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Court of Appeals No. 51469-9-II

In the  
*Court of Appeals for the State of Washington*  
Division Two

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STATE OF WASHINGTON,  
Respondent,  
v.  
AZIAS DEMETRIUS ROSS,  
Appellant.

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**OPENING BRIEF OF APPELLANT**

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Appeal From Pierce County Superior Court No. 12-1-03305-8

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**I. IDENTITY OF APPELLANT**

The appellant is Azias Demetrius Ross (“Mr. Ross”).

**II. ASSIGNMENTS OF ERROR**

- A. The resentencing court erred in failing to recognize the existence of its discretion to impose a new sentence for Mr. Ross on remand.
- B. The resentencing court erred in failing to meaningfully consider Mr. Ross’ youth as a mitigating factor when resentencing on remand.
- C. The resentencing court erred in failing to consider concurrent imposition of Mr. Ross’ weapon enhancements based on the presence of mitigating factors.

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. Did the resentencing court have discretion to impose a new sentence on remand, given this Court’s instructions to “resentence” Mr. Ross on two counts?
- 2. Did the resentencing court abuse its discretion by failing to recognize the existence of its discretion to impose a new sentence on remand?

3. Did the resentencing court err in failing to meaningfully consider Mr. Ross' youth as a mitigating factor when resentencing on remand, as required by intervening case law?
4. Did the resentencing court err in failing to consider concurrent imposition of Mr. Ross' weapon enhancements, as required by intervening case law?
5. Does Mr. Ross' current sentence violate his Eighth Amendment rights due to the failure of the sentencing courts to consider concurrent imposition of his weapon enhancements based on the mitigating factor of youth?
6. Has Mr. Ross been prejudiced by the resentencing court's failure to remedy his unlawful and unconstitutional sentence?

#### **IV. STATEMENT OF THE CASE**

##### **A. Trial, Conviction, and Sentence.**

On March 5, 2014, at the conclusion of trial, Mr. Ross was found guilty of 10 felony offenses, along with eight firearm enhancements and one other deadly weapon enhancement, for his role as a driver in connection with home invasions occurring in January and April, 2012, and for trafficking property stolen in August of 2012. Clerk's Papers (CP) 252-262. Mr. Ross was arrested and charged along with four co-defendants, Soy Oeung ("Ms. Oeung"), Nolan Chouap ("Mr. Chouap"),

Azariah Ross (“Azariah”), and Alicia Ngo (“Ms. Ngo”). 2.11.2014 Trial Report of Proceedings (2.11.2014 RP) 85-86. Mr. Ross was tried along with Mr. Chouap and Ms. Oeung. Ms. Ngo’s charges were dismissed and Azariah was tried separately.

On June 23, 2014, the matter proceeded to sentencing. Mr. Ross appeared along with his co-defendant, Ms. Oeung. Initial Sentencing Report of Proceedings (6.23.2014 RP) 2. The State set out its calculations of offender scores and sentencing ranges and requested that Mr. Ross be sentenced to the low end of the base range, running all sentences concurrently, plus consecutive imposition of the firearm enhancements, for a base sentence of 129 months plus enhancements of 378 months. 6.23.2014 RP 71-72. The total requested sentence was thus 507 months, or 42 years and 3 months. 6.23.2014 RP 71-72.

The State argued that it was seeking the low end for the base sentence only in “recognition of the sentence that the Court must impose as part of the firearm enhancements,” and not as a reflection of any decreased level of culpability attributable to Mr. Ross. 6.23.2014 RP 72:8-10 (emphasis added). Mr. Ross’ defense counsel agreed with imposition of the low end base sentence of 129 months, and agreed that the firearm enhancements were “mandatory.” 6.23.2014 RP 72:23-25. Nonetheless, defense counsel argued for leniency in imposing the firearm enhancements

due to the unprecedented number of enhancements stacked together in this matter. She attributed the unusually large number of enhancements to an exercise of prosecutorial discretion that diverged sharply from anything that could have been contemplated by the legislature in enacting the “Hard Time for Armed Crime” statutes. 6.23.2014 RP 73:5-10.

Defense counsel lamented the injustice of the fact that the low end for an offense of Murder in the First Degree is 22 years, nearly 10 years fewer than the total of Mr. Ross’ enhancements alone. 6.23.2014 RP 73:17-18. She argued further that the injustice wrought by the mandatory nature of the SRA was compounded by the fact that Mr. Ross did not actually enter any of the homes or threaten the victims, and none of the victims were physically injured, much less killed. 6.23.2014 RP 73:19-22.

In her pleas to the Court, defense counsel also emphasized Mr. Ross’ youth and potential, as evidenced by Mr. Ross’ exceptional comprehension of legal concepts and unusual degree of cooperation and engagement throughout the proceedings. 6.23.2014 RP 75. Mr. Ross was 19 years old at the time of the offenses and had a young child together with Ms. Oueng. 6.23.2014 RP 75.

