

**FILED**  
**Court of Appeals**  
**Division II**  
**State of Washington**  
**6/23/2020 3:17 PM**

NO. 54110-6-II

---

**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

---

STATE OF WASHINGTON,

Respondent,

v.

NGA NGOEUNG,

Appellant.

---

Appeal from the Superior Court of Pierce County  
The Honorable Judge Stanley J. Rumbaugh

No. 94-1-03719-8

---

**BRIEF OF RESPONDENT**

---

MARY E. ROBNETT  
Prosecuting Attorney

Teresa Chen  
Deputy Prosecuting Attorney  
WSB # 31762/OID 91121  
930 Tacoma Ave., Rm 946  
Tacoma, WA 98402  
(253) 798-7400

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. RESTATEMENT OF THE ISSUES ..... 2

    A. Where this Court determined in a previous appeal that the appearance of fairness doctrine did not require a new sentencing judge, may the Defendant challenge the law of the case on the identical record and argument?..... 2

    B. Is there any reasonable basis to challenge the judge’s impartiality where the court’s legal conclusions were required by the law which existed at the time of the previous hearing?..... 2

    C. Does the sentencing court’s decision to impose assault sentences consecutive to aggravated murder sentences have any effect on the juvenile offender’s ability to petition for release under RCW 9.94A.730 on the assault sentences now, where he has served more than twenty years in total confinement? ..... 2

    D. Has the Defendant presented any argument of merit challenging the sentence where the court made a thorough review of the *Miller* factors, found relevant youthful characteristics, and imposed minimum concurrent sentences on the aggravated murder counts?..... 2

III. STATEMENT OF THE CASE..... 3

IV.	ARGUMENT.....	16
A.	This Court correctly held that the appearance of fairness doctrine does not require a new sentencing judge.....	16
1.	The claim is foreclosed by the law of the case.....	17
2.	The record does not demonstrate evidence of actual or apparent bias.....	18
a.	The court’s imposition of a life sentence does not demonstrate bias where the sentence was required by the law that existed at the time.....	19
b.	The court did not give “short shrift” to the <i>Miller</i> factors in 2015, nor was it required to prioritize mitigating arguments over the victim’s losses.....	20
c.	The court’s reasonable opinion of the offense does not demonstrate bias. ....	22
d.	The judge’s agreement with the defense mitigation argument does not demonstrate bias against the Defendant.....	25
B.	The court did not abuse its discretion or commit legal or constitutional error in imposing the smallest sentence possible for a juvenile offender convicted of aggravated murder and under which the Defendant is immediately parolable.....	27

C.	The court did not abuse its discretion in imposing sentence.....	29
1.	It is not an abuse of discretion to impose a different sentence than the Defendant requested.....	29
2.	The Defendant has no right to concurrent sentences.....	31
3.	The Defendant is not eligible for a “juvenile-range” sentence.....	32
4.	The court did not impose any improper burden of proof.....	33
5.	There is no presumption for an exceptional downward sentence. ....	35
6.	There is no basis in law for the Defendant’s claim that the presumptive sentence for serious violent offenses was zero days incarceration.....	35
V.	CONCLUSION.....	37

## TABLE OF AUTHORITIES

### State Cases

<i>Oregon Mut. Ins. Co. v. Barton</i> , 109 Wn. App. 405, 36 P.3d 1065 (2001).....	20
<i>State v. Ammons</i> , 105 Wn.2d 175, 713 P.2d 719 (1986) .....	36
<i>State v. Bailey</i> , 35 Wn. App. 592, 668 P.2d 1285 (1983).....	17
<i>State v. Bassett</i> , 192 Wn.2d 67, 428 P.3d 343 (2018).....	1, 12, 19
<i>State v. Delbosque</i> , 195 Wn.2d 106, 456 P.3d 806 (2020).....	29, 33
<i>State v. Dreewes</i> , 192 Wn.2d 812, 432 P.3d 795 (2019).....	24
<i>State v. Gilbert</i> , 193 Wn.2d 169, 438 P.3d 133 (2019).....	1, 12, 13, 19, 28, 32
<i>State v. Gilbert</i> , 193 Wn.2d 169, 438 P.3d 133 (2019).....	1, 19
<i>State v. Gregg</i> , 9 Wn. App. 2d 569, 444 P.3d 1219 (2019), <i>review granted</i> , 194 Wn.2d 1002, 451 P.3d 341 (2019) .....	35
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017) .....	12, 27
<i>State v. Johnson</i> , 188 Wn.2d 742, 399 P.3d 507 (2017).....	17
<i>State v. Madry</i> , 8 Wn. App. 61, 504 P.2d 1156 (1972).....	18
<i>State v. McNeil</i> , 59 Wn. App. 478, 798 P.2d 817 (1990) .....	34
<i>State v. Mulcare</i> , 189 Wash. 625, 66 P.2d 360 (1937) .....	36
<i>State v. Ngoeung</i> , 6 Wn. App. 2d 1046 (No. 47157-4-II).....	12
<i>State v. Ngoeung</i> , 93 Wn. App. 1030 (No. 19657-3-II).....	24

<i>State v. O'Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015) .....	36
<i>State v. Peerson</i> , 62 Wn.App. 755, 816 P.2d 43 (1991), <i>review denied</i> , 118 Wn.2d 1012 (1992) .....	20
<i>State v. Post</i> , 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992).....	18
<i>State v. Ramos</i> , 187 Wn.2d 420, 387 P.3d 650 (2017) .....	19
<i>State v. Sauve</i> , 33 Wn. App. 181, 652 P.2d 967 (1982), <i>aff'd</i> , 100 Wn.2d 84, 666 P.2d 894 (1983).....	17
<i>State v. Solis-Diaz</i> , 187 Wn.2d 535, 387 P.3d 703 (2017) .....	18
Federal and Other Jurisdictions	
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).....	1, 2, 8, 9, 13, 19, 20, 21, 23, 29, 33
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718, 93 L. Ed. 2d 599 (2016).....	16, 32
Constitutional Provision	
Eighth Amendment .....	7, 8
WASH. CONST. art. I, §35 .....	21
Statutes	
Laws of 2014, ch. 130.....	28
Laws of 2014, ch. 130.....	5
RCW 10.95 .....	33
RCW 10.95.030 .....	28, 32, 33, 34
RCW 10.95.030(1).....	4
RCW 10.95.030(2).....	11
RCW 10.95.030(3)(a)(i).....	5

