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NO. 52400-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

STACEY BRIANNA ALLEN,

Appellant.

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

The Honorable Kitty-Ann Van Doorninck

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. THE STATE'S ARGUMENT THAT A SENTENCING COURT DOES NOT NEED TO GO THROUGH A *MILLER* ANALYSIS FOR CASES WHERE THE OFFENDER DOES NOT FACE A POSSIBLE LIFE-WITHOUT-PAROLE SENTENCE IS CONTRARY TO CASELAW AND IS MERITLESS

Ms. Allen argues that the sentencing court failed to conduct a *Miller* hearing, which violated Ms. Allen's Eighth Amendment and Washington Article 1, Section 14 constitutional rights. Because this is a question of law, this Court considers the issue de novo. *State v. Alvarado*, 164 Wn.2d 556, 563, 192 P.3d 345 (2008).

a. The State's restatement of the sentencing issue is a false statement of law and should be rejected. Counsel for Ms. Allen asserts her issues presented are the issues before this Court. Ms. Allen would also argue that the State's "Restatement of Issue Presented" number two is a misstatement of the law and is an ethical violation if intentional. The State asserts: "A sentencing court may consider a defendant's youth as a mitigating factor justifying an exceptional sentence below the sentencing guidelines under the SRA" (emphasis added). BOR at 2. The State cited *State v. Houston-Sconiers*, 188 Wn.2d 1, 24, 391 P.3d 409 (2017). But the quote is actually not the holding of *Houston-Sconiers* but

instead *State v. O'Dell*, 183 Wn.2d 680, 688-89, 358 P.3d 359

(2015). In *Houston-Sconiers*, the Court noted the following:

In *State v. O'Dell*, 183 Wn.2d 680, 688-89, 358 P.3d 359 (2015), we held that a sentencing court may consider a defendant's youth as a mitigating factor justifying an exceptional sentence below the sentencing guidelines under the SRA.

Houston-Sconiers, 188 Wn.2d at 24. Any assertion that this is the holding of *Houston-Sconiers* rather than the *O'Dell* Court is meritless.¹

Houston-Sconiers did not rule that the sentencing court has discretion as to whether or not to consider the defendant's youth at sentencing. Instead, the *Houston-Sconiers* Court ruled that *Miller*

¹ If intentional, this would violate the Rules of Professional Conduct 3.3, Candor Toward the Tribunal, which states in relevant part:

(a) a lawyer shall not knowingly ... (1) make a false statement of fact or law to a tribunal. Comment (2) provides:

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal.

Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

If the State is intentionally misquoting *Houston-Sconiers* to suggest the court has discretion whether or not to consider the mitigating qualities of a juvenile in adult court, the State has violated RPC 3.3(a)(1).

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

188 Wn.2d at 23, citing *Miller*, 132 S.Ct. at 2468. This Court should strike the State's Restatement of Issues Presented.

b. *Houston-Sconiers* requires a *Miller* hearing whenever a juvenile is haled into adult court, while *O'Dell* and *Lighthoth* are strictly SRA cases permitting a court to consider youth at the time of sentencing for individuals that are not juvenile offenders but were very young adults. While *O'Dell* and *Lighthoth* both held that the SRA has always allowed youth to be considered as a mitigating factor, *Houston-Sconiers* held that a *Miller* hearing is mandatory any time a juvenile is sentenced in adult court. 188 Wn.2d at 21, 23. Although the State attempts to downplay this important decision to argue it is just an extension of *O'Dell* and *Lighthoth*, *Houston-Sconiers* is in no way an extension of *O'Dell* and

Lighthoth. Instead, under the Eighth Amendment, *Houston-Sconiers* mandates consideration of the *Miller* factors, even if defense counsel failed to raise the issue.

The Supreme Court of Washington ruled that *whenever* a person who committed a crime while he or she was a juvenile is before an adult court for sentencing, the judge, even *sua sponte*, must properly consider the mitigating factors of youth under *Miller*. *Houston-Sconiers*, 188 Wn.2d at 21.

