No. 48877-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

JOHN PHET,
Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION [1]

Children are different from adults. This is true both biologically and constitutionally speaking.

When sentencing a juvenile, a court must give the defendant some "meaningful opportunity" to obtain release based on demonstrated "maturity and rehabilitation." *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455, 2469 (2012). A juvenile sentenced to life is denied the constitutionally required opportunity to demonstrate that he is fit to rejoin society. *Graham v. Florida,* 560 U.S. 48 (2010). This the Eighth Amendment does not permit. *Id.* As a result, a life sentence can be imposed only upon a finding of irretrievable corruption.

In this case, the sentencing judge imposed a sentence that denies Mr. Phet any opportunity for release. However, he did not find that John Phet was and would forever remain corrupt. Quite the opposite, the judge found that Mr. Phet had made "meaningful and substantial progress in his rehabilitation effort." RP 165. The sentencing judge imposed this sentence after concluding that (1) consecutive sentences were required by the SRA; and (2) the constitution does not protect against an aggregate life sentence imposed on a juvenile. On both points, the sentencing court erred.

Moreover, even if consecutive indeterminate sentences were ordinarily required by the statute, Mr. Phet presented mitigating evidence to justify

[1] Mr. Phet will also file a PRP attacking other aspect of his sentence and will seek to join the two cases.

exceptionally lenient concurrent sentences. But, the sentencing court erred by imposing a more onerous standard than is required by law.

This Court should reverse and remand for a new sentencing hearing.

II. ASSIGNMENTS OF ERROR

A. The sentencing court erred by concluding that RCW 9.94A.589 required consecutive indeterminate terms.

B. Where a judge fails to make an irreparable corruption finding and instead finds that a juvenile has made substantial progress in his rehabilitation does a sentence that far exceeds life violate the state and federal constitutions?

C. Did the sentencing court fail to recognize that it possessed the discretion to impose exceptional concurrent sentences?

III. STATEMENT OF THE CASE

On July 5, 1998, at approximately 1:45 a.m., several men burst into Tacoma's Trang Dai Café and opened fire on the patrons killing four men and wounding five others. 16-year old John Phet and another boy, kept watch out back. When waitress Tuyen Vo tried to leave through the back door, they did as they had been told. They shot and killed her.

Up until that fateful day, John Phet had lived a life pockmarked with trauma, deprivation, and dislocation. John is the fourth of nine children born to Phet Mom (father) and Tem Nap (mother), who fled the killing fields of Cambodia.[2] Both of John's parents have been deeply wounded by the experience. Both drank

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[2] Q Why did you leave Cambodia?
A Because I'm afraid of the Khmer Rouge shooting.
Q What did the Khmer Rouge do to your family?
A When they see us, they would kill us, so that's why I escaped. RP 55.

substantial amounts of alcohol on a regular basis and domestic violence was prevalent in the home. Both have found cultural assimilation difficult. Neither speak or are literate in English. As a result, neither was able to provide meaningful guidance to John.

John's family settled in the Hilltop neighborhood in Tacoma during a period when there was a high level of gang violence occurring in the neighborhood. John's older brother Sam's involvement in the LOC gang began around 1993 or 1994. John was formally initiated into the LOC gang at age 15. Sam's gang name was "ClumZ" and John was given the name "Little ClumZ" and referred to as "Little." He had very low status in the gang and was accepted only as a younger brother to Sam, who had much higher status in the gang and who was peers with many of the other gang members.

By all accounts, John was a "follower," both in and out of the gang, and as one who "didn't want to initiate anything but just responded." Another described him as just "wanting to go along with things." Despite frequent exposure to violence, John was kind and caring. A psychiatric evaluation concluded that John was largely passive and emotionally and intellectually unrelated to what was happening until the final moments of the incident.

In the years since, Mr. Phet has been a model inmate. He takes full responsibility for his actions. He is sincerely remorseful. He has made meaningful and substantial progress in his rehabilitation effort.

In fact, the sentencing judge found: "Mr. Phet has, since his incarceration, made many good choices. He has demonstrated a clear capacity to change his thinking, his behavior, and I believe he has become remorseful of the circumstances which have led him to a life of imprisonment and restriction." RP 166.

