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No. 97517-5

No. 77913-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN GREGG,

Appellant.

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

BRIEF OF APPELLANT

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. INTRODUCTION

Children are different. Because they are categorically different from adults, both the state and federal constitutional prohibitions against cruel punishment require different rules for children at sentencing. For children sentenced in adult court, mitigation is the rule, not the exception. For this reason, the sentencing court must presume that otherwise mandatory adult sentencing ranges and enhancements do not apply. And the State bears the burden to overcome this presumption with proof beyond a reasonable doubt.

In this case, although Sebastian Gregg was 17 years old when he made the greatest mistake of his life, the court presumed that mitigation was the exception, not the rule. Accepting the prosecution's claim that Sebastian had not proved his status as a child made him less culpable, the court treated Sebastian just like an adult and imposed the prosecution's request for a lengthy, adult sentence. Because placing the burden on Sebastian to prove that he was different from an adult violated the constitutional prohibitions against cruel punishment, Sebastian is entitled to a new sentencing hearing.

B. ASSIGNMENTS OF ERROR

1. In violation of article I, § 14 of the Washington Constitution and the Eighth and Fourteenth Amendments to the United States Constitution,

the trial court erred by requiring Sebastian prove that his status of being a child at the time of the offense was a substantial and compelling reason to mitigate his sentence and depart from the adult sentencing rules.

2. In violation of due process as guaranteed by the Fourteenth Amendment to the United States Constitution and article I, § 3 of the Washington Constitution, the trial court erred in accepting Sebastian's guilty plea.

C. ISSUES

1. Children are categorically less culpable and have a greater capacity for change. The Eighth Amendment's prohibition against cruel and unusual punishment recognizes this difference. For this reason, when sentencing a juvenile in adult court, the court has complete discretion to disregard otherwise mandatory minimum sentencing ranges and enhancements. Does the Eighth Amendment require a presumption that the juvenile's youth is a mitigating factor and that the prosecution bear the burden to prove otherwise beyond a reasonable doubt?

2. Article I, § 14 forbids all cruel punishment. It is more protective than the Eighth Amendment and is to be independently interpreted. This provision must be interpreted to effectuate the constitutional rule that children are different. To guard against cruel punishment and the significant risk that juveniles will not receive appropriate sentences in

adult court, does article I, § 14 require a presumption that the juvenile's youth is mitigating factor and that the prosecution bear the burden to prove otherwise beyond a reasonable doubt?

3. A guilty plea is involuntary if the defendant was affirmatively misled as to a sentencing consequence. Sebastian was affirmatively told in his plea agreement and by the prosecutor at his plea hearing that if he pleaded guilty, the sentencing court would not be required to make Sebastian register as a felony firearm offender upon release. The law, however, required the court to make Sebastian register and the court imposed a registration requirement in the judgment and sentence. Was Sebastian's guilty plea involuntary, entitling him to withdraw his plea should he choose?

D. STATEMENT OF THE CASE

Sebastian Gregg was born on September 29, 1998 in California. CP 16; RP 294. Sebastian's father, Erin Gregg, separated from Sebastian's mother and moved to Washington with Sebastian a couple of years later. RP 294. Sebastian lived with his father and step-mother, Kiersten Kime, until he was about five years old. RP 294-95. He moved back to California and lived with his mother, Koren Gregg, until he was about eight years old. RP 295.

While living with his mother, Sebastian was neglected. RP 297, 230-31. There was domestic violence and drug use in the home. RP 554-56. Sebastian had behavioral problems at school, such as lying, acting out, and being disruptive. RP 296. Diagnosed with attention deficit hyperactivity disorder (ADHD), Sebastian was medicated. RP 239, 589. Following his mother's arrest for possessing controlled substances, Sebastian returned to his father's care in Washington. RP 298.

Sebastian continued to suffer from behavioral problems in his father's and step-mother's care. RP 229, 557. Despite the medications, Sebastian still had outbursts. RP 300-01. Because the medications were not helping and were having ill side-effects, Sebastian's father stopped the medications when Sebastian was in fifth grade. RP 300. Sebastian continued to misbehave at home and at school, and would often lie to try to get out of trouble. RP 251-52, 256, 306.

Sebastian's father served in the military. RP 292. In response to Sebastian's behavior, Sebastian's father acted like a drill sergeant with his son. RP 307. He would yell and swear at Sebastian. RP 309. Sebastian's step-mother, who separated from Sebastian's father when Sebastian was about 14 years old, testified that Sebastian's father was a harsh disciplinarian. RP 228, 241-42. He used physical and verbal discipline with Sebastian. RP 241-42. She believed Sebastian's father often

overreacted, like when Sebastian would stay up late at night or sneak onto the computer. RP 244.

