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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER HOLT, JR

Appellant.

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

The Honorable Stanley Rumbaugh, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court abused its discretion when it refused to consider youthfulness as a mitigating factor as directed by the Washington and United States Supreme Courts.

2. The sentencing court abused its discretion by finding that the holding of *State v. Sledge*,¹ prevented the court from considering youthfulness as a mitigation factor under *State v. Houston-Sconiers*.²

3. The sentencing court abused its discretion by declining to hear testimony from defense witnesses regarding appellant Christopher Holt's youthfulness at the time of offense.

4. The court erred in entering the following finding of fact:

At the hearing on January 30, 2019, defendant requested testimony from several witnesses about the defendant's behavior since the time of the plea. The Court declined to hear from any of the witnesses that defense tried to proffer at the hearing because it would have violated the plea agreement in this case.

Finding of Fact V; Clerk's Papers (CP) 376.

5. The sentencing court erred in entering Conclusion of Law III. CP 378.

6. The sentencing court erred in entering Conclusion of law IV. CP 378.

7. The sentencing court erred in entering Conclusion of Law V. CP

¹133 Wash.2d 828, 839, 947 P.2d 1199 (1997).

378.

8. The sentencing court erred in entering conclusion of Law VIII. CP 379-80.

9. The appellant's Judgment and Sentence contains legal financial obligations, including a \$200 criminal filing fee and Department of Corrections supervision fee, that are no longer authorized following *State v. Ramirez*³ and after enactment of House Bill 1783.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where youthfulness and surrounding circumstances of upbringing and family history can diminish a juvenile offender's culpability and can constitute a mitigating factor justifying the imposition of a reduced sentence, did the trial court abuse its discretion when it failed to consider whether Mr. Holt's behavior and decision making at the time of the offense were a product of his youthful immaturity and traumatic childhood? Assignments of Error 1 and 2.

2. Where the Supreme Court held in *State v. Houston-Sconiers* that trial courts must consider mitigating qualities of youthfulness at sentencing and must have discretion to impose any sentence below the standard range, did the trial court err by declining to allow testimony from witnesses proffered by the defense at resentencing to testify regarding Mr. Hold's childhood, his immaturity and youthfulness at the time of the offense, and of the progress and

³188 Wn.2d 1, 21, 391 P.3d 409 (2017).

personal growth he achieved in prison? Assignments of Error 2, 3, and 4.

3. Where case law provides that an accusation of a breach of a plea agreement requires an evidentiary hearing, and where the breach of a plea agreement by the defendant relieves the State of its obligation to uphold its plea recommendation, did the sentencing court err by finding that *State v. Sledge* precluded the defense from presenting witnesses in support of a mitigated sentence under *State v. Houston-Sconiers*? Assignments of Error 5 and 6.

4. Did the trial court err by granting the State's request for specific performance? Assignments of Error 7 and 8.

5. Should the case be remanded to the trial court to strike the \$200 criminal filing fee and community supervision fee that are no longer authorized after enactment of House Bill 1783? Assignment of Error 9.

C. STATEMENT OF THE CASE

1. Procedural facts:

Christopher Holt⁴ was convicted of second degree murder on January 9, 2012, following a change of plea entered on December 2, 2008. Clerk's Papers (CP) 5, 7-15, 33. The offense took place on March 25, 2008 when Mr. Holt was 17 years old. CP 5, 85. Mr. Holt was charged as an accomplice and James Ellis was identified as the shooter in the incident. CP 5.

At the original sentencing on January 9, 2009, Judge Beverly Grant imposed 216 months. CP 36. Mr. Holt had an offender score of "1" and a

³191 Wn.2d 732, 747, 426 P.3d 714 (2018).

standard range of 134 to 234 months. CP 34. The court ordered a \$500 crime victim assessment, \$200.00 criminal filing fee and \$100.00 DNA database fee. CP 35.

The judgment and sentence also provides that the defendant “shall pay supervision fees as determined by DOC.” CP 38.