No evidence was presented at the sentencing hearing regarding the presence of mitigating factors that might justify an exceptional sentence, apparently because trial counsel and the Court believed that

youth was not a potential mitigating factor and, even if it were, it would not provide relief from the firearm enhancements.<sup>1</sup> Thus, the Court heard very little at sentencing of Mr. Ross' troubled youth, in which peer pressure pushed him into the gang and drug subculture as young as 13 years old, the role his immaturity and youthful impulsivity played in his disastrous decision to participate in the offenses, or the prosperous journey of personal growth and maturity upon which he embarked following his arrest.

The Court ultimately imposed the sentence recommended by the State, concurring that the low end base sentence was appropriate not because of a lessened degree of Mr. Ross' culpability, but because the mandatory application of the weapons enhancements created "a tough sentence to swallow for anybody." 6.23.2014 RP 76. The Court also stated that no mitigating factors were available, and suggested it would not have applied them even if they were, but this suggestion was made without the benefit of the presentation of mitigating evidence. 6.23.2014 RP 76. The Court concluded its pronouncement of the sentence saying "the firearm enhancements, of course, I have no control over." 6.23.2014 RP 76.

Based on the combination of the standard sentencing ranges and firearms enhancements, Mr. Ross received a total sentence of 132.75

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<sup>1</sup> As set forth in arguments below, these beliefs were erroneous.

months, or 11 years and 1 month, for Count I - Conspiracy and 61 months, or 5 years and 1 month, for Count XI. CP 247, 252-57. The statutory maximum term allowed for Count I - Conspiracy was 10 years and that for Count XI - Unlawful imprisonment, was 5 years. CP 247-48, 254.

**B. Appeal, Remand, and Resentencing**

Mr. Ross appealed his convictions and sentence to the Court of Appeals of the State of Washington, Division II. On September 27, 2016, the Court of Appeals entered its order upholding Mr. Ross' convictions, but held that Mr. Ross' sentences on Counts I, XI, and LXII were in error, and that the court erred in dismissing Mr. Ross' convictions under counts IV, VII, X, and V without, rather than with, prejudice. CP 179-248. As to Counts I and XI, the sentences were unlawful because they exceeded the statutory maximum terms when combined with the firearm enhancements, in violation of RCW 9.94A.506(3). Thus, the Court of Appeals "remand[ed] with instructions to resentence Ross on counts I and XI ... not to exceed the statutory maximum sentence." CP 248.

As to Counts IV, VII, X, and V, the Court of Appeals found vacation of these convictions without prejudice violated Mr. Ross' double jeopardy rights and thus "remand[ed] to the sentencing court to

vacate and dismiss these convictions with prejudice.” CP 238. As to Count LXXII, the Court of Appeals noted that this count was wrongly numbered, and should be corrected to reference Count LXXI in order to comport with the charging document. Thus, the Court of Appeals “order[ed] the sentencing court to resentence Ross on count LXXI.” CP 180, 248.

On remand, Mr. Ross submitted a resentencing memorandum explaining that the instructions on remand went beyond instructing the court to engage in a “purely ministerial” action, so the court had discretion under controlling Washington case law and RAP 2.5(c) to resentence on all counts. CP 156-75 Mr. Ross also presented the court with intervening case law establishing that the court was now required to meaningfully consider Mr. Ross’ youth as a mitigating factor in imposing the new sentence. CP 164-74. He presented these arguments again at the outset of the October 6 resentencing hearing. 10.6.2018 RP 3-5. The State argued to the contrary, asserting that the court was authorized by the Court of Appeals only to reduce the sentences imposed on counts I and XI down to the statutory maximums for those sentences, not to impose a new sentence. 10.6.2018 RP 1-3.

At the October 6 hearing, the court stated that it believed it had discretion on remand to consider Mr. Ross’ motion for a new trial and

request for resentencing. 10.6.2018 RP 8. However, because the court and the State were unprepared to address those issues, the court decided to allow additional time and opportunity for the State to brief the issue and conduct a subsequent hearing. 10.6.2018 RP 8-9. The court then proceeded to enter an order bringing the sentences on counts I and XI down to the statutory maximums and fixing the scrivener's error on count LXXII/LXXI. 10.6.2018 RP 9-10.

At the conclusion of the hearing, the matter was reset for January 26, 2018, to further consider Mr. Ross' request for a full sentencing hearing and new sentence. 10.6.2018 RP 11-12; 1.26.2019 RP 14-37. After hearing argument from the parties at this second hearing, the court concluded it did not have discretion to resentence Mr. Ross, stating:

[T]he Court in this case is ruling that when the court of appeals sent its mandate to this Court on this particular case, that it was to correct what the Court is considering two Scrivener errors. And basically to -- that the sentence exceeded the statutory maximum.

1.26.2019 RP 33. Mr. Ross' counsel asked the resentencing court to clarify for the record whether it believed it had discretion to resentence Mr. Ross on remand, to which the court replied "[t]he Court is determining that it does not. I do not have the discretion to resentence." 1.26.2019 RP 35.

