***State v. Phet***, 127 Wn. App. 1016, 2005 WL 1023100 (2005). In July 2014 the defendant was

[1] Citations to the record in this case will be accomplished as follows: (1) citations to testimony at the March 25, 2016, resentencing hearing will consist of "RP" and the page number; (2) citations to testimony from the 2002 trial and pre-trial proceedings where possible will be to the VRP excerpts admitted during the re-sentencing hearing and will include the exhibit number, the appendix designation, the name of the witness and page numbers; (3) where the trial testimony was referenced but not summarized with an excerpt, citations will include the volume, date and page of the trial testimony; and (4) citations to visual exhibits will include both the exhibit number and the appendix designation.

brought back before the trial court for resentencing following enactment of legislation mandating resentencing of juvenile aggravated murder defendants. *See* Laws of 2014, Ch. 130 §9 (effective 6/1/2014). After nearly two years of re-sentencing related proceedings, including an interlocutory appeal to this Court filed under case number 47535-9, the defendant was re-sentenced on the five aggravated murders. On March 25, 2016 he was sentenced to 25 years in prison on each count to run consecutive. CP 712-717. The trial court explicitly left unchanged the defendant's sentences for the first degree assaults and the sentence enhancements. *Id.*

The defendant timely filed this appeal on March 29, 2016. CP 718-23. The defendant also filed a personal restraint petition under case number 49508-2 challenging his sentence for the five first degree assaults and the sentence enhancements. However to the best knowledge of the state the defendant has not filed a petition for early release with the indeterminate sentencing review board concerning the first degree assaults or the sentence enhancements.

2. *Statement of Facts.*

The July 5, 1998, shooting attack at the Trang Dai was horrific. Five people lost their lives, and five people were injured by bullets or

bullet fragments. At the re-sentencing hearing the trial court[2] heard testimony from the lead detective, Tom Davidson, which included the basic facts and some pertinent details. Some of the significant testimony from Detective Davidson included (1) a description of the roles of the members and associates of the street gang that perpetrated the shooting [RP 13-15]; (2) a description of the trivial incidents of disrespect that constituted the motive for the shooting [RP 16]; (3) a description of the events of the day of the shooting, how the shooting was planned and carried out [RP 16-21.]; and (4) a description of the shooting itself, both of the shooting through the front door of the Trang Dai and at the back and sides [RP 21-31].

Concerning the defendant's role, Detective Davidson also provided an overview. He described the defendant having positioned himself at the back of the café to shoot anyone who might flee from the shooting at the front. RP 24-31. He also described the ballistic evidence at the back of the café. RP 27-30. He described the nine millimeter cartridge cases recovered from two guns, as well as the evidence that put a particular weapon with a fourteen cartridge capacity known as the "Dirty Nina" in the defendant's hands. RP 24-31. That particular gun could not be confirmed as the murder weapon but based on matching of cartridge cases,

[2] The state introduced summary evidence about the shooting because the original trial judge, the Honorable Karen L. Strombom, took a position as a federal magistrate judge after the trial and sentencing proceedings were concluded in 2002.

it could be determined that the defendant had emptied his clip. *Id.* Davidson' re-sentencing testimony was supplemented by excerpts from the trial testimony.

A trial witness, Veasna Sok, provided direct evidence of the defendant's specific role in the shooting. CP Exhibit 1, Appendix A, Testimony of Veasna Sok. First, he stated that the gang scouted the Trang Dai earlier before going to the back and arming themselves for the actual shooting. *Id.* pp. 4412-24. He also testified that after the shooting while reminiscing about what they had done, the defendant reported to the others that he saw a light at the back door of the café and, "He was trying to dump on it, just in case anybody was coming out." *Id.* p. 4437. Mr. Sok also provided a description of a pre-trial incident in which the defendant and his co-defendant Jimmie Chea beat him up in retaliation for agreeing to testify. RP 34-35. CP Exhibit 1, Appendix A, Testimony of Veasna Sok, pp.4458-61.

Detective Davidson also provided evidence of the defendant's post-shooting statements and attitude. RP 32. CP Exhibit 1, Appendix I, CrR 3.5 testimony of Tom Davidson. The defendant was defiant and unremorseful in that, "During that interview at that time, his attitude was cocky and arrogant. He treated it like a joke. He just had a smirk on his face." RP 32. This was two weeks after the shooting. *Id.* In addition, the defendant claimed an alibi saying he was not present at the Trang Dai. *Id.* The defendant did not abandon the alibi until the 2016 sentencing hearing.

At trial; his attorney introduced the false suggestion through co-defendant Marvin Leo that he was not at the Trang Dai. RP 06/13/2002, pp. 6016 et. seq., Trial testimony of Marvin Leo.

In conformity with the requirements of the ***Miller***[3] case the state introduced evidence from a child development expert, Dr. Frances Lexcen. Dr. Lexcen testified about stages of development of adolescents [RP 59-65], about their capabilities and weaknesses at each stage [RP 63-70], and the impact of particular individual challenges that the defendant faced while growing up [RP 70-80]. Dr. Lexcen also testified about the limitations of psychology when it comes to predicting or explaining aberrant, violent behavior:

> I don't think there is research that's that specific to outcomes. I do think there are studies of juveniles who engage in lethal violence that indicates that it's very influenced by situational factors and it can seem to happen out of the blue and it can be an unpredictable thing. Some youth with those -- some youth with those types of offending history have no prior contact with the justice system, and some of them have just a few interactions with the justice system.
> RP 80-81.