The sentencing court ruled that the SRA mandated consecutive sentences, unless Phet could meet a statutory mitigating factor, namely that he was "substantially" impaired due to his youth. RP 159. The court recognized that "behavioral manifestations of the neurological immaturity of the youthful brain include impulsivity, excessive risk taking, irresponsibility, vulnerability to peer pressure, and inability to comprehend the long-term ramifications of their behavior." RP 161. The court also found:

> Mr. Phet details a family life that is characterized as chaotic and traumatized to a degree scarcely imaginable to much of the larger community. His parents fled the genocidal regime of Khmer Rouge. His parents were bereft of any meaningful education. His siblings were born, at least some of them, in refugee camps where his family was subjected to the harshest of conditions, though he was born and raised in the United States. There was credible testimony about the intergenerational effect that this trauma has on a family that has fled terror, spent time in a refugee camp and ultimately relocated to the United States. gripped by poverty, alcoholism and domestic violence. He suffered from neglect, lack of discipline, absence of positive role models and was without any meaningful constructive guidance of any kind. His young life lacked structure, compassion and in many ways lacked hope.

RP 161-62.

But, the court ultimately agreed with the State regarding the statutory exceptional sentence standard (RP 165) and did not make finding regarding how Phet's youthful attributes diminished his responsibility, instead only pointing out the conflicting theories. RP 162 ("So it goes on and on in this way like a dog chasing

its tail, circle after circle without any likelihood of achieving a conclusive resolution.”).

On the issue of rehabilitation, the court found:

> It is well-established in the record that Mr. Phet has made extraordinary strides himself to improve his educational attainments, his work skills, and he has affected positive behavioral changes while in prison. He has never been involved in a major infraction that involved violence in prison. RCW 10.95.030 directs the Court to specifically consider a youthful offender's capacity for rehabilitation in formulating an appropriate sentence.

RP 164. Finally, the court concluded: “Mr. Phet has made meaningful and substantial progress in his rehabilitation effort.” RP 165.

Nevertheless, the court found that it was bound to impose five consecutive terms, which it set at 25 years each. “The five aggravated murder first degree sentences will be imposed consecutively as specified by statute. And the Court is fully aware this is the functional equivalent of a sentence of life without the possibility of parole.” RP 167.

This appeal follows.

IV. ARGUMENT

A. The Sentencing Court Erred by Concluding that RCW 9.94A.589 Required Consecutive Indeterminate Terms.

Phet starts with the sentencing court’s misapplication of the statute. Consecutive sentences were not required. RCW 9.94A.589 does not apply to sentences imposed under RCW 10.95.035. RCW 9.94A.589 applies only to the scoring and sentencing of determinate terms. Mr. Phet was sentenced under an indeterminate scheme.

The Statute Must Be Read As A Whole

The juvenile resentencing law creates mandatory indeterminate life sentences for juveniles convicted of aggravated murder. The minimum term is 25 years. RCW 9.94A.550(3); 10.95.030(3). However, it would be erroneous to say that the "standard range" is 25 years to life. The term "standard range" applies only to the discretionary range of determinate sentences. RCW 9.94A.030(48). See also RCW 9.94A.030(18) ("'Determinate sentence' means a sentence that states with exactitude the number of actual years, months, or days of total confinement...").

A court should not add or subtract words in order to apply a statute, which is exactly what must be done several times over in order to make .589 apply. Reading the statute as a whole, as required, immediately reveals the inapplicability to the case at bar. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles,* 148 Wash.2d 224, 239, 59 P.3d 655 (2002).

RCW 9.94A.589(1)(a) provides that when a person is to be sentenced for two or more current offenses, "the sentence range" is calculated in a certain manner. There is no sentence range in this case. Likewise, it is absurd to apply the rule of only scoring one aggravated murder and sentencing any additional counts with "an offender score of zero," found in RCW 9.94A.589(1)(b), given that scoring does not apply to aggravated murder. That is true both for adults convicted of aggravated murder and for juveniles resentenced pursuant to RCW 10.95.035. The statute also provides that when a person is sentenced for "two or more serious violent offenses,"

those sentences run consecutively. But, aggravated murder is not included in the definition of serious violent offenses. RCW 9.94A.030(45).

Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms. *State v. Beaver,* 148 Wash.2d 338, 343, 60 P.3d 586 (2002). There is a difference between a determinate "standard range" and an indeterminate "minimum term of total confinement."

Analogous Caselaw Supports Phet

This Court has already recognized that the statute includes an express limitation. The statute only applies to sentence ranges calculated under RCW 9.94A.589(1)(b), *i.e.*, [a]ll sentences *imposed under (b) of this subsection* shall be served consecutively to each other." (emphasis added). *State v. Crumble*, 142 Wash.App. 798, 177 P.3d 129 (2008) ("Because the calculation method of .589(1)(b) does not apply to persistent offenders, we apply the default rule that the court must impose concurrent sentences."). *Crumble* applies with equal force here.

Likewise, the Washington Supreme Court held in *State v. Yates*, 161 Wash.2d 714, 784, 168 P.3d 359 (2007), that the consecutive sentence provisions of the SRA did not apply to aggravated murder convictions sentenced under RCW chapter 10.95. ("We reach this conclusion because 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."). Likewise, those provisions cannot be "sensibly applied" to this

situation.

The Doctrine of Constitutional Avoidance Requires Phet's Construction

If there is any ambiguity in the statute, the doctrine of "constitutional avoidance" requires this Court to construe the statute to avoid a possible constitutional violation. *State v. Crediford,* 130 Wash.2d 747, 755, 927 P.2d 1129 (1996). See also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

If the statute requires consecutive indeterminate terms which cannot be less than 25 years, the statute mandates a life equivalent sentence not only for Mr. Phet, but for any juvenile convicted of three counts of aggravated murder, maybe even two. The following section sets forth why the constitution requires a different result. This Court should construe the statute to avoid a constitutional infirmity. This Court should hold that the trial court erred by concluding that consecutive sentences were required under RCW 9.94A.589.

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B. In Light of the Sentencing Court's Finding that Mr. Phet has Made Substantial Rehabilitative Progress, Imposing a Minimum Sentence That Far Exceeds Phet's Lifespan is Unconstitutional.

Introduction

The following points are indisputable: (1) Phet's current sentence makes him ineligible for parole during his lifetime[3]; and (2) not only did the sentencing judge not find that Phet was irreparably corrupt, it found the opposite.[4]

Sentencing a child to life without parole is excessive for all but the rare juvenile offender who is irreparably corrupt.[5] Life without parole is an unconstitutional penalty for a "class of defendants because of their status"—that is, juvenile offenders who can be or are rehabilitated. In those instances, the "hope for some years of life outside prison walls must be restored." Here, the sentencing

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[3] The Supreme Court's focus in *Graham* and *Miller* "was not on the label of a 'life sentence' " but rather on whether a juvenile would, as a consequence of a lengthy sentence be imprisoned for the rest of his life. The United States Supreme Court viewed the concept of "life" in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to reenter society or have any meaningful life outside of prison. See *Graham v. Florida,* supra, at 560 U.S. at 75 (states must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" for juvenile non-homicide offender); Indeed, most courts that have considered the issue agree that a lengthy term of years for a juvenile offender will become a *de facto* life sentence at some point.

[4] The State did not present any evidence to support such a finding at the resentencing; did not challenge this well-founded finding below; and, did not cross-appeal and cannot challenge it now.

[5] The Eighth Amendment prohibits cruel and unusual punishment. This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. See *Furman v. Georgia,* 408 U.S. 238, 239–40 (1972). Article I, Section 14 of this state's constitution bars cruel punishment. In *State v. Fain,* 94 Wash.2d 387, 617 P.2d 720 (1980), the Washington Supreme court held the state constitutional provision barring cruel punishment is more protective than the Eighth Amendment.

court found that Phet has made substantial rehabilitative progress. Consequently, imposing a total minimum sentence that far exceeds his lifespan is cruel punishment.

