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Division II  
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No. 52651-4

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

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STATE OF WASHINGTON,

Respondent,

v.

AARON ATA TOLEAFOA,

Appellant.

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

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REPLY BRIEF OF APPELLANT

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## A. INTRODUCTION

In nearly every area of the law and society, children do not possess the same legal rights and responsibilities as adults because they are deemed categorically less capable and culpable than adults. But when it comes to criminal liability and punishment, which most often affects the most economically and socially disadvantaged children, we abandon these protections for children, holding them to the same legal standards as adults. We subject these children to severe adult criminal penalties, despite knowing that this exceedingly harsh treatment of children is ineffective for children and society, and is plagued by racial disproportionality.

The state and federal prohibitions on cruel and unusual punishment recognize that children are different from adults; these clauses should be interpreted to require a sentencing court to presume that when it finds the child's crime is mitigated by youth, the court must presumptively apply a sentence our legislature has deemed appropriate for a child, unless the State overcomes this presumption, which it cannot do in Aaron's case.

## B. ARGUMENT

**1. The state and federal prohibitions on cruel and unusual punishment recognize that children are different. These clauses should be interpreted to require a court to sentence children whose crimes are mitigated by youth commensurate with the culpability of a child unless the State can establish a juvenile sentence is not justified, which the State cannot establish in Aaron’s case.**

Our state and federal constitutional prohibitions on cruel and unusual punishment should require sentencing courts to give meaning to the constitutional recognition that “children are different”<sup>1</sup> when sentencing children tried in adult court.

- a. The court’s sentence is not limited by any particular provisions of the Sentencing Reform Act, but it must be constitutional.

The authority relied on by the State to argue that the legislature requires courts to follow the mandates of the Sentencing Reform Act (SRA) when sentencing juveniles no longer controls after *State v. Houston-Sconiers*, which held that sentencing courts must have complete discretion when sentencing juveniles in adult court:

[S]entencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not.

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<sup>1</sup>*State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017) (citing *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)).

To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles they are overruled.

*Houston-Sconiers*, 188 Wn.2d at 21. The Court’s Eighth Amendment holding prevails over any statutes to the contrary. *Id.* at 23. *Houston-Sconiers* was clear: “the sentencing judge’s hands are not tied . . . sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there.” *Houston-Sconiers*, 188 Wn.2d at 9. There is now simply no question that a statute does not limit a court’s discretion to consider the mitigating factors of youth at sentencing. *State v. Gilbert*, 193 Wn.2d 169, 176, 438 P.3d 133 (2019) (the sentencing court “was required to consider Gilbert’s youth as a mitigating factor and had discretion to impose a downward sentence. RCW 10.95.035 cannot act to limit that discretion.”).

The State’s argument that the court is bound by sentences permitted under the Sentencing Reform Act which gives courts “limited discretion” is not accurate after *Houston-Sconiers*. Brief of Respondent (BOR) at 12. Indeed, contrary to its first argument, the State acknowledges in section two of its brief that a trial court has absolute discretion to

sentence a child whose crime is mitigated by youth, and this discretion may not be limited by statute. BOR at 14-16.

The State's argument that Aaron cannot challenge his exceptional sentence downward on appeal through citation to RCW 9.94A.585, (BOR at 13), also ignores the constitutional right to appeal in Washington where a defendant's constitutional challenge to his sentence should defeat the statute. *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) (determining that if the statutory denial of the right to appeal a standard range sentence were read to prohibit any appeal, it would likely violate the guarantee of "the right to appeal in all cases" contained in article 1, section 22 of the Washington Constitution).

The State's effort to preclude Aaron's appeal based on a narrow statutory argument fails because statutory authority "is ultimately circumscribed by the constitutional mandate forbidding cruel punishment." *State v. Bassett*, 192 Wn.2d 67, 78, 428 P.3d 343 (2018) (citing *State v. Fain*, 94 Wn.2d 387, 402, 617 P.2d 720 (1980)).

b. When a sentencing court finds a child's crime is mitigated by youth, courts should be required to consider the undisputed fact that "children are different," and sentence a child commensurate with the culpability of a child unless the State can overcome this presumption.

Judicial recognition that "children are different," has resulted in constitutional protections for children under the Eighth Amendment and

Article I, sec.14. *Houston-Sconiers*, 188 Wn.2d at 21; *Bassett*, 192 Wn.2d at 81. These protections are not limited to the narrow class of offenders at issue in *Miller* as claimed by the State. BOR at 17 (citing *Miller*, 567 U.S. at 479). To the contrary, in *Houston-Sconiers*, our Supreme Court applied Eighth Amendment protections to children tried in adult court who faced similar sentences to Aaron. *Houston-Sconiers*, 188 Wn.2d at 8 (one child faced a sentencing range of 41.75-45.25 years in prison and another faced a sentencing range of 36.75-40.25 years in prison). Even if the State believes *Houston-Sconiers* was wrongly decided, but it is the law. BOR at 17. And as argued in Aaron's Opening Brief, Article I, sec. 14 is interpreted independently of its federal counterpart. AOB at 27 (citing *Bassett*, 192 Wn.2d at 78).

