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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

AARON ATA TOLEAFOA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge James Orlando

No. 15-1-01426-1

Brief of Respondent

MARY E. ROBNETT
Prosecuting Attorney

By 
Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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I. INTRODUCTION

The Defendant engaged in a violent crime spree which spanned several days and many victims. His case was decided in adult court after a declination hearing. Because the Defendant agreed to plead guilty and in consideration of his youth, the State significantly reduced the charges. He is convicted of Attempted Murder in the Second Degree with a firearm enhancement, Robbery in the First Degree, Burglary in the First Degree, Theft of a Motor Vehicle, and Taking a Motor Vehicle in the Second Degree. The Defendant acknowledged that “Mr. McCollaum will lose his arm and almost lost his life because of Aaron’s actions.” CP 355.

At the first sentencing hearing, the prosecutor asked for a high-end sentence of 281 months (23+ years). The Defendant asked for a 15 year sentence (an exceptional sentence downward), conceding that “Juvenile life is clearly not enough.” CP 355.

While the appeal was pending, the Washington Supreme Court issued its opinion in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). Although the judge had considered the Defendant’s youth at the first sentencing hearing, the matter was remanded for the lower court’s consideration of the new case. The court then imposed an exceptional sentence downward of 16 years.

Having received what he asked for, the Defendant now challenges the Sentencing Reform Act and declination statute as unconstitutional. He argues that if a sentencing court finds youth to be a mitigating factor, the court must sentence the defendant “as a child” under the Juvenile Justice Act. No authority supports this argument. To the contrary, the result in *Houston-Sconiers*, was to permit the sentencing court to apply RCW 9.94A.535 to firearm enhancements, which is what happened in this case.

For the first time on appeal, he argues that the restitution order, which he repeatedly agreed to, is an abuse of discretion. The Defendant argues that the order for actual damages is unjust due to his incarceration, indigency, or youth. He asks this Court to find that the juvenile statute applies to his restitution order. No authority supports any part of this challenge. Moreover, doctrines of waiver and invited error prevent consideration of this claim.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is there any authority for Defendant’s claim that, if the sentencing court finds youth to be a mitigating factor, the court must ignore the unchallenged declination order transferring jurisdiction and “sentence [him] like a child” under the Juvenile

Justice Act, notwithstanding the law of the case, statutory mandates, and legal precedent?

2. Will the Court entertain a challenge to restitution raised for the first time on appeal and after the Defendant explicitly waived objection at sentencing?
3. Is there any merit to the Defendant's claim that, after declination from juvenile jurisdiction, Chapter 13.40 RCW applies to his restitution order?

III. STATEMENT OF THE CASE.

In October of 2014, the Defendant/Appellant Aaron Tolefoa engaged in a crime spree over several days. CP 6-9, 509-15. He was a 15 year old with a felony history of car theft living a *de facto* emancipated lifestyle and the "hardest person" he knew. CP 41, 53, 70, 352, 520; RP 24-25, 39. On the first night, the Defendant and his accomplices broke into Rogelio Campos' home and stole a .223 Bushmaster semi-automatic rifle and an AR-15 (with laser sight system and eight magazines) which the Defendant used over the next several days in various armed crimes. CP 6-9, 509-15. They also stole Mr. Campos' 2011 Toyota Tundra, a bow and arrow, alcohol, and many other items of value. CP 6, 8, 363, 494-99. For these crimes, the Defendant would eventually be charged with first degree

burglary with a firearm enhancement, theft of a firearm, theft of a motor vehicle, and unlawful possession of a firearm. CP 3-4 (counts IV, V, VI, and VII).

The second night, the Defendant and his accomplices stole Charles Banks' Ford Expedition while it was charging. CP 6. They used the Expedition in an armed robbery to carjack Mia McDaniel, pointing the rifle at her face and snatching her bag with her cellphone and wallet inside. CP 6-8, 511. For these crimes, the Defendant would eventually be charged with first degree robbery with a firearm enhancement and second degree taking a motor vehicle without permission. CP 2, 4 (counts III and VIII).

Riding in Ms. McDaniel's Jeep Liberty, the Defendant attempted to rob David McCollaum, pointing the green laser of the AR-15 at the victim's head and ordering the victim out of his Subaru. CP 7-8. When Mr. McCollaum did not comply and before the victim could reach his handgun,¹ the Defendant shot him in the chest. CP 7-8, 512-13. The Defendant and his accomplices drove off, not knowing whether Mr. McCollaum would survive. CP 7-9. For this shooting, the Defendant was originally charged with attempted murder in the first degree and assault in the first degree – with firearm enhancements. CP 1-2 (counts I and II).

¹ The Defendant would claim that he shot Mr. McCollaum after the victim raised a handgun and pointed it at him. CP 7-8. However, the victim reported he was unable to reach his gun before he was shot, and the Defendant was unable to describe the weapon. CP 7-8.