Although he had behavioral problems and was “very immature,” Sebastian was intelligent. RP 249, 336. In addition to video games, he enjoyed reading, particularly fantasy and science fiction. RP 239-40. Following one Christmas, he read all seven Harry Potter books in two months. RP 328. Sebastian read at a college-level in the 7th grade. RP 327, 559.

Despite his intelligence, Sebastian obtained poor grades in school. RP 307, 341; Ex 55. Perhaps due to his attention deficit disorder, he failed to complete work, do homework, and stay on task. RP 563. Only during his senior year of high school was Sebastian able to obtain decent grades. RP 563; Ex. 55. Sebastian was motivated to follow in his father’s footsteps and join the army. RP 335, 568, 585.

Sebastian’s behavioral problems were not related to violence. His father testified Sebastian was a “loving individual,” not a violent person. RP 306, 330. Sebastian loved his four younger brothers and never hurt them. RP 247-48, 292, 330. He played with his younger brothers even when he was a teenager. RP 330.

Sebastian was socially awkward and had difficulty making friends. RP 303. In high school, he regularly played video games online with his girlfriend in Florida whom he had never met in person. RP 569.

Sebastian, however, had one “friend,” Dylan Mullins. RP 313-14; Ex. 51, p. 7. Dylan was about a year and half older than Sebastian, and had been a grade ahead of him in school. RP 180; CP 12. Dylan began coming over to Sebastian’s house during Sebastian’s junior or senior year. RP 314. Sebastian’s father testified, “I didn’t have a generally good feeling about Dylan.” RP 315.

Dylan was unlike Sebastian in many respects. Dylan bragged about being in fights. RP 570-71. He used alcohol and marijuana. RP 178-79, 280, 319. He had other friends, and hung out with group called the “707 Rebels,” a group of self-identified rednecks who drive trucks, fly the confederate flag, and had encounters with law enforcement. RP 155-56; Ex. 14, p. 56-57; Ex 21., p. 29

One of Dylan’s friends was Michael Clayton, who was a little older than Dylan. RP 60, 62. Dylan and Michael were “best friends.” RP 177, 282. Michael graduated high school in 2014. RP 180-81.

Michael lived at home with his father. RP 60, 288. Michael's uncle lived next door. RP 60. On Friday, June 10, 2016, Michael and Dylan broke into the uncle's home and stole firearms. RP 60-61, 81.¹

Later that day, Michael asked his older cousin, Jeremy Nelson, if he wanted to go to Greenwater, which is near Enumclaw, and shoot guns. RP 264-65. On Saturday, Michael, Dylan, Jeremy, and two other male friends went to Greenwater and shot guns. RP 269, 272-73.

That night, the group drank and smoked marijuana. RP 272-73. Dylan kept trying to convince Michael and Jeremy that he was part of some kind of military or "special forces" team and asked them to join. RP 274, 277. He told them "they would go out and hunt people down." RP 274. Although this sounded "sketchy" to Jeremy, who was in his early twenties, he believed Dylan at the time. RP 275, 286, 289. Michael and Jeremy told Dylan they were not interested in joining, but Dylan kept pushing them to join. RP 275.

Later that night, Dylan told Jeremy, "I'm going to beat the shit out of you." RP 278. After Michael told Dylan to not talk to his cousin like that, Dylan charged Michael. RP 278. The two fought. RP 278. During the fight, Dylan got punched in the face and his head hit a rock. RP 278. The

¹ Sebastian would later admit to being involved with this burglary. RP 478.

group took Dylan to the emergency room. RP 281. Although Dylan continued to be hostile toward Michael at the hospital, the two reconciled. RP 281-82.

Within days, Michael's uncle found out that his nephew had burglarized his home. RP 61-62; Ex. 37. To avoid charges, Michael told his family he was suicidal and went to a mental health facility. RP 65, 84-85; Ex. 30. Michael sent Dylan a message complaining about how Dylan had snitched on one of his friends and told Dylan to stop snitching or he was going to get hurt. RP 210.

Dylan's mother and step-father kicked Dylan out of the house. On June 20, Dylan broke back into the house. Ex. 36, p. 5. After refusing to leave, Dylan threatened to kill himself while holding a large hunting knife. Ex. 35 & 36, p. 5. After a standoff with police, Dylan surrendered and was involuntarily committed. Ex. 35. Dylan's step-father obtained a restraining order the following day. Ex. 36.