Mr. Holt moved for relief from judgment pursuant to CrR 7.8 on February 5, 2018. Citing *State v. Houston-Sconiers*, Mr. Holt argued that the case represents a significant change in the law vesting the court the discretion to depart from the sentencing guidelines when sentencing juveniles in adult court, and that the court considers Mr. Holt’s youthfulness as a mitigating factor at resentencing. (Motion for Relief From Judgment and For Show Cause Hearing, February 5, 2018); CP 44-51.

The trial court denied the motion to vacate the judgment and sentence on July 3, 2018. (Order on Defendant’s Motion For Relief From Judgment, Pursuant to CrR 7.8(b)), CP 53-57. The court’s order states in part that the CrR 7.8 motion was not supported to be supported by an affidavit, that indicia of the effect of youthfulness on Holts behavior is not provided in Holt’s pleadings, and that a bare assertion that Mr. Holt was 17 years old at the time of the offense is insufficient for relief from judgment. CP 56. The court ordered that the case be transferred to the Court of Appeals as a personal restraint petition (PRP). CP 53-56.

⁴DOB: 7/29/1990.

The transfer as a PRP (Cause no. 52070-2-II) was rejected by this Court on August 28, 2018. CP 74-75. The order rejecting transfer states in part:

The superior court cannot deny a CrR 7.8 *and* transfer that motion to this court for consideration as a personal restraint petition under CrR 7.8(c)(2). If the superior court intended to transfer the motion to this court under CrR 7.8(c)(2), it must vacate the July 3, 2018 order and issue a proper transfer order that includes the findings required under *State v. Smith*, 144 Wn.App 860 (2008) and CrR 7.8(c)(2).

Accordingly, it is hereby

ORDERED that the July 3, 2018 Pierce County Superior Court transfer order is rejected and the matter is remanded to the superior court for further action. CrR 7.8(c).

Order Rejecting Transfer, August 28, 2019, Cause No. 52070-2-II (emphasis in original); Attachment A; (See also State's Motion to Transfer to Court of Appeals, October 19, 2018; CP 75).

1. October 26, 2018 hearing

The matter came for show cause hearing on October 26, 2018, the Honorable Stanley Rumbaugh presiding. 1Report of Proceedings (RP) at 3-27.⁵ After discussion with counsel about the status of the case the relevant case law, the court stated:

I don't want to go too far astray, you know, well-intended, but that doesn't really provide any kind of certainty of review for anybody. I'm going to hear the evidence. Set a sentencing date.

⁵The record of proceedings is designated as follows: October 26, 2018 and January 30, 2019 (resentencing hearing).

1RP at 24.

The clerk's minutes state: "Court will set a re-sentencing date for December 20, 2018 at 9:00 a.m." CP 83. The court inquired if the defense was going to present expert testimony and set a schedule for exchange of packets prior to the hearing. 1RP at 25. The court requested that defense counsel provide a thorough recounting of Mr. Holt's institutional behavior and infraction record. 1RP at 26.

On December 19 the resentencing hearing was reset to January 30, 2019. CP 84. The scheduling order refers to the hearing a "sentencing date." CP 84.

Defense counsel filed a presentence report on January 7, 2019. CP 85-352. The pleadings describe Mr. Holt's immaturity, the role of peer pressure in the offense, Mr. Holt's developmental impairment and deplorable childhood including exposure to parents who used or sold drugs, and being passed around to relatives, and lack of a stable home life. CP 85-95.

The presentence report also describes Mr. Holt's rehabilitation while in prison and five declarations CP 93-95. As directed by the court, the defense included his DOC disciplinary record. 114-352

The State filed a brief in support of the original sentence and argued that the defense was precluded from requesting a sentence below the standard range under *State v. Sledge*. (State's Opposition to a Change in Sentence, January 22, 2019); CP 358-68. The defense filed a brief in reply, stating that

Mr. Holt is not requesting a specific sentence but was presenting mitigation evidence to the court, pursuant to *Houston-Sconiers*, stating that the “Court should sentence Mr. Holt with the above information in mind.” CP 77-80.