The sentencing court concluded that the cruel punishment clauses do not apply to aggregate sentences. Even if that is true for adults, it is not true for children. When a court sentences a child to serve life in prison, the defendant's status as a child is the critical factor. The number of crimes and a defendant's relative culpability are undeniably relevant factors when setting a minimum sentence. But, when that minimum sentence is life or its equivalent, then a defendant's membership in the juvenile class always requires a finding of irretrievable corruption.

This is so because children are constitutionally different from adults for purposes of sentencing. *Miller v. Alabama*, 567 U.S. __ (2014); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *In re McNeil,* 181 Wash.2d 582, 588, 334 P.3d 548 (2014).

The clearest expression of the applicable constitutional command is found in *Montgomery v. Louisiana,* _ U.S. _, 136 S. Ct. 718 (2016), which held that the rule announced in *Miller v. Alabama,* 567 U.S. __ (2014), applies retroactively. *Miller* was one of several decisions which held that, categorically speaking, juveniles are more capable of change and that this difference restricts the penalties that can be imposed. *Montgomery* explained:

> The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," *Miller* made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.*

133 S.Ct. 733-34. The Court continued:

> *Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." *Id.,* at ——, 132 S.Ct., at 2465. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.' " *Id.,* at ——, 132 S.Ct., at 2469 (quoting *Roper,* 543 U.S., at 573, 125 S.Ct. 1183). Because *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " 567 U.S., at ——, 132 S.Ct., at 2469 (quoting *Roper, supra,* at 573, 125 S.Ct. 1183), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. *Penry,* 492 U.S., at 330, 109 S.Ct. 2934.

The simplest expression of the constitution rule is that juveniles cannot be sentenced to life without parole without a finding of irreparable corruption or incorrigibility. The focus of the rule is not on how many crimes were committed, but instead on the rehabilitative prospects of the child.

The legislative history to the so-called *Miller*-fix legislation recognized this distinction. The Final Bill Report for Second Senate Substitute Bill 5064 (2014) stated: "In June 2012 the United States Supreme Court held, in *Miller v. Alabama*, (10-9646), that the eighth amendment ban on cruel and unusual punishment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders." Nowhere in any of the legislative history

was there any intent to apply the prohibition against a statutorily mandated life without parole sentence only to juveniles with a single aggravated murder conviction.

In *State v. Roquillo*, 190 Wash.App. 765, 361 P.3d 779 (2015), Division I held that the principles announced in *Miller* also applied to aggregate sentences imposed on a juvenile offender that were *de facto* life sentences. 190 Wn.App. at 775. *Ronquillo* like the case at bar involved a single criminal episode.

Ronquillo held:

> Ronquillo's sentence contemplates that he will remain in prison until the age of 68. This is a *de facto* life sentence. It assesses Ronquillo as virtually irredeemable. This is inconsistent with the teachings of *Miller* and its predecessors. Before imposing a term-of-years sentence that is the functional equivalent of a life sentence for crimes committed when the offender was a juvenile, the court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller,* 132 S.Ct. at 2469. The trial court erred in concluding that only a literally mandatory life sentence falls within the ambit of *Miller*.

190 Wn.App. at 775. *But see State v. Ramos,* 189 Wash.App. 431, 357 P.3d 680 (2015).

A recent California decision is likewise persuasive. In *People v. Caballero*, 55 Cal.4th 262 (2012), the California Supreme Court held that a 110-year-to-life sentence for three attempted murders committed when the defendant was unconstitutional. A juvenile offender must have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" – i.e., eligibility for parole some time during the person's natural life expectancy. As the *Caballero* court explained, "the Eighth Amendment requires the state to afford the

juvenile offender a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,' and that '[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.' (*Graham, supra,* 560 U.S. at 75, 73).

In *Caballero,* the Attorney General argued the 110–year–to–life prison sentence for a minor did not violate the Eighth Amendment even though it was the "functional equivalent of a life without parole term" on grounds no individual component of the defendant's sentence by itself amounted to a life sentence. *Caballero, supra,* 55 Cal.4th at 271 (conc. opn. of Werdegar, J.). The California Supreme Court rejected the contention because "the purported distinction between a single sentence of life without parole and one of component parts adding up to 110 years to life is unpersuasive." *Id.* at pp. 271–272.