RCW 10.95.030(a)(2) .....	2
RCW 10.95.035 .....	5, 7, 13
RCW 13.40.0357 .....	33
RCW 13.404.030(1)(e)(v)(A) .....	33
RCW 9.94A.....	33
RCW 9.94A.010.....	21
RCW 9.94A.500.....	21
RCW 9.94A.535.....	10, 37
RCW 9.94A.535(1).....	33
RCW 9.94A.535(1)(e) .....	34
RCW 9.94A.589(1).....	8
RCW 9.94A.589(1)(a) .....	1
RCW 9.94A.589(1)(b) .....	7, 13, 19, 34, 36
RCW 9.94A.730.....	2, 14, 15, 16, 28, 32
RCW 9.94A.730(1).....	2
RCW 9A.08.020(3).....	24
Other Authorities	
American Psychiatric Association, <u>Diagnostic and Statistical Manual of Mental Disorders</u> (5th ed.) (2013) .....	22
Merriam-Webster Online Dictionary, <a href="https://www.merriam-webster.com/dictionary/rampage">https://www.merriam- webster.com/dictionary/rampage</a> .....	25

## I. INTRODUCTION

The Defendant Nga Ngoeung was convicted by a jury of two counts of aggravated murder in the first degree, two counts of first-degree assault, and taking a motor vehicle. He chased after a carload of teenage boys in a car he had stolen to punish them for throwing eggs around the neighborhood. When he caught up with them, he illuminated their vehicle with his high beams while his accomplice executed two of them with a high powered assault rifle and shot at two other boys as they fled.

At his re-sentencing, the court properly considered the *Miller* factors and imposed a sentence with the benefit of recent opinions in *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018) (which categorically barred life sentences for juvenile offenders) and *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019) (which allowed the court to question any statute which would limit its consideration of mitigating factors – including RCW 9.94A.589(1)(a) would otherwise require the serious violent offenses to run consecutive to each other).

Satisfied that the Defendant's evidence of transient immaturity justified running sentences concurrently, the court imposed concurrent minimum sentences of 25 years to life as to each aggravated murder. The court imposed counts III and IV consecutively. As a function of under

RCW 10.95.030(a)(2) and RCW 9.94A.730(1), the Defendant was immediately eligible for parole on these sentences.

Notwithstanding the fact that the court's findings support the smallest sentence that can be imposed for aggravated murder (i.e. immediate eligibility for parole), the Defendant appeals, claiming the court failed to meaningfully consider the *Miller* factors and his evidence. The appeal is frivolous. No greater relief is available through the sentencing court. His relief is now through the Indeterminate Sentencing Review Board.

## II. RESTATEMENT OF THE ISSUES

- A. Where this Court determined in a previous appeal that the appearance of fairness doctrine did not require a new sentencing judge, may the Defendant challenge the law of the case on the identical record and argument?
- B. Is there any reasonable basis to challenge the judge's impartiality where the court's legal conclusions were required by the law which existed at the time of the previous hearing?
- C. Does the sentencing court's decision to impose assault sentences consecutive to aggravated murder sentences have any effect on the juvenile offender's ability to petition for release under RCW 9.94A.730 on the assault sentences now, where he has served more than twenty years in total confinement?
- D. Has the Defendant presented any argument of merit challenging the sentence where the court made a thorough review of the *Miller* factors, found relevant youthful characteristics, and imposed minimum concurrent sentences on the aggravated murder counts?

### III. STATEMENT OF THE CASE

In 1995, a jury convicted the Defendant Nga Ngoeung of two counts of aggravated first-degree murder, two counts of first-degree assault, and taking a motor vehicle. CP 10-11.

Although the trial transcripts have not been made part of this third appeal, the details of the crime are summarized in various places in the designated record. CP 6-7, 21-23, 57-58, 86-87, 515, 530-31; RP (1/23/15) at 38-39. Robert James Forrest was raised by an immigrant mother who did not speak English and worked several jobs. CP 728; RP (1/23/15) at 50; RP (9/6/19) at 54 (military father was mostly absent). He and Michael Keith Welden were honor roll students and star tennis players about to start their senior year of high school. CP 546-47, 549, 728. After tennis practice the two were joined by friends Clinton Thayer and Matthew Nordin, and the four 17-year-old boys decided to drive around throwing eggs at houses. CP 4-6, 547, 728. Robert was driving; Michael was in the front passenger seat; and the two in the back, who did not live in the neighborhood, could not have known that one of the houses they egged was a drug and gang house. CP 4-7, 547.

The Defendant Ngoeung was working on a stolen car in front of that house when he was struck by one or more eggs. CP 58, 561. Oloth Insyxiengmay and Southanom Misaengsay were also outside. CP 531.

Feeling disrespected, Insyxiengmay armed himself with an assault rifle, and Ngoeung gave chase in the stolen car. CP 7, 58, 547, 562. Ngoeung was the oldest of the assailants, less than two months shy of his majority. CP 531, 562. Insyxiengmay was 15 years old, and the back seat passenger Misaengsay was only 13. CP 561-62. When Robert came to a stop, Insyxiengmay shot up the car with an assault rifle. CP 547; RP (1/23/15) at 38.

Robert died instantly from a high velocity rifle bullet to the head, and the car crashed into a tree. CP 6, 547. Clinton and Matthew managed to duck down, but Michael's seatbelt locked, and he was shot once in the chest and once in the shoulder. CP 547. Insyxiengmay continued to shoot at the victims as they fled. RP (1/23/15) at 38. Michael expired from his wounds before an ambulance could arrive. CP 6, 22. His parents heard the gunshots. CP 549. He had almost made it home. CP 554.

The Honorable Judge Karen Strombom sentenced Ngoeung to life without parole as then required by RCW 10.95.030(1). CP 12, 16. The convictions were affirmed on appeal and final in 1999. CP 19, 21 (No. 19658-1-II), 48.

First resentencing. Ngoeung was 17 years old at the time of his offense. CP 1-2, 531. Therefore, in 2015, the Defendant was resentenced under the *Miller*-fix statute for juvenile offenders convicted of aggravated

murder. CP 51-53. *See also* Laws of 2014, ch. 130, §§9, 11; RCW 10.95.030(3)(a)(i); RCW 10.95.035.

Prior to the resentencing, the Honorable Judge Stanley Rumbaugh reviewed “about a six-inch stack of information.” RP (1/23/15) at 4, 35; CP 523-731.

Arguing for a 25 year to life sentence, the Defendant’s attorneys DeCosta and Johnson filed two memoranda and a large mitigation packet. CP 535-37, 558-720. This included approximately 45-pages of letters from the Defendant’s family, former inmates, and from his family members’ family and friends (CP 60, 590-635) as well as an advocate’s characterization of that same material (CP 558-89). RP (1/23/15) at 35-37.