Unlike *O'Dell* and *Light-Roth*, Ms. Allen was not a young adult that *could* raise youth as a mitigating factor under the SRA. In those cases, defense counsel must raise the issue and the sentencing judge has discretion to impose an exceptional sentence below the standard range under the SRA. *Matter of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2008) (citing RCW 9.94A.535(1)(e)).

But whenever a juvenile is haled into adult sentencing courts, the matter is not a simple SRA matter. Instead, it is a constitutional matter. *Houston-Sconiers* ruled that *whenever* a juvenile is brought before an adult sentencing court, the court *must* conduct a *Miller* hearing in all cases, even when defense counsel fails to argue the mitigating qualities of youth. 188 Wn.2d at 21; *see infra*, *State v. Gilbert*, 193 Wn.2d 169, 176, 438 P.3d 133 (April

4, 2019) (affirming *Houston-Sconier's* requirement of a *Miller* hearing any time a juvenile is before an adult sentencing court).

Ramos also reaffirmed *Houston-Sconiers* as to what is required at a *Miller* hearing. "*Miller* 'establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered.'" 187 Wn.2d at 443, quoting *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572 (2014).

This reasoning applies for any sentencing in adult court and for any sentence:

[*Miller*] 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.*

Houston-Sconiers, 188 Wn.2d at 23. The *Houston-Sconiers* Court concluded "[t]his is what the sentencing court should have done in this case and this is what we remand for it to do." *Id.*

The *Ramos* Court also made clear that following its analysis, "the sentencing court must thoroughly explain its reasoning,

specifically considering the differences between juveniles and adults identified by the *Miller* Court and how those differences apply to the case presented.” 187 Wn.2d at 444. The *Ramos* Court makes it clear that Ms. Allen cannot waive her right to a proper *Miller* analysis. In *Ramos*, the Court ruled that a “juvenile cannot forfeit his or her right to a *Miller* hearing merely by failing to affirmatively request it, and all doubts should always be resolved in favor of holding a *Miller* hearing.” 187 W.2d at 443. Therefore, the fact that defense counsel failed to present mitigating evidence of youth does not excuse the court’s failure to conduct a meaningful *Miller* hearing.

This holding was recently reaffirmed in *State v. Gilbert*, ___ Wn.2d ___, 438 P.3d 133 (April 4, 2019). In *Gilbert*, the defendant was 15 when he murdered two men and attempted to murder a third man. *Id.* at 134. The Court ruled that it does not matter how a juvenile appears before an adult sentencing court, whenever it happens, the court must undergo a *Miller* analysis:

Although *Houston-Sconiers* did not involve a resentencing under RCW 10.95.035, it did address and resolve the discretion judges have in sentencing for crimes committed by juveniles and, important to the issue here, the discretion to consider exceptional sentencing even where statutes would otherwise limit it. Our opinion in that case cannot be read as confined to the firearm enhancement statutes as it went so far as to question *any* statute that acts to limit consideration of the mitigating factors of youth during

sentencing. Nor can it be read as confined to, or excluding, certain types of sentencing hearings as we held that the courts have discretion to impose downward sentences “regardless of how the juvenile got there.” *Houston-Sconiers*, 188 Wash.2d at 9, 391 P.3d 409.

Gilbert, 438 P.3d at 136.

The State’s inference that this is no more than an *O’Dell* consideration is contrary to the holdings of *Houston-Sconiers*, *Ramos* and now *Gilbert*. BOR at 15.

c. A *Miller* hearing is required whenever a juvenile offender is haled into adult court and not just when a juvenile faces a de facto life sentence. The State argues in its Brief of Respondent that the only time a *Miller* hearing is required is when the sentence a juvenile is facing is a “defacto life sentence.” BOR at 14. The deputy prosecutor then faults Ms. Allen for citing *State v. Ramos*, arguing “[t]he Supreme Court does not require the same formal, searching scrutiny for all sentences. Instead, sentencing courts must exercise the discretion they have always had: to take youthfulness into account as a mitigating factor.” BOR at 14.