### **C. Additional Facts Relevant to Resentencing**

Mr. Ross was 19 years old at the time of his awful decision to participate in the crimes for which he stands convicted. CP 160. His offenses were the culmination of a life derailed at the impressionable age of 13 by the allure of gangs and drugs, coupled with a lack of adequate structure and support in his home life. Id. Once he fell into the wrong crowd and became addicted to drugs, Mr. Ross lacked the maturity and cognitive tools to dig himself out. Id. He fell into an all-too-common vicious cycle of drugs, gangs, and crime, seeking constantly to prove himself to his misguided peers. Id. In the course of leading this wayward life, Mr. Ross met and fell in love with Ms. Oueng, his co-defendant, and the two of them had a child. Id. Having failed to pursue education and the skills needed for gainful employment, they resorted to aiding in the commission of the crimes at issue in this matter in an effort to support themselves, their child, and their addictions. Id. From the age of 13 until his arrest, Mr. Ross' life was the product of impulsivity, immaturity, terrible decision-making, and peer pressure. Id.

Since his arrest approximately seven years ago, Mr. Ross has revealed the great potential that was lost to the streets in his youth. Id. He has shunned the gang culture that pervades behind prison walls and rejected the ideology and mentality that formerly dictated his actions. Id.

In its place, he has discovered his innate passion for learning and motivating those around him to do the same. CP 160, 269-75. As noted by his trial counsel, he was very engaged and cooperative throughout the trial proceedings, researching and analyzing the relevant case law and even aptly referring to precedents during in-chambers conferences. CP 160-61.

He has further demonstrated his potential to act as a positive contributing member of society subsequent to trial, completing his GED and obtaining certificates from Learn Green, a college-level course on sustainability. CP 161, 269-75. He has actively pursued, and completed, every educational opportunity available to him thus far, and hopes to become eligible for additional educational programs that are presently unavailable to him due to the length of his sentence. CP 161, 269-75. Through his productive and positive behavior while incarcerated, Mr. Ross has proven that the poor decisions leading to the commission of his crimes was the result not of any inherent character flaws, but rather of immaturity, impulsivity, and susceptibility to peer pressure. CP 161. The personal growth and maturity he has demonstrated since his incarceration reveal his true character and his unusually high potential to be rehabilitated and to live safely and productively in society. Id.

## V. STANDARD OF REVIEW

"Superior courts must strictly comply with directives from an appellate court which leave no discretion to the lower court." State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006), aff'd, 163 Wn.2d 664, 185 P.3d 1151 (2008). By contrast, where the appellate court issues a mandate that merely requires the trial court to "consider" certain issues, the trial court's conduct on remand is reviewed for an abuse of discretion. Harp v. Am. Surety Co. of N.Y., 50 Wn.2d 365, 368-69, 311 P.2d 988 (1957). It is submitted that the issue of whether the superior court had discretion is a legal issue to be reviewed *de novo*. See Seattle v. May, 151 Wn. App. 694, 213 P.3d 945 (2009), aff'd, 171 Wn.2d 847, 256 P.3d 1161 (2011). A failure to recognize the existence of discretion automatically constitutes an abuse of discretion. See In re Pers. Restraint of Rowland, 149 Wn. App. 496, 507-08, 204 P.3d 953 (2009)); State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008), aff'd, 169 Wn.2d 571, 238 P.3d 487 (2010) ("A trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion" (citing State v. Garcia-Martinez, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997))).

## VI. ARGUMENT

### A. The Resentencing court had Discretion to Conduct a Full Resentencing on Remand and Abused its Discretion by Failing to Recognize it.

Pursuant to this Court's directions on remand, the resentencing court had discretion to fully resentence Mr. Ross on all counts. The court abused this discretion by failing to recognize its existence, stating expressly it believed it had no discretion to conduct a full resentencing. This abuse of discretion is further compounded by the fact that Mr. Ross' current sentence is patently illegal based on intervening case law, as Mr. Ross was deprived the opportunity to have the court meaningfully consider his youth as a mitigating factor and the court wrongly believed it lacked discretion to impose Mr. Ross' nine weapon enhancements concurrently.

Although a trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate, the scope of appellate court mandates is assessed in light of RAP 2.5(c). State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009) (citing State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993); State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992)). RAP 2.5(c), in turn, allows the Superior Court, at any resentencing, to revisit any issues that the appellate court has not explicitly rejected. Id. at 38-39.

In Barberio, the defendant challenged a sentencing enhancement for the first time on remand. 121 Wn.2d at 51. The trial court refused to revisit the enhancement and the defendant appealed. Id. On appeal to the Supreme Court, the Court affirmed the trial court's exercise of its discretion, but clarified, based on advisory committee notes to the Rules of Appellate Procedure, that:

The trial court may exercise independent judgment as to decisions to which error was not assigned in the prior review, and those decisions are subject to later review by the appellate court.