The defense packet describes that the Defendant immigrated to the United States when he was four years old. CP 565. The Defendant was “smart about things he loved.” CP 567. He could play at the arcade all day with smashed pennies or quarters on a string. CP 567. By the age of ten, he was regularly breaking into cars prowling for money and taking joyrides, sometimes with his little sister in tow. CP 568-69. *See also* CP 715-19 (at age 11, Ngoeung and a 9-year-old friend stole his father’s truck and were soundly beaten with a cable for the theft). He was expelled in the fifth grade after two years of truancy. CP 569-70. Although his parents desperately needed assistance with care of the younger children, they had no control

over or help from either the Defendant or his older brother. CP 568, 578, 594, 607, 610. The Defendant joined a gang at 16 in which his cousins were “shot callers” or leaders. CP 572-73. His older brother was a leader in a different gang responsible for the infamous Trang Dai massacre. CP 573-74, 578.

Although the Defendant received disability income as a child, it was through the assistance of a social worker who was later convicted of widespread public assistance fraud among the Cambodian community. CP 574, 639-40. In fact, the Defendant was demonstrably resourceful and independent, able to obtain cars or other items whenever requested. CP 573-74. He was evaluated several times as a youth. One doctor determined the Defendant’s failure to perform in school was emotional (lacked motivation), rather than the result of a developmental or learning disability. CP 574-75, 644. Ngoeung was observed to have a good command of the English language, better even than Khmer, but he was uncooperative with the evaluation and would only converse with trusted persons. CP 646-47. Another evaluator determined the Defendant was just “extremely under-educated, but not cognitively handicapped.” CP 575. This is consistent with his own self-report. CP 686.

The family narrative is that the Defendant developed “only shallow friendships and interpersonal relationships, if he even developed any at all.”

CP 571. And to this day, “Nga still lacks social skills.” CP 571. The early evaluators suggest he had an “emotional disability” and an “adjustment disorder.” CP 574-75. A final doctor opined the Defendant had a probable personality disorder. CP 575.

Arguing for a life sentence, DPA Ausserer provided multiple short memoranda attempting to process the rapidly evolving law. CP 523-34, 538-45. The prosecutor argued that RCW 10.95.035 only authorized the court to resentence on the aggravated murder counts, but did not affect the finality of the sentences on the other counts. RP (1/23/15) at 5-8; CP 526-27. The prosecutor argued that all serious, violent offenses must run consecutive to each other under RCW 9.94A.589(1)(b). RP (1/23/15) at 9; CP 527-28. And the prosecutor noted a majority of jurisdictions had held that the Eighth Amendment analysis is per crime, rather than the offender’s aggregate sentence. CP 542-44.

Michael Welden’s family filed 10 pages of letters also requesting a life sentence. CP 546-55. They described the double murder as “ruthless,” “senseless,” “horrific,” and “unconscionable” – demonstrating “complete and utter disregard for human life.” CP 1-4, 546-48, 553, 562; RP (1/23/15) at 38. Michael’s sister wrote that the defendants bragged about what they had done and returned to the murder scene to gloat. CP 547-48. The stress

on the victims' loved ones has manifested in lost jobs, illness (cancer), depression, and drug abuse. CP 548-49, 553, 554.

Wendy Cruttenden wrote that, after twenty years in prison, "Nga Ngoeung has learned nothing but lying[,] scheming and every deceptive thing there is to learn in prison." CP 553. Prison records chronicle innumerable infractions including assaults on correctional staff and inmates, weapons possessions, and continued gang ("security threat group") association. CP 655, 670, 673 (a new felony conviction under superior court cause number 10-1-00202-1), 674, 679, 685. In approximately twenty years in prison, the Defendant had not obtained a GED and only been employed for three months (handing out sack lunches). CP 651. Ms. Cruttenden argued this correctional history demonstrated the Defendant could not be rehabilitated or did not desire to make restitution. CP 553.

The significant legal question before the court was the viability of RCW 9.94A.589(1) after *Miller*, i.e. whether the sentences on counts I-IV would run concurrently or consecutively. CP 526-29, 540-44; RP (1/23/15) at 5-33. The court held that the Eighth Amendment did not require the court to run the sentences on all counts concurrently. RP (1/23/15) at 27-33. Such a requirement would:

give a free pass to however many other additional murders -  
- here one -- or other serious violent offenses the offender  
commits. The constitutional protections of the Eighth

Amendment do not support such an outcome, nor is there any suggestion that killing with impunity advances the legislative intent related to RCW Chapters 9.94A or RCW Chapters 10.95.

...

[T]here is nothing cruel or unusual or constitutionally infirm nor anything mandated by statutory construction which prohibits punishing a person who commits two, or here five crimes, more severely than a person who commits one crime.

RP (1/23/15) at 31-33.

The court then turned to a discussion of the term of each sentence. The judge was not impressed with the prosecutor's arguments. CP 66 (the court "repeatedly disagreed with the State's assessments of certain *Miller* factors and relied on Nga Ngoeung's mitigation evidence"). Notwithstanding the Defendant's proximity to the legal age of majority at the time of the crime, Judge Rumbaugh was satisfied that the science supported that he had an adolescent brain. RP (1/23/15) at 39 ll. 19-23. The judge disagreed the Defendant was required to show that his offense was mitigated in every possible way. *Id.* at 41 l. 9. He rejected the characterization of the Defendant's childhood abuse as merely alleged where police had documented it or as merely parental discipline where the prosecutor's office "would charge a second degree assault" on those facts. *Id.* at 41, ll. 20-21; *Id.* at 42 ll. 6-7. Judge Rumbaugh did not fault the Defendant for leaving a home where he was neglected and abused. *Id.* at 42, ll. 16-18. Nor did he hold an elementary school student responsible for

his own education. *Id.* at 44 ll. 19-23. And Judge Rumbaugh rejected any argument that mere legal competency undercut evidence of intellectual disability or mental illness. *Id.* at 43 ll. 20-25.

However, when the Defendant was given an opportunity to present argument, defense counsel Johnson provided little further in mitigation. CP 61; RP (1/23/15) at 49. Because the court had indicated that it intended to run the sentences in each count consecutively, counsel interpreted a baseline of 72 years and made no attempt to request a downward departure under RCW 9.94A.535. RP (1/23/15) at 30, 33. Counsel Johnson argued only that the Defendant's significant prison infractions reflected the hopelessness resulting from a life-without-parole sentence. RP (1/23/15) at 49.

After the attorneys had made their arguments, the prosecutor asked the court to hear from Robert's father. *Id.* at 50. Mr. Forrest explained that his family had not filed letters, because he was protecting them from these hearings. *Id.* at 50-51. *See also* RP (9/6/19) at 55-56 (the father has been the family representative for his son at the trial and at the co-defendant's ISRB hearings, "a panel of eight people ... looking at me like 'what's your problem'"). Both Michael's mother and Robert's mother are barely surviving the loss of their sons. CP 549; RP (1/23/15) at 50; RP (9/6/19) at 55. Mr. Forrest told the judge that he worried what it would do to his family if the Defendant were released. RP (1/23/15) at 50-51.

