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STATE OF WASHINGTON, RESPONDENT

v.

KEONTE SMITH, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Stephanie A. Arend

No. 17-1-03573-6

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The defendant, Keonte Smith, pled guilty to one count of human trafficking in the second degree in superior court. He was age 16 and 17 at the time of the crime and age 18 at the time of sentencing. The defendant submitted extensive mitigation materials in support of his request for an exceptional sentence downward based on youth under *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). The trial court was familiar with *Houston-Sconiers* and the requirement that it must consider the defendant's age and the mitigating factors of youth at sentencing. The trial court considered all of the defendant's evidence in support of a mitigated sentence before properly exercising its discretion to deny his request for an exceptional sentence. This is all that *Houston-Sconiers* requires. The court properly exercised its discretion to impose a sentence at the low end of the standard range. The defendant is not entitled to appeal this sentence, and there is no basis to remand for resentencing. If this Court remands for resentencing, the defendant's request for reassignment to a different sentencing judge should be denied as the defendant has not met his burden to show that the initial sentencing judge's impartiality might reasonably be questioned. Finally, this Court should affirm the trial court's imposition of

supervision fees and collection costs, but remand for the trial court to amend the interest accrual provision in the defendant's judgment and sentence.

## II. RESTATEMENT OF THE ISSUES

- A. Did the trial court properly exercise its discretion in denying the defendant's request for an exceptional sentence downward based on youth where it considered all of the defendant's mitigation materials?
- B. If this Court remands for resentencing, should it deny the defendant's request to reassign a different judge where nothing in the record indicates that the initial sentencing judge's impartiality can reasonably be questioned?
- C. Should this Court remand for the trial court to strike the supervision fees and collection costs in the judgment and sentence where the defendant failed to object below and where these fees and costs are not discretionary costs?
- D. Should this Court remand for the trial court to amend the interest accrual language in the judgment and sentence to reflect a recent change in the law that no interest shall accrue on non-restitution obligations?

## III. STATEMENT OF THE CASE

### A. Information and Guilty Plea

In September 2017, Keonte Smith (hereafter, defendant) was charged in superior court with human trafficking in the second degree, promoting commercial sexual abuse of a minor, and unlawful possession of a firearm in the second degree. CP 1-6. The defendant committed these crimes at the age of 16 and 17. *See* CP 31-33. The defendant was initially charged in juvenile court, but the case was transferred to adult court after

the court determined that decline of juvenile jurisdiction is in the best interest of the defendant and the community. CP 184-95. In declining juvenile jurisdiction, the court explicitly noted that the adult court will be required to consider youthful mitigating factors at any future sentencing hearing under *Houston-Sconiers*. CP 195.

On March 22, 2018, the defendant pled guilty to one count of human trafficking in the second degree, and the other charges were dismissed based on plea negotiations. *See* CP 34-43. The defendant's guilty plea indicated that the State will recommend a sentence at the low end of the standard range and that the defendant will request an exceptional sentence below the standard range based on youth pursuant to *Houston-Sconiers*. CP 37. The parties included a stipulation with the guilty plea, which noted that *Houston-Sconiers* appears to set no limit on the discretion of the sentencing court or the defendant in requesting an exceptional sentence. CP 44-46. The stipulation also stated that the defendant recognizes that if the court rejects an exceptional sentence and imposes a standard range sentence, he will be limited on direct appeal to arguing the trial court considered inappropriate factors or outright refused to consider his request for an exceptional sentence. CP 46. The trial court acknowledged this at the time of the plea.

See 3/22/18 2RP 12-13, 17-19.<sup>1</sup> The trial court set sentencing over for the defendant to submit materials in support of his request for an exceptional sentence based on youth. See 3/22/18 2RP 12-13, 23.

**B. Sentencing**

On the date scheduled for sentencing, the defendant asked for a continuance to obtain an evaluation from a “juvenile justice expert” regarding the mitigating factors of youth under *Houston-Sconiers*. 6/4/18 RP 27-31; CP 197-99. The trial court recognized that it was required to consider any mitigating factors of youth and specifically noted that it had reread the *Houston-Sconiers* decision in preparation for sentencing. 6/4/18 RP 30-34. The trial court granted the defendant’s request to continue sentencing for the defendant to provide mitigation materials for the court’s consideration. See 6/4/18 RP 31, 41-57; CP 200.