Although the commitment referral form stated that Dylan needed to be held and not released, Dylan was released. Ex. 35; RP 192. Dylan was upset at his parents' neighbor because the neighbor had called the police on him. RP 212. On June 23, Dylan and Sebastian broke into the neighbor's house and stole items. Ex. 39-40. Several days later, Sebastian and Dylan were both arrested. Exs. 43, 61.

Sebastian's father picked Sebastian up from juvenile detention. RP 317-18. Sebastian's father forbade his son from talking to Dylan. RP 319.

On July 5, Dylan checked into the emergency room again. RP 281-19; Ex. 42. He had a head wound, including a large gash on his forehead. RP 281-82; Ex. 42.

Dylan told Sebastian that Michael had jumped him and beat him up again. RP 16-17, 49; Ex. 14, p. 33-34. Sebastian had seen Dylan's earlier injuries from the previous fight between Michael and Dylan. RP 476. Dylan had told Sebastian that Michael had smashed his head into rocks. RP 16-17, 476. Dylan told Sebastian that Michael had told him that Sebastian was next. Ex. 20, p. 32. Sebastian had hung out with Michael before, but only when Dylan was with them. Ex. 51, p. 7. Sebastian knew that Michael had been admitted to the "suicidal branch" of a hospital recently. Ex. 20, p. 48. Sebastian was worried about being hurt really bad by Michael. RP 222. Dylan came up with a plan to kill Michael. Ex. 20, p. 32, 45.

Similar to how Dylan had told Jeremy and Michael about his membership in a special military group, Dylan had also often told Sebastian about a group he and his uncle belonged to, called the "Northwest Militia." RP 427. The group ran a criminal enterprise, stealing cars and killing people. RP 430; Ex. 51, p. 7. In an effort to recruit

Sebastian into helping him kill Michael, Dylan told Sebastian that the group would come after Sebastian and his family if he did not help him kill Michael. RP 427. Sebastian feared for his family. RP 428. Dylan also assured Sebastian that the Northwest Militia would help reestablish them with new identities and lives elsewhere. Ex. 51, p. 7.

On the morning of July 6, 19-year-old Dylan and 17-year-old Sebastian snuck into Michael's house. Ex. 49; CP 12. Dylan knew Michael's and Michael's father's schedules. Ex. 21, p. 53-54. Michael's father would leave early in the morning and he expected Michael to return sometime later that morning or in the afternoon. Ex. 21, p. 53-55. After Michael's father had left, they broke into a safe that they knew contained firearms. RP 70; Ex. 21, p. 45. Dylan armed himself with a handgun and Sebastian armed himself with a rifle. Ex. 20, p. 34. When Michael entered the house that morning, Sebastian fired first, intentionally missing. Ex. 20, p. 40. Dylan then unloaded his handgun at Michael, hitting him. Ex. 21, p. 35. Sebastian then fired at Michael once, hitting Michael as well. Ex. 20, p. 40.

Following the killing, Dylan and Sebastian used accelerants to burn the house. RP 114. Dylan had suggested they do this to destroy the evidence. Ex. 21, p. 36; Ex. 20, p. 46, 73.

Dylan and Sebastian left. Perhaps because he had naively believed Dylan's story about how the "Northwest Militia" would get him a new identity, Sebastian left his wallet containing his school ID at a trail near the scene. RP 122-23; Ex. 20, p. 48. Dylan also left the handgun he used nearby. RP 180. Both items were later found by the police. RP 180.

Taking some of the guns with them, Dylan and Sebastian stole an old truck owned by the Kent Parks Department. RP 128, 142-43; Ex. 34. They planned to go to Ocean Shores. Ex. 18-19.

The same morning Michael was killed, Sebastian's father had called the police to report that Sebastian was missing. Ex. 40, p. 3. Sebastian's father believed his son was with Dylan. Ex. 40, p. 3. Sebastian had left a note stating he was running away to protect his family. Ex. 40, p. 3; RP 213.

The next day, July 7, the Washington State Patrol stopped the truck in Grays Harbor County because the driver was speeding. Ex. 34, p. 3. The driver was Dylan. Ex. 34, p. 3. Sebastian, who did not have a driver's license and had not been allowed to drive by his father, was in the passenger seat. Ex. 34, p.3; RP 420, 550. Unaware of their involvement in the homicide or the fire, police arrested them for the stolen truck. Ex. 34, p. 3.