Id. at 50 (quoting 2 Lewis H. Orland & Karl B. Tegland, Washington Practice: Rules of Practice 481 (4th ed. 1991)); accord Kilgore, 167 Wn.2d at 38. Thus, Barberio stands for the proposition that RAP 2.5(c) permits a trial court, in its discretion, to decide to revisit an issue on remand that was not the subject of the initial appeal. 121 Wn.2d 48, 846 P.2d 519.

Similarly, in Kilgore, two of the defendant's seven convictions were reversed on appeal, and the appellate court remanded for entry of a new judgment and sentence removing the two reversed convictions. 167 Wn.2d at 32. Although the Court did not remand for resentencing, the defendant requested that the trial court resentence him on the remaining counts, challenging for the first time the trial court's imposition of upward exceptional sentences. Id. at 34. The trial court considered, but

denied, the defendant's request, and the defendant appealed for a second time. Id. at 34-35. On appeal, the Supreme Court again recognized that while it had not remanded for the purpose of resentencing on the affirmed counts, "the trial court had discretion under RAP 2.5(c)(1) to revisit Kilgore's exceptional sentence on the remaining five convictions."<sup>2</sup> Id. at 41. See also State v. Larson, 56 Wn. App. 323, 329, 783 P.2d 1093 (1989) (legal sentence on multiple count charge may be increased to effectuate original sentencing court's scheme).

The lynchpin of the availability of discretion under RAP 2.5(c)(1), as articulated in Kilgore and Barberio is whether the case is remanded for a "purely ministerial purpose." See State v. Ramos, No.

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<sup>2</sup> Courts at the federal level are also explicit that, when any part of a sentence is reversed, the defendant may be resentenced on all counts as each sentence is a "package" which, when "unbundled," warrants construction of a new "package." See e.g. U.S. v. Handa, 122 F.3d 690 (9th Cir. 1997); United States v. Morris, 116 F.3d 501 (D.C.Cir.1997); United States v. Rodriguez, 112 F.3d 26 (1st Cir.1997); United States v. Davis, 112 F.3d 118 (3rd Cir.1997); United States v. Hillary, 106 F.3d 1170 (4th Cir.1997); United States v. Rodriguez, 114 F.3d 46 (5th Cir.1997); United States v. Smith, 103 F.3d 531 (7th Cir.1996); United States v. Harrison, 113 F.3d 135 (8th Cir.1997); United States v. Pimienta-Redondo, 874 F.2d 9, 14 (1st Cir. 1989) ("When a defendant is found guilty on a multicount indictment, there is a strong likelihood that the district court will craft a disposition in which the sentences on the various counts form part of an overall plan... common sense dictates that the judge should be free to review the efficacy of what remains in light of the original plan, and to reconstruct the sentencing architecture upon remand, within applicable constitutional and statutory limits, if that appears necessary in order to ensure that the punishment still fits both crime and criminal.").

30279-2-III, 2013 Wash. App. LEXIS 816, at \*12-13 (Ct. App. Apr. 16, 2013) (unpublished) (“unless a case is remanded for a purely ministerial purpose, the trial court enjoys the authority that Mr. Ramos asked the trial court to exercise here,” i.e., to be resentenced) (citing Kilgore, 167 Wn.2d at 47 n.21 (Sanders, J., dissenting) (agreeing that a trial court does not exercise independent judgment if its action on remand is “*strictly ministerial*” (citing Burrell v. United States, 467 F.3d 160, 166 (2d Cir. 2006))). Thus, in Ramos, the appellate court applied this rule and held that “the trial court enjoyed discretion to revisit the concurrent or consecutive character of [the defendant]’s sentences for the murder counts, which had not been the subject of an earlier appeal.” Id.

Where, as in Mr. Ross’ case, the matter is remanded with instructions to resentence the defendant on one or more counts, the scope of the trial court’s duties goes beyond a “purely ministerial purpose,” thus permitting the trial court to review all sentencing issues that the appellate court has not explicitly rejected. Kilgore, 167 Wn.2d at 38-39. Whereas the Court of Appeals’ instructions to correct the scrivener’s error in mistakenly referring to Count LXXI as Count LXXII may be a “purely ministerial” correction, the instructions to resentence on Counts I and XI are open-ended. See State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009) (“Toney’s sentence was not final because our remand

did not limit the trial court to making a ministerial correction. Rather, we unequivocally ‘remand[ed] for resentencing’”). This Court did not instruct the resentencing court to mechanically impose the statutory maximums, but instead gave instructions to impose new sentences on counts I and XI that are “not to exceed the statutory maximum sentence”. CP 248. Any sentence on counts I and XI at *or below* the statutory maximum would have satisfied this instruction, the only limitation being that the sentences on those counts may not exceed the statutory maximums.

The resentencing court was instructed to “resentence” Mr. Ross and therefore had discretion to address any and all issues not expressly foreclosed on appeal pursuant to RAP 2.5(c) and the cases interpreting the rule. The court abused this discretion by failing to recognize its existence. Moreover, Mr. Ross was prejudiced by this abuse of discretion because his sentence is manifestly unlawful and unjust, as set forth below, and should have been remedied via imposition of a new sentence.

