

NO. 49302-1-II
Pierce County Sup. Ct. No. 06-01-02134-9

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

In re Personal Restraint of:

JARRELL MAURICE MARSHALL

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

The Honorable Thomas P. Larkin

REPLY BRIEF OF PETITIONER

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A. ARGUMENT

The Respondent starts the Response to Personal Restraint Petition with strong hyperbole discussing the offenses and how the victims suffered at the hands of Mr. Marshall's co-defendants, while Mr. Marshall simply stood as a lookout. SRB at 2-5. Then in the first few more pages of the beginning of the Argument Section, the State speaks about its dissatisfaction about the United States Supreme Court and Washington Supreme Court which have focused their holdings on the treatment of juveniles in adult court and how studies that show that they are not adults because their brains have not developed. *Id.* at 7-8. The State believes the focus should instead be on very young heroes from World War II in U.S. history that were not in the criminal justice system. But the State has already lost this debate.

Federal courts as well as state, county, and municipal courts from across the United States now fully recognize that children are not adults and cannot constitutionally be treated as adults for sentencing. *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 2460, 183 L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 74, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); and *Roper v. Simmons*, 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); U.S. Const. amend. 8; Const. art. I, § 14. An "increasing

body of settled research” in psychology and brain science show “fundamental differences” between the minds of children and adults that render lengthy sentences unconstitutional. *Miller*, 132 S.Ct. at 2464 n.5; *Graham*, 560 U.S. at 68. As our state’s Supreme Court most recently said:

“[C]hildren are different.” *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2470, 183 L.Ed.2d 407 (2012). That difference has constitutional ramifications: “An offender’s age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”

(Internal citation omitted.) *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 413 (2017), Slip Op. at 1-2.

1. THIS COURT SHOULD DECIDE THE MERITS OF MR. MARSHALL’S SENTENCING CLAIM BECAUSE THE LACK OF A RECORD IS NOT HIS FAULT AND ALSO BECAUSE THE CLAIM IS SUBSTANTIVE AND SHOULD BE REVERSED WITHOUT SHOWING PREJUDICE

- a. Mr. Marshall provided the best and only evidence about what happened at sentencing. The State argues that, because Mr. Marshall failed to present a sentencing transcript of his sentencing, he cannot challenge his sentence and his petition should be dismissed. SRB at 8. But the failure to provide a transcript in this case is not Mr. Marshall’s fault by any measure. The undersigned counsel filed a declaration under oath about the steps that the Law Offices of Gordon & Saunders took to adduce a transcript. PRP App. D. The judge who imposed Mr. Marshall’s

sentence is no longer on the bench and has since retired. *Id.* at 1. The Clerk's Office did not have access to any recording of the sentencing. *Id.* The court reporter present at the hearing has also since retired. *Id.* Not only did she retire, but she moved and was unable to locate any notes from the sentencing hearing. *Id.* at 2.

Gordon & Saunders also attempted to recreate a narrative by speaking to trial counsel, Ron Helsop. But he informed the Firm that he had no recollection of the case and all his files had been destroyed. Gordon & Saunders also reached out to the Pierce County prosecutors present at the sentencing hearing, and they also had no recollection or notes from the hearing. As such, there is no way to create a transcript in this case. RAP 9.3 allows a party seeking review to prepare a narrative report of proceedings. But in this case, it is not possible to provide a narrative report. The best and only evidence has been provided. That evidence consists of the declarations provided in the Petition's appendices.

b. A transcript is not required in order for this Court to decide Mr. Marshall's claim on its merits. Washington case law recognizes that not every hearing can be transcribed. "The usual remedy for a defective record is to supplement the record with appropriate affidavits and have discrepancies resolved by the judge that heard the case." *State v. Tilton*, 149 Wn.2d 775, 783, 72 P.2d 735 (2003). This typically involves

following the procedures set forth in RAP 9.3 (producing a narrative report of proceedings) or RAP 9.4 (producing an agreed report of proceeding). *Id.*

If the appellant is unable to reconstruct an adequate record for the appeal, the remedy is a new trial. *Tilton*, 149 Wn.2d at 740-741, *State v. Larson*, 62 Wn. 2d 64, 67, 381, P.2d 120 (1963). In cases where the record is significantly deficient, the defendant need not make any effort to reconstruct the record. *State ex rel. Henderson v. Woods*, 72 Wn. App. 544, 552, 865 P.2d 33 (1994) (distinguishable from *Miller* because missing information about paternity test results could not have been cured by affidavits), *disapproved of on other grounds, State on Behalf of McMichael v. Fox*, 132 Wn.2d 346, 937 P.2d 1075 (1997). Accordingly, this Court should decide the merits of this case based on the evidence provided in the personal restraint petition.

c. Because Mr. Marshall raises a substantive, not procedural, issue, he does not need to show prejudice in order to get relief. In *Montgomery v. Louisiana*, the United States Supreme Court held that the current requirement that courts consider youth before subjecting a juvenile to adult punishment was substantive. __ U.S. __, 136 S.Ct. 718, 732, 735, 193 L.Ed.2d 599 (2016). That court ruled that in order to obtain relief, a juvenile respondent need not show prejudice, but rather ruled that a court

has no authority to leave in place either a conviction or a sentence that violates a substantive rule. *Id.* at 731. Because Mr. Marshall raises a substantive constitutional claim, he does not have to prove prejudice.

d. Remand for a hearing is required. At a minimum, a reference hearing is required because Mr. Marshall has made a *prima facie* and uncontradicted showing of the merits of his claim. Mr. Marshall provided an affidavit stating his memory about whether his youthful considerations were taken into account at sentencing. PRP App. I. Mr. Marshall recalled that the interpreter for the family said their religion taught forgiveness and that they forgave Mr. Marshall for his role in the death of Mr. Huynh. App. I at 2. The family also requested that Mr. Marshall receive a short sentence because of his minor role and participation in the offense as well as his young age. *Id.* Mr. Marshall also remembered the prosecutor stating that age was not a factor and that the court could not give a sentence less than the low end of the standard range. *Id.* As for the judge, Mr. Marshall declared under oath that the judge sentenced him above the prosecutor and defense counsel's low end recommendations, stating, "in for a penny, in for a pound." *Id.* at 3.