Dr. Lexcen's testimony was largely corroborated by the defense expert, Dr. Lawrence Wilson. Having examined the defendant, Dr. Wilson testified that he had no mental or brain disorder and that his "cognitive function was very, very good." RP 135. This opinion was

[3] ***Miller v. Alabama***, ---U.S.---, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

further corroborated by lay witnesses who reported that the defendant had a fine intellect and was such a good student that he was able to pass his GED in less than six months after having been incarcerated in the prison system. RP 120-21.

The defendant allocuted during the re-sentencing hearing. RP 141-42. He expressed remorse and sought to "take full responsibility for my action and my careless choices" without making a specific admission of his particular role in the shooting. *Id.* He did not reference the shots he fired at Tuyen Vo at the back door of the Trang Dai. *Id.*

C. ARGUMENT.

1. THE PROPER METHOD OF SEEKING REVIEW OF AN ORDER SETTING MINIMUM TERM THAT WAS ENTERED PURSUANT TO RCW 10.95.035 IS BY FILING A PERSONAL RESTRAINT PETITION.

When the legislature enacted the so-called ***Miller*** fix, it directed that persons sentenced prior to June 1, 2014, to a term of life without the possibility of parole for an aggravated murder committed when they were under the age of eighteen should be brought back before the sentencing court for a hearing consistent with newly enacted RCW 10.95.030(3). RCW 10.95.035. In the same legislation, the legislature also enacted a procedural provision stating that the "court's 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." RCW 10.95.035.

A minimum term decision by the parole board is not a decision that can be the subject of a direct appeal. In 1986, review of parole board decisions was available only through a personal restraint petition. ***In re Personal Restraint of Rolston***, 46 Wn. App. 622, 623, 732 P.2d 166 (1987) ("Prior to July 1, 1986 the Parole Board set minimum terms of incarceration. RCW 9.95.040. Review of such Parole Board decisions was obtained by filing a personal restraint petition."). RAP 2.2(a) provides that a party may appeal from certain final trial court decisions, "[u]nless otherwise prohibited by statute". The ***Miller*** fix enactment's limitation as to the availability of review should be considered an explicit statutory prohibition against a direct appeal. Thus, under current RCW 10.95.035 the proper procedure to obtain review of a trial court decision fixing a minimum term is to file a personal restraint petition.

In this case, the defendant has filed both a direct appeal and a personal restraint petition. It is not the state's position that the issues raised in the defendant's appeal should be disregarded. As to the appeal, this Court previously stated under analogous circumstances, "In order to facilitate review of the minimum term decision on the merits, this court will disregard the defect in filing it as a notice of appeal and treat it as a personal restraint petition." *Id.* at 623. As in ***Rolston***, the Court should consider the grounds raised in both the appeal and the petition as having been raised in the petition. *Id.* However as to the issues in both the appeal

and the petition, the full panoply of procedural limitations that apply to personal restraint petitions should apply.

2. THE AGGRAVATED MURDER SENTENCING STATUTE APPLIES TO THIS AGGRAVATED MURDER RESENTENCING, NOT THE SENTENCING REFORM ACT.

Several of the defendant's assignments of error concern the application of the Sentencing Reform Act of 1981 (the "SRA") to this, an aggravated murder case. On the one hand the defendant argues that the consecutive sentencing provisions of the SRA should not apply to defendants sentenced under the aggravated murder sentencing statutes. Appellant's Opening Brief, pp. 5-8. On the other, he argues that exceptional sentences should apply and thus authorize a sentence "below the range". Appellant's Opening Brief, pp.13-16. For the reasons discussed below both of these positions are erroneous. The SRA does not supplant or supplement the incarceration aspects of the aggravated murder sentencing statute, RCW 10.95.030.

Washington's current aggravated murder sentencing statute was enacted in 1981, the same year as the SRA. *See* Laws of 1981, Ch.s 137 and 138. Enactment of the aggravated murder statute repealed prior statutory provisions related to punishment of Washington's most serious crime, aggravated first degree murder. *Id.* A new section was added to Title 10 that governed the imposition of one of two possible sentences in

aggravated murder cases. Laws of 1981, Ch.s 138. *See* former RCW 10.95.030(1) and (2). Until 2014, that provision allowed for only two possible sentences for defendants convicted of aggravated murder, be they juveniles or adults, namely death or life in prison without parole. *Id.*

Aggravated murder sentencing was amended in 2014 in response to the United States Supreme Court's ***Miller*** decision. ***Miller v. Alabama***, ---U.S.---, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407 (2012) ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). The 2014 so called ***Miller*** fix legislation amended Washington's statutory provisions that apply to juvenile aggravated murder offenders. *See* Laws of 2014, Ch. 130, §1, Table 1 and §9 (effective 6/1/2014). The purpose of the amendments was to address the "mitigating factors that account for the diminished culpability of youth as provided in ***Miller v. Alabama***. . . ." RCW 10.95.030(3)(b).