**B. The Resentencing Court’s Abuse of Discretion Prejudiced Mr. Ross Due to the Fact that Mr. Ross’ Sentence is Unlawful, Unjust, and Unconstitutional Under Current Law.**

At the time of Mr. Ross’ initial sentencing, the court, along with respective counsel for the parties, expressed their shared belief that the court lacked discretion to consider a lesser exceptional sentence or to run

the firearm enhancements concurrently. 6.23.2014 RP at 72, 76. Based on intervening Supreme Court decisions following Mr. Ross' initial sentence, however, it is apparent that this belief was erroneous. See State v. McFarland, 189 Wn.2d 47, 49, 399 P.3d 1106 (2017) (holding courts have discretion to run firearm-related sentences concurrently based on mitigating factors, relying on In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007)); State v. Houston-Sconiers, 188 Wash. 2d 1, 24, 391 P.3d 409, 421 (2017) (holding the "mandatory nature" of the firearm enhancement penalties violates the Eighth Amendment when applied to youths); State v. O'Dell, 183 Wn.2d 680, 693, 358 P.3d 359 (2015) (youth must be taken into consideration as a factor justifying exceptional sentences downward, even for adults).

These recent cases mandate the conclusions that (1) the role Mr. Ross' youth played in contributing to his criminal activity should have been meaningfully considered at sentencing as a possible mitigating factor; (2) the imposition of an exceptional downward sentence, including by running the firearm and deadly weapon enhancements concurrently, should have been considered; and (3) the failure to properly consider these factors violated Mr. Ross' Eighth Amendment rights. Due to these failures, intervening case law establish that Mr. Ross' sentence is patently unlawful. Thus, not only did the resentencing court err in failing to

recognize the existence of its discretion, but it also erred in failing to exercise that discretion to remedy Mr. Ross' illegal and unjust sentence. This matter should accordingly be remanded so Mr. Ross can receive a lawful sentence. See State v. Lanphier, No. 28672-0-III, 2011 Wash. App. LEXIS 2146, at \*13-14 (Ct. App. Sep. 15, 2011) (unpublished) (RAP 2.5(c) "explicitly authorizes this court, at the instance of a party, to review the propriety of our earlier decisions in the same case and, where justice would best be served, to decide the case on the basis of our opinion of the law at the time of the later review").

**1. Mr. Ross' sentence is unjust and unlawful because he was deprived his right to have his youth meaningfully considered as a mitigating factor.**

After Mr. Ross' initial sentence was imposed, Washington's Supreme Court held that courts must meaningfully consider youth as a mitigating factor justifying downward departures from standard sentencing ranges established by the SRA. O'Dell, 183 Wn.2d at 693. The Court further recognized that these differences do not magically disappear on one's eighteenth birthday, and accordingly determined that a downward departure can be appropriate for young adults. Id. at 695 ("we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18"). Further, because O'Dell's holding constitutes an interpretation of the SRA, it applies retroactively to Mr.

Ross' sentence. In re Pers. Restraint of Johnson, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997) (“Once the Court has determined the meaning of a statute, that is what the statute has meant since its enactment,” and thus applies retroactively).

In general, a trial court must impose a sentence that falls within the standard range. State v. Law, 154 Wash.2d 85, 94, 110 P.3d 717 (2005). A court has discretion to depart from the standard range either upward or downward. However, “this discretion may be exercised only if: (1) the asserted aggravating or mitigating factor is not one necessarily considered by the legislature in establishing the standard sentence range, and (2) it is sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” State v. Ronquillo, 190 Wn. App. 765, 780-83, 361 P.3d 779 (2015), citing Law, 154 Wash.2d at 95, 110 P.3d 717. The Court in Law held that a factor is sufficiently substantial and compelling to justify departure from a standard sentence only if it relates “directly to the crime or the defendant's culpability for the crime committed.” Law, 154 Wash.2d at 95, 110 P.3d 717.

In O'Dell, the Supreme Court rejected the “sweeping conclusion” in prior cases that “[t]he age of the defendant *does not relate to the crime* or the previous record of the defendant.” Id. at 695. (emphasis in original) (quoting State v. Ha'mim, 132 Wn.2d 834, 847, 940 P.2d 633 (1997)).

Instead, the Court held that youth may justify a downward departure from the SRA so long as there is evidence “that youth in fact diminished a defendant's culpability.” O'Dell, 183 Wn.2d at 689.

This change in thinking was effectuated by recent U.S. Supreme Court opinions relying on psychological studies regarding “adolescents' cognitive and emotional development,” that have established “a clear connection between youth and decreased moral culpability for criminal conduct.” Id. at 695 (citing Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012) (mandatory life sentences without parole violate the Eighth Amendment when applied to juveniles); Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (prohibiting sentences of life without parole for juveniles convicted of crimes other than homicide); Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (juveniles may not be sentenced to death because of their immaturity and heightened capacity for reform)). The Court further noted that these studies “reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure.” O'Dell, 183 Wn.2d at 692 (footnotes omitted).