2. Resentencing hearing

The matter came on for resentencing on January 30, 2019, again before Judge Rumbaugh. 2RP at 3-28.

Despite the initial ruling stating that it was a sentencing hearing, the court announced that “it was set for a show cause to determine whether resentencing would be scheduled. That actually is the procedural posture.” 2RP at 3. Counsel asked if the court was proceeding with a sentencing and the court responded, “No. We are proceeding with a show cause to determine whether or not the case should be resented, not the resentencing itself.” 2RP at 4.

The court then announcing the hearing was in fact a sentencing, stating:

But at any rate I am willing to go ahead. I have read both of the parties’ briefing. I’m willing to go ahead with a sentencing hearing because I believe that on remand the order that I received from the Court of Appeals---they rejected the transfer and basically sent it back here for unspecified further action.

The further action will be in the form of determining whether Mr. Holt’s sentence should be somehow modified or whether the original sentence was appropriate when he did it and therefore appropriate now.

2RP at 6.

Defense counsel stated that she expected to proceed to sentencing, that she had provided the DOC records requested by the court, and that the hearing was set over to December 20 to allow time to gather the DOC records as the court had directed. 2RP at 7, 8. Defense counsel stated that she anticipated calling Rebecca Holt, Christopher Holt, Sr., Christopher Holt, Jr., and David Hippert to testify at sentencing. 2RP at 10.

The State and argued that the defense request for resentencing is a violation of the original plea agreement and argued for imposition of the original sentence of 216 months. 2RP at 18-19; CP 358-68. Mr. Holt's counsel argued that courts have discretion to consider mitigating factors involving youthfulness following *Houston-Sconiers*. 2RP at 8, 9-18. Defense counsel described the circumstances of the offense, that Mr. Holt was not the shooter, the circumstances of his dismal childhood, and that in prison he left gang life, that he did well in prison was given back his "good time" in 2017, and that he had received certifications in plumbing program, electrical program, carpentry program, and facility maintenance and received a certificate from the Freedom Program in nonviolent communication, and completed the Smart Recovery Substance Abuse Program in August, 2017, and the Bridge to Life program in 2018. 2RP at 9-17. Documentation of the programs that Mr. Holt completed and declarations from Mr. Holt, Rebecca Holt, his father, his mother, and grandfather are contained in the defense Pre-Sentence Report. CP 96-112.

The State argued that the question was whether the case should be remanded to Division Two as a PRP or if the court was going to keep the case for further hearings. 2RP at 2. The State argued that *Houston-Sconiers* did not apply because that case did not involve a plea agreement, that Mr. Holt was sentenced as part of an agreed recommendation, and that *Sledge* prevented the defense from arguing for a sentence other than the original agreement. 2RP at 18-19. The court stated: “it is much like the *Sledge* case, only that it was the State that was the breaching party in the *Sledge* case.” 2RP at 19. The court stated:

So all of that leads me to conclude that testimony in the context of whether this plea should be enforced, which is what we’re actually talking about here, or whether there has been such a change in law that the Court should consider a new sentence, testimony would only be in the context of *State v. Sledge*, which is a Supreme Court decision, and would only be useful in trying to persuade the Court that the wrong sentence was imposed at the time of sentencing.

I will decline your offer to hear testimony at this sentencing because I think that the Supreme Court has told me not to.

2RP at 22-23.

After additional discussion, the court stated:

The only goal in putting forward testimony at this time would be to try to undermine the agreement that was made for 216 months of incarceration as a result of the crime that Mr. Holt pled guilty to. I think that’s prohibited by *State v. Sledge*.

2RP at 27-28.

The court stated that it would grant specific enforcement of the plea

agreement as requested by the State. 2RP at 28.