Prior to 2014, there had never been any indication that the sentencing scheme that applies to non-aggravated murder cases, the SRA, was engrafted on the aggravated murder statute. ***State v. Meas***, 118 Wn. App. 297, 306, 75 P.3d 998, 1002 (2003). "RCW 10.95.030(1) requires trial courts to sentence persons convicted of aggravated first degree murder to life imprisonment without possibility of release or parole. . .

The only statutory exception occurs when the trier of fact finds no mitigating circumstances to merit leniency in a special sentencing proceeding, in which case, the sentence is death." *Id.* (citation omitted), citing ***State v. Ortiz***, 104 Wn.2d 479, 485-86, 706 P.2d 1069 (1985).

If the SRA applied to aggravated murder one would have expected a robust jurisprudence to have developed over the past 35 years concerning mitigation and exceptional sentences. What better way to avoid life in prison or the death penalty than to seek an exceptional sentence? The reason no such jurisprudence has developed is that the two sentencing statutes are separate and apply to different offenses. ***State v. Ortiz***, 104 Wn.2d 479, 485–86, 706 P.2d 1069 (1985). In ***Ortiz***, the court stated:

> We take this time, however, to express our dissatisfaction with the mandatory sentencing provision in the aggravated first degree murder statute, RCW 10.95. Unlike the Sentencing Reform Act of 1981, RCW 9.94A, which allows the trial judge to depart from the prescribed sentencing range when the prescribed sentence would impose excessive punishment on a defendant, the aggravated first degree murder statute allows for no such flexibility.

Id.

Both the Supreme Court and this Court have adhered to the reasoning in ***Ortiz***. The Supreme Court, in response to an argument about consecutive sentencing in a death penalty case stated that "the SRA

provisions on concurrent and consecutive sentences (RCW 9.94A.589) cannot be sensibly applied when a jury in a special sentencing proceeding under chapter 10.95 RCW returns a verdict for a death sentence." ***State v. Yates***, 161 Wn.2d 714, 784, 168 P.3d 359 (2007). It also stated, "The SRA and RCW 10.95 serve two separate functions and are consistent. . . The SRA is a determinate sentencing system for felony offenders. It gives first degree aggravated murder a seriousness score of 15 and provides for two possible sentences, life without parole or death." ***State v. Brett***, 126 Wn.2d 136, 184, 892 P.2d 29 (1995) (citation omitted), ***State v. Kron***, 63 Wn. App. 688, 694, 821 P.2d 1248, 1252 (1992)("The Legislature has specified in two separate statutes that death or life in prison without parole will be the only sentencing alternatives for someone who commits aggravated murder. The Legislature could not have intended any other penalty."). Finally, this Court citing ***Ortiz*** stated explicitly that, "Unlike the Sentencing Reform Act of 1981, the aggravated first degree murder statute does not allow a trial judge flexibility to depart from the prescribed sentencing range." ***State v. Meas***, 118 Wn. App. at 306.

A final observation adds further support to the view that the SRA does not apply to this case. ***Miller's*** holding was limited to cases where it was mandatory that a juvenile be sentenced to life in prison without the possibility of parole. ***Miller v. Alabama***, ---U.S.---, 132 S. Ct. 2455, 2469,

183 L. Ed. 2d 407 (2012)("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). Four years later, the Supreme Court made it clear that states could avoid an Eighth Amendment violation by not mandating life in prison: "Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." ***Montgomery v. Louisiana***, 577 U.S. ---, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016). Thus, if all along Washington's aggravated murder sentencing statute had provided for a less than life sentence, if it had incorporated the SRA's mitigation exceptional sentence provisions, there would have been no need for the ***Miller*** fix. If life in prison was not mandatory, ***Miller*** did not apply.

In light of the foregoing, the defendant's arguments about consecutive and concurrent sentences, and exceptional sentences are not well taken. *See* RCW 9.94A.535 and .589. Since this case is about aggravated murder, RCW 10.95.030 applies to the exclusion of the mitigating circumstances provisions applicable to an exceptional sentences. RCW 9.94A.535(1)(c)(d) or (e). Both the defendant and the trial court were in error insofar as the trial court's authority to impose an

exceptional sentence. This is true even though the trial court ultimately found that there was insufficient support for such an exceptional sentence[4]. RP 3-25-2016, p. 166-67.

For the same reasons the trial court erred insofar as it determined that consecutive or concurrent sentences under the SRA applied. RCW 9.94A.589(1)(b). ***State v. Yates***, 161 Wn.2d at 784. If the SRA did not apply concerning exceptional sentences, it likewise did not apply concerning consecutive sentencing of serious violent offenses.

3. THE AGGRAVATED MURDER SENTENCING STATUTE MANDATES SEPARATE, THAT IS CONSECUTIVE, PUNISHMENT FOR EACH AGGRAVATED MURDER COUNT, BUT EVEN IF IT DOES NOT, THE TRIAL COURT DID NOT ABUSE ITS SENTENCING DISCRETION.