Dylan told police he knew about an automobile theft ring and stated he was willing to be a confidential informant. RP 183-84; Ex. 33, p. 3. Dylan stated he wanted to cooperate because he had a child on the way. RP 186. This was a lie. RP 188. Because Dylan was apparently persuasive, a trooper conveyed this information to the Grays Harbor prosecutor's office, and Dylan was almost released. RP 187-88; Ex. 33, p.8. At a trooper's request, a prosecutor met with Sebastian to discuss being a confidential informant and about possibly dropping the charges. RP 195-96; Ex. 33 p.6. Sebastian expressed great excitement about the possibility of working with Dylan and asked if he would be able to live with Dylan. RP 195-96; Ex. 33, p. 7. The prosecutor recalled Sebastian's comments and marked excitement as striking her as odd. RP 195-96; Ex. 33, p. 7. Shortly after the meeting, however, the prosecutor learned Sebastian and Dylan were possibly involved in a homicide. Ex. 33, p. 8.

The next day, homicide detectives from Auburn interviewed both Dylan and Sebastian separately. The detectives interviewed Dylan first in the morning. Ex. 21, p. 1. After telling Dylan that they had forensic evidence, surveillance footage from trails near the scene, and had spoken to Sebastian, Dylan confessed. Ex. 21, p. 30-33. Dylan explained that "Michael double crossed" him and that Michael and a whole group of guys had jumped him. Ex. 21, p. 33-34.

Later that afternoon, the detectives interviewed Sebastian. Ex. 20, p. 1. Although the Washington State Patrol had notified Sebastian's father that his son was in juvenile detention in Grays Harbor County the day before, the detectives did not tell Sebastian's father that his son was suspect in a homicide before the interview. Ex. 34, p. 3; RP 181. After telling Sebastian they knew he was involved in Michael's death and using a similar ruse concerning forensic evidence, Sebastian confessed. Ex. 20, p. 32-80. Sebastian expressed remorse and had difficulty talking about what had happened to Michael. RP 219-221.

The prosecution charged Sebastian with first degree murder, first degree burglary, and first degree arson. CP 1-2, 14-15. The murder and burglary charges each contained a firearm enhancement allegation. CP 1-2; 14-15. Per statute, Sebastian was prosecuted in adult court even though he was 17 years old when 19-year old Dylan recruited him to help kill Michael. CP 1-3, 12.

About a year after the charges were filed, Sebastian pleaded guilty. CP 16-33; RP 18-20. The prosecution asked the court to impose a total sentence of 37 years. CP 123. Sebastian asked the court to depart from the adult sentencing rules and sentence him to 12 years and two months. CP 34. He argued departure and mitigation was appropriate because he was a juvenile at the time of the offense, his youthfulness was central to his

participation, he was influenced by an older peer, he was a first time offender, his risk of reoffending was low, and he was capable of living a productive and crime free life upon release. CP 25-36.

To determine whether the court should depart from the adult sentencing rules, the court held a fact finding hearing in December 2017 over six days. RP 22-675. The court received evidence and heard testimony about Sebastian's life and the facts surrounding the offenses.

For example, the court heard from Sebastian's father, who remained shocked that his son helped Dylan kill Michael:

I have a hard time with this whole case, the fact that it even transpired. He doesn't fit it. Never has. Never will. I don't know what caused this to happen. The family doesn't know what caused this to happen. This is an unbelievable tragedy.

RP 330.

Some explanation was provided by Dr. Megan Carter, a board certified forensic psychologist, who provided the court an expert opinion. RP 342-44, 366. She believed that Sebastian's youthfulness was a contributing factor to the offense and that Sebastian had been particularly vulnerable to negative peer influences. RP 408, 431-32. Similarly, Valerie Mitchell, a mitigation specialist with a master's in social work, did not "believe Sebastian would have engaged in any type of violent behavior without coercion from a more sophisticated partner whom Sebastian

admired so much.” Ex 51, p. 7. After conducting a risk assessment, Dr. Carter believed that Sebastian had a low risk of committing a violent or similar offense in the future. RP 366, 405, 436.

Despite the evidence, and accepting the prosecution’s claim that Sebastian bore the burden of proving a departure based on his juvenile status was warranted, the court found that Sebastian had not met his burden. RP 675-688. The court imposed the prosecution’s recommended sentence of 37 years. RP 711.