The prosecutor cites to the potential, nearly de facto<sup>2</sup> life sentence Aaron faced if he had been convicted as originally charged. BOR at 5 (hypothesizing that Aaron's faced up to 457.7 months in prison). However, Aaron was not convicted as charged, and instead faced a standard range sentence of 206.25-281.25 months. CP 27. The State

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<sup>2</sup> The United States Sentencing Commission identifies 470 months or longer as a proxy to identify cases in which a de facto life sentence had been imposed. United States Sentencing Commission, *Life Sentences in the Federal System*, 10 (2015), available at, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226\\_Life\\_Sentences.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf).

emphasizes the dismissed and unproven charges in an effort to show that the ultimate standard range Aaron faced as a result of a plea offer was a benefit to him, without of course, mentioning State being benefitted by the power imbalance of its sophisticated investigatory powers in relation to a 15-year-old child, which in Aaron’s case, resulted in an immediate, detailed confession. CP 515; see e.g. *Haley v. State of Ohio*, 332 U.S. 596, 599-600, 68 S. Ct. 302, 304, 92 L. Ed. 224 (1948) (“a lad of tender years” [15-years-old] is “no match for the police”).

This potential adult maximum sentence based on the most the State could possibly charge a child should not be a reference point for assessing the constitutional requirements of the court’s exercise of its discretion in sentencing a child whose crime was mitigated by youth.

In every other area of law, children do not possess the same rights and responsibilities as adults. See e.g. *J.D.B. v. North Carolina*, 564 U.S. 261, 273, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (“the legal disqualifications placed on children as a class—e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal”); see also RCW 26.28.015(4) (children under age 18 may not

enter into any legal contractual obligation); RCW 26.28.015(5) (until age 18, a child is not able to make decisions in regard to their own body).

The fact that a 15-year-old like Aaron, who in no other social or legal context possess the same legal responsibilities as an adult, is deemed legally responsible and subjected to the harshest of adult punishment for conduct he committed as a child is an astounding exception to the way we treat children under the law. This should not provide the reference point for sentencing a child as argued by the prosecutor. BOR at 23 (claiming the State would have pressed for a 38-45 year sentence had Aaron been an adult, not a 15-year-old child).

We have become accustomed to our criminal justice system's extremely harsh sentences that have resulted in the United having an incarceration rate "more than five times higher" than most of its peers. Sara Mayeux, *Youth and Punishment at the Roberts Court*, 21 U. Pa. J. Const. L. 543, 563 (2018). Even the most progressive states far surpass global norms in the severity of punishments imposed on criminal defendants:

Massachusetts, for example, the United States' state with the lowest incarceration rate, nevertheless has an incarceration rate higher than every European and South American country, and lower only than Turkmenistan, El Salvador, Cuba, Thailand, Russia, Rwanda, Panama, and Costa Rica.

*Id.* at 562-63. Where for even adults, the lengthy sentences faced by criminal defendants are extraordinary, they should not be the presumptive norm for children, who in every other facet of the law and society are deemed incompetent to make even the most basic legal decisions for themselves.

The State argues that the “procedure” for imposing sentence on a child tried in adult court is “plain.” BOR at 14. But as it stands, courts have complete discretion in sentencing a child tried as an adult after finding his crime is mitigated by youth. *Houston-Sconiers*, 188 Wn.2d at 24. Courts have not yet determined if one party bears the burden, or by what standard of proof it will determine the appropriate sentence once the court determines the child’s crime is mitigated by youth. BOA at 22-23.

In Aaron’s case, after he pleaded guilty, the court could have sentenced him to between 0 and 281.5 months after finding, as it did, that Aaron’s “age, immaturity, and impetuosity” affected his crime. CP 316. Despite finding that there were “substantial and compelling reasons” for an exceptional sentence downward based on his youth, the court’s starting point for sentencing him was the top of the standard sentencing range for adults. CP 316. The Constitution should require that the starting point for a court to exercise its complete discretion should begin with the range the legislature has deemed appropriate for children. This would not require the

court to “dispense” with Chapter 9.94A, as argued by the State, because the court’s sentencing is not currently bound by the requirements of the SRA when sentencing a child whose crime is mitigated by youth. BOR at 14; *Gilbert*, 193 Wn.2d at 175. Therefore, this is not an issues of depriving the adult court of jurisdiction or altering the sentencing scheme as described by the State. BOR at 22-23. A court could rely on the sentence ranges provided by the SRA once the State overcomes the presumption that a child whose crime is mitigated by youth is not entitled to a sentence commensurate with the criminal culpability of a child.