The aggravated murder sentencing statute as originally enacted did not explicitly or clearly provide for concurrent sentences in multiple aggravated murder cases. RCW 10.95.030(1) and (3). The cases that discuss, even obliquely, multiple count sentencing seem to assume that each aggravated murder conviction would result in separate sentencing consequences. ***State v. Hacheney***, 160 Wn.2d 503, 511, 158 P.3d

[4] The state did not file a cross appeal because the defendant's sentence was consistent with ***Miller*** and the requirements of RCW 10.95.030(3). RAP 2.5(b) provides that "a party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision . . . or (iii) if regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision. . . ."

1152(2007)("A verdict of aggravated first degree murder can subject the defendant to the death penalty, but where the prosecutor has chosen not to seek the death penalty, the sentence must be life without the possibility of release."). ***State v. Brett***, 126 Wn.2d 136, 171, 892 P.2d 29 (1995) ("Because we find the same criminal conduct rule inapplicable by its terms, we need not address whether the procedural rules in the Sentencing Reform Act of 1981 (SRA) (RCW 9.94A) apply to capital cases."). ***State v. Meas***, 118 Wn. App. 297, 307, 75 P.3d 998 (2003) ("[The defendant] also claims, without citing to authority, that the trial court had an option to sentence him on either of his two convictions. But RCW 10.95.030 does not give trial courts an option in sentencing defendants convicted of aggravated first degree murder.").

It should also be kept in mind that before the ***Miller*** fix there was little cause to consider concurrent or consecutive sentencing for aggravated murder. Each conviction resulted in a life sentence or death. Concurrent or consecutive sentencing was a symbolic or academic issue at best. Thus it is important to consider carefully the language adopted by the ***Miller*** fix because after that amendment, for the first time, less than life sentences became a possibility.

Multiple deaths were an explicit aggravating factor both before and after the ***Miller*** fix. RCW 10.95.020(10)("There was more than one

victim and the murders were part of a common scheme or plan or the result of a single act of the person. . . ."). With that in mind, the first section that applies to aggravated murder sentencing imposes a life sentence or death for anyone "convicted of *the crime* of aggravated first degree murder. . . ." RCW 10.95.030(1)(emphasis supplied). The reference to the singular term "the crime" suggests that each crime was intended to receive its own punishment. *Id.*

The section that applies to the defendant adds strength to that interpretation. It provides for twenty five years to life for any "person convicted of *the crime* of aggravated first degree murder *for an offense*" committed at age sixteen to eighteen. RCW 10.95.030(3)(ii)(emphasis supplied). The singular forms of the nouns "crime" and "offense" (especially in light of the possibility of a multiple victim aggravator) strongly supports the view that an offender is to serve a separate sentence for each aggravated murder that he may commit.

The defendant may argue that a different interpretation is mandated by the Eighth Amendment. A number of authorities have held that the Eighth Amendment applies crime by crime rather than in the aggregate. ***United States v. Schell***, 692 F.2d 672 (10th Cir.1982), ***United States v. Aiello***, 864 F.2d 257 (2d Cir.1988) ("Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence."); ***Pearson v. Ramos***, 237 F.3d 881 (7th Cir.2001) ("in any rate it is wrong to treat stacked sanctions as a single sanction. To

do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim."); ***Close v. People***, 48 P.3d 528 (Colo.2002); ***People v. Gay***, 960 N.E.2d 1272, 1279 (2011), *cert. denied*, 133 S. Ct. 270 (2012) ("The eighth amendment allows the State to punish a criminal for each crime he commits, regardless of the number of convictions or the duration of sentences he has already accrued.").

These Eighth Amendment cases have the advantage of logic. As the Supreme Court of Iowa wrote, "There is nothing cruel and unusual about punishing a person committing *two* crimes more severely than a person committing only one crime, which is the effect of consecutive sentencing." ***State v. August***, 589 N.W.2d 740, 744 (Iowa 1999) (emphasis in the original). Likewise, the Arizona Supreme Court concluded that "if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." ***State v. Berger***, 212 Ariz. 473, 479, 134 P.3d 378, 384 (Ariz 2006) (mandatory consecutive sentences amounting to 200 years imprisonment for 20 counts of possession of child pornography was not cruel or unusual). And finally the United States Supreme Court once pointed out that "[i]f [the defendant] has subjected himself to a severe penalty, it is simply because he has committed a great many such offences." ***O'Neil v. Vermont***, 144

U.S. 323, 331, 12 S. Ct. 693, 696, 36 L. Ed. 450 (1892), quoting ***State v. Four Jugs of Intoxicating Liquor***, 58 Vt. 140, 2 A. 586 (1886).

The foregoing is however somewhat contradicted by ***Ramos***. In ***Ramos*** the court held that the Eight Amendment applied to de facto life sentences cause by aggregating multiple offenses. ***State v. Ramos***, Slip Opinion, p. 14-15. Division One reached a similar result in a case decided before ***Ramos***. ***State v. Ronquillo***, 190 Wn. App. 765, 777, 361 P.3d 779, 785 (2015) (We "conclude that the aggregate nature of Ronquillo's 51.3–year sentence does not protect it from a ***Miller*** challenge."). ***Ramos*** did not involve the aggravated murder statute. Instead it dealt with non-aggravated murder under the SRA, which explicitly makes concurrent or consecutive sentencing a discretionary option. ***Ramos*** and ***Ronquillo*** do not control the question in this case. The Eighth Amendment is a separate consideration from the correct interpretation of the aggravated murder statute.