On August 2, 2018, the trial court held the sentencing hearing. 8/2/18 RP 1-43. The State recommended a sentence of 111 months, which was the low end of the standard range. 8/2/18 RP 5. Prior to sentencing, the defendant filed a 23-page sentencing memorandum with approximately 75 pages of exhibits in support of his request for an exceptional sentence

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<sup>1</sup> The verbatim report of proceedings will refer to the date the hearing was held. There are two separate transcripts for the morning and afternoon hearings held on March 22, 2018. The morning hearing will be referred to as “3/22/18 1RP” and the afternoon hearing will be referred to as “3/22/18 2RP.”

downward based on youth. CP 52-151, 201-02. The trial court explicitly noted that it “read the lengthy sentencing memorandum and all of the attachments which included several letters and included an evaluation, photographs, and I would agree that I don’t see any reason to reiterate what I’ve already read[.]” 8/2/18 RP 3-4. The defendant outlined the detailed materials it submitted, noting that they included interviews with the defendant’s family, letters of support, and a forensic assessment from Dr. Ronald Roesch. 8/2/18 RP 6. The trial court stated that it “read everything” except for the multiple-page curriculum vitae from Dr. Roesch. 8/2/18 RP 6-7.

The defendant requested an exceptional sentence of 36 months and summarized the written materials in support of a mitigated sentence based on youth. 8/2/18 RP 7-23, 33-35.<sup>2</sup> Defense counsel argued that the defendant was only 16 years old at the time of the offense and that his deplorable upbringing and lack of guidance impacted his development and maturity. 8/2/18 RP 7-8; CP 76-91. Counsel outlined the cases discussing a connection between youth and decreased moral culpability and recognized that she knew the court was familiar with *Houston-Sconiers*. 8/2/18 RP 9-14; *see* CP 62-66.

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<sup>2</sup> The State accepts the defendant’s statement of facts regarding the materials contained in his sentencing memorandum at CP 52-151. *See* Br. of App. at 3-9.

Defense counsel described the evaluation from Dr. Roesch and argued that it provided ample support for the imposition of an exceptional sentence. 8/2/18 RP 19; CP 137-47. Dr. Roesch concluded that the defendant is a low risk for future violent behavior. 8/2/18 RP 19; CP 143. Dr. Roesch's testing indicated that the defendant scored in the low to middle range on sophistication and maturity, which tends to reflect a diminished capacity for judgment and a difficulty in fully understanding the consequences of one's actions. 8/2/18 RP 20; CP 144. Counsel argued that the defendant's home life added to his instability, but that Dr. Roesch concluded that he is highly amenable to treatment. 8/2/18 RP 19-20; *see* CP 144-46.

At sentencing, defense counsel stressed the importance of Dr. Roesch's assessment of the defendant and his overall findings that support an exceptional sentence. 8/2/18 RP 21. The defendant requested a sentence of 36 months, but recognized that the court has complete discretion in deciding whether to grant his request for an exceptional sentence:

Your honor, we understand that this Court – it's really up to this Court to decide what will happen with Keonte, and Keonte has already been in custody for 20 months. He's at an age where he can turn everything around. ... We're asking the Court to not sentence him to nine years, to instead sentence him to three years, noting that he had a lack of sophistication and maturity at the time of the offense, noting that he was 16 years old at the time of the offense, and that three years is a fair and just result for this case. And we're

asking the Court to do that so that he can have the opportunities to build a life for himself, one that's productive, one that is positive, and we know that the Court has complete discretion today so we are begging the Court to impose a sentence of 36 months.

8/2/18 RP 22-23. The defendant urged the court to consider all of the information he provided to the court, "including information about his lack of guidance and upbringing, including the report authored by Dr. Roesch, including all of the reasons that we've set forth in the sentencing memorandum which also include the fact that today this crime...is not eligible to be discretionarily declined or auto-declined." 8/2/18 RP 34.

