

NO. 47251-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

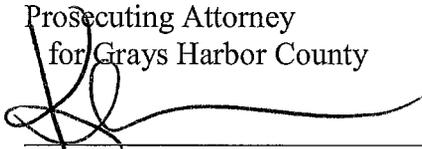
BRIAN M. BASSETT,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE CASE

A. Facts of underlying crime¹

On August 11, 1995, after walking into a police station in Grants Pass, Oregon, 17-year-old Nicholaus McDonald implicated his 16-year-old boyfriend Brian Bassett (hereinafter Bassett) in the shooting deaths of Bassett's parents, Michael and Wendy Bassett. McDonald indicated to the Grants Pass police officers that the shootings took place at the Bassetts' home in McCleary, Washington, at approximately 12:30 a.m. that day. He said that Bassett, who had been “kicked out” of his parents' home, climbed up a ladder and then surreptitiously entered the home through a second-floor window. Verbatim Report of Proceedings (RP) at 1274. McDonald revealed that as he waited outside of the house he heard gunshots. Bassett, according to McDonald's statement to the Grants Pass police, thereafter came out and accompanied McDonald inside, allegedly telling him that “I had to finish his parents off.” RP at 1766. McDonald also implicated himself in the drowning death of Bassett's five-year-old brother Austin. McDonald was returned to Washington and was thereafter charged in

¹ As set forth in co-defendant Nicholaus McDonald's case by *State v. McDonald*, 138 Wash. 2d 680, 683-85, 981 P.2d 443, 446-47 (1999).

Grays Harbor County Superior Court with three counts of aggravated first degree murder for the deaths of Wendy, Michael, and Austin Bassett.¹

A police officer who had taken McDonald's statement in Grants Pass testified at trial and indicated that McDonald told him that upon entering the home with Bassett he found Bassett's parents lying dead with their child, Austin, crying and touching his parents in an apparent effort to rouse them. The officer went on to say that McDonald told him that Bassett filled a bathtub and told Austin, who was covered in his parents' blood, "that he had to take a bath." RP at 1277. The officer said that McDonald told him that "he then went into the bathroom and that Bassett was waiting just outside the door," and "that he feared Bassett would shoot him, so he held the boy under the water face down until he was drowned." RP at 1282.

McDonald testified at trial and admitted that he shot Michael once in the head with Bassett's gun, claiming that he did so only to relieve Michael's "suffering" after Bassett had already shot him. RP at 1860. "I felt that he was suffering," he testified, "... and I heard what sounded like air was — like, his lung was shot and air was going through the lung or through the hole." RP at 1860–61.

McDonald denied that he had shot Wendy Bassett, and, despite his earlier statements to the Grants Pass police, he also denied having drowned Austin Bassett. McDonald claimed that his earlier confession to Austin's murder was intended to conform to a “concoction that me and Brian had come to,” RP at 1841, and now claimed that he had entered the bathroom to find that Bassett had already drowned Austin in the bathtub. Instead of assisting Bassett in this murder, McDonald asserted that “I gave him a dirty look.” RP at 1795. McDonald admitted to driving off alone with the bodies of Austin and Michael and hiding them along a logging road. He also conceded that he helped Bassett hide Wendy's body in the Bassetts' pump house, and that he cleaned the Bassetts' home after the murders in order to conceal evidence of the killings.

A forensic pathologist testified for the State. His testimony revealed that Michael Bassett had been shot five times, and that either of two gunshot wounds to Michael's head, including the one that McDonald admitted to, would have been fatal. Moreover, of the other three gunshot wounds, one — a gunshot wound to the heart — would have been fatal. Yet another wound “may have been fatal.” RP at 1221. According to the pathologist, the order in which these injuries occurred could not be determined.

B. Procedural History

The State agrees with the procedural history presented in the Appellant's Brief.

II. Argument

A. THE PROPER METHOD OF SEEKING REVIEW OF AN ORDER SETTING MINIMUM TERM THAT WAS ENTERED PURSUANT TO RCW 10.95.035 IS BY FILING A PERSONAL RESTRAINT PETITION.

When the Legislature enacted the *Miller* fix it directed that persons sentenced prior to June 1, 2014, to a term of life without the possibility of parole for an aggravated murder committed when they were under the age of eighteen should be brought back before the sentencing court for a hearing consistent with RCW 10.95.030². RCW 10.95.035³. The Legislature also enacted a provision stating the “court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986.” RCW 10.95.035. Prior to July 1, 1986, review of a parole board⁴ decisions setting a minimum term was obtained by filing a personal restraint petition. *In re Personal*

² Full text of the statute can be found attached as Appendix A.