As is shown below, the defendant was sentenced consistent with the requirements of the Eighth Amendment. Thus for purposes of the Eighth Amendment challenge in this appeal, it makes no difference whether the aggravated murder statute requires consecutive sentencing or not. CP 31-32. If the statute requires consecutive sentencing, that is exactly what the trial court ruled. CP 712-717. If not, the trial court did

not abuse its discretion in rejecting that option. Thus, no matter which is the correct interpretation, the defendant's sentence should be affirmed.

The defendant will no doubt concede that consecutive sentencing was at least an option in this case. If it was only an option and not mandatory there can be no error in the trial court's consideration of the issue or its ultimate decision provided it did not abuse its discretion. Thus, the consecutive character of the defendant's sentence should be affirmed.

4. THE DEFENDANT'S SENTENCE WAS IMPOSED CONSISTENT WITH THE REQUIREMENTS OF THE ***MILLER*** FIX AND THE EIGHTH AMENDMENT.

Just as the aggravated murder sentencing provisions are separate and distinct from the SRA, so too are the requirements of the Eighth Amendment compared to any particular state's sentencing scheme. ***Montgomery v. Louisiana***, 136 S. Ct. at 736. Washington's statute, the ***Miller*** fix, called for a resentencing hearing as to the aggravated murder counts. The defendant availed himself of just such a hearing and thus has been re-sentenced consistent with the Eighth Amendment, notwithstanding whether the SRA was misapplied during the proceedings or not.

One of the ***Miller*** fix provisions applies to the defendant's aggravated murder convictions. RCW 10.95.030. The other applies to his first degree assault convictions. RCW 9.94A.730. *See* Laws of 2014, Ch. 130, §9 and 10 (effective 6/1/2014). The first degree assault convictions were not before the trial court and no ruling was made that changed the

sentences imposed for them. CP 712-717. It should also be noted that to date the defendant has not availed himself of the remedy that the ***Miller*** fix made available to him under RCW 9.94A.730. Since no ruling was made by the trial court that can be appealed from under RAP 2.2(a), and since the defendant has an adequate remedy at law under RAP 16.4(d), the Court should rule that relief cannot be granted as to the first degree assault convictions in the defendant's personal restraint petition. A separate motion to that effect will be filed along with this brief.

As to the defendant's aggravated murder resentencing, the trial court in this case correctly applied the ***Miller*** fix provision as to those convictions. The ***Miller*** fix has been upheld against a constitutional challenge in a non-aggravated murder case. ***State v. Ramos***, ---Wn.2d---, ---P.3d---, 2017 WL 121541 (January 12, 2017). That being the case, and in light of the similarity of the aggravated murder provisions compared to the SRA provisions at issue in ***Ramos***, the procedure and sentencing options in RCW 10.95.030 and .035 should likewise be upheld.

The aggravated murder sentencing statute was amended to include a new subsection that governs the imposition of a term of incarceration for a juvenile offender convicted of aggravated first degree murder. RCW 10.95.020 and 030(3). The statute requires that a juvenile defendant "shall be returned to the sentencing court or the sentencing court's successor for sentencing" consistent with the newly adopted juvenile aggravated murder sentencing provisions. RCW 10.95.035.

The standards of review that apply to aggravated murder sentences are various. Insofar as whether a defendant's sentence complied with the requirements of ***Miller,*** review is *de novo*. ***State v. Ramos***, slip opinion, p. 7-8. By contrast, review of an order setting a minimum term is for an abuse of discretion. ***In re Personal Restraint of Myers***, 105 Wn.2d 257, 264, 714 P.2d 303 (1986). Finally, a trial court's factual findings in a sentencing proceeding are reviewed under the clearly erroneous standard. ***State v. Copeland***, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996).

A minimum term "***Miller*** hearing 'gives effect to ***Miller***'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.' " ***State v. Ramos,*** --- Wn.2d---, ---P.3d---,2017 WL 121541 (January 12, 2017), quoting ***Montgomery v. Louisiana***, 577 U.S. ---, 136 S. Ct. 718, 735, 193 L. Ed. 2d 599 (2016). In ***Ramos*** the Supreme Court affirmed a sentence said to be "a de facto life-without-parole sentence". ***State v. Ramos,*** Slip Opinion, p. 2. The defendant in ***Ramos*** had pleaded guilty to four counts of first degree murder in 1993 and was sentenced to four consecutive 20 year sentences totaling 80 years. *Id.* At resentencing, the defendant received five years more than the original sentence because he was sentenced to 25 years for the first count rather than just 20. *Id.* at p. 6.

During its review of the resentencing, the Supreme Court resolved one of the issues in this case. The ***Ramos*** court held that the standard to be applied in an Eighth Amendment case when a sentencing court

considers youth and its attributes is whether the defendant's "crimes reflect transient immaturity." *Id.* at 11. Contrary to the defendant's argument that ***Miller*** mandates an "irreparable corruption" standard [Appellant's Opening Brief, §4B.], ***Ramos*** observed that "the Supreme Court has expressly acknowledged that 'Miller did *not* require trial courts to make a finding of fact regarding a child's incorrigibility.' " ***State v. Ramos,*** Slip Opinion, p. 29, citing. ***Montgomery v. Louisiana***, 136 S. Ct. at 735 (emphasis added).