The court solicited the Defendant's brief allocution:

I do apologize to the family. I know what I did is going to cause a lot of pain because of my actions. I don't know what else to say.

*Id.* at 50.

In deciding on a sentence, the court acknowledged environmental and social factors and the factors in RCW 10.95.030(2). *Id.* at 51-53. The Defendant's childhood was marked by neglect, abuse, and lack of discipline. *Id.* at 52-53. Judge Rumbaugh was unable to determine whether the Defendant's cognitive deficits were due to organic deficiencies or lack of education. *Id.* at 53. Ultimately, two factors were salient. Based on the Defendant's continuing violent behavior in prison, the court was "extraordinarily doubtful that any rehabilitation would be available." *Id.* at 54-55. And defense had not argued the individual sentences, if run consecutively, would add up to less than 72 years to life, i.e. a de facto life sentence. *Id.* at 55. Accordingly, the court imposed life sentences on count one and two. CP 52.

In his second appeal, the Defendant requested to be resentenced with the assistance of different counsel. CP 56-57, 64. Initially, he also asked to be resentenced before a different judge.

On remand, new counsel should be appointed and the case should go before another judge, to ensure the appearance of fairness and N.N.'s basic rights.

Appellant's Opening Brief at 6, 55, *State v. Ngoeung*, 6 Wn. App. 2d 1046 (No. 47157-4-II) (filed Oct. 12, 2015). However, in a supplemental pleading filed two years after the opening brief, the Defendant withdrew the request for a new judge. CP 64 n. 8.

Given the passage of time and clear mandates of the law and with respect to the Honorable Judge who handled the resentencing, Mr. Ngoeung believes it is possible that, with counsel who perform their actual duties and present the law and advocate for him, the judge who was unable to properly consider the case in light of the Miller factors at the resentencing now years ago will follow the law as set forth in Ramos, Houston-Sconiers and this Court.

Appellant's Supplemental Brief at 15-16, *State v. Ngoeung*, 6 Wn. App. 2d 1046 (No. 47157-4-II) (filed May 11, 2017).

This Court remanded for resentencing under the direction of *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), a case which issued three years after the resentencing and which categorically prohibits life sentences for juvenile offenders. CP 57, 64, 67. But this Court denied the request for either a change of counsel or judge. CP 57, 64.

Second resentencing: Before the second resentencing took place, the Washington supreme court issued an opinion in *State v. Gilbert*, 193 Wn.2d 169, 175, 438 P.3d 133, 136 (2019). It clarified that *Houston-Sconiers* was not "confined to the firearm enhancement statutes," but permitted sentencing courts to "question *any* statute that acts to limit

consideration of the mitigating factors of youth during sentencing.” *Gilbert*, 193 Wn.2d at 175. At a resentencing under RCW 10.95.035, a court may reconsider the sentences of all counts, not just the aggravated murder counts. *Id.* at 177. In light of this case, the prosecutor conceded that the sentencing court was no longer required to impose consecutive sentences under RCW 9.94A.589(1)(b). CP 68-69.

Notwithstanding the law of the case, defense counsel DeCosta asked Judge Rumbaugh to recuse himself. CP 70-79. The Defendant’s siblings wrote letters in support of the motion. CP 721-25. Ultimately, counsel conceded that the higher court’s decision denying judicial disqualification was “obviously binding.” RP (8/9/19) at 7. The motion was denied. CP 84. Counsel DeCosta then withdrew, while Counsel Johnson remained. CP 726; RP (9/6/19) at 3. The Defendant filed another lengthy sentencing memorandum and mitigation package. CP 85-322. Although much of the material is recycled from 2015, this filing also included a letter from Insyxiengmay (CP 119-22), Dr. Stanfill’s 2019 evaluation (CP 249-57), a discussion of the co-defendants’ sentences (87-88, 109-18), and a comparison of post-*Miller* resentencings in Pierce County Superior court (CP 106-07, 265-322). Again the Defendant requested that all sentences run concurrent with a minimum sentence of 25 years to life. CP 85, 106.

Counsel urged the court that such a sentence would “let the ISRB decide.” RP (9/6/19) at 82.

Ngoeung’s co-defendants have completed their sentences. CP 87-88, 109-22. Thirteen-year-old Misaengsay cooperated with police, testified against his co-defendants, and was prosecuted in juvenile court. CP 88, 515-16. Fifteen-year-old Insyxiengmay was convicted of the lesser alternative first-degree murders and received a sentence of 886 months. CP 87-88; 114, 119, 515. Under RCW 9.94A.730, he was able to apply for parole to the ISRB after serving 20 years. CP 114. Unlike Ngoeung, Insyxiengmay had not been convicted of any new crimes and actually applied himself to the available programming in prison. CP 114-15 (a tier representative; employed as a therapy aide; earned his GED; working on an AA degree); RP (9/6/19) at 76 (court commenting on the differences between defendants). Insyxiengmay attributed his transformed attitude to his mother’s death and his transfer to Clallam Bay. CP 115-16. The Board released him over the prosecutor’s objection in 2017, apparently believing in error<sup>1</sup> that another “co-defendant” was the shooter. CP 115-16, 118-19.

Dr. Stanfill concluded the Defendant had been immature, less cognitively complex, overly compliant to antisocial peers, and directly

---

<sup>1</sup> The error may reflect Insyxiengmay’s minimization. CP 730. He characterizes his crimes to his supporters as a mere drive-by shooting.  
[http://www.dailyuw.com/audio\\_7b225cae-6a43-11e9-8556-5b22c279a72b.html](http://www.dailyuw.com/audio_7b225cae-6a43-11e9-8556-5b22c279a72b.html)

impacted by numerous socioeconomic, geographic, and other social factors outside of his control. CP 256. While finding it hard to parse fully what was environmental versus intrinsic, Dr. Stanfill opined the Defendant's violence in prison may be situational and defensive, rather than indicative of psychopathy or a personality disorder. CP 256; RP (9/6/19) at 42. He testified that the Defendant would need a lot of support if released, which he will not receive if deported. RP (9/6/19) at 40-43. Insyxiengmay believes that Ngoeung will be deported to Cambodia if he is released from DOC custody. CP 120-21. The Defendant's counsel agrees. CP 102-05; RP (9/6/19) at 81.

DPA Schacht also filed a lengthy sentencing memorandum. CP 323-459. It chronicled 50 serious prison infractions including a 2016 prison riot and a 2018 aggravated assault on an inmate – committed after his 2015 resentencing. CP 326. The prosecutor argued that the sentence should take into account each victim. CP 328; RP (9/6/19) at 60. He explained,

I'm not asking you to go above the minimum. I'm asking for the minimum in this case. I'm just suggesting that the appropriate sentence here should punish each of these crimes separately, with a consecutive sentence.