The State recognized the court's ability to impose an exceptional sentence, but noted that it was not here to discuss the defendant's upbringing or his life because "I don't know anything about it." 8/2/18 RP 23-24, 28-29; *see also* 11/13/17 RP 15; 3/22/18 1RP 7 (acknowledging the defendant may request an exceptional sentence under *Houston-Sconiers*). The State argued that the defendant minimized his culpability for the offense and then detailed the defendant's escalating criminal behavior. 8/2/18 RP 24-28, 31. The State noted that it dismissed multiple serious charges as part of the plea bargaining process and that it took into consideration the defendant's age, criminal history, and the nature of the offense in its sentencing recommendation. 8/2/18 RP 29-31.

In issuing its ruling, the trial court stated that it read the defendant's 23-page sentencing memorandum, including all of the attachments. 8/2/18 RP 35. The court then explicitly stated, "I have considered all of it." 8/2/18 RP 35. The court recognized that it must consider the defendant's age and "whatever factors the defense wants to bring forward as it relates to his youthfulness." 8/2/18 RP 35-36. But the trial court also recognized that it still had the discretion "to sentence within the standard sentencing range or let him walk out tomorrow" after it considered the relevant factors. 8/2/18 RP 36.

After considering all of the defendant's mitigation materials, the trial court noted that it wanted to touch on a few of the facts before issuing its ruling. 8/2/18 RP 35-36. The court acknowledged the cases talking about juveniles, brain development, and impulsivity, but noted the defendant's escalating criminal behavior over time. 8/2/18 RP 37. The court noted the young age of the victim and expressed concern that some of the defendant's arguments appear to blame the victim. 8/2/18 RP 40-41. The court noted that this is not a situation where the defendant just had an error in judgment one time and made a mistake. 8/2/18 RP 37. The court acknowledged the defendant may not have appreciated the full ramifications or seriousness of the crime, but did not believe the defendant's assertion that he did not know his conduct was against the law. 8/2/18 RP 39; *see* CP 145.

The court addressed Dr. Roesch's conclusion that the defendant's thinking reflects his lack of maturity and sophistication because he discussed acts of prostitution with the victim in jail phone calls despite knowing the calls were being recorded. *See* 8/2/18 RP 39; *see also* CP 145-46. The court was not persuaded that this is something that is "just because of youthfulness." 8/2/18 RP 39. The court concluded that "there's nothing about this that suggests to me that he did not understand or appreciate the wrongfulness of his conduct. So I don't think that supports an exceptional sentence downward." 8/2/18 RP 39-40. The court adopted the State's recommendation and imposed a low-end standard range sentence of 111 months. 8/2/18 RP 41; CP 155-57. The judgment and sentence indicates that the trial court "considered all of the information provided by the defense in support of its request for an exceptional sentence below the standard range, which was based on *Houston-Sconiers*," and the court also independently weighed such sentence "under that case and all other relevant authority." CP 155. The defendant timely appealed. *See* CP 165-76.

#### IV. ARGUMENT

**A. The Trial Court Properly Exercised Its Discretion in Denying the Defendant's Request for an Exceptional Sentence Based on Youth After Considering All of the Defendant's Mitigation Materials**

The trial court considered all of the mitigating circumstances related to the defendant's youth and properly exercised its discretion in determining that the defendant's youthfulness did not support an exceptional sentence downward. After considering the evidence presented by the defendant, the trial court sentenced the defendant to the low end of the standard range. This was a proper exercise of the trial court's discretion, and there is no basis to remand for resentencing.

A trial court does not abuse its discretion as a matter of law by sentencing a defendant within the sentencing range set by the Legislature. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Generally, a sentence within the standard range is not subject to appellate review. RCW 9.94A.585(1); *Williams*, 149 Wn.2d at 146. A defendant may appeal a standard range sentence only if the trial court violated the constitution or failed to comply with the procedural requirements of the Sentencing Reform Act (SRA). *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006).

A trial court may impose a sentence outside the standard sentence range if it finds "substantial and compelling reasons justifying an

exceptional sentence.” RCW 9.94A.535. Mitigating circumstances justifying a sentence below the standard range must be established by a preponderance of the evidence. RCW 9.94A.535(1). One such mitigating circumstance is if the “defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.” RCW 9.94A.535(1)(e).

Although every defendant is entitled to ask the court for an exceptional sentence downward and to have the court consider the request, no defendant is entitled to such a sentence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); see *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (when a court is called on to make a discretionary sentencing decision, it must meaningfully consider the request in accordance with the applicable law).