A few days later, the Defendant was seen acting “crazy,” firing the stolen Bushmaster rifle, and then crawling through an open window in an apartment complex with the weapon. CP 7-8, 514. Police detained him, but he slipped the handcuffs and was chased over several fences. CP 7. Police tased him, but he crawled under a trailer and fled out the other side. CP 7. When finally restrained by several deputies, he gave a false name. CP 8. For this chain of events, the prosecutor only charged the misdemeanors of obstruction and making a false statement. CP 4-5 (counts IX and X).

The Defendant gave a recorded statement admitting the various offenses, including shooting Mr. Collaum in the chest with the assault rifle. CP 515.

After a declination hearing, the Defendant was charged in adult court. CP 1-5, 342-43; RP 7-8. If convicted as charged, the Defendant’s standard sentencing range would have been 457.5 to 369.75 months, i.e. 38-45 years.²

A year and a half after his arrest and just before trial, the Defendant pled guilty to amended charges which halved the original sentencing range.

² Calculation is based on an assumption that the assault would be dismissed under the double jeopardy clause, resulting in an offender score of 8 (two points each for robbery 1 and burglary 1; one point each for firearm theft, vehicle theft, unlawful possession, and taking a motor vehicle) on an attempted murder one plus three firearm enhancements.

CP 27, 301, 343. The amendment reduced the attempted murder charge from first to second degree. CP 10-23. The State also agreed to dismiss the counts of first degree assault, theft of a firearm, unlawful possession of a firearm, obstruction, false statement, and three of the four firearm enhancements. CP 1-3, 10-12. His eventual standard range was 206.25 to 281.25 months, i.e. 17-23 years.

STANDARD RANGE (not including enhancements)	PLUS ENHANCE	TOTAL STANDARD RANGE (including enhancements)
146.25 – 221.25 months	60 months Firearm	206.25 – 281.25 months

CP 27, 301.

In the plea agreement, the prosecutor advised that the State would be recommending the high end of the standard range. CP 16. Mr. Campos expressed how the burglary and theft have harmed his family both financially and psychologically. CP 502-03 (five-year-old son cannot sleep and is afraid to enter his own home). Mr. McCollaum and his loved ones asked for the maximum. CP 533-40.

The Defendant filed a sentencing memorandum and mitigation report, discussing recent case law regarding youth in sentencing and requesting an exceptional sentence of 15 years (180 months). CP 339-461. Defense counsel conceded that “Juvenile life is clearly not enough.” CP

355. “Aaron has stated he would accept 15 years since the day undersigned counsel came on this case.” CP 355.

The Honorable Judge James Orlando was not persuaded that the Defendant’s youth merited a downward departure and imposed 260 months. CP 30-31, 41-42 (behavior and history demonstrated the Defendant appreciated the wrongfulness of his conduct).

The prosecutor gave notice in the plea negotiation that the State would be seeking restitution. CP 16. As a direct result of the Defendant’s act, Mr. McCollaum has incurred significant medical bills and lost wages. CP 465-74, 478-79 (approximately \$285,000). The Defendant’s bullet damaged the passenger door and drenched the upholstery and carpet in Mr. McCollaum’s blood – resulting in over \$5,000 in damage. CP 475-77, 480-86. Rogelio Campos’ losses as a result of the burglary and car theft are approximately \$7,500. CP 465, 487-501, 504-05.

The restitution order was entered with the Defendant’s agreement. CP 37-38. The Defendant did not appeal from that agreed order.

In his first appeal, this Court remanded for resentencing, noting that, while the superior court considered the Defendant’s youth, it did not have

the benefit of *Houston-Sconiers*.³ CP 39, 41. In particular, the lower court was directed to consider (1) whether the offender's youth prevented him from appreciating the risks and consequences of his acts; (2) how the offender's environment affected him; (3) whether his youth impacted his legal defense; and (4) any factor suggesting the offender might be successfully rehabilitated. CP 43-44.

Additional victim impact statements were filed promptly. CP 541-45. However, the resentencing hearing was rescheduled four times. RP 4. Two days before the hearing and while the prosecutor was away from the office, the Defendant filed almost 250 pages as a "mitigation package," which described that the Defendant is working toward rehabilitation. CP 48-297. The filing concluded with a request that the court impose a sentence which would result in the Defendant's release by the age of 25, i.e. a sentence of approximately 120 months. CP 62.

Despite the late filing, the prosecutor did not ask for a fifth continuance out of respect for Mr. McCollaum's attendance.

The victim in this case is living out of town and is present here for the sentencing, and it's a great hardship for him to have to keep making the trip up here, so I would ask that we proceed.

³ *Houston-Sconiers* overruled *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999) with regard to juveniles. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21 n. 5, 391 P.3d 409 (2017). *Brown* held that sentencing courts lack discretion to run firearm enhancements concurrently even as an exceptional sentence. *Brown*, 139 Wn.2d at 29.

RP 4. The prosecutor again recommended the high end of the standard range, explaining that the State had factored the Defendant's youth and his eventual cooperation/confession when it made the "very substantial reduction" of charges in plea negotiation. RP 8-10.