³ Full text of the statute can be found attached as Appendix B.

⁴ After July 1, 1986 the trial court, rather than the parole board, had the responsibility of fixing minimum terms for offenses committed before July 1, 1984. RCW 9.95.011. However, the court's minimum term decision was subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986. *Id.*

Restraint of Rolston, 46 Wn. App. 622, 623, 732 P.2d 166 (1987). Thus, the proper procedure to obtain review of a trial court decision fixing a minimum term of incarceration pursuant to RCW 10.95.035 is to file a personal restraint petition.

In *Rolston*, the appellate court opted to disregard the fact that Rolston had improperly sought review by filing a notice of appeal rather than filing a personal restraint petition and, in order to facilitate review on the merits, simply treated the matter as a personal restraint petition. *Id.* at 623. The State will presume that as this case brings before the court issues of first impression including challenges to the constitutionality of the *Miller* fix, that this court, like the one in *Rolston*, will waive the procedural defect, treat the matter as a personal restraint petition, and address the challenge to the setting of the minimum term on the merits. Nevertheless, the Legislature has specifically indicated the manner of review of such orders and this provision should not be ignored.

To obtain relief, Bassett must show that he is restrained under RAP 16.4(b) and that his restraint is unlawful under RAP 16.4(c). *See In re Personal Restraint of Isadore*, 151 Wn.2d 294, 298–300, 88 P.3d 390 (2004) (noting that petitioners who have had no prior opportunity for judicial review are relieved of the heightened standards of review

generally applied in personal restraint petitions); *In re Personal Restraint of Grantham*, 168 Wn.2d 204, 208, 212–14, 227 P.3d 285 (2010); *In re Personal Restraint of Cashaw*, 123 Wn.2d 138, 148–49, 866 P.2d 8 (1994). For the reasons stated below he has failed to make this showing.

B. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING RCW 10.95.030(3) IS UNCONSTITUTIONAL; FURTHER, HE MISCONSTRUES *ALLEYNE* AND ITS APPLICABILITY TO THE INSTANT CASE.

An appellate court reviews issues regarding statutory construction de novo. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

Constitutional challenges are questions of law and are also reviewed de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 878, 91 P.3d 875 (2004). Although Bassett raised a constitutional challenge to RCW 10.95.030(3) below, it was on a different basis. *See* 1/30/15 RP 60-61. He did not challenge the statute below as unconstitutional because it required judicial fact finding in violation of the *Apprendi/Alleyne*⁵ line of cases as he does now on review. *See* Appellant’s brief at pp 18-20.

Constitutional challenges to statutes may be either “as applied” or facial. *City of Redmond*, 151 Wn.2d at 668-69. “An as-applied challenge

⁵ *See Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Alleyne v. United States*, 570 U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional.” *Id.* A successful “as applied” challenge will invalidate the statute only when it is attempted to be used in similar circumstances, whereas a successful facial challenge is “one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied” rendering the statute “totally inoperative.” *Id.*

Defendant’s argument is that the provisions of RCW 10.95.030(3) violate due process and the Sixth Amendment because it allows a judge to impose increased punishment based upon judicial fact finding rather than what was authorized by the jury’s verdicts. *See* Appellant’s brief at pp 18-20. This is a facial challenge to the constitutionality RCW 10.95.030(3).

Under the *Apprendi* line of cases, any fact that increases the “legally prescribed punishment,” regardless of whether that is an increase the minimum term or the maximum punishment, must be found by a jury. *See Apprendi*, 530 U.S. at 490; *Alleyne*, 133 S. Ct. at 2162. The question “is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict,” *Apprendi*, 530 U.S. at 494 (emphasis added), or prevent the

sentencing court from imposing a lower punishment than is authorized by the jury's guilty verdict, *see Alleyne*, 133 S. Ct. at 2161.

But in *Apprendi*, the United States Supreme Court expressly indicated that a sentencing court was free to engage in judicial fact finding, by taking into consideration various factors relating both to offense and offender, in determining what sentence should be imposed *within the range* prescribed by statute:

We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case. *See, e.g., Williams v. New York*, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949) (“[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law” (emphasis added)). As in *Williams*, our periodic recognition of judges' broad discretion in sentencing—since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range, [citation omitted] has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature.