A trial court abuses its discretion when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.” *Grayson*, 154 Wn.2d at 342. A trial court also abuses its discretion if it incorrectly believes it is prohibited from exercising its discretion. *State v. O’Dell*, 183 Wn.2d 680, 696-97, 358 P.3d 359 (2015). But a trial court that has considered the facts and concluded that there is no factual or legal basis for an exceptional sentence has exercised its discretion, and the defendant cannot appeal that ruling. *State v. Garcia-Martinez*, 88

Wn. App. 322, 330-31, 944 P.2d 1104 (1997); *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

Washington law recognizes that a defendant's youth may amount to a substantial and compelling reason to mitigate a sentence if it significantly impairs his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. *See e.g. O'Dell*, 183 Wn.2d at 696. But age is not a per se mitigating factor automatically entitling every youthful defendant to a mitigated exceptional sentence. *Id.* at 695. Relying on several United States Supreme Court decisions citing studies establishing a link between youth and decreased criminal culpability,<sup>3</sup> the Washington Supreme Court noted that "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." *O'Dell*, 183 Wn.2d at 695. In *Miller*, *Graham*, and *Roper*, the Court recognized that the neurological differences between adolescent and mature brains make young offenders, in general, less culpable for their crimes. *O'Dell*, 183 Wn.2d at 692. *O'Dell* explained that these differences might justify a trial court's finding that youth diminished a defendant's culpability. *Id.* at 693.

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<sup>3</sup> *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (holding that the constitution forbids a sentencing scheme mandating life without parole for juveniles); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (holding that the constitution prohibits a life sentence without parole for juvenile nonhomicide offenders); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding that the constitution forbids capital punishment for juvenile offenders).

In *O'Dell*, the defendant asked the trial court to impose an exceptional sentence downward because his youth significantly impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. *Id.* at 685. The trial court acknowledged this argument, but believed it was prohibited from considering youth as a mitigating factor based on *State v. Ha'mim*, 82 Wn. App. 139, 916 P.2d 971 (1996), *aff'd*, 132 Wn.2d 834, 940 P.2d 633 (1997). *O'Dell*, 183 Wn.2d at 685-86. The Court held that youth can be a mitigating factor that diminishes a defendant's culpability and supports an exceptional sentence downward. *O'Dell*, 183 Wn.2d at 696-99. Because the trial court believed it was prohibited from considering youth as a mitigating factor, the Court remanded for the trial court to meaningfully consider whether youth diminished the defendant's culpability. *Id.* at 696-97.

Similarly, in *State v. Solis-Diaz*, 194 Wn. App. 129, 132-35, 376 P.3d 458 (2016), *reversed on other grounds*, 187 Wn.2d 535, 387 P.3d 703 (2017), the Court remanded the case for resentencing because the trial court erroneously believed it was prohibited from considering the defendant's request for a mitigated sentence based on youth. The Court held that the trial court abused its discretion in refusing to consider the defendant's youth as a mitigating factor at sentencing. *Id.* at 138. The Court directed the trial court 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.” *Id.* at 141.

Our Supreme Court has held that when sentencing juveniles in adult court, a trial court must have full discretion to depart from the sentencing guidelines and mandatory enhancements and “to take the particular circumstances surrounding a defendant’s youth into account.” *Houston-Sconiers*, 188 Wn.2d at 34. Relying on *Miller*, the Court explained that sentencing courts must consider a variety of mitigating circumstances related to the defendant’s youth:

[T]he 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.” 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].” And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.

*Houston-Sconiers*, 188 Wn.2d at 23 (citations omitted; internal quotations in original). An inquiry into the individual circumstances of the particular juvenile defendant should take into account his level of sophistication and maturity. *Solis-Diaz*, 194 Wn. App. at 141 (citing *O'Dell*, 183 Wn.2d at 697). Evidence suggesting that the defendant thought and acted like a juvenile may indicate that his culpability was less than that necessary to

justify a standard range sentence. *Solis-Diaz*, 194 Wn. App. at 141. If the sentencing court determines that the defendant's youth did so diminish his capacity and culpability, it must consider whether an exceptional sentence below the standard range is justified based on youth. *Id.* (citing *O'Dell*, 183 Wn.2d at 696).