E. ARGUMENT

1. Violating the state and federal constitutions, the sentencing court erred in requiring that Sebastian prove his status as a juvenile justified a departure from the adult sentencing rules.

a. Children are categorically different. When sentencing a child in adult court, the court has complete discretion to impose a mitigated sentence despite the otherwise mandatory sentencing ranges and enhancements.

The Eighth Amendment to the United States Constitution forbids “cruel and unusual punishment.” U.S. Const. amend. VIII.² In a series of revolutionary cases, the United States Supreme Court has recognized this

² The Eighth Amendment is binding on the states under the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

amendment demands that children be treated differently in the criminal justice system.

The Supreme Court began this revolution by holding that the Eighth Amendment categorically forbade the execution of juvenile offenders under the age of 18. Roper v. Simmons, 543 U.S. 551, 578, 125 S. Ct. 1183, 1195, 161 L. Ed. 2d 1 (2005). In so holding, the court recognized not merely that there was a national consensus against executing juveniles, but that children were categorically less culpable than adults and more capable of change. Id. at 567-74. The court reasoned children are (1) immature and this immaturity often results in impetuous and ill-considered behavior; (2) vulnerable to negative influences, such as peer pressures; and (3) capable of change because a child's character is not yet fixed. Id. at 569-70.

The Supreme Court has adhered to Roper and followed its rationale. The court later held in Graham that the Eighth Amendment forbade sentencing a juvenile to life in prison without the possibility of parole for a non-homicide crime. Graham v. Florida, 560 U.S. 48, 82, 130 S. Ct. 2011, 2026, 176 L. Ed. 2d 825 (2010). The court noted that developments in brain science supported the basic premise that there were fundamental differences between juveniles and adults. Id. at 68.

Following Graham, the court held that mandatory life without parole for juveniles violated the Eighth Amendment even for an offense of homicide. Miller v. Alabama, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The court ruled that sentencing courts must consider certain differences between children and adults (the Miller factors) before imposing such a harsh penalty. Id. at 479-80. The court subsequently reaffirmed Miller, holding that Miller recognized a substantive rule of constitutional law that was retroactive. Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016).

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

Shortly thereafter, our Supreme Court in Houston-Sconiers extended the requirement of a Miller hearing to *all* cases where juveniles are sentenced in adult court. State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). There, two juveniles received lengthy sentences of around 30 years due to “mandatory” firearm enhancements. Id. at 8-9. Our Supreme Court reversed, holding that the Eighth Amendment required that

sentencing courts have “complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system.” Id. at 21. Now, “[t]rial courts must consider mitigating qualities of youth at sentencing” and have complete discretion to impose a sentence below what would otherwise be a mandatory range or sentencing enhancement were the offender an adult. Id. at 21. The court held sentencing courts must consider the Miller factors in sentencing a juvenile offender in adult court:

the court must consider mitigating circumstances related to the defendant’s youth—including age and its “hallmark features,” such as the juvenile’s “immaturity, impetuosity, and failure to appreciate risks and consequences.” It must also consider factors like the nature of the juvenile’s surrounding environment and family circumstances, the extent of the juvenile’s participation in the crime, and “the way familial and peer pressures may have affected him [or her].” And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.

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

b. The court wrongly accepted the prosecution’s claim that Sebastian should be sentenced just as an adult unless he proved otherwise.

In this case, the prosecution requested that the court sentence Sebastian as adult. Under the adult sentencing scheme, Sebastian faced a mandatory sentencing range of 401-494 months (about 33 to 41 years). CP 17, 123. Of that, 120 months (10 years) was due to the two “mandatory”

firearm enhancements. CP 21, 123. Unless a sentencing court exercises its discretion afforded to it for juvenile offenders, time on firearm enhancements is consecutive rather than concurrent, and is served as ‘flat time,’ meaning no earned early release. Houston-Sconiers, 188 Wn.2d at 8-9.

Relying on Houston-Sconiers, Sebastian argued the mandatory sentencing range and firearm enhancements did not apply to him because he was 17 years old at the time of the offense. CP 60. Due to his age and the circumstances of the offense, Sebastian argued he should receive a mitigated sentence of 146 months, which would permit him to rejoin society when he was about 30 years old. CP 35-60.