In Aaron’s case, the prosecutor acknowledges that Aaron’s rehabilitation is proof that the resources at the JRA are an effective punishment for some children who commit serious violent felonies. BOR at 24. Here, where the State does not contest that Aaron has been fully rehabilitated through JRA services, the State cannot overcome the presumption that the crimes Aaron committed as a 15-year-old reflect the transient features of youth and diminished culpability of a child.

The State mistakenly interprets Aaron’s constitutional challenge as an attack on the court’s finding on declination. BOR at 18-22. Without citation to the Appellant’s Opening brief, the State erroneously states that Aaron is arguing that “the work of the declination heading is undone” when a court imposes an exceptional sentence down based on a

defendant's youth. BOR at 21. Aaron does not argue this, nor has he made any challenge to the court's decline decision. Aaron's argument that he should be presumptively sentenced commensurate with the culpability of a child *after* he pleads guilty and *after* the court finds the crimes he pleaded to were mitigated by youth in no way affects the court's previous decline decision. To the extent that the State frames its opposition to Aaron's constitutional challenge as a challenge to the decline decision, it misapprehends his argument, and Aaron rests on the constitutional challenge to his sentence advanced in his Opening Brief. AOB at 14-35.

Finally, the State's effort to foreclose Aaron's ability to attack the constitutionality of his sentence on appeal by arguing that Aaron's sentencing requests have changed over time based on changes in the law and his personal rehabilitation has no merit. BOR at 22-23. When Aaron was first charged with the criminal offenses, the State was still able to seek and obtain juvenile life sentences without parole against children, until the Court declared it unconstitutional. CP 1 (Aaron charged in 2015); *Bassett*, 192 Wn.2d 67 (decided 2018). Nor was a court required to consider the mitigating factors of youth when Aaron's first sentencing requests were made. CP 40 (Court of Appeals reversing for court to consider *Houston-Sconiers* factors). It is not, as the State says, "disingenuous" (BOR at 22) for Aaron to challenge the constitutionality of his sentence, especially

where there have been such significant changes in the law affecting the constitutional rights of children at sentencing since the time that Aaron committed his offense.

**2. Justice demands reconsideration of a restitution order that requires a child to pay over \$200,000 to a billion-dollar earning, for-profit insurance company, even if Aaron’s attorney and the court wrongly believed it was not part of Aaron’s resentencing.**

The State wrongly asserts that Aaron should be bound by his attorney and the court’s mistaken belief that the resentencing court was not required to consider the *Houston-Sconiers* factors in relation to the order of restitution entered at Aaron’s first sentencing hearing, prior to this Court’s remand for resentencing after *Houston-Sconiers*. BOR at 25.

*State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) establishes that a court errs when it refuses to consider an exceptional sentence based on a “mistaken belief that it did not have the discretion” to consider an exceptional mitigated sentence. Aaron’s attorney clearly stated that “restitution is not discretionary” so he would not address the restitution order. BOR at 25. This is contrary to law and this Court’s remand for resentencing in which the trial court was instructed it “*must consider* certain factors” when resentencing Aaron. CP 40 (emphasis in original). Where restitution is a part of Aaron’s original sentence without consideration of the *Houston-Sconiers* factors, the resentencing court

failed to comply with this Court's mandate by failing to consider the *Houston-Sconiers* factors in relation to restitution.

The cases cited in support of the State's claim that this issue cannot be raised for the first time on appeal or is invited error do not apply, because they involve adult sentencing hearings, in which courts are not mandated to resentence a juvenile based on a particular criteria required by the Constitution as was the case here. BOR 25.

The sentencing court was required to apply the criteria provided for in *Houston-Sconiers* when resentencing Aaron, and failed to consider this mandatory criteria in regards to the restitution order, requiring reversal and remand for resentencing on the restitution order under *Houston-Sconiers*.

### **C. CONCLUSION**

Our state and federal prohibitions against cruel and unusual punishment should be interpreted to give meaning to the courts' recognition that "children are different" by requiring courts to presumptively sentence children who commit crimes commensurate with the culpability of a child under the Eighth Amendment and Article I, sec. 14. Aaron seeks remand for resentencing under the correct standard, including resentencing on his restitution order.

DATED this 14th day of October, 2019.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 52651-4-II
	)	
AARON TOLEAFOA,	)	
	)	
Appellant.	)	

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# WASHINGTON APPELLATE PROJECT

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