A second issue resolved in ***Ramos*** is whether a trial court's exceptional sentence findings are sufficient for purposes of the Eighth Amendment. Although the SRA does not apply to aggravated murder, it is nevertheless useful to note that in ***Ramos*** the Supreme Court held that if a defendant successfully proves that his crimes reflect transient immaturity, he would have necessarily established grounds for an exceptional sentence below the standard range. ***State v. Ramos,*** Slip Opinion, p. 11. It can thus be said that even though the SRA does not apply to aggravated murder, for Eighth Amendment purposes there is equivalency between "transient immaturity" and the grounds for an exceptional sentence.

In this case the trial court applied the very standard that satisfies the Eighth Amendment per ***Ramos***. The trial court ruled (incorrectly) that it had the authority to impose an exceptional sentence and then considered the ***Miller*** factors as to whether leniency was appropriate or required. RP 3-265-2016, pp. 158-167. CP 109-114, at p. 113. Having considered

factors that are consistent with the requirements of the Eighth Amendment, the court nevertheless ruled that the reasons offered in support of exceptional leniency were not sufficient. *Id.* In light of the review standards, this ruling should not be gainsaid.

It is well settled in Washington that the setting of a minimum term is not part of a criminal prosecution and the full panoply of rights due a criminal defendant in such a proceeding does not apply. ***State v. King***, 130 Wn.2d 517, 525, 925 P.2d 606, 610 (1996); ***In re Personal Restraint of Whitesel***, 111 Wn.2d 621, 630-31, 763 P.2d 199 (1988); ***In re Personal Restraint of Sinka***, 92 Wn.2d 555, 566, 599 P.2d 1275 (1979). Minimal due process requires "notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case." ***In re Personal Restraint of Whitesel***, 111 Wn.2d at 630, citing ***In re Personal Restraint of Sinka***, 92 Wn.2d at 565, citing ***In re Personal Restraint of Hendrickson***, 12 Wn.2d 600, 606, 123 P.2d 322 (1942)(internal quotations omitted).

In setting a minimum term for aggravated murder, the trial court is directed to consider, in addition to the particular circumstances of the crime, the "mitigating factors that account for the diminished culpability of youth as provided in Miller... including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated." RCW 10.95.030(3)(b). *See* ***In re Personal***

Restraint of Myers, 105 Wn.2d 257, 264, 714 P.2d 303 (1986). In light of the abuse of discretion standard of review, the validity of the trial court's decision necessarily turns on whether the trial court in fact considered the mitigating factors and whether its decision was manifestly unreasonable or based on untenable grounds or for untenable reasons. ***In re Personal Restraint of Myers***, 105 Wn.2d at 264. *See* ***State v. Embry***, 171 Wn. App. 714, 732, 287 P.3d 648 (2012), *review denied*, 177 Wn.2d 1005, 300 P.3d 416 (2013). Under that standard an appellate court should reverse a trial court discretionary ruling only if it has "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached." ***United States v. Schlette***, 842 F.2d 1574, 1577 (9th Cir. 1988).

In light of the standards of review, in light of the ***Miller*** line of cases from the United States Supreme Court, and in light of ***Ramos,*** there is no basis to conclude that the defendant's aggravated murder sentences violate the Eighth Amendment. When an aggravated murder is committed by a juvenile who was less than sixteen years of age, the statute provides that the sentence will be indeterminate: that is the defendant will "be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years." RCW 10.95.030(3)(a)(i). Judicial discretion is thus removed for juvenile aggravated murder defendants who are less than sixteen years of age.

The same is not true of juveniles over the age of sixteen. Juvenile defendants over the age of sixteen "shall be sentenced to a maximum term

of life imprisonment and a minimum term of total confinement of *no less than* twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release." RCW 10.95.030(3)(a)(ii)(emphasis supplied). Under this provision the court must set the maximum term at life but in the case of sixteen to eighteen year olds has discretion to set the minimum term at 25 years or more. The statute expressly allows for the minimum term to be set at life, but does not require it. *Id.*

The trial court's ruling applying the aggravated murder statute came after lengthy deliberation. It was issued after nearly two years' worth of hearings. CP 32-32, 109-114. The time that the trial court took to make the final decision in this case is, by itself, strong support for the view that the trial court was using appropriate care and discretion. However, in addition to the extended period of deliberation, the abhorrent facts in this case add further support for the trial court's proper exercise of discretion.