Here, unlike the trial courts in *O'Dell* and *Solis-Diaz*, the trial court neither refused to consider an exceptional sentence based on youth, nor expressed an erroneous belief that it was prohibited from considering such a sentence. See 8/2/18 RP 35-41. The defendant concedes as much. See Br. of App. at 16, 24. Rather, the defendant argues that the trial court failed to consider the requisite factors and make a full, meaningful inquiry into whether the defendant's youth justified an exceptional sentence downward. Br. of App. at 16-17. The defendant's argument lacks merit. The trial court explicitly stated that it considered "all" of the mitigation materials submitted by the defendant. 8/2/18 RP 35; CP 155. The trial court then concluded that this did not support an exceptional sentence downward and sentenced the defendant to the low end of the standard range. 8/2/18 RP 35-41; CP 155-57. This was a proper exercise of the trial court's discretion. The defendant cannot appeal this standard range sentence, and there is no basis to remand for resentencing.

When sentencing juveniles in adult court, a trial court must have complete discretion to consider the mitigating circumstances associated with youth and to depart from the sentencing guidelines and mandatory enhancements. *Houston-Sconiers*, 188 Wn.2d at 21. The trial court must consider a variety of mitigating circumstances related to defendant's youth, including: his immaturity, impetuosity, and failure to appreciate risks and consequences; the nature of his surrounding environment and family circumstances, including the effect of any familial or peer pressures; the extent of his participation in the crime; and how youth impacted any legal defense, including whether successful rehabilitation is possible. *Id.* at 23. Thus, the trial court must take "the particular circumstances surrounding a defendant's youth into account." *Id.* at 34.

Here, the trial court fully and meaningfully considered the defendant's individual circumstances and properly exercised its discretion in denying an exceptional sentence downward based on youth. The defendant presented detailed and extensive mitigation materials in support of an exceptional sentence downward. *See* CP 52-151. These materials included letters of support, interviews with the defendant's family, a letter from the defendant, and a forensic assessment by Dr. Roesch. CP 52-151; 8/2/18 RP 6. The defendant's materials addressed all of the mitigating circumstances related to youth that the Court discussed in *Houston-*

*Sconiers*. See *Houston-Sconiers*, 188 Wn.2d at 23; see also CP 52-151. In particular, Dr. Roesch opined that the defendant possessed “virtually all of the hallmark features [of youth] noted in prior court decisions.” CP 145. Dr. Roesch discussed in detail the applicability of these factors in the defendant’s case. CP 144-46.

At the sentencing hearing, the trial court stated that other than the expert’s curriculum vitae, it “read everything” submitted by the defendant, including “the lengthy sentencing memorandum and all of the attachments[.]” 8/2/18 RP 3-7. At the hearing, the defendant summarized all of the mitigation materials and argued for exceptional sentence based on youth. 8/2/18 RP 7-23, 33-35. The defendant outlined the cases discussing a connection between youth and decreased moral culpability and argued that Dr. Roesch’s evaluation provides ample support for a mitigated sentence. 8/2/18 RP 19. The defendant stressed the importance of Dr. Roesch’s evaluation and discussed the defendant’s youthful age and immaturity, his failure to fully understand the consequences of his actions, his difficult and unstable family environment, and his amenability to treatment. 8/2/18 RP 19-23, 34.

After considering all of the defendant’s mitigation materials, the trial court stated that it wanted to touch on a few of the facts before issuing its ruling. See 8/2/18 RP 35-36. The court acknowledged the cases talking

about juveniles, brain development, and impulsivity, but noted the defendant's escalating criminal behavior over time. 8/2/18 RP 37. The court noted that this is not a situation where the defendant just had an error in judgment one time and made a mistake. 8/2/18 RP 37. The court addressed Dr. Roesch's conclusion that the defendant's thinking reflects his lack of maturity and sophistication because he discussed acts of prostitution with the victim in jail phone calls despite knowing the calls were being recorded. *See* 8/2/18 RP 39; *see also* CP 145-46. But the court was not persuaded that this is something that is "just because of youthfulness." 8/2/18 RP 39. Although the court acknowledged the defendant may not have appreciated the full ramifications or seriousness of the crime, the court did not believe the defendant's assertion that he did not know his conduct was against the law. 8/2/18 RP 39; *see* CP 145. The court ultimately concluded that "there's nothing about this that suggests to me that he did not understand or appreciate the wrongfulness of his conduct. So I don't think that supports an exceptional sentence downward." 8/2/18 RP 39-40.