The distinction is unpersuasive because while the number and seriousness of the crimes may be relevant in deciding what minimum sentence to impose, when that minimum sentence is life or the virtual equivalent of life, the constitutional focus is on membership in the juvenile "class."

Mr. Phet is entitled to be resentenced. Because he has established that he is not irreparably corrupt, that minimum sentence must be less than life.

C. <u>The Sentencing Court Failed to Recognize that it Possessed the Discretion to Impose Exceptional Concurrent Sentences.</u>

This Court should reach this issue even if it reverses based on either or both preceding errors.

Mr. Phet argued that the sentencing court could impose exceptional concurrent sentences based on Mr. Phet's diminished culpability that was tied to his youth. The trial court concluded that it did not have the authority to impose such a sentence unless it found that Phet's youth substantially impaired his ability to know right from wrong or to conform his conduct to the law. The sentencing court concluded that "(m)erely citing to Mr. Phet's youth is not enough" to justify an exceptional sentence. RP 167. See also RP 166. ("The State argues with considerable persuasive force that if youth is allowed to act as a compelling circumstance, it would result in an exceptional sentence being imposed in every case involving minors."). Ultimately, the sentencing court abdicated and did not make findings whether Phet's culpability was diminished at the time of the crime due to his youth and its attendant circumstances. RP 162.

While Phet agrees that youth alone is not mitigating, requiring significant or substantial impairment is too onerous. Youth does not *per se* automatically reduce an offender's culpability. But, where there is some evidence that youth *in fact* impaired his capacities, an exceptional sentence may be justified. *State v. O'Dell,* 183 Wash.2d 680, 689, 358 P.3d 359 (2015).

However, a defendant need not prove "substantial" or "significant" impairment in the ability to know right from wrong or to conform conduct to the law. Diminished capacity is sufficient. *Id.* at 696. See also *id.* at 699 ("We hold that a defendant's youthfulness can support an exceptional sentence below the standard

range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is.").

This case is squarely on all fours and controlled by this Court's decision in *State v. Soliz-Diaz*, 194 Wash.App. 129, 140-41, 376 P.3d 458 (2016), which held:

> In short, a sentencing court must take into account the observations underlying *Miller, Graham*, *Roper*, and *O'Dell* that generally show among juveniles a reduced sense of responsibility, increased impetuousness, increased susceptibility to outside pressures, including peer pressure, and a greater claim to forgiveness and time for amendment of life. *O'Dell,* 183 Wash.2d at 695–96, 358 P.3d 359.
>
> Against this background, the sentencing court must consider whether youth diminished Solis–Diaz's culpability and make an individualized determination whether his "capacity to appreciate the wrongfulness of his conduct or [to] conform that conduct to the requirements of the law" was meaningfully impaired. *O'Dell,* 183 Wash.2d at 696, 358 P.3d 359.
>
> ****
>
> Consistently with *O'Dell,* we direct the sentencing court in this case to fully and meaningfully consider Solis–Diaz's individual circumstances and determine whether his youth at the time he committed the offenses diminished his capacity and culpability.

Put another way, if a court determines that youth did diminish defendant's capacity and culpability, it must consider whether an exceptional sentence below the standard range is justified based on youth. *O'Dell,* 183 Wash.2d at 696. In fact, lay evidence suggesting that the offender thought and acted like a juvenile may indicate that the offender's culpability was less than that necessary to justify imposition of a standard range sentence. *Id.*

Youth also applies to the application of the multiple offense policy mitigating factor in the same manner.

Because the trial court did not meaningfully consider youth as a possible mitigating factor in this case, this Court must remand for a new sentencing hearing. This failure to exercise discretion is itself an abuse of discretion subject to reversal. *State v. Grayson,* 154 Wash.2d 333, 342, 111 P.3d 1183 (2005).

V. CONCLUSION

This Court should reverse and remand for resentencing.

DATED this 3rd day of October, 2016.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

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October 3, 2016//Portland, OR /s/Jeffrey Ellis

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