RP (9/6/19) at 68. However, the prosecutor acknowledged that the Defendant had the same rights and remedies as Insyxiengmay under RCW 9.94A.730. CP 323, 327, 329-31. And the court observed that RCW

9.94A.730 was consistent with *Montgomery v. Louisiana*, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016). RP (9/6/19) at 69.

After the Defendant made a strong allocution (*Id.* at 83-86), the court followed the prosecutor's recommendation. The aggravated murder sentences of 25 years to life run concurrently to each other and consecutively to the other counts. CP 485-86; 514-19. The court opined:

By my rough calculation, that comes to 195 months that will be consecutive to the 25 years to life sentence for the murders.

After all of that time is done, then the ISRB will be able to make its determinations.

The eight months on the fifth count can be served concurrent with all of the rest of this.

So to reiterate, 25 years or 300 months to life for each of the murders. Those will be served concurrent with one another. But the third and the fourth counts will each be consecutive, another 102 months on Count III, 93 months on Count IV.

That's 495 months after which the ISRB can make its release determination.

RP (9/6/19) at 95-96.

The Defendant appeals for the third time. CP 492-505.

#### IV. ARGUMENT

**A. This Court correctly held that the appearance of fairness doctrine does not require a new sentencing judge.**

The Defendant challenges that law of the case, arguing that Judge Rumbaugh's denial of the motion to recuse was reversible error. This claim

was “discusse[d]” in the earlier appeal where the Defendant eventually “acknowledge[d]” that there was no cause to disqualify Judge Rumbaugh from presiding over the resentencing on remand. CP 64, n.8. The court of appeals agreed. *Id.*

**1. The claim is foreclosed by the law of the case.**

Questions determined on appeal or which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case. *State v. Bailey*, 35 Wn. App. 592, 594, 668 P.2d 1285, 1286 (1983); *State v. Sauve*, 33 Wn. App. 181, 185, 652 P.2d 967, 969 (1982), *aff'd*, 100 Wn.2d 84, 666 P.2d 894 (1983). The underlying goal of the “law of the case” doctrine is to promote finality and efficiency in the judicial process and encourage general notions of fairness. *State v. Johnson*, 188 Wn.2d 742, 757, 399 P.3d 507, 515 (2017).

The question of Judge Rumbaugh’s fairness or appearance of fairness as ascertained from the record of the 2015 resentencing was resolved in the appeal. At that time, the court reviewed the full record, heard the identical argument, and applied the correct legal standard. CP 80-81. That decision has become the law of the case. The Defendant’s subsequent motion to recuse Judge Rumbaugh and its renewal in this appeal are improper.

**2. The record does not demonstrate evidence of actual or apparent bias.**

A judge is disqualified from acting in a case where there exists evidence of actual or apparent bias on his or her part. *State v. Post*, 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992); *State v. Madry*, 8 Wn. App. 61, 504 P.2d 1156 (1972) (disqualification required where impartiality might reasonably be questioned).

Pursuant to the appearance of fairness doctrine, a judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing. *State v. Gamble*, 168 Wash.2d 161, 187, 225 P.3d 973 (2010). ... The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias. *Id.* at 187–88, 225 P.3d 973. The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts. *Sherman v. State*, 128 Wash.2d 164, 206, 905 P.2d 355 (1995).

*State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703, 706 (2017).

Here the Defendant's complaints express dissatisfaction with the law which then existed or make an unreasonable interpretation of the record. The supplemental complaints of the siblings fail to respect the jury's verdict and the law on accomplice liability.

- a. The court's imposition of a life sentence does not demonstrate bias where the sentence was required by the law that existed at the time.

The Defendant asserts that the imposition of a life sentence in 2015 in and of itself demonstrates prejudging and bias. Opening Brief (OB) at 22, 24, 25. This is not plausible. Juvenile sentencing is an area of law that is in flux and has been since *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

Two years *after* Judge Rumbaugh resentenced the Defendant Ngoeung, the Washington Supreme Court upheld a de facto life sentence (85 years) on a juvenile offender convicted of four murders. *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017). The mechanism which directed this sentence was the same statute relevant in our own case: RCW 9.94A.589(1)(b) (requiring serious violent offenses to run consecutively to each other). Under the law at the time and for years after, Judge Rumbaugh's legal conclusion at the first resentencing was correct. CP 82.

However, *Ramos* was followed by two other cases which changed the legal landscape. Before *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), the court believed it had authority to sentence a juvenile offender to life. And before *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019), the court believed the law required that counts I, II, III, and IV run

consecutively to each other. The second resentencing benefited from authorities which issued three and four years after the first resentencing.

The judge's impartiality may not reasonably be questioned based on law which did not exist at the time.

- b. The court did not give "short shrift" to the Miller factors in 2015, nor was it required to prioritize mitigating arguments over the victim's losses.

In the motion to recuse, Counsel DeCosta argued that the primary purpose of sentencing is to consider the offender's youthful characteristics and not to punish him or to consider the impact on the victims. RP (8/9/19) at 4, 6-8. The argument is repeated in passing in the appeal. OB at 24-25.

The State knows of no authority which would suggest that an offender's mitigation arguments must be prioritized over the victims' loss. The Defendant provided no authority for the argument either below or above. In the absence of any citation to legal authority, the court is entitled to presume that none exists. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065, 1071 (2001). The Court need not consider this claim. *State v. Peerson*, 62 Wn.App. 755, 767, 816 P.2d 43 (1991), *review denied*, 118 Wn.2d 1012 (1992).

A sentence should be proportionate to the seriousness of the offense, promote respect for the law, protect the public, reduce the risk of reoffense in the community, provide opportunities for the offender to improve. and

avoid disparate sentences for similar offenses. RCW 9.94A.010. This statute does not prioritize any purpose over another.

At sentencing, the court is required to consider the offender's risk to the community and criminal history and the victim impact statement. RCW 9.94A.500. The court is constitutionally required to hear from victims "at sentencing and at any proceeding where the defendant's release is considered." WASH. CONST. art. I, §35.

Counsel DeCosta acknowledged that the judge had considered all relevant *Miller* factors, but suggested that the court had given mitigation factors "short shrift." RP (8/9/19) at 7-8. Judge Rumbaugh disagreed.

THE COURT: Well, that may be your perception, Mr. DeCosta, which you are entitled to have.

But from an objective point of view and a subjective point of view, all of the *Miller* factors were discussed and were considered. It's been reviewed by the Court of Appeals.