The court entered the following relevant findings of fact and conclusions of law on March 12, 2019:

V.

At the hearing on January 30, 2019, defendant requested testimony from several witnesses about the defendant's behavior since the time of the plea. The Court declined to hear from any of the witnesses that defense tried to proffer at the hearing because it would have violated the plea agreement in this case.

Conclusions of Law

III.

This case was resolved by plea agreement. The Court finds the cases cited by the defense, *State v. Fain*, 94 Wn.2d 387 (1980), *Miller v. Alabama*, 567 U.S. 460 (2012), *In re PRP of McNeil*, 181 Wn.2d 582 (2014) *State v. O'Dell*, 183 Wn.2d 680 (2015), *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017), *State v. Scott*, 190 Wn.2d 586 (2018), *State v. Light-Roth*, 191 Wn.2d 328, 332 (2018), *State v. Bassett*, 428 P.3d 343 (2018) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) are not applicable as they do not apply to a valid plea agreement.

IV.

Sledge says that presenting testimony or evidence supporting a lower sentence is a violation of the plea agreement, even if, you later state you still support the agreement. The Court finds, based on *Sledge*, that for the defense to present witnesses at the hearing would be a violation of the plea agreement as the purpose would be ask for a lesser sentence. There is no legal basis to allow testimony. The testimony in this case would be offered to violate the plea agreement.

V.

The Court finds that the State's request for specific performance is the correct remedy. The sentencing Court was familiar with the case as it

had been pre-assigned, heard information and motions on the case, taken the plea on the co-defendants, and exercised its discretion to accept an amended information. All evidence shows the sentencing Court was well informed and exercised its discretion at the time of the plea.

VIII.

The Court finds no legal basis to set aside the plea agreement or alter the original sentence.

CP 376-78.

Timely notice of appeal was filed on March 18, 2019. CP 379. This appeal follows.

D. ARGUMENT

1. REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE SENTENCING COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER MR. HOLT'S YOUTHFULNESS AT THE TIME OF THE OFFENSE AND TRAUMATIC UPBRINGING AS MITIGATING FACTOR

a. When sentencing a juvenile in adult court, the court has complete discretion to impose a mitigated sentence despite the otherwise mandatory sentencing ranges

Under the SRA, a sentencing court must generally sentence a defendant within the standard range. *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014); RCW 9.94A.505(2)(a)(i). However, “[t]he court may impose an exceptional sentence below the standard range if it finds that mitigating

circumstances are established by a preponderance of the evidence.” RCW 9.94A.535(1). Under RCW 9.94A.535(1)(e), one mitigating factor is that “[t]he 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.”

The diminished culpability of youth may serve as a mitigating factor. See RCW 9.94A.535(1)(e); *State v. Ronquillo*, 190 Wn. App. 765, 769, 361 P.3d 779 (2015); *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

The United States Supreme Court held that mandatory life without parole for juveniles violated the Eighth Amendment even for an offense of homicide in *Miller v. Alabama, supra*. The court ruled that sentencing courts must consider certain differences between children and adults (the *Miller* factors) before imposing such a harsh penalty. *Miller*, 567 U.S. at 479-80. The court subsequently reaffirmed *Miller*, holding that *Miller* recognized a substantive rule of constitutional law that was retroactive. *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016).

In 2015, the Washington Supreme Court held that trial courts must be allowed to consider a defendant's youth and immaturity as a mitigating factor justifying an exceptional sentence below the standard range. *State v. O'Dell*,

183 Wn.2d 680, 358 P.3d 359 (2015) The Supreme Court held that a defendant's youthfulness is a mitigating factor that may justify an exceptional sentence below statutory sentencing guidelines, even when the defendant is a legal adult. *O'Dell*, 183 Wn.2d at 688-89. A sentencing court abuses its discretion when the defense requests an exceptional sentence below the standard range and the court fails to consider mitigating factors raised by the defense. *O'Dell*, 183 Wn.2d at 697.