The State’s argument that only de facto life sentences require *Miller* hearings is meritless. The State can cite no authority for such a misguided argument. It was *Houston-Sconiers* that ruled a *Miller* hearing is required and that was not a de facto life

sentence case at all. In *Houston-Sconiers*, both juveniles were given exceptional sentences of 0 months, but both were then sentenced to the firearm enhancements, leaving sentences of 31 and 26 years. Even though they were not facing de facto life sentences (Zylon Houston-Sconiers would be released when he reached approximately 48 years of age, while Treson Roberts would be released at the age of approximately 42. Accordingly, the State's argument that a court need not undergo a "formal, searching scrutiny" *Miller* hearing in Ms. Allen's case is incorrect.

d. The sentencing court failed to consider the mitigating qualities of youth at Ms. Allen's sentencing, requiring reversal. *Houston-Sconiers* mandated that whenever a juvenile offender is sentenced in adult court, the sentencing court must consider the "hallmark features" of youth, which include the juvenile's 1) immaturity, 2) impetuosity, 3) failure to appreciate risks and consequences, 4) surrounding environment, 5) family circumstances, 6) extent of participation in the crime, 7) effect of familial pressures, 8) effect of peer pressures, 9) impact of youth on legal defense, and 10) factors suggesting successful rehabilitation. 188 Wn.2d at 23, citing *Miller*, 132 S.Ct. at 2468.

The State argues on appeal that the adult sentencing court "carefully considered Defendant's youth as a mitigating factor and

entered a low-end standard-range sentence as a result.” BOR at 15, citing 5RP 578. But the State is again mistaken. Mitigating qualities of youth were not discussed at all at Ms. Allen’s sentencing.

The State did not file a sentencing memorandum. The State’s only comment at sentencing about the ten mitigating qualities of youth was that *Houston-Sconiers* should not apply because Ms. Allen’s did not have a lack of impulse control, arguing the crime was planned and repeated. 5RP 568, 571. Arguing the justification for a high-end sentence based on one of the ten mitigating qualities (impulsivity) is not a full *Miller* hearing.

Defense counsel also failed to argue any of the ten mitigating qualities of youth to the court, instead arguing that Ms. Allen was a juvenile when the offenses occurred and the court had discretion to impose a sentence below the standard range. 5RP 572. Defense counsel did not speak about the ten *Miller* considerations mandated by *Houston-Sconiers* at sentencing, but did recommend a sentence below the standard range due to her “youthfulness.” 5RP 574. Defense counsel never once attempted to explain to the court any information about how Ms. Allen was impetuous, immature, lacked impulse control, or how any *Miller* differences applied to the case presented. 187 Wn.2d at 444.

The author of the PSI by DOC also failed to address the mitigating qualities of youth. CP 221. The record shows that no party addressed the ten mitigating qualities of youth and the sentencing court never made any mention of the ten mitigating qualities of youth as required by *Houston-Sconiers*. The court did not consider the required mitigating qualities of youth, but sidelined the consideration, ruling that an exceptional sentence downward was inappropriate, as the jury found an aggravating factor that she abused her position of trust. 5RP 578. But *Houston-Sconiers* required the court to consider Ms. Allen's impulsivity, impetuosity, failure to appreciate risks and consequences, surrounding environment, family circumstances, extent of participation in the crime, effect of familial pressures, effect of peer pressures, impact of youth on legal defense, and factors suggesting successful rehabilitation. 188 Wn.2d at 23.

The *Ramos* Court held that at a *Miller* hearing,

The court and counsel have an affirmative duty to ensure that proper consideration is given to the juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 132 S.Ct. at 2468.

Ramos, 187 Wn.2d at 443. The Washington Supreme Court recognized that a *Miller* analysis requires a court to do more than

simply recite differences between juveniles and adults and then make conclusory remarks that the offender failed to show he should receive an exceptional downward sentence. *Ramos*, 187 Wn.2d at 443, citing *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572 (2014).