... apparently the defendant has done some positive things while at the Department of Corrections, and that makes me hopeful, and it should make us all hopeful. But what we have to remember is that the things that he's doing in the Department of Corrections are the things that are expected of individuals at the Department of Corrections. We want them to take advantage of the services and opportunities that they have at the Department of Corrections. But when they comply with that, we can't -- just because they have complied with that, we cannot forget what happened back in October of 2014.

RP 19.

Mr. McCollaum also asked for the high end.

... If he turns his life around, that's great, but that doesn't absolve him of the nature of the crimes. There still needs to be justice served for what was done, the same as if someone ran up a huge credit card debt through uncontrolled spending, they learn then how to handle that credit; there's still that debt there.

His actions have created a debt that needs to be paid. It's hard on his family. It's hard on my family. It's hard on everyone involved, but it still needs to be paid.

RP 17. The Defendant's bullet destroyed Mr. McCollaum's shoulder socket resulting in the loss of 90 percent of the use of his dominant arm and his

profession as an OR nurse. CP 536; RP 15-16. He is not able to provide for his family, and he is in constant, unbearable pain. RP 15-16.

Judge Orlando stated that the court recognized long ago that the defendant was capable of rehabilitation. RP 40 (in the declination process), 42. The judge noted that the Defendant had the maturity and experience to understand the consequences of his actions; in choosing to live independently of his family, the Defendant was impacted by the negative environment he had chosen; the Defendant's criminal history was impacted by his brain development; and the Defendant has a demonstrated ability to improve through his involvement in Juvenile Rehabilitation Administration (JRA) programs. CP 315-16. The court found the Defendant's chosen environment was a mitigating circumstance and provided a substantial and compelling reason to depart downward from the standard range. CP 316.

The court sentenced the Defendant to 192 months (16 years), i.e. 68 months less than previously imposed, a departure which effectively removed the firearm enhancement penalty. CP 301, 304; RP 45.

Defense counsel waived any objection to restitution, requesting only that the court not impose any discretionary LFOs. RP 22 ("Certainly, restitution is not discretionary, so I'm not going to touch on that; that's mandatory, absent some other showing of exceptional circumstances that would have to be addressed at a later time once the principal is paid.").

Accordingly, the court struck some fees, but left the restitution order intact.
CP 302; RP 46-47.

In this second appeal, the Defendant argues that, the declination order notwithstanding, he should be “treated like a child” and sentenced under Chapter 13.40 RCW.

IV. ARGUMENT.

A. THERE IS NO ERROR IN SENTENCING THE DEFENDANT UNDER THE SRA FOLLOWING DECLINATION FROM JUVENILE COURT.

1. The challenge to the sentence is improper under the separation of powers doctrine and the statute.

The Defendant complains that the Sentencing Reform Act (SRA) should not be applied to him. He asks this Court to direct the superior court to sentence him under the Juvenile Justice Act (JJA). Because it is the Legislature, not the courts, which fixes legal punishments for criminal offenses, this is not within the courts’ authority.

The Washington Supreme Court “has consistently held” that the fixing of legal punishments for criminal offenses is a legislative, rather than a judicial, function. *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719 (1986) (citing *State v. Le Pitre*, 54 Wash. 166, 169, 103 P. 27 (1909)). The power of the legislature in that respect is plenary. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). If the judicial power does not follow

the laws prescribed, it encroaches on the legislative authority. *State v. Le Pitre*, 54 Wash. at 629. When the activity of one branch threatens the independence or integrity or invades the prerogatives of another, there is a violation of the separation of powers doctrine. *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

The Legislature has enacted juvenile offender sentencing standards at RCW 13.40.0357. However, for the purposes of Chapter 13.40 RCW, a “juvenile” is a person “who has not been transferred to adult court pursuant to RCW 13.40.110,” (i.e. a person who has not been transferred to adult court after a declination hearing). RCW 13.40.020(15). The Defendant’s case was in adult court subsequent to a declination hearing. CP 343, 357. Therefore, Chapter 9.94A RCW applies to his sentence.

The Sentencing Reform Act accords the trial court limited discretion. *State v. Ammons*, 105 Wn.2d at 181; RCW 9.94A.010 (SRA “structures, but does not eliminate, discretionary decisions affecting sentences”). Generally, a trial judge is expected to impose a sentence within the standard range as determined by the defendant’s offender score and the seriousness level of the offense. RCW 9.94A.505(2)(a)(i); RCW 9.94A.517; RCW 9.94A.518; RCW 9.94A.525; RCW 9.94A.589(1)(a). However, the court may depart from these ranges and impose an exceptional sentence. RCW 9.94A.535.

The Defendant challenges his exceptional sentence below the standard range. The Legislature has directed that a sentence outside the standard range may be appealed in limited fashion. RCW 9.94A.585(2).