It is useful to contrast the decision upheld in ***Ramos*** with this case. ***Ramos*** involved four murders not five. In addition in ***Ramos,*** the trial court found that the defendant's actions in one of the murders in particular did not evidence "the twice-diminished responsibility" of youth, and thus the court was led to "reject the request for concurrent sentences." ***State v. Ramos,*** Slip Opinion, p. 33. Of that decision the Supreme Court said, "Although we cannot say that every reasonable judge would necessarily

make the same decisions as the court did here, we cannot reweigh the evidence on review. The court clearly received and considered [the defendant's] extensive mitigation evidence, was fully aware of its authority to impose an exceptional sentence below the standard range, and reasonably considered the issues identified in ***Miller*** when making its decision. Ramos has not shown that his second resentencing violated ***Miller's*** minimal requirements." *Id.*

The defendant in this case has likewise not shown that "***Miller's*** minimal requirements" were not met. To start with, the defendant's actions connected to the murder were anything but transient. It would be a mistake to view this as a spur of the moment or fleeting incident. The lead detective testified: (1) that there was a distinction between a "wannabe" compared to a full fledge member of the LOC street gang [RP 13-15.]; (2) that the fight with victim Son Kim that was the motive for the shooting, took place some four months before, and that the fight and other trivial disrespectful incidents led the LOC's to conceive of and carry out the shooting [RP 16.]; (3) that the day of the shooting itself the gang planned what it was going to do, recruited members to participate, and went to the bar at least twice before piling out of the vehicles, arming themselves and fanning out to both sides of the Trang Dai [RP 17-21.]; (4) that without hesitation and with remarkable teamwork the gang carried out a shooting which included "firing indiscriminately" (that is not at Son Kim or any other particular human target) in a fan pattern inside the Trang Dai [RP

21-23.]; (5) that the gang never sought to target Son Kim or any other particular person and instead sought to kill whoever happened to have been at the Trang Dai that night [RP 23-24.]; (6) that the defendant's assignment as part of the team was to keep watch at the back of the Trang Dai and shoot (using a nine millimeter handgun known as the "Dirty Nina") anyone who tried to flee the gunfire from the front door [RP 24-31.]; (7) that according to the ballistic evidence left behind at the back of the Trang Dai, the defendant personally carried out his assignment by emptying his gun [RP 27.]; and finally (8) that 18 year old Tuyen Vo was killed by a bullet that penetrated her chest and severed her aorta and that was fired from one of the two guns that fired shots at the backdoor [RP 29-30.].

The foregoing summary of the shooting itself amply supports the view of the trial court that concurrent sentences were not warranted. The court stated: "There is, however, no gainsaying that the crimes Mr. Phet was convicted of were monstrous and untenable in any civilized society." RP 165. To have agreed to participate in a mass shooting straight out of today's headlines, to have agreed to take innocent lives merely because the victims were fleeing in terror from shots fired from an assault rifle, to have emptied his clip at a wholly innocent person over so trivial a matter as a show of disrespect and a fist fight that took place four months before, belies any claim that the defendant's crime was transient. The trial court summed up the defendant's precise role as follows: "What I read was that

he was going to dump on anybody who came out that back door. And when he saw the light, that's what happened." RP 42. The facts of the shooting itself and the defendant's role provide ample support that the transient immaturity standard was not satisfied here.

When the focus is turned to the defendant's individual circumstances, there is even less support. The defendant was at large for two weeks after the shooting. RP 32. During that time there is no evidence that he had an attack of conscience or feelings of remorse. He did not come forward but instead was arrested just like all of the other perpetrators. *Id.* Even after his arrest he displayed no remorse or sorrow for the victims. The detective described the defendant during his police interview as follows: "During that interview at that time, his attitude was cocky and arrogant. He treated it like a joke. He just had a smirk on his face." RP 32. Furthermore he provided a false alibi and thus claimed he was not even present much less a shooter at the Trang Dai. *Id.*

The false alibi belies both the transient part of the standard and the immaturity part. Insofar as the evidence is concerned the defendant persisted in falsely claiming not to have been a shooter (1) during his initial contact with the police [*Id.*], (2) during four years of pre-trial proceedings (including the CrR 3.5 hearing) [RP 6/7/1999, pp 417, et. seq., Testimony of the Defendant.]; (3) during the trial itself in which the defense introduced testimony from a co-defendant witness to support his alibi [RP 06/13/2002, pp. 6016 et. seq., Trial Testimony of Marvin Leo.];

and (4) while he matured and developed from a sixteen year old adolescent into a twenty year old young adult. He also personally engaged in actual violence against a young man whom he considered to be a "snitch". RP 34-35. Far from supporting transient immaturity, these facts, coupled with the facts surrounding the shooting itself, belie any claim that the shooting or the defendant's role or attitude about it was the product of "his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." ***Miller v. Alabama***, 132 S. Ct. at 2468.

Admittedly the defendant embarked on the course of behavior that led to his conviction, and the sentences when he was two months shy of his seventeenth birthday. However the defendant's persistence in not only defiant antisocial and dishonest behavior in court over the course of four years, not to mention actual violence against a witness is the very antithesis of transient immaturity.

It is likely that in reply the defense will stress the defendant's laudable prison record. In ***Ramos*** the Supreme Court addressed the weight to be given such evidence:

> While a resentencing court may certainly exercise its discretion to consider evidence of subsequent rehabilitation where such evidence is relevant to the circumstances of the crime or the offender's culpability, we decline to hold that the court is constitutionally required to consider such evidence in every case. If it were, the court would be required to consider evidence of a person's subsequent rehabilitation in prison as a basis for an exceptional

> sentence downward, but it might also be required to consider evidence that the person has not demonstrated subsequent rehabilitation as a basis for refusing to impose an exceptional sentence downward. We do not believe ***Miller*** can be interpreted to require such a result.