The fact that you may be disappointed with the degree to which the *Miller* factors was considered and with the Court's outcome after considering those factors does not mean that they were not considered.

MR. DECOSTA: Yes, sir.

THE COURT: I would also indicate that it was argued at some length before the Court of Appeals that the Court did not consider any of the mitigation evidence. That is also the subject of a comment by the Court of Appeals saying: "Because Nga Ngoeung's counsel presented an extensive mitigation packet and presented some argument, Nga Ngoeung's ineffective assistance of counsel claim fails." They went on to say that: "The resentencing Court stated that it considered all of the over 100 pages of mitigation evidence submitted by Nga Ngoeung. This evidence included information about Nga Ngoeung's age,

developmental background and deficits, lack of education, his abusive and neglectful family dynamics, the nature of the crime and his role, his gang involvement and the gang culture in his neighborhood, how his family perceived he had matured since his crime, a psychological evaluation about how Nga Ngoeung's circumstances all rendered him less culpable than an adult and more susceptible to compulsive and poor decision making."

It went on to say that this Court actually disagreed with many of the State's characterizations of the mitigation evidence, indicating, and my recollection is also, that I do believe that some of the mitigation evidence was appropriate and was considered by the Court in the first sentencing.

So to say that the focus was solely on the desires of the victim, I respectfully disagree with you.

RP (8/9/19) at 8-9 (quoting from CP 65-66). Neither the record nor the law which is before this Court bears out the Defendant's claim.

c. The court's reasonable opinion of the offense does not demonstrate bias.

The Defendant argues that judge's use of the word "sociopathic" shows bias where no expert diagnosed him as a sociopath. OB at 22-23. *See also* CP 724; RP (8/9/19) at 4. In fact, sociopathy is not a diagnosis in the Diagnostic and Statistical Manual. The medical term is antisocial personality disorder (APD). American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed.) (2013) at 659. *See also* CP 575 (Dr. Gagliardi diagnosing a probable personality disorder). "Sociopathic" only describes a cluster of behaviors, attitudes, or beliefs which together shape an understanding of an APD diagnosis.

And the judge did not call the Defendant a sociopath. He called the defendants' "response" to a couple of broken eggs "sociopathic." RP (1/23/15) at 39-40 (commenting that *Miller* requires the Court to drill down deeper to determine what motivated this "unimaginably horrible" or "sociopathic" response "to nothing"), 55 (finding that "despite [his] effort to gain understanding," the judge was "unable to perceive any rational basis" for this "morally bankrupt and sociopathic behavior").

The Defendant claims that Dr. Stanfill "found that, during the 1995 trial, no one described Nga as having sociopathic behaviors, attitudes or beliefs despite the violence of offense." OB at 23 (citing CP 254). In fact, this is not what Dr. Stanfill wrote. He wrote that Ngoeung had not been described as having "high sociopathic or psychopathic behaviors, attitudes or beliefs despite the brutality of the offense." CP 254 (emphasis added). In other words, the brutal crime, while sociopathic, was insufficient for a diagnosis by itself. Dr. Stanfill's 2019 report is not inconsistent with the judge's 2015 language.

The court is permitted to have an opinion of the evidence and the crime on which it is imposing sentence. In fact, it must. The court's opinion is entirely reasonable. An appropriate retribution for the egging, as Mr. Forrest testified, would have been for the boys to scrub the houses clean the next morning. RP (9/6/19) at 55. The defendants hunted the boys down

and slaughtered them. That is a sociopathic response, “well outside the behavioral bounds of any civilized society.” RP (9/6/19) at 95.

The Defendant claims it is inaccurate to accuse him of a rampage where he was not the shooter. OB at 23. *See also* CP 722, 725 (Defendant’s siblings failing to grasp the legal concept of complicity). There was no inaccuracy. Under the law, a principal and an accomplice need not share the same mental state, but do share the same legal responsibility. RCW 9A.08.020(3); *State v. Dreewes*, 192 Wn.2d 812, 824, 432 P.3d 795, 802 (2019). Moreover, it is apparent the two acted in tandem.

After Ngoeung was hit by eggs, Insyxiengmay ran into the house and returned with an assault rifle. CP 7, 22, 561. Ngoeung then drove Insyxiengmay to chase the victims up and down the street, turning around and finding them after they hid in a dead-end, and catching up to them at a light where the victims stopped to observe the rules of the road. Brief of Respondent at 15-16, *State v. Ngoeung*, 93 Wn. App. 1030 (No. 19657-3-II) (filed April 24, 1997). When Ngoeung illuminated the victims with his high beams, Insyxiengmay began shooting, executing Robert with a bullet to the head and mortally wounding Michael. *Id.* The car drifted up and down an embankment before coming to a stop. *Id.* Three victims exited and ran. *Id.* And Insyxiengmay shot at them some more. *Id.*

This describes a rampage, which is defined as “a course of violent, riotous, or reckless action or behavior.” Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/rampage> (last visited May 29, 2020).

The judge’s impartiality cannot reasonably be questioned for the reason that he accurately described the crime.

- d. The judge’s agreement with the defense mitigation argument does not demonstrate bias against the Defendant.

The Defendant argues that the judge demonstrated bias *against* him by *agreeing* with him. OB at 24. This is not logical.

The defense mitigation package argued that family neglect and abuse contributed to the Defendant’s failings. CP 562, 564-74, 576, 578, 593-95. *See also* RP (8/9/19) at 10-11. The argument relied in part upon the brother’s statement (CP 593-95), which the court accepted at face value. For example, the brother took responsibility for the family returning to a gang neighborhood. CP 594 (“since I wasn’t home”). And he blamed the cousins for initiating the Defendant into a gang. *Id.*

Judge Rumbaugh acknowledged the Defendant’s family’s 45 pages of letters and noted that it was frequently difficult for family members to reconcile a loved one with his criminal act or understand how it came to pass. RP (1/23/15) at 52. In this case, the court was satisfied that the

defense had “established” a genesis in “neglect and abuse.” *Id.* at 52. And although the prosecutor had argued the father’s abuse might not have been criminal, “to some degree” family circumstances contributed. *Id.* at 52-53. If Ngoeung’s family had kept him in school and living at home and if they had prevented him from stealing cars and joining a gang, the crime could not have happened. RP (8/9/19) at 21 (brother testifying that he was to blame for Ngoeung’s truancy), 50 (doctor testifying that an expelled child was unlikely to be able to return to school without parental assistance).

But when the court credited the Defendant’s own argument that Ngoeung was comparatively less responsible due to his immaturity, neglect, and abuse, the brother took offense. He seems to have interpreted an accusation of aiding and abetting or rendering criminal assistance.

How did we directly contribute to the deadly offense? There is no one in our family that has ever received training or have trained one another to be a driver for a shooter to kill people that throws eggs.