Apprendi, 530 U.S. at 481 (footnote omitted); *see also United States v.*

Tucker, 404 U.S. 443, 447, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972)

(agreeing that “[t]he Government is also on solid ground in asserting that a

sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review”). This limitation to the extent of *Apprendi*’s reach has not been modified in subsequent cases. As the Court in *Alleyne* reiterated:

In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial fact finding, does not violate the Sixth Amendment.

Alleyne, 133 S. Ct. at 2163.

The sentencing provisions of RCW 10.95.030 are triggered by a jury finding a person guilty of premeditated murder in the first degree and the existence of one or more of the statutory aggravating circumstances. RCW 10.95.020. Prior to 2014, there were only two possible sentences for a person who was convicted of aggravated murder in the first degree in Washington: death or life without the possibility of parole. *State v. Meas*, 118 Wn. App. 297, 306, 75 P.3d 998 (2003).

After the United States Supreme Court issued *Miller v. Alabama*, — U.S. —, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012),⁶ the Washington Legislature recognized that a *mandatory* imposition of a sentence of life

⁶ The decision in *Miller* has been made fully retroactive. *Montgomery v. Louisiana*, — U.S. —, — S. Ct. —, — L. Ed. 2d —, (2016) (2016 WL 280758).

without the possibility of parole ran afoul of *Miller* when applied to persons who committed aggravated murder prior to their eighteenth birthday. In response, it amended the provisions of RCW 10.95.030 to comport with *Miller*. Laws of 2014, ch. 130, §9 (effective 6/1/2014). The amendment did not affect the possible sentences for an adult convicted of aggravated murder in the first degree the options remain either death or life without the possibility of parole. RCW 10.95.030(1) and (2).

Under the amended provision, when the aggravated murder was committed by a person who was less than sixteen years of age, the person will be “be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.” RCW 10.95.030(3)(a)(i). These provisions do not permit any exercise of discretion by the sentencing court. When, however, the person committing the aggravated murder was at least sixteen years of age but less eighteen, the following provisions are pertinent:

...

Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which

case the person will be ineligible for parole or early release.

...

In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

RCW 10.95.030(3)(a)(ii) and (b). Under these provisions the court *must* set the maximum term at life, but has discretion to set the minimum term anywhere within the specified range of no less than twenty five years to life. The statute expressly allows for the minimum term to be set at life, but does not require it.

While the Legislature has directed the sentencing court to consider various factors in exercising its discretion; the statute does not require any additional factual finding in order to impose a sentence of life without the possibility of parole. A jury's verdicts finding a defendant guilty of aggravated murder provide all the necessary fact finding in order to impose a sentence of life without parole, but the Legislature has removed the mandatory nature of such a sentence when the person committing the crime is between sixteen and eighteen years of age.

According to the express terms of the statute any minimum term set from no less than twenty five years to life is *within the statutory range authorized* by the legislature. As such, the *Apprendi/Alleyne* line of cases dealing with the Sixth Amendment right to a jury trial are not implicated.

Defendant has failed to show any constitutional infirmity in RCW 10.95.030. Moreover, as defendant has made a facial challenge, he must show that there is *no* set of circumstances in which the statute, as written, can be constitutionally applied. *See City of Redmond v. Moore*, 151 Wn.2d at 669. Even were this court to accept defendant's arguments regarding the applicability of *Apprendi/Alleyne* to RCW 10.95.030(3)(a)(ii) and (b), he could show no constitutional infirmity were the court to impose a minimum term of twenty five years. Defendant's facial challenge to RCW 10.95.030(3)(a)(ii) and (b) is without merit.

Defendant relies upon the case of *People v. Skinner*, ___ N.W. 2d ___ (Mich. Ct. App., 2015)(2015 WL 4945986) in support of his argument that RCW 10.95.030(3)(a)(ii) and (b) conflicts with *Apprendi* and *Alleyne*. In *Skinner*, a divided three judge panel found that Michigan's legislative fix enacted in the wake of *Miller* violated a defendant's Sixth Amendment right to a jury. The dissent, written by Judge Sawyer, found that *Apprendi* and *Alleyne* were not implicated because the legislative fix required only

that the trial court choose a sentence that was within the range authorized by the statute after considering the *Miller* factors. *Id.* Judge Sawyer noted that in determining the sentence, the statute directed that the trial court “shall consider” the *Miller* factors, but did not require any specific findings to be made.