The State argues on appeal that it is an “unreasonable request” for Ms. Allen to demand a court give greater weight to the mitigating qualities of youth. BOR at 15. The State also states it is an unreasonable request because age does not automatically entitle every juvenile defendant to an exceptional sentence.” BOR at 15, citing *O’Dell*, 183 Wn.2d at 693. Again, the State misses the point. *Houston-Sconiers* mandates the court give consideration of the mitigating qualities of youth every time a juvenile offender is before an adult sentencing court. The State is also conflating the two issues: the required *Miller* hearing under *Houston-Sconiers*, *Ramos*, and *Gilbert*, followed then by a sentencing court’s discretion to impose a sentence below the standard range. The court must hold a *Miller* hearing, but then has discretion to impose an exceptional sentence below the standard range or not.

Ms. Allen has not demanded that the sentencing court impose an exceptional sentence. Instead, she argues that before the sentencing court can impose *any* sentence, it must conduct a

Miller hearing. The State's argument that Ms. Allen received a full, meaningful consideration of her youth as a mitigating factor is meritless. In the State's 16-page Brief of Respondent, the only citation that the judge considered the mitigating qualities of youth is in a block quote that states noting about any consideration of the mitigating qualities of youth. BOR at 8, citing 5RP 578. Of that block quote, the only line about youth is as follows:

And I appreciate that you were young at the time. I'm not going to give an exceptional sentence downward. I don't think that's appropriate. You were young but also the jury found an aggravating factor there, and I need to consider that as well, because that's what the Legislature talks about in terms of the jury findings to these things.

Id.

Had the sentencing court conducted a *Miller* hearing and then decide to impose a standard range sentence, Ms. Allen would have no argument. But here, the court failed to properly consider the mitigating qualities of youth and simply determined youth did not matter because of jury finding of an aggravating factor. 5RP 578.

Under *Houston-Sconiers*, *Ramos*, *Aiken*, *Gilbert*, and this Court's recent decision, *State v. Kitt*, ___ Wn. App. 2d ___, 2019 WL 2509251 (Div. 2, June 18, 2019), the sentencing court had a duty to actually meaningfully consider Ms. Allen's youth at the time of

the offenses as a possible mitigating circumstance, despite a jury finding of an aggravating factor.

Concerning the aggravating factor of abuse of a position of trust, defense counsel argued that, with this type of offense, there is an inherent abuse of trust that typically occurs. 5RP 572. But this even has more meaning, defense counsel argued, when you deal with two minors, rather than an adult abusing a position of trust over a minor. *Id.* Had the court considered the mitigating qualities of youth, the court would have been required to assess whether the abuse of trust finding itself could be mitigated by Ms. Allen's impulsivity, immaturity, impetuosity, the circumstances of the offenses, her family circumstances, peer pressure and the factors suggesting successful rehabilitation. *Houston-Sconiers*, 188 Wn.2d at 23, citing *Miller*, 567 U.S. at 477-78.

2. UNDER ARTICLE 1, SECTION 14 OF THE WASHINGTON CONSTITUTION, THE SENTENCING COURT WAS ALSO REQUIRED TO CONSIDER THE MITIGATING FACTORS OF YOUTH AT MS. ALLEN'S SENTENCING

The State failed to respond to Ms. Allen's Art. 1, § 14 claim, which provides Ms. Allen even greater protection against cruel punishment than the Eighth Amendment. *State v. Bassett*, 192 Wn.2d 67, 78, 428 P.3d 343 (2018). Ms. Allen assumes the State has conceded that a *Miller* hearing was required under our State

Constitution. The Washington Supreme Court in *State v. Basset* underwent a *Gunwall* analysis to determine whether a Washington statute authorizing the imposition of a sentence of life imprisonment without parole for defendants aged 16 and 17 violated the State Constitution. *Id.* at 79. The *Bassett* Court concluded “[t]he six *Gunwall* factors all direct us toward interpreting article I, section 14 more broadly than the Eighth Amendment,” and holding “in the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment.” 192 Wn.2d at 82.