CP 724-25. It is not reasonable to read this into the judge’s words.

In this same vein, Counsel DeCosta claimed the judge had blamed a two-year-old for the Defendant’s behavior. RP (8/9/19) at 11. This is also not a reasonable interpretation of the court’s words.

And even if it were, it would not reflect bias against the Defendant.

The siblings challenged the jury's finding of premeditation and the legal concept of complicity – legal verities. CP 722, 725. They felt that the court had failed to adequately credit their brother's minimal attempt at education during his decades of confinement and his restraint in not killing anyone in prison riots. CP 722, 724. These arguments are all frivolous.

The family's unreasonable misinterpretations of the record and misunderstanding of the law cannot demonstrate judicial bias.

**B. The court did not abuse its discretion or commit legal or constitutional error in imposing the smallest sentence possible for a juvenile offender convicted of aggravated murder and under which the Defendant is immediately parolable.**

The Defendant claims he has been sentenced to a “life-equivalent” sentence. OB at 28. He believes he must serve “495 months, or 41.25 years before [he] would even be eligible for release by the ISRB.” OB at 20. While this is what the judge expressed orally, how the Department of Corrections interprets the law as applied to the judgment may be a different matter.

The prosecutor said he was asking for the “minimum,” but also consecutive sentences in order to acknowledge the multiple victims. At first glance, this seems an inherent conflict. Consecutive sentences are not a minimum in the context of juvenile offenders. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409, 420 (2017) (holding “sentencing courts

must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant”). Post-*Gilbert*, the court’s discretion was an “open field to run on.” RP (9/6/19) at 91.

However, the prosecutor also acknowledged that Ngoeung had the same non-judicial remedy as Insyxiengmay.

(1) Notwithstanding any other provision of this chapter, any person convicted of one or more crimes committed prior to the person’s eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement, provided the person has not been convicted for any crime committed subsequent to the person's eighteenth birthday, the person has not committed a disqualifying serious infraction as defined by the department in the twelve months prior to filing the petition for early release, and the current sentence was not imposed under RCW 10.95.030 or 9.94A.507.

RCW 9.94A.730 (emphasis added). The sentences imposed on counts 3 and 4 are “not imposed under RCW 10.95.030.” The Defendant has served over “twenty years of total confinement.” In other words, the consecutive nature of the sentences notwithstanding, the Defendant may petition the ISRB for early release now.

In light of SSSB 5064, the consecutive nature of the sentences in this case, as in the co-defendant’s, is a largely symbolic acknowledgement of the four victims. Laws of 2014, ch. 130. It does not prevent the

Defendant from petitioning for release immediately. And a sentence from which one can be paroled immediately is indeed a minimum.

If this is a correct reading of the statute, then the premise of the appeal is inarguably false. A sentence that is parolable as soon as it is imposed is not a life-equivalent sentence.

However, how the Department of Corrections applies the law is a review for different parties.

**C. The court did not abuse its discretion in imposing sentence.**

Defendant challenges the court's process at sentencing. A sentence is reviewable only for a clear abuse of discretion or misapplication of the law. *State v. Delbosque*, 195 Wn.2d 106, 116, 456 P.3d 806, 812 (2020). The Defendant's entire argument disregards this standard, ostensibly asking this Court to resentence him. His disagreement with the outcome does not establish an abuse of discretion.

**1. It is not an abuse of discretion to impose a different sentence than the Defendant requested.**

Although the court plainly reviewed and discussed the *Miller* factors at length, the Defendant alleges the court's consideration was not meaningful, because it did not arrive at the result the Defendant desired, namely concurrent sentences in all counts. OB at 31-33. This is not a meaningful criticism.

The Defendant complains on appeal that the court did not consider certain arguments. OB 34-35 (regarding his relative responsibility and cognitive ability). The court listened to and considered those arguments and a great many others. From everything the judge considered, he concluded the Defendant's youthful attributes were substantial and compelling and justified the reduced sentence imposed. CP 519.

The Defendant complains that the court gave Insyxiengmay more credit than he deserved for his behavior in prison. OB at 35-36. The record is that Insyxiengmay "immediately detached from all gangs associations" when he arrived in prison. CP 115. Although he had many infractions, his last serious infraction was in 2012. CP 115. In 2013, he had a turning point after his mother died and after he transferred to Clallam Bay. CP 115-16. He stopped committing infractions. CP 116. The court properly credited a change in behavior.

The Defendant argues that, where he had no hope of parole, his own prison infractions are excusable and should not have been considered. OB 11 37-38. The court gave a tenable response to this argument.

Rehabilitation must be internally driven and those efforts undertaken for their own sake to make the individual being rehabilitated a better functioning person, to make behavioral adjustments because it's the right thing to do, irrespective of the duration of a person's incarceration.

RP (9/6/19) at 94. Appreciating the Defendant's cognitive limitations and expectation that he would never be released, he still has made almost no effort to improve himself. He has made very few attempts to engage in positive programming. This lack of effort is relevant to his ability to be rehabilitated and to succeed if released. It is a proper subject for the court's (and the ISRB's) consideration.

He complains that he should not be expected to engage in programming, where programs were limited. OB at 38-39. However limited, there were still programs available, and Insyxiengmay took advantage of them. The Defendant has not.

The Defendant complains the court did not "explain its reasoning." OB at 41. The court explained its reasoning at great length. RP (9/6/19) at 86-96. It found the Defendant's crime marked by immaturity and reduced the sentence.

**2. The Defendant has no right to concurrent sentences.**

The Defendant argues that if he was deserving of minimum, concurrent sentence in the murders, the court was also required to run the assaults concurrent so as to impose no appreciable penalty for those offenses. OB at 39-40. This does not track. He does not have a right to receive no incarceration for his crimes against Clinton Thayer and Matthew Nordin. These survivors live with the memories of cowering on the floor

of the car, crawling through shattered windows, fleeing under gunfire, struggling to save Michael as he collapsed, and finding Robert's exploded corpse.

In any case, the Defendant has a separate statute under which to seek early release on the assault sentences. The aggravated murder sentences are made parolable under RCW 10.95.030. For the assault sentences, it is RCW 9.94A.730. The same non-judicial avenue that obtained Insyxiengmay's release is available to Ngoeung. *Montgomery* allows that this statute is sufficient remedy.

The Defendant claims that the law requires the court to consider the total sentence. OB at 40 (citing *Gilbert*, 193 Wn.2d at 176-77). The court did consider the total sentence. The law does not require the court to run other counts concurrent to sentences for aggravated murder.

If after considering such factors, the trial court does find an exceptional sentence is warranted, it may adjust the standard sentence to provide for a reduced term of years, for concurrent rather than consecutive sentences, or for both.