Recently, a second panel of the Michigan Court of Appeals was faced with the same issue as in *Skinner*. *See State v. Perkins*, ___ N.W.2d ___ (Mich. Ct. App., 2016)(2016 WL 228364). The court in *Perkins* disagreed with *Skinner*, stating its reasons for concluding that *Skinner* was wrongly decided, thereby declaring a conflict with that decision under Michigan’s appellate rules. *Id.* Thus, of the six judges on the Michigan Court of Appeals that have examine this issue, only two have agreed with arguments that are similar to the ones advanced by defendant in this case.

For the reasons stated above, defendant has failed to show that RCW 10.95.030(3)(a)(ii) and (b) are facially invalid under the Sixth Amendment.

C. THE ORDER SETTING MINIMUM TERM SHOULD BE UPHELD AS THE COURT PROPERLY EXERCISED ITS DISCRETION IN A HEARING THAT COMPORTED WITH THE REQUIREMENTS OF RCW 10.95.030, MILLER, AND THE MINIMAL DUE PROCESS STANDARDS APPLICABLE TO THE SETTING OF MINIMUM TERMS.

It is well settled in Washington that the setting of a minimum term is not part of a criminal prosecution and the full panoply of rights due a criminal defendant in such a proceeding thus does not apply. *State v. King*, 130 Wn.2d 517, 525, 925 P.2d 606, 610 (1996); *In re Personal Restraint of Whitesel*, 111 Wn.2d 621, 630-31, 763 P.2d 199 (1988); *In re Personal Restraint of Sinka*, 92 Wn.2d 555, 566, 599 P.2d 1275 (1979). The minimal due process requires “notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case.” *Matter of Whitesel*, 111 Wn.2d 621, 630, 763 P.2d 199, 204 (1988), citing *Sinka*, 92 Wn.2d at 565, citing *In re Personal Restraint of Hendrickson*, 12 Wn.2d 600, 606, 123 P.2d 322 (1942)(internal quotations omitted).

An appellate court reviews an order setting minimum term for an abuse of discretion. *In re Personal Restraint of Myers*, 105 Wn.2d 257, 264, 714 P.2d 303 (1986).

1. The hearing setting minimum term complied with RCW 10.95.030(3)(a)(ii) and (b) and satisfied Miller.

In *Miller*, the United States Supreme Court held that “mandatory life without parole [“LWOP”] for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on ‘cruel and unusual punishments.’” 132 S. Ct. at 2460. The Supreme Court did not categorically prohibit LWOP sentences but rather required that before imposing such sentences, “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” 132 S. Ct. at 2475. Among the factors to be considered are the juvenile's “immaturity, impetuosity, and failure to appreciate risks and consequences.” *Id.* at 2468.

RCW 10.95.030(3)(a)(ii) and (b) do not mandate the imposition of a LWOP sentence, although such a sentence is permitted. The court is directed to consider “mitigating factors that account for the diminished culpability of youth as provided in *Miller*... including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.” RCW 10.95.030(3)(b). The

Legislature has properly drafted a statute that complies with the requirements of *Miller*.

Moreover, that statute was properly followed below. It is clear that the trial judge understood his responsibilities:

[The] United States Supreme Court in a series of decisions between 2005 and 2012 declared that juvenile offenders should be assessed differently than adults under the same circumstances due to the inherent difference between how a juvenile functions intellectually versus how an adult functions and there is certainly an element of common sense to that.

There's also a growing body of scientific support for - for that position that juvenile brains work differently than adult brains do. And because of - of those premises the Supreme Court determined that a sentence of death for a juvenile constituted cruel and unusual punishment and violated the United States constitution.

The Court also determined that late - one of the later three decisions that a mandatory sentence of life without parole violated a juvenile's right to be free of cruel and unusual punishment. That last decision of a Supreme Court was called *Miller versus Alabama*. And in that case the Court held that while mandatory sentences of life without parole violated the constitutional rights of the juvenile that the sentencing Court could still consider sentences of life without parole but needed to weigh several factors.