Notwithstanding Houston-Sconiers, the prosecution took the position that the court must sentence Sebastian as an adult unless Sebastian proved his age justified mitigation. CP 127-28; RP 636-40. Although the Miller factors partly look forward in recognizing that children have a greater capacity for change, the prosecutor argued the court could not depart from the adult sentencing rules unless the court found that the “particular characteristics [of youth] affected this crime.” RP 647; cf. Houston-Sconiers, 188 Wn.2d at 23 (Miller requires court to consider “any factors suggesting that the child might be successfully rehabilitated”). The prosecutor argued further the “court cannot presume that all of the

precepts youthfulness that we've talked about over the several day that we've been here necessarily apply to Sebastian Gregg." RP 639. The prosecutor argued "because this is the defense's burden, which is unusual, and unusual for me, the Court doesn't presume." RP 639.

Despite the mountain of evidence showing that Sebastian's involvement in the offense was tied to Sebastian's age, the prosecution maintained the offense had nothing to do with Sebastian's age and that Sebastian had not met *his burden* to prove he should not be sentenced just like an adult:

There is no evidence that his age of 17 years and 10 months had anything to do with his murder of Michael Clayton. There is no basis to impose an exceptional sentence down. And the Court can know that he had every - he had six days of a Miller hearing. This court has heard everything he wanted you to hear. Every exhibit is admitted. All -- there was not a single objection from either side. There was no evidence rule, hearsay -- you have everything to consider. And there's simply no evidence left beyond presumption and assumption which, because they have the burden, doesn't work.

RP 658-59.

The court accepted the prosecution's framework and rejected Sebastian's request for a mitigated sentence, ruling: "This court does not find there are substantial and compelling reasons to justify a sentence below the standard range." RP 688. The court then followed the

prosecution's request and imposed a sentence of 37 years, which included ten years for the firearm enhancements. RP 711.

c. The Eighth Amendment requires a presumption of a mitigated sentence for juveniles sentenced in adult court and that the prosecution bears the burden of proving otherwise beyond a reasonable doubt

In rejecting Sebastian's request for a departure from the adult sentencing rules and a mitigated sentence, the trial court committed two errors. First, the court erred in failing to presume that a mitigated sentence was appropriate because Sebastian was 17 years old when he committed the offenses. Second, the court erred in not requiring the prosecution to prove that a mitigated sentence was inappropriate. Instead, the court improperly placed the burden on Sebastian to prove that his status as a juvenile offender mitigated his sentence.

The Eighth Amendment demands a presumption that a mitigated sentence is appropriate for a juvenile offender in adult court and that the prosecution bear the burden of proving otherwise beyond a reasonable doubt. These rules are derived from the constitutional rule that children are categorically different and less culpable than adults. Miller, 567 U.S. at 471; Houston-Sconiers, 188 Wn.2d at 20.

For this reason, other state courts have concluded that Miller and Montgomery require a presumption against a life without parole sentence

and that the prosecution bear the burden of overcoming this presumption. Davis v. State, 415 P.3d 666, 681-82 (Wyo. 2018); Commonwealth v. Batts, 640 Pa. 401, 163 A.3d 410, 451-55 (2017); State v. Riley, 315 Conn. 637, 654-55, 110 A.3d 1205 (2015); State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013). As explained by the Pennsylvania Supreme Court, “any suggestion of placing the burden on the juvenile offender is belied by the central premise of *Roper*, *Graham*, *Miller* and *Montgomery*—that as a matter of law, juveniles are categorically less culpable than adults.” Batts, 163 A.3d at 452. It follows that when imposing the same sentence on adult and juvenile alike, the juvenile sentence is disproportionately harsher.

That Miller and the foregoing cases involved the context of life without parole sentences on juveniles is immaterial. In Houston-Sconiers, our Supreme Court extended Miller to all cases where a juvenile is sentenced in adult court. Houston-Sconiers, 188 Wn.2d at 20. There, the two juveniles received non-life sentences of 26 and 31 years each. Id. Sebastian received a sentence of 37 years.

Thus, when a juvenile is sentenced in adult court, it must be presumed that the juvenile is less culpable than an adult, and the prosecution bears the burden of proving otherwise. Although the Sentencing Reform Act generally places the burden of proof on the party seeking an exceptional sentence, this mandatory rule must give way to the

constitutional rule that children are different. See Houston-Sconiers, 188 Wn.2d at 20.

In other areas of the law, children are treated as children unless the State carries the burden of proving otherwise. For example, children between eight and 12 years of age are presumed to be incapable of committing crimes unless the State proves they have sufficient capacity to understand the alleged act or neglect, and to know that it was wrong. RCW 9A.04.050; State v. Ramer, 151 Wn.2d 106, 112-13, 86 P.3d 132 (2004). Similarly, in cases where the charged offense does not require the juvenile to be automatically prosecuted in adult court, the prosecution bears the burden of proving that the juvenile should be prosecuted in adult court. State v. Massey, 60 Wn. App. 131, 137, 803 P.2d 340 (1990). Thus, for juveniles like Sebastian who are automatically prosecuted in adult court, they cannot be presumed to be like adults, and the prosecution should carry the burden of proving that they should be sentenced as an adult.