State v. Ramos, Slip Opinion, p. 27-28.

Since the weight to be given the defendant's prison record was entrusted to the trial court's discretion, the court's decision should be given deference. That decision was more than reasonable. After remarking on the defendant's prison record the trial court declined to adopt it as the deciding factor saying, "The basis for this position is, as has already been detailed, anchored to Mr. Phet's age and circumstances at the time of the offenses . . . After many hours of reflection and study on this unmitigated tragedy, the Court is unable to find the substantial and compelling reasons for a sentence of extraordinary leniency." RP 166-67.

The court's decision is amply supported both by the record and ***Ramos***. Because the prison record evidence was not all that "relevant to the circumstances of the crime or the offender's culpability" when compared to the defendant's actions during the shooting and his subsequent defiant attitude during four years of litigation, the trial court cannot be said to have made a decision that no reasonable judge would have made.

It is also likely that the defendant's stage of development will be pointed to as requiring leniency under the Eighth Amendment. This was

the same claim made by the defendant in ***Ramos***. ***State v. Ramos,*** Slip Opinion, p. 31-32. In ***Ramos,*** the trial court heard evidence from one expert as to the development of the adolescent brain. *Id.* But having heard that evidence, the trial court in ***Ramos*** "concluded none of the gaps applied here because the murders were 'planned' and 'not indicative of impulsive acts'; the murder of [the first degree premeditated murder victim] to eliminate him as a witness 'evidences to me a clear, cold, calculating decision of a mind fully cognizant of future consequences'; and the murders 'were monstrous.' " These conclusions were upheld by the Supreme Court, which said "Although we cannot say that every reasonable judge would necessarily make the same decisions as the court did here, we cannot reweigh the evidence on review. The court clearly received and considered Ramos' extensive mitigation evidence, was fully aware of its authority to impose an exceptional sentence below the standard range, and reasonably considered the issues identified in Miller when making its decision." ***State v. Ramos,*** Slip Opinion, p. 33. Since the trial court's conclusions in this case are nearly identical, the trial court in this case should likewise be upheld.

In this case two experts, not one, testified about brain development in adolescents. One of the experts, Dr. Frances Lexen, testified that the time frame involved in a crime would be significant because of the youthful attributes of spontaneity and recklessness: "If there was a planned event and there was recognition that there would be some level of

aggression or violence involved, then there would be time to consider how far the individual was willing to go." RP 74. Dr. Lexcen then contrasted the facts in this case with a case in which a juvenile might be surprised during commission of a crime and engage in violence. The persuasiveness of her testimony was enhanced because it reflected similar analysis from the United State Supreme Court which has stated that "Indeed, '[t]he 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 v. Simmons***, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). There was nothing spontaneous, reckless, impetuous, or transient in the defendant's case given that his attitude toward the violence he helped perpetrate remained unchanged for four years.

The other expert, Dr. George Wilson, testified consistently with Dr. Lexcen. The defendant's actions were not those of an unusually susceptible adolescent. The defendant had the advantage of a very good intellect:

> Q And did you see any signs or symptoms of any mental disorder or any injury to his brain or any other brain disorder?
>
> A No. His cognitive function was very, very good. And I saw no evidence, both historically and at the present time -- and I saw him several months ago -- of any presence of mental illness.

> Q So as distinguished from an individual who, as an adolescent, would have a serious brain disorder or injury or whatever and might be expected to go off into a life of violence, that is not the picture we get of the Defendant John Phet?
>
> A That's correct.
> RP 135.

Dr. Wilson's testimony was supported by the defendant's admirable academic performance. The defendant scored in the 75th percentile on the reading portion of his GED test which he passed within six months of having been incarcerated. RP 122. The defendant was known for being intelligent and thus it can be said that his circumstances presented a better than average ability to resist the weaknesses of youth.

When evaluating the trial court's decision under the abuse of discretion standard, the fullness of the evidence in this case demonstrates that the court looked at all sides of the issues before making its decision. We can ask no more of our trial courts. The court below considered the testimony of nine witnesses in addition to the defendant. It also considered numerous exhibits, including VRP's from the trial proceedings, photographs, and diagrams. CP Exhibit 1, Appendices A – I. This body of evidence included both evidence related to the circumstances of the crime and of the defendant's youthfulness at the time he committed it. Having weighed all that was relevant to the decision, the trial court's decision to sentence the defendant to 25 years for each life forever taken cannot be said to have been a clear error of judgment. That decision

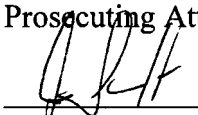
certainly cannot be said to have been a decision that no reasonable trial judge would have made.

D. CONCLUSION.

For the foregoing reasons, the state respectfully requests that the court affirm the defendant's aggravated murder sentences and dismiss the defendant's personal restraint petition.

DATED: Friday, February 10, 2017.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2·10·17 Therese Kal
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PIERCE COUNTY PROSECUTOR

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