Taking into account that juveniles exercise less control over their impulses, that they lack the same level of maturity as do adults and that often times they don't have the ability to completely appreciate the consequences of their actions. And the - the United States Supreme Court said that a sentencing judge must engage in a process that it calls individualized sentencing, a process which requires the

Court to consider mitigating information, including circumstances surrounding the family of the juvenile and the environment within the home prior to the commission of the crimes, how prior may have affected the conduct of the offender, how the - how the juvenile dealt with the police. And then, of course, the - what the Court called the hallmark features of being a youth and that is immaturity, acting upon emotion without thought involved in - in the decision making process, and the failure to appreciate consequences.

And I'm saying - I'm telling you all of this because I - I want everyone to understand that that's the process that this Court is using today. I need - I need to look at all of those factors today and not make a decision based simply upon the horrific circumstances of the crimes that were committed in 1995.

1/30/15 RP 83-85.

The defendant submitted a large packet of mitigation evidence.

1/30/15 RP 16-52, 60-82, CP 158-296. There is no argument that the court improperly excluded evidence that he wanted considered or that the court refused to consider relevant mitigation evidence. The record makes it clear that the trial court read all of the information thoroughly and considered its contents carefully.

After listening to the arguments of counsel, the court issued its decision and explained its reasoning discussing relevant *Miller* factors.

1/30/15 RP 85-93. It is clear that the court properly considered the information presented and in the record. The court found that this was a

sophisticated and well-planned crime, including the defendant: stealing a firearm some days ahead of the murders, cutting the phone lines, and fashioning a silencer for the weapon. 1/30/15 RP 86-87.

The court concluded:

I think these crimes were the result of a cold and calculated and very well planned goal of eliminating his family from his life. And I don't believe that any amount of time in prison is going to ever result in his being rehabilitated such that he could safely return to any community.

1/30/15 RP 93.

The defendant's complains about the trial court's application of the facts presented and its failure "to give any meaningful consideration" to the defendant's chances of becoming rehabilitated. Appellant's Brief 41. However, these are really just complaints that the court did not agree with the defendant's argument.

This record shows compliance with the statute and *Miller*; it does not show an abuse of discretion. The court's setting of the minimum term on each count of aggravated murder at life should be upheld.

As will be addressed below, defendant's arguments that the hearing setting minimum term was faulty are generally based on claims not supported by the record or on erroneous legal assumptions.

2. RCW 10.95.030(3)(a)(ii) and (b) requires that a minimum term be set but does not establish a “presumptive” minimum term.

In his brief, defendant alleges, without argument or explanation, that the court must “presume” that LWOP is not the appropriate sentence in this case. He also states the trial court operated with a “presumption” that life without parole was the appropriate sentence. Appellant’s Brief 21. Defendant’s argument on review misconstrues the statutory language.

The Legislature clearly knew how to word a statute if it wanted to direct the setting of the minimum term at twenty five years, because it did so when addressing persons under the age of sixteen who committed aggravated murder: “Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.” RCW 10.95.030(a)(i). The language governing the setting of minimum terms for persons committing aggravated murder between the ages of sixteen and eighteen is quite different. In that circumstance the legislature stated:

Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum

term of life imprisonment and a minimum term of total confinement *of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.*

RCW 10.95.030(3)(a)(ii) (emphasis added). This language sets a floor that the minimum term cannot be set below; this floor is articulated in a manner -“no less than twenty five years” – that is not specific or determinate such that the language could be used by the court.

Furthermore, the next sentence indicates that the minimum term *may* be set at “life” or the same point as the maximum term. The Legislature was clearly and unambiguously establishing a range in which the minimum term could be set, namely: “no less than 25 years” to life. Then the Legislature, in the next section, directed the court as to what factors it should consider in setting the minimum term within that range. RCW 10.95.030(3)(b). Defendant’s unsupported assertion that RCW 10.95.030(a)(ii) established a “presumptive” minimum term of 25 years is without merit.

D. Neither *Miller* nor RCW 10.95.030(3)(b) requires a finding of “irreparable corruption” before a LWOP sentence may be imposed, nor does an LWOP sentence constitute “cruel and unusual punishment”.

At one point in his brief defendant seems to be arguing that the court must make a finding of “irreparable corruption” before it may impose a sentence of LWOP. *See* Brief of Appellant 18-20. Neither *Miller* nor RCW 10.95.030(3)(b) imposes such a requirement.