Following the lead of the United States Supreme Court, Washington courts have expanded upon the recognition that children are constitutionally different. In *Ramos*, the Washington Supreme Court held that juveniles facing a literal or *de facto* life sentence without parole are entitled to a *Miller* hearing. *State v. Ramos*, 187 Wn.2d 420, 434, 387 P.3d 650 (2017).

Shortly thereafter, in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), the Court addressed juveniles and how the trial courts were to comply with the Eighth Amendment. Relying on *Miller v. Alabama*, the Court provided guidance to trial courts on how to exercise their discretion in juvenile sentencing. *Houston-Sconiers*, 188 Wn.2d at 23.

A sentencing court violates the Eighth Amendment when it fails to consider the defendants' youthfulness when sentencing juveniles in adult court. *Houston-Sconiers*, 188 Wn.2d at 9. In that case, two youths were sentenced to

decades of imprisonment due to “mandatory” firearm sentence enhancements. *Houston-Sconiers*, 188 Wn.2d at 12-13. The Supreme Court reversed and in doing so, partly overruled *State v. Brown*. *Id.* at 21 & n.5. The Supreme Court held that the trial court was required to consider a juvenile defendant's youth in sentencing, even for statutorily mandated sentences. *Houston-Sconiers*, 188 Wn.2d at 8-9.

The Court reasoned that in light of Eighth Amendment jurisprudence, the statutes had to be read to allow trial courts discretion to impose mitigated downward sentences for juveniles. *Houston-Sconiers* 188 Wn.2d at 21, 24-26. The Court found “[a]n offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.” *Id.* at 20. The Court held sentencing courts must consider the *Miller* factors in sentencing a juvenile offender in adult court:

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.” 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.

Id. at 23 (internal citations to *Miller* omitted).

The Supreme Court held that “[t]rial courts *must* consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.” *Houston–Sconiers* 188 Wn.2d at 21 (emphasis added).

Under these circumstances, the sentencing judge was required to consider evidence of Mr. Holt's youthfulness at resentencing, and had discretion to deviate from the standard range. *Houston-Sconiers*, 188 Wn.2d at 21; *O'Dell*, 183 Wn.2d at 696.

Under the SRA, courts must act within the principles of due process. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A court abuses its discretion when it court fails to consider a mitigating factor on the mistaken belief it is barred from such consideration. *O'Dell*, 183 Wn.2d at 696. Where an appellate court cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option, remand is the proper remedy. *In Re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007) (quoting *State v. McGill*, 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002)).

In this case, by declining to hear defense witnesses and by failing to consider the evidence of Mr. Holt's youthfulness proffered in the defense sentencing memorandum, the judge failed to exercise his discretion. This

failure to exercise discretion amounted to an abuse of discretion. *O'Dell*, 183 Wn.2d at 697 (citing *Grayson*, 154 Wn.2d at 342).

The superior court was well aware of its ability and discretion to impose an exceptional mitigated sentence based on Mr. Holt's youthfulness, and was provided by counsel with Mr. Holt's DOC disciplinary records, as requested by the court at the October 26 hearing. The court heard extensive argument regarding Mr. Holt's youth, his childhood, and heard argument regarding the *Houston-Sconiers* decision. Contrary to *Houston-Sconiers*, however, the court declined to hear from the defense witnesses and failed to exercise its discretion regarding the presence of youth as a mitigating factor. 2RP at 27.

The trial court, relying on *State v. Sledge*, essentially ended the resentencing hearing and declined to hear testimony from the witnesses the defense intended to call regarding *Houston-Sconiers*. The court, in prohibiting the defense from calling witnesses, stated that it would not hear testimony from defense witnesses because the previously-imposed sentence was an agreed disposition and that "[t]he only goal in putting forward testimony at this time would be to try to undermine the agreement that was made for 216 months[,]" and stated that it would be contrary to *Sledge*. 2RP at 27-28.