Even if the *Houston-Sconiers* decision extended Eighth Amendment protections beyond the protections afforded in *Miller*, the Washington Supreme Court recognizes that our State constitution would require a *Miller* hearing whenever a juvenile is haled into adult court for sentencing, even when a juvenile is faced with less than a de facto life sentence.

Because the sentencing court failed to undergo a *Miller* analysis under the Eighth Amendment and art. I, § 14 of the Washington State Constitution, this Court should remand Ms. Allen for resentencing.

3. THE STATE VIOLATED AN *IN LIMINE* MOTION CONCERNING EVIDENCE ASSOCIATED WITH MS. ALLEN'S SEXUAL ORIENTATION

A mistrial must be granted when the defendant has been prejudiced and only a new trial could ensure that the defendant will be tried fairly. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). The State argues that the error was not a serious error, and that homophobia did not affect Ms. Allen's trial. BOR at 11-12. But such reasoning is purely speculative. And moreover, even though the judge as well as the parties may not believe gay people sodomize children, the problem exists that some people still do.

When a jury hears that a child was molested by a person of the same sex, studies have shown that the jurors will be more pro-prosecution and will find the victim more credible. Tisha Wiley & Bette L. Bottoms, Effects of Defendant Sexual Orientation on Jurors' Perceptions of Child Sexual Assault, *Law and Human Behavior* 33(1): 46-60 (May 2008). The authors conducted a study of mock jurors to "test whether defendants perceived to be gay face unfair presumptions of guilt in child sexual abuse cases." *Id.* at 46. Studies in 2000 showed that mock jurors were more likely to convict gay than straight defendants. *Id.* at 47.

During this more recent study, "victims of gay defendants were rated as significantly more credible than victims of straight

defendants." *Id.* at 52. Moreover, trends in the study showed that gay defendants were rated "guiltier" and more responsible than straight defendants. *Id.* Of note, "jurors made more pro-prosecution judgments when the victim was a girl versus a boy." *Id.* at 54. Jurors were also determined to be significantly more likely to vote guilty when the victim was a young girl versus a boy and be more morally outraged. *Id.* Accordingly, the State's argument that the victim stating that Ms. Allen was a lesbian "was not a serious error" is meritless.

The testimony was also prejudicial, requiring a mistrial. As the study results above demonstrate, jurors are more likely to convict a person if they are the same sex as the victim. The jurors also find the victims more credible when they are victims of a same-sex sexual assault. With this type of perceived guilt by the jurors, even the weakest of evidence seems stronger.

This case was a "she said versus she said" and the alleged victim should not have seemed credible to the jury. Indeed, the jury acquitted Ms. Allen concerning the two allegations of rape. 4RP 556-67, CP 213, 215. But the jury found the victim at least credible when it came to the two child molestation charges, Counts 3 and 4. This occurred even though the evidence was weak. For Count 4, Bill Allen testified that the family did not own a DVD player

at any time, even though T.W. said Ms. Allen watched a movie on one with her. 3RP 431.

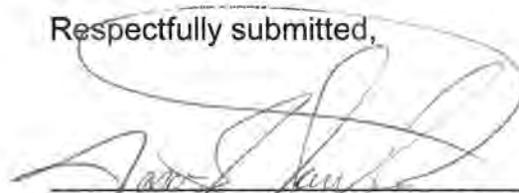
"[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010). In "sex cases, ... the prejudicial potential of prior acts is at its highest." *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). This Court should reverse Ms. Allen's convictions and remand for a new trial.

B. CONCLUSION.

For the foregoing reasons, Ms. Allen requests this Court reverse her conviction. In the alternative, should this court affirm her conviction, Ms. Allen requests this Court remand her case for resentencing so that the court can conduct a proper *Miller* analysis.

DATED this 11th day of July, 2019.

Respectfully submitted,



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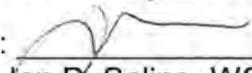
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Date: 07/11/2019

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