In *State v. Ramos*, 189 Wn. App. 431, 357 P.3d 680 (2015), Division III addressed whether *Miller* stood for the proposition that a sentence equivalent to life in prison is constitutionally permissible for a juvenile murderer only when there is proof of “irreparable corruption.” Division III concluded that there is no such requirement. *Ramos*, 189 Wn. App. at 450-52.

Division III noted that such an argument was presumably based upon this portion of the *Miller* decision:

[W]e do not consider [the petitioners’] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Roper*, 543 U.S., at 573, 125 S.Ct. 1183; *Graham*, 560 U.S., at —, 130

S.Ct., at 2026–2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Ramos, 189 Wn. App. at 450-51, citing *Miller*, 132 S. Ct. at 2469.

The Court looked at the United States' Supreme Court's history of using the phrase "irreparable corruption" when discussing juvenile sentencing. It first appeared in *Roper v. Simmons*, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), discussing the difficulty of assessing the juvenile's psychological makeup: "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." In *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) this Court repeated this concept noting that a juvenile's character is "not as well formed" which makes assessments about their long term character more difficult.

In *Graham*, the Court was assessing the constitutionality of a life sentence on a juvenile for a non-homicide offense and this discussion of "irreparable corruption occurred in the portion of the opinion where the court was assessing whether the challenged sentencing practice "serves legitimate penological goals." *Graham*, 560 U.S. at 67-68.

Division III reasoned that whether a juvenile is “irreparably corrupt or incorrigible is “relevant to the penological goal of incapacitation, one of the four goals of imprisonment [- the other three being retribution, deterrence and rehabilitation-] that the [United State Supreme] Court has recognized as legitimate.” *Ramos*, 189 Wn. App. at 451. Division III concluded “irreparable corrupt[ion]” is not relevant to retribution or deterrence *Ramos*, at 451.

As the Supreme Court in *Graham* reiterated that “choosing among [penological goals] is within a legislature’s discretion,” it would be contrary to this principle to find a requirement of a factor that had no relevance to two penological goals before a particular sentence could be imposed. Finally, Division III pointed to the language in *Miller* “setting forth what it requires of a sentencing judge who does make that judgment in a homicide case, it does not say that he or she must find ‘irreparable corruption’ but only that he or she is ‘require[d] ... to take into account how children are different.’” *Ramos*, 189 Wn. App. at 451-52, citing *Miller*, 132 S. Ct. at 2456.

The Court also held that: “Mr. Ramos's related argument that *Miller* mandates that a sentence without an opportunity for release based on rehabilitation violates the Eighth Amendment fails for the same reason:

Miller explicitly recognizes that even a life sentence without parole may be imposed on a juvenile offender as long as it is an individualized sentence arrived at after considering, among other factors, the attributes of youth.” *Id.*

Other jurisdictions have reached a similar conclusion as Division III. *People v. Palafox*, 231 Cal. App. 4th 68, 91, 179 Cal. Rptr. 3d 789, 805 (2014), *review denied* (Feb. 11, 2015), *cert. denied sub nom, Palafox v. California*, 135 S. Ct. 2811, 192 L. Ed. 2d 854 (2015) (*Miller* decision “mandates only that a sentencer follow a certain process--considering an offender’s youth and attendant characteristics--before imposing a particular penalty” not a finding of irreparable corruption.); *State v. Lovette*, 758 S.E.2d 399, 408 (N.C. Ct. App. 2014), *appeal dismissed*, 763 S.E.2d 392 (N.C. 2014) (Lovette’s argument takes the statement in *Miller* “regarding ‘irreparable corruption’ out of context and seemingly elevates it to a required finding, but this is simply one of the factors a trial court may consider.”)

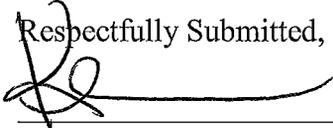
Moreover, nothing in RCW 10.95.030(3)(b) requires a finding that the juvenile is “irreparably corrupt” or any particular finding before a minimum term is set- it only requires the court to examine mitigating factors pertaining to youth and its characteristics before setting the term.

To the extent defendant is arguing that LWOP may only be imposed upon a juvenile if the court find the juvenile to be “irreparably corrupt,” he is incorrect.

III. CONCLUSION.

The proper method of seeking review of the setting of a minimum term under RCW 10.95.035 is by personal restraint petition. Defendant has failed to show that his restraint is unlawful under RAP 16.4(c). Defendant has not shown that RCW 10.95.030(3)(a)(ii) and (b) is unconstitutional on its face. Nor has he shown any error in how his hearing pursuant to these provisions was conducted or that the trial court abused its discretion in setting the minimum term at “life” on his three convictions for aggravated murder. The petition should be dismissed.