In *Sledge*, the prosecutor insisted on an evidentiary hearing, notwithstanding the juvenile defendant's guilty plea. 133 Wn.2d at 831. At the hearing, the State announced its standard range sentencing recommendation but then brought forth a probation officer and parole officer, both of whom testified in support of factors supporting an exceptional disposition. *Sledge*, 133 Wn.2d at 831, 833–36. The State's examination of both witnesses focused on facts supporting aggravating factors. *Sledge*, 133 Wn.2d at 833–36. Then the State summarized the evidence supporting an exceptional disposition. *Sledge*, 133 Wn.2d at 837. The Supreme Court held that the State's conduct breached the plea agreement. *Sledge*, 133 Wn.2d at 843.

The court's reliance on *Sledge* is misplaced. The court erred by entering Finding of Fact V that hearing witness testimony would violate the plea agreement entered in 2009. CP 376.

A plea agreement is a contract between the State and the defendant. *Sledge*, 133 Wn.2d at 838. The State thus has a contractual duty of good faith, requiring that it not undercut the terms of the agreement, either explicitly or implicitly, by conduct evidencing intent to circumvent the terms of the plea agreement. *Id.* at 840; *State v. Jerde*, 93 Wn.App. 774, 780, 970 P.2d 781, review denied, 138 Wash.2d 1002, 984 P.2d 1033 (1999).

As an initial matter, the trial court is not bound by any

recommendations contained in the plea agreement. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003); *State v. Henderson*, 99 Wn.App. 369, 376, 993 P.2d 928 (2000) (citing RCW 9.94A.090(2), remodified as RCW 9.94A.431(2) (sentencing judge is not bound by any recommendations contained in a plea agreement)).

Moreover, notice of the possibility of an exceptional sentence was provided in the guilty plea statement that Mr. Holt signed in 2008.

6(h)(i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.

CP 10.

In addition, the court did not address the mandatory language of *Houston-Sconiers* that “[t]rial courts *must* consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.” *Houston-Sconiers* 188 Wn.2d at 21 (emphasis added). The word “must” denotes a mandatory obligation. In this context, it is analogous to “shall.” In Webster's Third New Int'l Dictionary, 1492 (1993), “must” is defined as “is obliged or compelled.” Random House Webster's College Dictionary (2001) defines “must” as “necessary; vital.” According to Black's Law Dictionary 919 (5th ed.1979), the word “must” is defined as follows: “This

word, like the word ‘shall,’ is primarily of mandatory effect [citation omitted]; and in that sense is used in antithesis to ‘may.’”

Despite the mandatory language of *Houston-Sconiers*, the sentencing court did not explain why the contractual provisions of *Sledge* take precedent over Mr. Holt’s Eighth Amendment rights. The trial court did not explain its rationale for essentially ignoring the Eighth Amendment protection announced in *Miller* and followed in *Houston-Sconiers*, and did not reconcile the court’s decision to not hear defense witnesses with the recognition of the Eighth Amendment rights of a juvenile who is sentenced in adult court contained in *Miller* and *Houston-Sconiers*.

In addition, is it questionable whether *Sledge* imposes the same duty on a defendant as it does on the State to adhere to a plea agreement. *Sledge* squarely places a restriction on the State: a plea agreement obligates the State to recommend to the court the sentence contained in the agreement. *Sledge*, 133 Wn.2d at 840. A careful review of Washington case law indicates that this obligation inures to the State; when a defendant breaches a plea agreement, the repercussion is that he or she has no right to specifically enforce an agreement. *State v. Thomas*, 79 Wn.App. 32, 36, 899 P.2d 1312 (1995). *State v. Hall*, 32 Wn.App. 108, 110, 645 P.2d 1143 (1982) (“The State is expected to keep its bargains unless the defendant has failed to keep his or hers.”).