The law only requires that the trial court consider a defendant's request for an exceptional sentence downward—the defendant is not entitled to such a sentence. *Grayson*, 154 Wn.2d at 342. The trial court read *and considered* all of the mitigating materials submitted by the defendant and denied his request for an exceptional sentence based on youth. 8/2/18

RP 3-7, 35-41; CP 155. The judgment and sentence explicitly indicates that the trial court “considered all of the information provided by the defense in support of its request for an exceptional sentence below the standard range, which was based on *Houston-Sconiers*,” and the court also independently weighed such sentence “under that case and all other relevant authority.” CP 155. Further, in issuing its ruling, the trial court explicitly stated, “**I have considered all of it.**” 8/2/18 RP 35 (emphasis added). This is all that *Houston-Sconiers* requires.

The trial court was familiar with *Houston-Sconiers* and the requirement that it must consider any mitigating factors of youth. 6/4/18 RP 30-34. The trial court properly recognized that it “must consider the defendant’s age” and “whatever factors the defense wants to bring forward as it relates to his youthfulness.” 8/2/18 RP 35-36. But the trial court also properly recognized that it had the discretion to reject the defendant’s request for an exceptional sentence and instead impose a sentence within the standard range. 8/2/18 RP 36. After considering all of the defendant’s mitigation materials and hearing argument from counsel, the trial court properly exercised its discretion and rejected the defendant’s request for an exceptional sentence based on youth. *See* 8/2/18 RP 35-41. The trial court then sentenced the defendant to the low end of the standard range. 8/2/18

RP 41; CP at 155-57.<sup>4</sup> Thus, the trial court considered all the mitigating factors of youth as required by *Houston-Sconiers*, and there is no basis to remand for resentencing.

**B. If This Court Remands for Resentencing, There Is No Basis for Reassignment As Nothing in the Record Indicates That the Judge's Impartiality Might Reasonably Be Questioned**

If this Court remands for resentencing, it should deny the defendant's request to reassign a new judge as nothing in the record indicates that the initial sentencing judge's impartiality might reasonably be questioned. A defendant has the right to be tried and sentenced by an impartial court. *State v. Solis-Diaz*, 187 Wn.2d 535, 539, 387 P.3d 703 (2017). Pursuant to the appearance of fairness doctrine, a judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair and impartial hearing. *Id.* at 540. The law requires not only an impartial judge, but also a judge who appears to be impartial. *Id.* The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias. *Id.* The test for determining whether the judge's impartiality might reasonably be

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<sup>4</sup> Contrary to the defendant's assertion that the trial court did not consider the change in the decline law after the defendant was charged with the crime, the record reflects that the court acknowledged that the law had changed. 8/2/18 RP 40. Despite this, the court exercised its discretion to impose a standard range sentence.

questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts. *Id.*

A party may seek reassignment for the first time on appeal “where, for example, the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue.” *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014) (internal citations omitted). But this remedy is available only in limited circumstances. *Id.* Even where a trial judge has expressed a strong opinion as to the matter appealed, reassignment is generally not available as an appellate remedy if an appellate opinion offers sufficient guidance to effectively limit the court’s discretion on remand. *Id.*

Erroneous rulings generally are grounds for an appeal, not for recusal. *Solis-Diaz*, 187 Wn.2d at 540. Legal errors alone do not warrant reassignment. *McEnroe*, 181 Wn.2d at 388-90 (denying reassignment and noting that “an error of law is certainly not evidence of bias.”) An appellate court should remand to another judge only where a review of the record shows the judge’s impartiality might reasonably be questioned. *See Solis-Diaz*, 187 Wn.2d at 540.

Here, the defendant has failed to show actual or potential bias by the initial sentencing judge, and nothing in the record indicates that the judge’s

impartiality might reasonably be questioned. The sentencing judge, Judge Arend, was familiar with the law regarding youth and sentencing, including the *Houston-Sconiers* decision, and accurately recognized that she was required to consider all factors presented by the defendant regarding youthfulness. 8/2/18 RP 35-36; 6/4/18 RP 30-34. The judge also accurately recognized that it was within the trial court's discretion to grant or deny the defendant's request for an exceptional sentence. 8/2/18 RP 36. The judge stated that she read and considered all of the defendant's mitigation materials. 8/2/18 RP 35; *see* CP 155. And she ultimately determined that the defendant's youthfulness and mitigation materials did not support an exceptional sentence downward. 8/2/18 RP 39-41. Nothing in the court's ruling shows actual or potential bias by the judge.