Appellate review of an exceptional sentence involves three determinations. First, the appellate court determines whether the trial court's reasons for imposing an exceptional sentence are supported by the record. This is a factual inquiry and the trial court's findings will be upheld unless they are clearly erroneous. Second, the reviewing court determines, " 'as a matter of law' ", whether the trial court's reasons justify an exceptional sentence. Third, the reviewing court must determine whether the trial court abused its discretion and imposed a sentence which was "clearly excessive" or "clearly too lenient."

State v. Hodges, 70 Wn. App. 621, 623, 855 P.2d 291, 292-93 (1993) (citations omitted). The Defendant does not challenge that there was a basis to depart that was substantial and compelling. Indeed, he requested the departure. And the Defendant does not challenge that the departure downward was clearly too lenient. Because the Defendant could not challenge a standard range sentence as being excessive (RCW 9.94A.585(1)), he certainly cannot challenge an exceptional *downward* sentence on this basis – nor does he. The sentence must be affirmed.

The Defendant's challenge is improper under the law drafted by the appropriate branch of government.

2. The court imposed a sentence outside the standard range after finding the mitigating qualities of youth provided substantial and compelling reason to depart downward.

The Defendant argues that, if the sentencing court finds that offenses are mitigated by the offender's youth, the court should dispense with Chapter 9.94A RCW and "presumptively sentence [the defendant] as a child" under Chapter 13.40 RCW as if a declination hearing never took place. Brief of Appellant (BOA) at 2, 14; Supplemental Brief of Appellant (SBOA) at 3. This is not the law.

The Defendant claims he does not know what the law is, that the courts have not provided guidance "on what standard to use or what presumption applies once it finds the crime is mitigated by youth." BOA at 22. In fact, the procedure is, and has long been, very plain. The judge may depart from standard ranges under the exceptional sentence statute for an appropriate reason. RCW 9.94A.535. Youth has always been an appropriate reason to depart downward from the standard range. *Matter of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018) (citing RCW 9.94A.535(1)(e)).

For defendants who were under the age of 18 at the time of the offense, no statute may limit the courts' consideration of the mitigating factors of youth during sentencing. *State v. Gilbert*, 193 Wn.2d 169, 175, 438 P.3d 133, 136 (2019). For example, a court may depart downward from

otherwise mandatory firearm enhancements after proper consideration of *Miller* factors. *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). A downward departure of zero incarceration is permitted under RCW 9.94A.535. *Houston-Sconiers*, 188 Wn.2d at 24.⁴

The Washington Supreme Court has upheld the SRA standard ranges and exceptional sentence provision as applied to youthful offenders. *Gilbert*, 193 Wn.2d at 175-76 (explaining that *Houston-Sconiers* held that sentencing courts have the discretion to consider exceptional downward sentencing for juvenile offenders even in the face of otherwise mandatory provisions).

We held, “ ‘[I]t is the duty of this court to construe a statute so as to uphold its constitutionality.’ ” ...

... We have upheld statutes like the one at issue in this case, RCW 13.04.030(1)(e)(v)(C), which “authorizes juveniles to be tried as adults, but does not mention [firearm or other sentence enhancements].”

Houston-Sconiers, 188 Wn.2d at 24-25 (quoting *State v. Furman*, 122 Wn.2d 440, 457-58, 858 P.2d 1092 (1993)). The remedy to mandatory sentencing provisions that would otherwise deprive a youthful offender of a meaningful opportunity for release is to give courts discretion to impose

⁴ But for the requirement that a departure not be clearly too lenient, the sentencing court could sentence a defendant to zero incarceration on the base sentence and could sentence a *Miller* defendant to zero incarceration on the entire sentence. In other words, under the SRA, the court has greater discretion to depart downward for youthful considerations than in juvenile court where the respondent’s youth is already factored into the ranges.

exceptional sentences downward, not to overturn a declination decision and apply juvenile sentencing standards.

Here, the Defendant's standard range was 206.25 – 281.25 months (146.25 – 221.25 months plus the 60 month firearm enhancement). CP 301. The court departed from that range and imposed a term of 192 months. CP 304.

The Defendant claims the court found he was "entitled" to an exceptional sentence. BOA at 23-24. This misrepresents both the record and the statute. RP 45; RCW 9.94A.535 (court "may" grant an exceptional sentence after finding that a factor provides a substantial and compelling reason to depart). The court chose to impose an exceptional sentence, a decision that was entirely within its discretion.

3. The Defendant is not a member of the *Miller* class.

Insofar as the Defendant relies upon Eighth Amendment jurisprudence, it should be noted that Toleafoa is not in the class to which this body of work applies. The Eighth Amendment's prohibition of cruel and unusual punishment guarantees against excessive and disproportionate sanctions. *Miller v. Alabama*, 567 U.S. 460, 469, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Because children are different with a unique capacity for rehabilitation and change, courts must have the discretion to consider

this when faced with a sentencing scheme that otherwise would not permit a meaningful opportunity for these offenders to be released in their lifetime subsequent to their rehabilitation. *Miller*, 567 U.S. at 477-78. In other words, the *Miller* line of cases regards defendants who were under the age of 18 at the time of their offenses who are facing sentencing schemes which could *deny them a meaningful opportunity for release in their lifetimes*. *Miller*, 567 U.S. at 479 (quoting *Graham v. Florida*, 560 U.S. 48, 75, 130 S. Ct. 2011, 2030, 176 L. Ed. 2d 825 (2010)).