Accordingly, the trial court erred by unilaterally precluding Mr. Holt from presenting witnesses and arguing for a downward departure. Instead, the remedy if the defense breaks the terms of the agreement is that the State is no longer required to uphold its terms of the plea agreement. If the defense breaks the terms of the plea agreement, the State is then free to argue for a sentence in excess of the agreement. In short, the trial court erred by finding *Sledge* to be controlling authority and by declining to hear the testimony of defense witnesses.

In addition, the State's accusation alone does not establish a breach; the court must determine whether the defendant has committed the violation as a question of fact. The court's ruling that *Sledge* precludes arguing for a mitigated sentence is based on an assumption the Mr. Holt had in fact violated the terms of the plea agreement. A criminal defendant faced with allegations of violating the terms of a plea agreement is entitled to an evidentiary hearing. *State v. Townsend*, 2 Wash.App.2d 434409 P.3d 1094 (2018); *In re Pers. Restraint of James*, 96 Wn.2d 847, 850–51, 60 P.2d 18 (1982). Here, no such hearing was conducted. Instead, the court accepted the argument that arguing for any sentence other than 216 was a breach under *Sledge*.

A trial court errs when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances” or

when it operates under the “mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.” *State v. McFarland*, 189 Wash.2d 47, 399 P.3d 1106 (2017) (quoting *Garcia-Martinez*, 88 Wash. App. at 330, 944 P.2d 1104); see also *In re Pers. Restraint of Mulholland*, 161 Wash.2d at 333, 166 P.3d 677.

In *Houston-Sconiers*, the Court held that the Eighth Amendment requires sentencing courts to consider the mitigating qualities of youth for juveniles sentenced in adult court, and that trial courts must have discretion to impose any sentence below the otherwise applicable SRA (Sentencing Reform Act of 1981, chapter 9.94A RCW) range and/or sentence enhancements. *Houston-Sconiers*, 188 Wn.2d at 20-21. Even if a mitigated sentence was not requested by the defense, the mandatory language requires a sentencing court to consider a defendant’s youthfulness. A sentencing court violates the Eighth Amendment when it fails to consider the defendants’ youthfulness when sentencing juveniles in adult court. *Houston-Sconiers*, 188 Wn.2d at 9.

b. The remedy is remand for a new sentencing hearing.

When a sentencing court might have imposed an exceptional sentence if “it had known an exceptional sentence was an option,” remand is proper. *Mulholland*, 161 Wn.2d at 334. Here, the court did not recognize the mandatory directive of the Supreme Court in *Houston-Sconiers* that the trial

“must” consider youthfulness of a defendant at sentencing. In light of *Miller, O'Dell*, and *Houston-Sconiers*, the trial court erred when it failed to exercise its discretion to impose any sentence other than the previously ordered sentence. Consequently, the trial court did not consider mitigating circumstances associated with Mr. Holt’s youth. Reversal and remand for resentencing is required. *Houston-Sconiers*, 188 Wn.2d at 21; *O'Dell*, 183 Wn.2d at 683; Because it incorrectly relied on *Sledge* and did not recognize it’s the mandatory requirement to consider the role of youthfulness at the time of the offense, a new sentencing hearing must be ordered.

2. THE COURT ERRED IN IMPOSING THE \$200 CRIMINAL FILING FEE AND SUPERVISION FEE

a. Recent statutory amendments prohibit discretionary costs for indigent defendants

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature recently amended former RCW 36.18.020(2)(h) in Engrossed Second Substitute House Bill 1783, which modified Washington's system of LFOs and amended RCW 10.01.160(3) to prohibit trial courts from imposing criminal filing fees, jury demand fees, and discretionary LFOs on defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, §§ 6, 9, 17. The amendments to the LFO statutes apply prospectively to cases pending on direct review and not final when the

amendment was enacted. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

As amended in 2018, subsection (3) of RCW 10.01.160 now states, “[t]he court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3). Subsection .010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

b. The \$200 filing fee cannot be imposed on an indigent person

ESHB 1783 amended RCW 36.18.020(2)(h) to prohibit trial courts from imposing the \$200 criminal filing fee on indigent defendants. LAWS OF 2018, ch. 269, § 17.