Citing *State v. Rice*, this Court has ruled that when a petitioner files an affidavit demonstrating his claim, the State then has the burden to produce affidavits to counter the petitioner's claim:

“Once the petitioner makes this threshold showing, the court will then examine the State’s response,” which must “answer the allegations of the petition and identify all material disputed questions of fact.” *Rice*, 118 Wn.2d at 886, 828 P.2d 1086. “[T]o define disputed questions of fact, the State must meet the petitioner’s evidence with its own competent evidence” and only after “the parties’ materials establish the existence of material disputed issues of fact” will we direct the trial court “to hold a reference hearing in order to resolve the factual questions.” *Rice*, 118 Wn.2d at 886–87, 828 P.2d 1086.

In re Monschke, 160 Wn. App. 479, 489, 251 P.3d 884, 890 (2010). This Court has also ruled that it can remand for a full hearing if the petitioner in a personal restraint petition makes a *prima facie* showing of a constitutional error but the merits of the contentions cannot be determined solely from the available record:

In evaluating personal restraint petitions, we can: (1) dismiss the petition if the petitioner fails to make a *prima facie* showing of constitutional or non-constitutional error; (2) remand for a full hearing if the petitioner makes a *prima facie* showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810–11, 792 P.2d 506; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

In re Stockwell, 160 Wn. App. 172, 176–77, 248 P.3d 576, 578 (2011), as corrected (Mar. 4, 2011); *Monschke*, 160 Wn.App. at 489, citing *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

The state did not provide any competent admissible evidence to dispute Mr. Marshall’s sworn statement or the corroboration provided by

Ms. Haack. *See* App. H, Attachment 2. Moreover, Mr. Marshall's recollection of what occurred fully shows that Mr. Marshall did suffer prejudice in that the court's discretion and sentencing authority was constrained in a way that is now recognized as improper. Because the sentencing court failed to recognize that it had discretion, it abused its discretion. *Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409, 426. Because the sentencing court failed to consider Mr. Marshall's youth, a new sentencing is justified.

This court should reverse his sentence based on the evidence he was able to ascertain about his sentencing.

2. THE STATE MISINTERPRETS RECENT CASELAW CONCERNING THE TREATMENT OF JUVENILES IN ADULT COURT

The State asserts that the *Houston-Sconiers* Court "refrained from authorizing exceptional sentences for 'youth alone,' framing factors to be considered in terms of 'mitigating circumstances associated with the youth,' or 'mitigating qualities of youth.'" SRP at 11. This is a distinction without a difference. The *Miller*, *O'Dell*, and *Houston-Sconiers* Courts all recognize that persons of a young age have inherent characteristics that distinguish them from adults. Certainly, it is not the same language of "youth alone" as a factor, but of course now, sentencing hearings will be held in the future where mitigation experts will be called to author

opinions and testify about how this specific juvenile defendant is young, immature, and impulsive, and whether he might be rehabilitated successfully:

Miller requires such discretion and provides the guidance on how to use it. It holds that in exercising full discretion in juvenile sentencing, the court must consider mitigating circumstances related to the defendant's youth—including age and its “hallmark features,” such as the juvenile's “immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller*, 132 S.Ct. at 2468. It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and “the way familial and peer pressures may have affected him [or her].” *Id.* And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. *Id.*

This is what the sentencing court should have done in this case, and this is what we remand for it to do.

Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409, 421 (2017).

The State also asserts that the *Houston-Sconiers* Court held youth must be considered only when mandatory enhancements are at issue. SRP at 11. But that is not what the Court ruled. Instead, the Court ruled,

In accordance with *Miller*, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. *Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.*

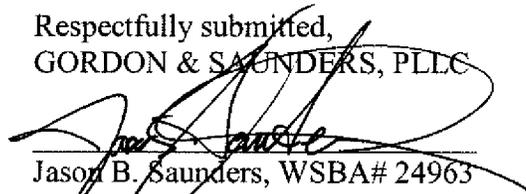
(Emphasis added.) *Houston-Sconiers*, 391 P.3d at 420. The Court in no way limited its ruling to sentencing enhancements. Instead, the Court ruled that trial courts must consider qualities of youth any time a youth faces any sentence or mandatory criminal procedure in adult court. The Court's ruling is plain – even for a juvenile facing a standard range sentence in adult court, the trial court's hands are not tied. Instead, youth must be given consideration and the sentence imposed can go as low as the court wants it to go.

B. CONCLUSION

For the reasons set forth above, Petitioner Jarrell Marshall respectfully requests this Court reverse his conviction and remand to adult court for resentencing with consideration of his youth as a mitigating factor.

DATED this 18th day of May, 2017.

Respectfully submitted,
GORDON & SAUNDERS, PLLC



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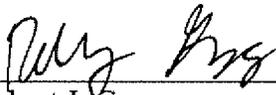
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