The United States Supreme Court cases have been in the context of life without parole cases. However, lower courts have extended the application to *de facto* life sentences. *State v. Ramos*, 187 Wn.2d 420, 437-39, 387 P.3d 650 (2017).

The *Houston-Sconiers* decision rested exclusively on Eighth Amendment grounds. *State v. Bacon*, 190 Wn.2d 458, 467, 415 P.3d 207, 212 (2018); *Houston-Sconiers*, 188 Wn.2d at 18-20, 23. Therefore, the Washington Supreme Court opinion lacked authority to expand the United States Supreme Court interpretation of the Eighth Amendment to another class. The defendants were in the *Miller* class, because they were facing potential *de facto* life sentences. *Houston-Sconiers*, 188 Wn.2d at 8 (defendants were facing sentences in excess of 40 years); *People v. Buffer*, -- NE.2d --, 2019 IL 122327, 2019 WL 1721435, ¶ 41 (Ill. filed Apr. 18,

2019) (subject to revision or withdrawal) (holding that a sentence greater than 40 years is a *de facto* life sentence).

The Defendant Tolefoa was not facing and has not received a life sentence. He was facing a possible 23 year sentence, which would have guaranteed his release by the age of 38. CP 301. He received 16 years. CP 304. He will be about 30 years old when he is released. There was never any threat that his sentence could have denied him a meaningful opportunity for release in his lifetime. He is not in the *Miller* class.

The court ran the firearm enhancement concurrent with the base sentence. CP 304, 317. The law requires it run consecutive. RCW 9.94A.533(3)(e). The only exception to the law is for members of the *Miller* class. However, the State has not appealed the sentence since the same sentence could have been accomplished by reducing the base sentence and running the enhancement consecutive.

4. There is no legal basis to disregard the declination order.

The Defendant notes that the State bears the burden at declination hearings. BOA at 23. The State met that burden and the court ordered a transfer to adult court. The order is the law of the case.

Notwithstanding these facts, the Defendant argues “the SRA should not govern” his sentencing. BOA at 23-24. The Defendant offers no

authority demonstrating that the mitigating factors of youth invalidate an unchallenged declination ruling so as to result in a presumptive juvenile sentence. None exist. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065, 1071 (2001) (when a party fails to provide authority for its argument, the court may presume this is because the party could find no authority).

The Defendant notes that the Washington Supreme Court has held recently that WASH. CONST. art. I, § 14 provides greater protection than the Eighth Amendment in the context of juvenile sentencing. *State v. Bassett*, 192 Wn.2d 67, 81, 428 P.3d 343, 350 (2018) (holding that life sentences for minors is unconstitutional). He concludes that this means he “should be presumptively be treated as a child at sentencing.” BOA at 32. The conclusion does not follow from the premise.

The Defendant compares adult and juvenile sentencing laws and ranges with the intention of showing disproportion.⁵ BOA at 24-26, 34. It is of no mention that the systems are different. Of course they are. This is

⁵ The Defendant argues that a proportionality analysis “allows for comparison between the juvenile and adult sentencing schemes.” BOA at 33 (citing *State v. Bassett*, 192 Wn.2d 67, 84-85, 428 P.3d 343 (2018)). This is false. Under a *Fain* analysis, the court considers the legislative purpose of, for example, the persistent offender statute or the death penalty statute – not entire sentencing schemes. *Bassett*, 192 Wn.2d at 82 (citing *State v. Witherspoon*, 180 Wn.2d 875, 888, 329 P.3d 888, 895 (2014); *State v. Davis*, 175 Wn.2d 287, 343, 290 P.3d 43, 68 (2012); *State v. Manussier*, 129 Wn.2d 652, 678, 921 P.2d 473, 485 (1996)). The categorical bar analysis, not the *Fain* test, is the appropriate tool when the claim is that a sentence is categorically unconstitutional based upon the nature of the juvenile offender class. *Id.* at 82-83.

the reason for a declination hearing. The juvenile court declined the Defendant from juvenile jurisdiction to adult court, finding that this system was more appropriate in the Defendant's case. The juvenile court necessarily considered the differences of the systems and specifically the sentencing differences.

A declination proceeding and order are of no small consequence. As the sentencing court noted, the Defendant's transfer via declination hearing is different from how the *Houston-Sconiers* defendants arrived in adult court via automatic adult jurisdiction. RP 40; *Houston-Sconiers*, 188 Wn.2d at 8. Automatic adult jurisdiction depends only upon the crime charged and the accused's age. RCW 13.04.030(1)(e)(v). In a declination hearing, the juvenile court makes a full consideration of the respondent.