DATED this 7th day of March, 2016.

Respectfully Submitted,


KATHERINE L.
SVOBODA34097

Attachment A

RCW 10.95.030

Sentences for aggravated first degree murder.

(1) Except as provided in subsections (2) and (3) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW **10.95.050**, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person had an intellectual disability at the time the crime was committed, under the definition of intellectual disability set forth in (a) of this subsection. A diagnosis of intellectual disability shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of intellectual disabilities. The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability.

(a) "Intellectual disability" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

(3)(a)(i) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

(c) A person sentenced under this subsection shall serve the sentence in a facility or institution operated, or utilized under contract, by the state. During the minimum term of total confinement, the person shall not be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave or absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (i) In the case of an offender in need of emergency medical treatment; or (ii) for an extraordinary medical placement when authorized under *RCW 9.94A.728(3).

(d) Any person sentenced pursuant to this subsection shall be subject to community custody under the supervision of the department of corrections and the authority of the indeterminate sentence review board. As part of any sentence under this subsection, the court shall require the person to comply with any conditions imposed by the board.

(e) No later than five years prior to the expiration of the person's minimum term, the department of corrections shall conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community. To the extent possible, the department shall make programming available as identified by the assessment.

(f) No later than one hundred eighty days prior to the expiration of the person's minimum term, the department of corrections shall conduct, and the offender shall participate in, an examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board. The board may consider a person's failure to participate in an evaluation under this subsection in determining whether to release the person. The board shall order the person released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. If the board does not order the person released, the board shall set a new minimum term not to exceed five additional years. The board shall give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.

(g) In a hearing conducted under (f) of this subsection, the board shall provide opportunities for victims and survivors of victims of any crimes for which the offender has been convicted to present statements as set forth in RCW 7.69.032. The procedures for victim and survivor of victim input shall be provided by rule. To facilitate victim and survivor of victim involvement, county prosecutor's offices shall ensure that any victim impact statements and known contact information for victims of record and survivors of victims are forwarded as part of the judgment and sentence.

(h) An offender released by the board is subject to the supervision of the department of corrections for a period of time to be determined by the board. The department shall monitor the offender's compliance with conditions of community custody imposed by the court or board and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

(i) An offender released or discharged under this section may be returned to the institution at the discretion of the board if the offender is found to have violated a condition of community

custody. The offender is entitled to a hearing pursuant to RCW **9.95.435**. The board shall set a new minimum term of incarceration not to exceed five years.

[2015 c 134 § 5; 2014 c 130 § 9; 2010 c 94 § 3; 1993 c 479 § 1; 1981 c 138 § 3.]

NOTES:

***Reviser's note:** RCW **9.94A.728** was amended by 2015 c 156 § 1, changing subsection (3) to subsection (1)(c).

Effective date—2015 c 134: See note following RCW **9.94A.501**.

Purpose—2010 c 94: See note following RCW **44.04.280**.

Attachment B

RCW 10.95.035

Return of persons to sentencing court if sentenced prior to June 1, 2014, under this chapter or any prior law, for a term of life without the possibility of parole for an offense committed prior to eighteenth birthday.

(1) A person, who was sentenced prior to June 1, 2014, under this chapter or any prior law, to a term of life without the possibility of parole for an offense committed prior to their eighteenth birthday, shall be returned to the sentencing court or the sentencing court's successor for sentencing consistent with RCW **10.95.030**. Release and supervision of a person who receives a minimum term of less than life will be governed by RCW **10.95.030**.

(2) The court shall provide an opportunity for victims and survivors of victims of any crimes for which the offender has been convicted to present a statement personally or by representation.

(3) The court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986.

(4) A resentencing under this section shall not reopen the defendant's conviction to challenges that would otherwise be barred by RCW **10.73.090**, **10.73.100**, **10.73.140**, or other procedural barriers.

[2015 c 134 § 7; 2014 c 130 § 11.]

NOTES:

Effective date—2015 c 134: See note following RCW **9.94A.501**.

Effective date—2014 c 130: See note following RCW **9.94A.510**.

GRAYS HARBOR COUNTY PROSECUTOR

March 07, 2016 - 11:25 AM

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