The State may argue the foregoing arguments conflict with our Supreme Court's decision in Ramos. There, in a case involving a de-facto life without parole sentence, the Washington Supreme Court reasoned Miller did not require the prosecution to carry the burden of proving that the Miller factors justified a life without parole sentence. Ramos, 187

Wn.2d at 436-37, 445. The court in Ramos acknowledged “the logical appeal” and “potential benefits” of a rule that placed the burden on the prosecution rather than the juvenile. Id. at 437, 445. But the court ruled that “at this time,” it would not require this rule. Id. at 446.

The Court moved past Ramos in Houston-Sconiers. Houston-Sconiers held sentencing courts must have “absolute” or “complete” discretion to consider how a child’s youth may mitigate a sentence. Houston-Sconiers, 188 Wn.2d at 9, 20-21. Although instructing that a juvenile in adult court should receive a Miller hearing, the Houston-Sconiers court did not state which party had the burden of proof at the hearing. Notably, Houston-Sconiers did not cite Ramos. By not citing Ramos, the court left the issue open. Therefore, the issue concerning the burden of proof following Houston-Sconiers is an issue of first impression.

Moreover, Ramos limited its holding to “the record presented.” Ramos, 187 Wn.2d at 437. The record in this case is different. As Ramos was a narrow ruling confined to its particular facts, it does not dictate the result on this Eighth Amendment issue, particularly in light of the court’s subsequent decision in Houston-Sconiers. See Kentucky v. Whorton, 441 U.S. 786, 789, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979) (“[T]he Court’s holding was expressly limited to the facts . . . This explicitly limited

holding . . . belie[s] any intention to create a rule that an instruction on the presumption of innocence is constitutionally required in every case.”).³

The Court should hold that the Eighth Amendment requires a presumption that a mitigated sentence is appropriate for a juvenile offender in adult court and that the prosecution bear the burden of proving beyond a reasonable doubt that a standard adult sentence is appropriate. Davis, 415 P.3d at 682 (adopting presumption and holding state bears the burden of overcoming presumption with proof beyond a reasonable doubt); Batts, 163 A.3d at 455 (same). The beyond a reasonable doubt standard is appropriate given the juvenile’s great interest in liberty, the significant risk of error absent this stringent standard, and the minimum burden imposed upon the State. See Batts, 163 A.3d at 452-55 (providing detailed analysis on why beyond reasonable doubt standard is appropriate). If the prosecution fails to meet its burden, the sentencing court has complete discretion to disregard otherwise mandatory sentencing

³ Ramos is also not controlling because on questions of the Eight Amendment, this Court is bound by United States Supreme Court decisions, not Washington Supreme Court decisions. Cooper v. Aaron, 358 U.S. 1, 18, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958); State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008); accord State v. Gilbert, 33794-4-III, 2018 WL 1611833, at *26 (Wash. Ct. App. Apr. 3, 2018) (unpublished) (Fearing, J., dissenting). Ramos cannot be squared with the Supreme Court’s jurisprudence on juveniles. Batts, 163 A.3d at 452; Gilbert, 33794-4-III, 2018 WL 1611833, at *26 (unpublished) (Fearing, J., dissenting).

ranges and enhancements, and can craft an appropriate sentence. See Houston-Sconiers, 188 Wn.2d at 9, 20-21

d. Article I, § 14 independently requires a presumption that a child in adult court receive a mitigated sentence unless the prosecution proves otherwise beyond a reasonable doubt.

Even assuming the Eighth Amendment does not require the foregoing rule, article I, § 14 of the Washington Constitution does.⁴

The United States Constitution proscribes “cruel and unusual” punishment. U.S. Const. amend. VIII. In contrast, the Washington Constitution prohibits “cruel” punishment. Const. art. I, § 14.