Here the declination process took six months. CP 1. At the conclusion of the process, the juvenile court found every factor but criminal history weighed in favor of declination and was particularly persuaded by the seriousness of the crimes and the Defendant's sophistication, intelligence, and independence. CP 352, 357; RP 7-8. The juvenile court considered carefully the length of sentence and rehabilitative programs in each system and found that a transfer into the adult system was in the best interest of the juvenile and public. *State v. Saenz*, 175 Wn.2d 167, 175, 283

P.2d 1094 (2012) (citing RCW 13.40.110). The Defendant has not and does not challenge the declination order.

Moving a case to adult court is a critically important action determining vitally important statutory rights of the juvenile, including the sentence range. *Saenz*, 175 Wn.2d at 174 (quoting *Kent v. United States*, 383 U.S. 541, 556, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966)). The court takes testimony of probation and rehabilitation professionals, crime witnesses, and family. There is a right to appeal the order. *State v. Kells*, 134 Wn.2d 309, 949 P.2d 818 (1998). The Defendant did not appeal the order. The transfer is irrevocable, “a one-way street with no return” resulting in the forfeiture of “the right to be tried in juvenile court for all future offenses.” *State v. Saenz*, 175 Wn.2d 167, 174, 283 P.2d 1094 (2012).

The Defendant claims that if the adult court imposes an exceptional downward sentence based on youthful considerations, then the work of the declination hearing is undone. There is no authority or rationale for this. The standard for declination (Kent factors) is not equivalent to the standard for departure from the standard range. In fact, as many have noted, the same facts which support declination can also support mitigation. That is true here. In the consideration of one of eight Kent factors, the juvenile court found that the Defendant’s choice and ability to live independently from his

parent and their influence supported declination. RP 7-8. But the environment and influence with which he chose to replace his family provided the sentencing court with a basis to depart downward from the standard range. CP 316. That this fact can weigh both ways is not sufficient to deprive the adult court of jurisdiction or to alter a legislative scheme.

5. The sentence, which the Defendant himself requested at his first sentencing hearing, is not disproportionate to the offense or offender.

Before the sentencing court, the Defendant argued that juvenile life clearly would not be an appropriate punishment for his crimes. CP 355. He asked the court for a sentence of 15 years and received a sentence of 16 years. CP 355. On appeal, he now argues that this sentence is disproportionate under WASH. CONST. art. I, § 14 and that the court should have sentenced him under the juvenile statute to juvenile life. The Court must hold the Defendant to his assertion and reject his moving of the goal posts from appeal to appeal. He has become disingenuous.

In the Defendant's own words:

I robbed a man's house when he was at work making money to support his family. I robbed a man when he was just about to go get groceries to support his family. I robbed a woman who was only coming home from work to support her family. I then shot a man who would have returned to his family if it wasn't for my actions.

RP 36. The Defendant victimized several people in four incidents on different days, by his own admission costing an OR nurse and new father his arm, his livelihood, and almost his life. CP 355. His crimes involved the theft of multiple family vehicles and two stolen assault weapons – pointed at two persons, shot at one.

For all those crimes, he has received a sentence of just 16 years. He will be in prison until he is 30. If he had been an adult, the State would have pressed for 38-45 years.

If the court had not declined jurisdiction and held him for juvenile life, he would be held until the age of 25, serving an 11 year sentence. But these are not juvenile crimes, and by declination order the Defendant is not a juvenile respondent.

This is not a disproportionate sentence – not generally and not for this particular Defendant who was mature and appreciated the wrongfulness of his conduct. CP 41. He was a leader, not a follower. CP 339-42, 374. The Defendant made these choices despite the advantages of a loving and supportive family, good health, and intelligence. CP 55-56, 85-96, 355-56.

The Defendant argues that that sentence is disproportionate because the SRA does not provide the same treatment and rehabilitation available under the JJA. BOA at 24, 26. This is patently false. Regardless of the

sentencing mechanism, a young⁶ offender is incarcerated in JRA facilities and receives JRA services. RCW 72.01.410; Laws of 2019, ch. 322, § 2. The Defendant is proof of this. CP 55-56, 78-79.

This sentence is constitutionally proportionate.

B. THE CHALLENGE TO RESTITUTION IS NOT PRESERVED AND WITHOUT MERIT.

1. Doctrines of waiver and invited error foreclose the Defendant's unpreserved restitution challenge.

The Defendant claims for the first time on appeal that the court should not have imposed restitution where the creditors are insurance companies. Under RAP 2.5(a), an appellate court may refuse to review any claim or error not raised in the trial court. Here, not only did the Defendant fail to preserve error, he affirmatively agreed to restitution and informed the court there was no basis for any challenge. The claim must be denied.

A defendant's agreement or stipulation to restitution waives any later challenge. In *State v. Pierson*, the defendant stipulated to the amount of restitution, but did not agree that the court should impose it. *State v. Pierson*, 105 Wn. App. 160, 164, 18 P.3d 1154 (2001). The court found this waived his challenge to the amount on appeal. *Id.* at 166.