Following the reasoning of these U.S. Supreme Court decisions, and their scientific underpinnings, the Supreme Court of Washington held

that, while “age is not a per se mitigating factor,” youth is “far more likely to diminish a defendant's culpability than” the Court indicated in Ha'mim. O'Dell, 183 Wn.2d at 695-96. Thus, “a trial court *must* be allowed to consider youth as a mitigating factor when imposing a sentence on a [young] offender.” Id. at 696 (emphasis added).

The Court further outlined what it considers “youth” for purposes of imposing a downward exceptional sentence. It cited with approval multiple studies concluding that the effects of youthfulness on culpability may remain in place until “closer to 25” or “the early 20s.” Id. at 692 n. 5.<sup>3</sup> Because the trial court did not “meaningfully consider youth as a possible mitigating factor,” the matter was remanded for resentencing. Id. at 689.

Following O'Dell, numerous cases have been remanded for resentencing with instructions to take the defendant's youth into

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<sup>3</sup> (citing Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 Notre Dame L. Rev. 89, 152 & n.252 (2009) (collecting studies); MIT Young Adult Development Project: Brain Changes, Mass. Inst. of Tech., <http://hrweb.mit.edu/worklife/youngadult/brain.html> (last visited Aug. 4, 2015) (“The brain isn't fully mature at ... 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.”); Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Ann. N.Y. Acad. Sci. 77 (2004) (“[t]he dorsal lateral prefrontal cortex, important for controlling impulses, is among the latest brain regions to mature without reaching adult dimensions until the early 20s” (formatting omitted)).

consideration as a mitigating factor. See, e.g., State v. Rife, 194 Wash. App. 1016, review denied, 186 Wash. 2d 1027, 385 P.3d 114 (2016) (trial court’s “erroneous” belief that it lacked discretion to impose an exceptional sentence based on youth constitutes reversible error); State v. Ronquillo, 190 Wn. App. 765, 780-83, 361 P.3d 779 (2015) (remanding for resentencing where the sentencing court stated it believed it could not consider youth as a mitigating factor).

The defendant in O’Dell, like Mr. Ross, was over eighteen at the time of the offense, and thus legally an adult. Id. at 683. Nonetheless, because “we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18,” Mr. Ross, like the defendant in O’Dell, is serving an illegal sentence because the sentencing courts failed to meaningfully consider youth as a mitigating factor. Id. 695. Because the resentencing court had discretion to remedy this illegality but failed to so recognize, Mr. Ross is entitled to remand and the opportunity to present evidence at a full resentencing hearing regarding his youth and the role it played in the commission of his offenses, and to have the resentencing court correct the manifest injustice effectuated by the failure to evaluate this mitigating factor at his initial sentencing and resentencing.

**2. Mr. Ross' sentence is unjust and unlawful because the court failed to recognize its discretion to run enhancements concurrently.**

At Mr. Ross' initial sentencing, the trial court stated "the firearm enhancements, of course, I have no control over." 6.23.2014 RP at 76. This assertion went unchallenged by counsel. Accordingly, the Court ran all firearm enhancements concurrently, tacking 378 months (31.5 years) onto Mr. Ross' sentence. Subsequent to Mr. Ross' sentencing, the Washington Supreme Court established that the Court's belief that it had "no control over" the imposition of the firearm and deadly weapon enhancements was incorrect. To the contrary, the Court had discretion to run the enhancements concurrently on the basis of Mr. Ross' youth and/or the "clearly excessive" sentence imposed, and its failure to recognize the availability of that discretion constituted an abuse of discretion. See Bunker, 144 Wn. App. at 421 (failure to recognize discretion is abuse of discretion).

In McFarland the defendant was sentenced to one count of burglary, ten counts of theft of a firearm, and three counts of unlawful possession of a firearm. 189 Wn.2d at 49. At sentencing, defense counsel conceded that the firearm-related sentences were required to run consecutively, pursuant to RCW 9.41.040(6) and 9.94A.589(1)(c), and thus did not make a request to run the sentences concurrently. Id. at 50-51.

The sentencing court also stated that it did not have discretion to run the sentences concurrently. Id. at 51. The Supreme Court disagreed and remanded the matter back to the trial court for resentencing with instructions to consider concurrent imposition of the firearm-related sentences. Id. at 55-56.

The Court began its analysis by discussing the holding in Mulholland, in which it was established that sentencing courts have discretionary authority to grant exceptional downward sentences by running sentences for serious violent offenses concurrently. McFarland, 189 Wn. 2d at 52-53 (citing Mulholland, 161 Wn.2d at 329-30). It went on to reason that there was no substantive difference between RCW 9.94A.589(1)(b), presuming consecutive sentences for serious violent offenses, and RCW 9.94A.589(1)(c), presuming consecutive sentences for firearm-related offenses. McFarland, 189 Wn.2d at 53-54. Given the lack of a meaningful distinction between the statutes, the Court held:

in a case in which standard range consecutive sentencing for multiple firearm-related convictions ‘results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA],’ a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences.