This case is distinguishable from *Solis-Diaz* where the Court remanded for a second resentencing in front of a different judge. *See Solis-Diaz*, 187 Wn.2d at 540-41. In *Solis-Diaz*, the case was initially remanded to the same sentencing judge despite the defendant's request to disqualify the judge. *Id.* at 537. At resentencing, the record reflects that the sentencing judge was frustrated and unhappy that the Court of Appeals required him to consider the defendant's request for an exceptional sentence downward based on age or the multiple offense policy. *Id.* at 541. The judge made several remarks at resentencing that strongly suggested he was committed

to imposing the same sentence regardless of the mitigation evidence. *Id.* Concerns about whether the judge would consider evidence with an open mind were heightened by his statement that the initial sentence had served a deterrent effect on gun violence. *Id.* The Court concluded that these facts indicate the judge's impartiality might reasonably be questioned. *Id.* "These are precisely circumstances that justify remand of the matter to another judge." *Id.*

The circumstances in *Solis-Diaz* are not present here. The defendant fails to point to anything in the record that suggests the type of bias present in *Solis-Diaz*. Further, the basis for the defendant's request for resentencing is that the sentencing judge failed to consider the "requisite factors" and make a "full, meaningful inquiry" into whether the defendant's youth justified an exceptional sentence. Br. of App. at 16-18. Rather than suggesting any actual or potential bias, the gist of the defendant's argument is that the sentencing judge should have been more thorough in the ruling regarding consideration of the mitigating factors presented by the defendant. But the trial court explicitly stated that it considered "all" of the mitigating information provided by the defendant in support of his request for an exceptional sentence based on *Houston-Sconiers*. CP 155; see 8/2/18 RP 35. This is consistent with *Houston-Sconiers*, and there is no basis for remand. If this Court disagrees and finds that the trial court's ruling was

deficient such that resentencing is warranted, reassignment to a different sentencing judge is not merited.

**C. The Defendant Failed to Object to the Imposition of Supervision Fees and Collection Costs and Has Failed to Preserve This Issue for Review**

For the first time on appeal, the defendant raises an objection to the trial court's imposition of supervision fees and collection costs. Because he has not preserved this issue for review, this Court should decline to reach the merits of his claim.

An appellate court may refuse to review any claim of error that was not raised below. RAP 2.5(a). A defendant who makes no objection at sentencing to the imposition of discretionary legal financial obligations (LFOs) has no right to appellate review. *State v. Blazina*, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015). The defendant did not object below to the imposition of supervision fees or collection costs in his judgment and sentence. *See* 8/2/18 RP 21-23, 34, 41-42. Thus, this Court should decline to address this unpreserved issue.

Although a defendant has the obligation to properly preserve a claim of error, an appellate court may use its discretion to reach unpreserved claims of error consistent with RAP 2.5. *Blazina*, 182 Wn.2d at 830. Should this Court exercise its discretion to reach the merits of the defendant's

unpreserved claims, it should deny his request to strike the supervision fees and collection costs.

**1. The Trial Court Properly Imposed a Community Custody Condition That the Defendant Pay a Supervision Fee as Determined by the Department of Corrections**

The trial court properly imposed a community custody condition that the defendant pay a supervision fee as determined by the Department of Corrections (DOC). There is no prohibition to authorizing the supervision fee because it is not a “cost” governed by RCW 10.01.160.

The State does not dispute that the law now prohibits the imposition of discretionary costs on indigent defendants. Effective June 7, 2018, the Legislature enacted House Bill 1783, which amends former RCW 10.01.160(3) to prohibit the imposition of any discretionary costs on indigent defendants. *State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018).