The record shows Mr. Holt is indigent; he was represented by court-appointed counsel during the initial case, and shortly after the re-sentencing hearing the court found Mr. Holt indigent and unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. CP 385. Thus, the record indicates that Mr. Holt was indigent under RCW 10.101.010(3) at the time of the re-sentencing hearing on January 30, 2019.

The previously mandatory \$200 filing fee cannot be imposed on

indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h).

Our Supreme Court held these changes apply prospectively to cases on appeal. *Ramirez*, 191 Wn.2d at 747-50. Applying the change in the law, *Ramirez* held the trial court impermissibly imposed discretionary legal financial obligations, including the \$200 criminal filing fee, because the defendant was indigent. Id. at 748-50. Under *Ramirez*, this Court should strike the \$200 filing fee.

c. Remand is necessary to strike the requirement that Mr. Holt pay the supervision fee

In Section 4.6 of the judgment and sentence, the court also directed Mr. Holt to pay a community supervision fee to the Department of Corrections. CP 38. The relevant statute provides that this is discretionary: “Unless waived by the court ... the court shall order an offender to ... [p]ay supervision fees as determined by the department.” RCW 9.94A.703(2)(d). For this reason, costs of community custody, including monitoring costs, are discretionary and are subject to an ability to pay inquiry. *State v. Lundstrom*, 6 Wn.App.2d 388, 396 n. 3, 429 P.3d 1116 (2018). Because Mr. Holt is indigent, this Court should strike this condition.

E. CONCLUSION

For the foregoing reasons, Mr. Holt’s sentence must be vacated and the case remanded to the sentencing court with instructions to consider his youthfulness at the time of the offense.

Mr. Holt also respectfully requests this Court to remand for

resentencing with instructions to strike the discretionary costs of the criminal
filing fee and the supervision fee.

DATED: September 19, 2019.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller". The signature is written in a cursive style with a large initial "P" and "T".

PETER B. TILLER-WSBA 20835

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Of Attorneys for Christopher Holt

CERTIFICATE OF SERVICE

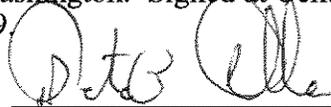
The undersigned certifies that on September 19, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and Kristie Barham and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 19, 2019



PETER B. TILLER

ATTACHMENT A

August 28, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the
Personal Restraint Petition of

CHRISTOPHER D. HOLT,

Petitioner.

No. 52070-2-II

ORDER REJECTING TRANSFER

On July 3, 2018, the Pierce County Superior Court issued an order purporting to transfer Christopher D. Holt's February 5, 2018 CrR 7.8 motion to withdraw his guilty plea in *State v. Holt*, Cause No. 08-1-01519-1, to this court for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2). In that same order, the superior court also denied Holt's motion.

The superior court cannot deny a CrR 7.8 *and* transfer that motion to this court for consideration as a personal restraint petition under CrR 7.8(c)(2). If the superior court intended to transfer the motion to this court under CrR 7.8(c)(2), it must vacate the July 3, 2018 order and issue a proper transfer order that includes the findings required under *State v. Smith*, 144 Wn. App. 860 (2008), and CrR 7.8(c)(2).

Accordingly, it is hereby

ORDERED that the July 3, 2018 Pierce County Superior Court transfer order is

52070-2-II

rejected and the matter is returned to the superior court for further action. CrR 7.8(c).


Chief Judge

cc: Christopher D. Holt
Pierce County Clerk
County Cause No(s). 08-1-01519-1
Mark E. Lindquist, Pierce County Prosecuting Attorney
Jeffrey Erwin Ellis

THE TILLER LAW FIRM

September 19, 2019 - 4:39 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v Christopher Daniel Holt, Jr. , Appellant
Superior Court Case Number: 08-1-01519-1

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