Id. at 55 (citing RCW 9.94A.535(1)(g)).

In arriving at this holding, the Court found that the language in RCW 9.41.040(6), providing “[n]otwithstanding any other law, if the

offender is convicted [of a firearm-related offense] then the offender shall serve consecutive sentences,” did not deprive the sentencing court of discretion to impose an exceptional downward sentence. Id. The language at issue in McFarland is substantively the same as that set forth in RCW 9.94A.533(3)(e), the firearm enhancement statute implicated in Mr. Conner’s sentence, which provides “[n]otwithstanding any other provision of law, all firearm enhancements [...] shall run consecutively to all other sentencing provisions.” RCW 9.94A.533(3)(e).

McFarland purports to address only sentences for firearm convictions under RCW 9.41.040(6), and not firearm enhancements under 9.94A.533(3)(e). However, for reasons articulated in the concurring opinion in Houston-Sconiers, this attempt to hold the line at firearm convictions, rather than enhancements, relies entirely on a distinction without a difference. There is no reason whatsoever, based on either the plain language of the statutes or their public policy underpinnings, for holding that the exceptional sentence provisions set forth in RCW 9.94A.535 would apply only to firearm convictions under RCW 9.94A.589, but not to firearm enhancements under RCW 9.94A.533.

Indeed, the concurring opinion of Justice Madsen, joined by Justice Johnson in Houston-Sconiers makes exactly this point. Houston-Sconiers, 188 Wash. 2d. at 34-40 (J. Madsen, concurring). She argued in

her opinion that Houston-Sconiers should have been decided on the nonconstitutional grounds that nothing in 9.94A.533 exempts its provisions from exceptional sentences under RCW 9.94A.535. Id. at 36.

McFarland further indicates that the “clearly excessive” factor set forth in RCW 9.94A.535(1)(g) could warrant a downward exceptional sentence for firearm-related offenses on facts similar to those present in Mr. Ross’ case. Id. at 9-10. Indeed, the defendant in McFarland, like Mr. Ross, was prosecuted as an accomplice. Unlike Mr. Ross, however, she actually invaded an occupied home and stole firearms and other items, yet received only a 237 month sentence. Here, Mr. Ross waited in the car while the offenses took place and received a sentence more than twice as long. If RCW 9.94A.535(1)(g) applies in McFarland, it must surely apply to Mr. Ross.

McFarland’s holding must also be applied retroactively because it announced a new interpretation of the SRA. See In re Pers. Restraint of Johnson, 131 Wn.2d at 568. By failing to consider concurrent imposition of Mr. Ross’ enhancements, the trial court abused its discretion under McFarland, thereby rendering Mr. Ross’ sentence unlawful. The resentencing court then further abused its discretion to Mr. Ross’ grave detriment by failing to remedy this illegality under the mistaken belief it had no discretion to do so.

**3. Mr. Ross' sentence violates the Eighth Amendment.**

Not only is Mr. Ross' sentence unlawful under McFarland, O'Dell, and the other cases cited herein, but it is also unconstitutional under Houston-Sconiers, another opinion filed subsequent to Mr. Ross' initial sentencing. See 188 Wash. 2d at 24. Houston-Sconiers establishes that the "mandatory nature" of the deadly weapon enhancement statutes violate the Eighth Amendment's prohibition on cruel and unusual punishments when applied to young offenders. 188 Wash. 2d at 24. Specifically, the Supreme Court held that sentencing courts must be allowed to consider youth as a mitigating factor and to impose exceptional downward sentences under the SRA and the "Hard Time for Armed Crimes" statutes in order to comply with the mandates of the Eighth Amendment. Id.

The defendants in Houston-Sconiers were 17 and 16 years old at the time of the offenses, but tried and convicted as adults. Id. at 8. They committed a series of robberies of Halloween trick-or-treaters, threatening their young victims at gun point while wearing Halloween masks. Id. at 10-11. The firearm enhancement penalties totaled 372 months and 312 months for the respective defendants. Id. at 8. The court imposed the full penalties, as it felt it had no discretion to do otherwise. Id. at 9. It did, however, impose a base sentence for the underlying offenses of zero months, even though it believed doing so violated the SRA (a mistaken

belief in light of O'Dell). Id. at 13. In reversing the sentences, the Court held that the trial court's failure to consider youth as a mitigating factor under the "Hard Time for Armed Crime" statutes, specifically RCW 9.94A.533, violated the Eighth Amendment's prohibition against cruel and unusual punishments. Id. at 18-21.

Mr. Ross was only two years older than the defendant in Houston-Sconiers at the time of their respective offenses. As set forth above, the studies of adolescent brain development underpinning the Court's decisions in Houston-Sconiers and O'Dell do not draw a magic line at the age of eighteen, but rather state that the effects of youthfulness on culpability may remain in place until "closer to 25" or "the early 20s."