In *Blazina*, the Court held that RCW 10.01.160(3) requires the sentencing court to consider a defendant’s ability to pay before imposing discretionary costs such as recoupment for public defense costs and extradition costs. *Blazina*, 182 Wn.2d at 830-32, 837-38. But RCW 10.01.160(3) does not apply to the DOC supervision fee because it is not a “cost” as defined by that statute. RCW 10.01.160(2) defines what “costs”

are: “Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” The fee imposed by DOC does not fall within this definition. In contrast, the costs at issue in *Blazina* fall squarely within this definition because they are expenses incurred in prosecuting the defendant. Similarly, in *Ramirez*, the only discretionary costs at issue were the recoupment of defense attorney fees and the filing fee. *Ramirez*, 191 Wn.2d at 736, 748-50.

Here, the trial court found the defendant indigent at sentencing and waived all discretionary costs. 8/2/18 RP 41. As part of the community custody conditions, the trial court entered the following order: “While on community placement or community custody, the defendant shall...pay supervision fees as determined by DOC[.]” CP 158. The defendant argues that this community supervision fee is discretionary and must be stricken from the judgment and sentence. He relies on dicta contained in a footnote in *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018) to support his claim that the costs of community custody are discretionary. This Court should deny the defendant’s request to strike the supervision fee because it is not a “cost” under RCW 10.01.160 and because it does not appear that they are discretionary.

RCW 9.94A.704(3)(d) provides, “If the offender is supervised by the department, the department shall at a minimum instruct the offender to...[p]ay the supervision fee assessment.” RCW 9.94A.703 includes a list of mandatory, waivable, and discretionary conditions for the court to impose at sentencing. The “mandatory conditions” provision provides, “As part of any term of community custody, the court shall...[r]equire the offender to comply with any conditions imposed by the department under RCW 9.94A.704[.]” RCW 9.94A.703(1)(b). The “waivable conditions” provision provides, “Unless waived by the court, as part of any term of community custody, the court shall order an offender to...[p]ay supervision fees as determined by the department[.]” RCW 9.94A.703(2)(b). The section of the statute addressing “discretionary conditions” does not include any reference to costs or fees. RCW 9.94A.703(3). Thus, it does not appear that supervision fees are discretionary costs, and the trial court did not err by ordering the defendant to pay supervision fees as determined by DOC.

**2. The Court Properly Ordered the Defendant to Pay the Costs of Services to Collect Any Unpaid Legal Financial Obligations**

The trial court properly ordered the defendant to “pay the costs of services to collect unpaid legal financial obligations” pursuant to the statutes. *See* CP at 157. This is not a prohibited discretionary cost for indigent defendants.

Trial courts may contract with collection agencies or use county collection services in order to collect unpaid court-ordered legal financial obligations. RCW 36.18.190; RCW 19.16.500. The county clerk may also impose an assessment for the cost of collections. RCW 9.94A.780(7). These are not “costs” as defined by RCW 10.01.160(3). “Costs” are defined in RCW 10.01.160(2) and “shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” RCW 10.01.160(2). The cost of services to collect unpaid costs or restitution does not fall within this definition. This is not a “discretionary cost,” but rather a means for the court to collect unpaid costs and restitution that the defendant is required to pay. The trial court did not err by including this provision in the judgment and sentence.

**D. The State Concedes That Remand Is Appropriate to Amend the Interest Accrual Language in the Judgment and Sentence**

The State concedes that the language in the defendant’s judgment and sentence involving interest accrual should be amended to reflect a recent change in the law. Restitution imposed in a judgment and sentence shall bear interest from the date of judgment until payment. RCW 10.82.090(1). But as of June 7, 2018, “no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1). Although

the trial court sentenced the defendant after this effective date, his judgment and sentence includes boilerplate language indicating that the “financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.” CP 157. The State agrees that the recent change in law provides that interest shall not accrue for nonrestitution legal financial obligations. Thus, remand is appropriate for the trial court to amend the interest accrual language in the judgment and sentence to reflect the following: “The restitution obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. No interest shall accrue on non-restitution obligations imposed in this judgment. RCW 10.82.090.”

#### V. CONCLUSION

For the foregoing reasons, this Court should affirm the defendant’s sentence, but remand for the trial court to amend the interest accrual provision in the judgment and sentence.

RESPECTFULLY SUBMITTED this 6th day of June, 2019.

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Pierce County Prosecuting Attorney

  
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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.

06/19/11 Theresa K.  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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