⁶ N.B. Not all *Miller* class members will be youthful. *See e.g. Montgomery v. Louisiana*, - U.S. --, 136 S. Ct. 718, 726, 193 L. Ed. 2d 599 (2016) (court granting *Miller* hearing to 59 year old petitioner whose offense was committed in 1963). *See also* RCW 13.40.301.

This Court must find waiver here where the Defendant not only agreed to the amount but to entry of the order. Defense counsel signed for his client directly under the language stating the client waived his right to be present at the restitution hearing “and agree[d] to entry of this order.” CP 38. When the Defendant appealed from his sentence in 2017, he did not challenge the restitution order. When he was resentenced in 2018, defense counsel in the presence of his client invited the court to carry over the restitution order from the earlier judgment, explicitly waiving objection by explaining that there was no legal basis to challenge the order.

Certainly, restitution is not discretionary, so I’m not going to touch on that; that’s mandatory, absent some other showing of exceptional circumstances that would have to be addressed at a later time once the principal is paid.

RP 22.

If the court committed error, it would have been at defense counsel’s urging. A party may not materially contribute to an erroneous application of law and then complain of it on appeal. *Ames v. Ames*, 184 Wn. App. 826, 849, 340 P.3d 232 (2014) (estopping parties from objecting to a procedure they suggested). If the court committed an error, and the complaining party encouraged it, the complaint will not be heard on appeal. *Id.* Even constitutional error may be waived when invited. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (applying invited error rule to jury instruction which would later be ruled unconstitutional); *Humbert/Birch*

Creek Const. v. Walla Walla Cty., 145 Wn. App. 185, 192, 185 P.3d 660, 663 (2008) (the invited error doctrine is itself constitutional and does not violate due process).

This challenge is improper and may not be heard.

2. The Court did not abuse its discretion in imposing the agreed restitution when no extraordinary circumstance was raised or exists.

Defense counsel did not misadvise the court when he said that restitution is not discretionary. This is a correct recitation of the law.

The court's authority to order restitution is statutory. *Pierson*, 105 Wn. App. at 165.

Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property ... unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. ...

RCW 9.94A.753(5). The statute requires restitution be ordered "unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record." RCW 9.94A.753(5).

The Defendant asserts that "justice demands" that restitution be modified. SBOA at 10. The SRA was crafted to promote respect for the law by providing punishment that is just. RCW 9.94A.010(2). One way in which the SRA promotes justice is by requiring restitution.

Restitution is not a substitute for a civil lawsuit. It serves other purposes, one of which is to impose upon one who breaks the law a thorough understanding of the economic effects of a particular crime upon the victim. *Cf. Davison*, 116 Wash.2d at 922, 809 P.2d 1374 (one of the purposes of the SRA is to “promote respect for the law” by providing just punishment); *see also Johnson*, 69 Wash.App. at 193, 847 P.2d 960 (defendant should not avoid culpability for “reasonable consequences” of her crime).

State v. Fleming, 75 Wn. App. 270, 275, 877 P.2d 243, 246 (1994).

Restitution serves “not only remedial, but also deterrent, rehabilitative, and retributive purposes.” *United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998). There is no more appropriate party to cover the damages than the person who caused them. Here the Defendant pled guilty and agreed to restitution.

The Defendant argues that the restitution should be reduced, due to his “indigency.” SBOA at 10. “Consideration of the defendant’s ability to pay applies to the setting of the minimum monthly payment, not to the setting of the total restitution amount.” *State v. We*, 138 Wn. App. 716, 728, 158 P.3d 1238, 1243 (2007) (rejecting any rule requiring consideration of defendant’s ability to pay in setting restitution). The Defendant is indigent because he is serving a term of incarceration. It is not just to sanction damage without compensation for the reason that the damage was criminal, resulting in incarceration and current unemployment. The justice principle is that “restitution should reflect the consequences of the defendant’s own

conduct.” *Paroline v. United States*, 572 U.S. 434, 134 S. Ct. 1710, 1715, 188 L. Ed. 2d 714 (2014).

Nor is indigency an “extraordinary circumstance” among criminal cases. The courts have found the following circumstances were not extraordinary within the meaning of the statute: imposition of a long term of incarceration, indigency, inability to pay, or the unlikelihood of repayment. *State v. Huddleston*, 80 Wn. App. 916, 929, 912 P.2d 1068, 1074 (1996); *State v. Stuhr*, 58 Wn. App. 660, 665, 794 P.2d 1297, 1300 (1990).

For the first time on appeal, the Defendant asserts that his youth at the time of the offense is an extraordinary circumstance which makes restitution inappropriate. SBOA at 4. The State is aware of no case in which a court has held that youth is an extraordinary circumstance which makes restitution inappropriate. The Defendant offers no authority on point, which gives rise to the presumption that none exists. *Oregon Mut. Ins. Co.*, 109 Wn. App. at 418. He raised no argument to the trial court.