*Gilbert*, 193 Wn.2d at 176-77 (emphasis added).

**3. The Defendant is not eligible for a "juvenile-range" sentence.**

The Defendant argues that it is error to impose an "adult-range" sentence. OB at 26, 41. This might merely be a rhetorical device, but to be clear the Defendant cannot be sentenced in juvenile court or to a range

defined under RCW 13.40.0357. That law does not apply to his case. In his case, there was automatic adult jurisdiction under RCW 13.404.030(1)(e)(v)(A). Therefore, the sentencing law that controls is in Chapter 9.94A RCW and Chapter 10.95 RCW.

He has been sentenced to the lowest sentence possible for a juvenile offender convicted of aggravated murder under RCW 10.95.030, which is the proper law.

**4. The court did not impose any improper burden of proof.**

[T]he *Miller-fix* statute, [ ] unlike the SRA, does not impose a burden of proof on either party. ... [A]lthough *Miller* and RCW 10.95.030(3)(b) “provide factors and guidelines for the court to consider during the resentencing hearing ... they do not establish any presumptions to be created or rebutted by any party.” Clerk’s Papers (CP) at 238. We agree with the trial court that the statute does not allocate a burden of proof, and we decline to write one in.

*Delbosque*, 195 Wn.2d at 123–24.

The Defendant notes that the court made reference to RCW 9.94A.535(1) in support of the concurrent murder sentences. CP 519. He argues this reference was not only unnecessary, but it also implied that the Defendant had the burden of proof in the *Miller* hearing. OB at 49-50. The imputation of such a meaning is not justified in the record.

The court adopted this language at the express invitation of the Defendant.

MR. JOHNSON: We ask under *Gilbert* that Nga be sentenced to 25 years to life, that the Court exercise its discretion and find an exceptional sentence, to run those two concurrent to each other...

RP (9/6/19) at 70.

The aggravated murder statute does not indicate whether, when the offender is convicted of more than one aggravated murder, sentences are to run concurrently or consecutively. In *State v. McNeil*, 59 Wn. App. 478, 480, 798 P.2d 817, 818 (1990), the court interpreted that consecutive life-without-parole sentences under RCW 10.95.030 would be an exceptional sentence upward. Alternatively, RCW 9.94A.589(1)(b) applies to counts 1 and 2, such that consecutive sentences are the norm, and concurrent sentences are departures downward.

Here, the court imposed them concurrently. CP 486. And to protect this ruling, the court requested the defense (the proponent of the ruling) draft written findings. RP (9/6/19) at 98-99. The court justified the concurrent sentences based on the Defendant's transient immaturity as both a constitutional exception and under RCW 9.94A.535(1)(e). CP 515-19.

The court did not demand any additional evidence from defense or complain that any evidence was lacking. On the contrary, the court found the Defendant's crime was marked by immaturity and deserving of a reduced sentence.

The Defendant's imputation on the court is not justified. The court was satisfied that the Defendant's immaturity warranted a reduced sentence.

**5. There is no presumption for an exceptional downward sentence.**

The Defendant argues that this Court should find a presumption for an exceptional downward sentence contrary to the current case law. OB at 51-53 (citing *State v. Gregg*, 9 Wn. App. 2d 569, 444 P.3d 1219 (2019), *review granted*, 194 Wn.2d 1002, 451 P.3d 341 (2019)). Because the Washington Supreme Court has already heard oral argument on this topic, there is no need for this Court to consider the question.

In our particular case, the matter is moot. The court not only found the mitigating factor, but it also found it substantial and compelling and imposed a downward sentence.

**6. There is no basis in law for the Defendant's claim that the presumptive sentence for serious violent offenses was zero days incarceration.**

The Defendant appears to argue that, because he was under the age of 18 at the time of his offense, the "presumptive minimum" sentence on counts III and IV was a concurrent sentence with other greater offenses and that the State had the burden of establishing any incarceration was warranted. OB at 54-57. The claim is without merit.

The Defendant's age alone is not a basis for an exceptional sentence. *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). And there is no "presumptive minimum" sentence of zero for serious violent offenses.

The legislature has directed that "serious violent" convictions will not factor into the offender score of any other count, but are to be punished by way of consecutive sentences. RCW 9.94A.589(1)(b). Because they do not contribute to the offender score, to require that serious violent sentences run concurrently to others is to begin with a presumption of no penalty at all ... for crimes that are both violent and serious. This is not only illogical, it is a violation of the separation of powers doctrine, because it is the legislature, not the courts, which fixes legal punishments. *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719 (1986). The power of the legislature in that respect is plenary. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937).

The State has a burden. It is the burden of proving beyond a reasonable doubt the offenses occurred. It met the burden. The result is a presumptive sentence as the SRA dictates, i.e. standard range sentences which run consecutively to all other serious violent offenses.

The finding of a mitigating or aggravating factor does not result in a presumptive sentence of any kind. After a finding has been made, the court must then determine whether it provides a substantial and compelling

reason to depart from the standard range. RCW 9.94A.535. If it is, then the court must decide how far to depart.

In the Appellant's overlength brief, this argument is not supported by citation to authority of any kind. Nor logic. It is not deserving of consideration.

#### V. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's sentence.

RESPECTFULLY SUBMITTED this 23rd day of June, 2020.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney

s/ TERESA CHEN  
Teresa Chen  
Deputy Prosecuting Attorney  
WSB # 31762/OID 91121  
Pierce County Prosecutor's Office  
930 Tacoma Ave., Rm 946  
Tacoma, WA 98402  
Telephone: (253) 798-7400  
Fax: (253) 798-6636  
[teresa.chen@piercecountywa.gov](mailto:teresa.chen@piercecountywa.gov)

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her 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.

6/23/20      s/ *Therese Kahn*  
Date            Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**June 23, 2020 - 3:17 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54110-6  
**Appellate Court Case Title:** State of Washington, Respondent v. Nga Ngoeung, Appellant  
**Superior Court Case Number:** 94-1-03719-8

**The following documents have been uploaded:**

- 541106\_Briefs\_20200623151652D2732154\_6082.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Ngoeung Response Brief.pdf*
- 541106\_Motion\_20200623151652D2732154\_2901.pdf  
This File Contains:  
Motion 1 - Extend Time to File  
*The Original File Name was Ngoeung Extension.pdf*

**A copy of the uploaded files will be sent to:**

- katebenward@washapp.org
- wapofficemail@washapp.org

**Comments:**

---

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

**Filing on Behalf of:** Teresa Jeanne Chen - Email: teresa.chen@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:  
930 Tacoma Ave S, Rm 946  
Tacoma, WA, 98402  
Phone: (253) 798-7400

**Note: The Filing Id is 20200623151652D2732154**