In Graham, the Court methodically set out the characteristics of youth and explained how, in light of these characteristics, the sentencing goals of retribution, deterrence, incapacitation, and rehabilitation are violated in the context of mandatory life without parole sentences for non-homicide crimes. Graham, 560 U.S. 48. As explained in O'Dell and the studies relied upon therein, the developments in knowledge of the human brain underpinning the foregoing decisions do not support the notion that individuals are more culpable for their misconduct the day after their eighteenth birthdays, or even years after their eighteenth birthdays, versus

the day before.<sup>4</sup> Every reason provided in Roper, Graham, Miller, and their progeny for striking down the sentencing schemes at issue applies with precisely equal weight to young offenders aged 18 years and older. This conclusion became the law in Washington in O'Dell, as elaborated hereinabove. See O'Dell, 183 Wn.2d at 695 (holding “we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18,” so youth must be considered as a mitigating factor even in the case of defendants who are “adults”).

The next issue concerns the implications of this recognition with respect to the rejection of mandatory firearm enhancement in Houston-Sconiers. In sum, the Washington Supreme Court has now held that:

- “sentencing juvenile offenders to life without parole or early release constitutes cruel punishment and, therefore, RCW

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<sup>4</sup> See Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners at 6 n.3, Graham, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621) (“Science cannot, of course, draw bright lines precisely demarcating the boundaries between childhood, adolescence, and adulthood.”); see also Sara B. Johnson et al., Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, 45 J. Adolescent Health 216, 218 (2009) (“Neuroimaging studies do not allow a chronologic cut-point for behavioral or cognitive maturity at either the individual or population level.”); Greg Ridgeway & Robert L. Listenbee, Young Offenders: What Happens and What Should Happen, U.S. DEP'T OF JUST. (Feb. 2014), <https://www.ncjrs.gov/pdffiles1/nij/242653.pdf> (last visited Oct. 14, 2017) (“During adolescence and into the early 20s, increased maturation of the prefrontal cortex improves cognitive functioning and reasoning ability. The evidence from developmental neuroscience suggests that young adult offenders ages 18-24 are, in some ways, more similar to juveniles than to adults.”)

10.95.030(3)(a)(ii) is unconstitutional”, State v. Bassett, 192 Wash. 2d 67, 78, 428 P.3d 343, 348 (2018);

- the “mandatory nature” of the weapon enhancement statute is unconstitutional when applied to juveniles, Houston-Sconiers, 188 Wn.2d at 18;
- “courts must be allowed to consider youth as a mitigating factor when imposing a sentence on a[ young] offender”, O’Dell, 183 Wn.2d at 696; *and*
- “we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18,” Id.

Given these principles, the unavoidable conclusion is that imposition of mandatory firearm enhancements on a young defendant, particularly where, as here, it nearly results in a *de facto* life sentence, constitutes cruel punishment “even if that defendant is over the age of 18”. In light of O’Dell, and the science upon which Roper and its progeny are based, Houston-Sconiers’ rejection of mandatory firearm enhancements on Eighth Amendment grounds cannot be limited to juveniles on any rational ground. Therefore, the resentencing court’s mechanical imposition of nine “mandatory” firearm enhancements and one deadly weapon enhancement in Mr. Ross’ case without meaningful consideration of the mitigating factor of youth is every bit as unconstitutional here as it was in Houston-Sconiers.

Thus, in addition to Mr. Ross’ sentence becoming exposed as unlawful in light of McFarland and O’Dell, Houston-Sconiers further

demonstrates that the sentence is unconstitutional pursuant to the Eighth Amendment. Even if the Court is disinclined to extend Houston-Sconiers to defendants over 18 (despite the language in O'Dell and supporting science rejecting this distinction), that decision nonetheless establishes, at a minimum, that the abuse of discretion in failing to consider Mr. Ross' youth and the possibility of running enhancements concurrently has worked a grave injustice at least approaching, if not attaining, constitutional magnitude. Under these circumstances, the resentencing court abused its discretion and prejudiced Mr. Ross by failing to remedy this injustice under the erroneous belief it lacked discretion to do so.

## **VII. CONCLUSION**

For the reasons stated herein, the resentencing court on remand abused its discretion and prejudiced Mr. Ross by failing to recognize that it had discretion to resentence Mr. Ross on all counts. This failure has left Mr. Ross serving a patently illegal and unjust sentence. To remedy this injustice, Mr. Ross respectfully requests that this Court reverse his sentence and remand this matter for full resentencing on all counts, in the alternative to reversing his convictions as requested in his personal restraint petition currently pending before the Court.

Respectfully submitted this 29th day of March, 2019.

LAW OFFICE OF COREY EVAN PARKER

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**CERTIFICATE OF SERVICE**

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on March 29, 2019, I caused to be served the document to which this is attached to the parties listed below in the manner shown next to their names:

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