A trial court’s order of restitution will not be disturbed on appeal absent an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167, 1169–70 (2007); *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999) (discretion is abused when exercised in a manifestly unreasonable manner or on untenable grounds).

When interpreting Washington's restitution statutes, we recognize that they were intended to require the defendant to face the consequences of his or her criminal conduct. *State v. Davison*, 116 Wash.2d 917, 922, 809 P.2d 1374 (1991). We do not engage in overly technical construction that would permit the defendant to escape from just punishment. *Id.* The legislature intended "to grant broad powers of restitution" to the trial court. *Id.* at 920, 809 P.2d 1374.

Tobin, 161 Wn.2d at 524. A court cannot be said to have abused its discretion for failing to consider an argument that was not raised to it.

3. *Houston-Sconiers* does not support this restitution challenge.

The Defendant claims that the holding in *Houston-Sconiers* gives sentencing courts discretion to deny restitution to victim insurance companies. SBOA at 4-5. As explained above, *Houston-Sconiers* is an Eighth Amendment case which applies only to that class of youthful offenders who may be deprived of a meaningful opportunity for release in their lifetime. The Defendant Tolefoa is not in that class.

Although *Houston-Sconiers* makes no mention of restitution, the Defendant urges that restitution is part of sentencing. SBOA at 5. Restitution orders are subject to analysis under the Eighth Amendment, because restitution is a form of punishment. *Dubose*, 146 F.3d at 1145. However, the Defendant provides no Eighth Amendment case that has found that restitution for actual damages can be excessive and

disproportionate sanctions. The Court must presume there is none. *Oregon Mut. Ins. Co.*, 109 Wn. App. at 418.

4. RCW 13.40.190 does not apply to an offender where juvenile jurisdiction was declined.

The Defendant asserts that the resentencing court mistakenly believed that the Juvenile Justice Act did not apply to him (SBOA at 2) and urges that the court had discretion to deny restitution to insurance companies under a juvenile provision. That provision reads:

At any time, the court may determine that the respondent is not required to pay, or may relieve the respondent of the requirement to pay, full or partial restitution to any insurance provider authorized under Title 48 RCW if the respondent reasonably satisfies the court that he or she does not have the means to make full or partial restitution to the insurance provider.

RCW 13.40.190(1)(g). This statute does not apply to the Defendant. The court made no error in failing to apply an inapplicable statute.

For the purposes of Chapter 13.40 RCW, “respondent” means “a juvenile who is alleged or proven to have committed and offense.” RCW 13.40.020(25). And “juvenile” means a person “who has not been transferred to adult court pursuant to RCW 13.40.110,” (i.e. a person who has not been transferred to adult court after a declination hearing). RCW 13.40.020(15). The Defendant’s case was in adult court subsequent to a

declination hearing. CP 343, 357. Therefore, he is neither a “juvenile” nor a “respondent.” This provision has no application to the Defendant’s case.

The result of the declination was loss of juvenile jurisdiction and the attendant rights and procedures under the Juvenile Court Act and Juvenile Justice Act. RCW 13.04.030; RCW 13.40.110. Because the Defendant was under adult jurisdiction, the Sentencing Reform Act governs his sentencing procedure.

The sentencing court did not make a mistake by failing to apply an inapplicable statute.

5. *Blazina* has no application to restitution.

The Defendant asserts that *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015) speaks to his request. SBOA at 7. In fact, the case has no relationship to restitution.

The *Blazina* opinion interpreted former RCW 10.01.160(3) which restricts a sentencing court’s authority to impose costs on a defendant absent a finding that the offender is or will be able to pay. The opinion urged sentencing courts to make thorough, individualized inquiries of defendant’s ability to pay before imposing costs.

Costs are defined at RCW 10.01.160(2). The definition does not include restitution. And the legislative amendment which responded to the

concerns raised in *Blazina* did not affect the imposition or collection of restitution. Laws of 2018, ch. 269.

The “ability to pay” standard, which is at the heart of *Blazina*, is one of seven safeguards necessary to insure that imposition of the costs of prosecution (e.g. defense attorney fees and defense investigation costs) do not chill a defendant’s constitutional right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 51, 94 S. Ct. 2116, 2123, 40 L. Ed. 2d 642 (1974); *State v. Blank*, 131 Wn.2d 230, 237-38, 930 P.2d 1213 (1997) (listing the seven safeguards necessary in a cost recoupment statute); *State v. Barklind*, 87 Wn.2d 814, 818, 557 P.2d 314 (1976) (holding that the Washington recoupment statute is identical to Oregon’s which was found constitutional in *Fuller*). The court’s ability to impose restitution has no relationship to a defendant’s decision to accept court appointed counsel. *Blazina* has no application to the question of restitution.

V. CONCLUSION.

The State requests this Court affirm the Defendant's convictions and sentence.

DATED: August 14, 2019

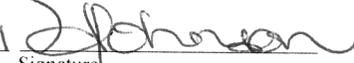
MARY E. ROBNETT
Pierce County Prosecuting Attorney



Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{cefile} 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.

8/14/19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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