Washington appellate courts have repeatedly held that article I, § 14 is broader than the Eighth Amendment and should be interpreted independently. State v. Fain, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980); State v. Bartholomew, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984); State v. Roberts, 142 Wn.2d 471, 505-06, 14 P.3d 713 (2000); State v. Bassett, 198 Wn. App. 714, 723, 394 P.3d 430 (2017), review granted, 189 Wn.2d 1008, 402 P.3d 827 (2017). An independent state constitutional analysis indicates that a more protective rule is required under article I, section 14. See State v. Gunwall, 106 Wn.2d 54, 59-61, 720 P.2d 808 (1986) (state

⁴ Ramos did not address article I, § 14. Ramos, 187 Wn.2d at 454.

constitutional provisions may be more protective than their federal constitutional analogs).⁵

Generally, Washington courts analyze the four Fain factors to assess whether a sentence is “cruel” under our constitution. State v. Witherspoon, 180 Wn.2d 875, 887, 329 P.3d 888 (2014). These factors consider “(1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment meted out for other offenses in the same jurisdiction.” Id. (internal quotation omitted).

But because the Fain factors do not consider special constitutional concerns inherent in sentencing children—the attributes of youth and a youth’s diminished culpability—this Court applied a different framework to assess the constitutionality of a Washington statute that grants courts discretion to sentence juveniles to life without parole. Bassett, 198 Wn. App. at 734-739. This Court also rejected the Fain framework in Bassett because the petitioner was challenging an entire sentencing scheme, not simply the proportionality of his actual sentence. Id. at 738. Applying a categorical bar analysis, this Court held imposition of life without parole

⁵ No Gunwall analysis is necessary because article I, § 14 has already been held to be broader than its federal analog and has been interpreted independently. City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 641-42, 211 P.3d 406 (2009); Roberts, 142 Wn.2d at 505-06.

or release sentence is unconstitutionally cruel punishment in violation of article I, § 14. Id. at 738-41.

Bassett supports adoption of a presumption that a child’s youth is a mitigating circumstance and rule that the prosecution bear the burden of proving otherwise beyond a reasonable doubt. As discussed in Bassett, the “nature of the *Miller* analysis” is “speculative and uncertain.” Bassett, 198 Wn. App. at 743. Even where the court applies the Miller factors, there is unacceptable risk that the court will reach the wrong result. Id. at 742-43. When that happens, there is great risk that unconstitutional punishment in violation of article I, § 14 will result. See id.

When juveniles like Sebastian are automatically prosecuted in adult court, there is a risk that the juvenile will improperly be treated just like an adult rather than as child. Nevertheless, there is no constitutional right for a juvenile to be tried in juvenile court. State v. Watkins, ___ Wn.2d ___, 423 P.3d 830, 839 (2018). In so holding, our Supreme Court reasoned this result was tenable because the court had “declared in *Houston-Sconiers* that trial courts have discretion to sentence juveniles below the applicable sentencing range in accordance with their culpability.” Id. at 838. But if a trial court misapplies the Miller factors, the juvenile will not receive the possibility of mitigation and will be subject to the same mandatory ranges and enhancements applied to adults.

By having a presumption in favor of juveniles and requiring the prosecution to bear the burden of proving beyond a reasonable doubt that the Miller factors support imposition of an adult sentence, the foregoing risk of error is greatly mitigated. It will decrease the odds that juveniles in adult court will receive unconstitutionally cruel punishment.

To effectuate the promise of Miller and Houston-Sconiers, this Court should hold that article I, § 14 requires a presumption that a mitigated sentence is appropriate for a juvenile offender in adult court and that the prosecution bear the burden of proving beyond a reasonable doubt that a standard adult sentence is appropriate.

e. The error in placing the burden on Sebastian, rather than the prosecution, is manifest constitutional error.

Sebastian did not raise this issue below. The issue, however, is properly raised for the first time on appeal as manifest constitutional error.

“Constitutional errors are treated specially because they often result in serious injustice . . .” State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). Thus, under RAP 2.5(a)(3), manifest error affecting a constitutional right may be raised for the first time on appeal as a matter of right. State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015).

A claim that sentence or sentencing practice violates the Eighth Amendment or article I, § 14 qualifies as manifest constitutional error that

can be raised for the first time on appeal. See Roberts, 142 Wn.2d at 500-01 (claim of instructional error that resulted in violations of the Eighth Amendment and article I, § 14 qualified as manifest constitutional error). Additionally, a misapplication as to the burden of proof generally qualifies as manifest constitutional error. State v. Kalebaugh, 183 Wn.2d 578, 583-85, 355 P.3d 253 (2015) (reviewing error related to burden of proof for first time on appeal); In re A.W., 182 Wn.2d 689, 700 n.10, 344 P.3d 1186 (2015) (same). Thus, Sebastian’s claim the trial court incorrectly placed the burden on him to prove that the Miller factors justified a departure from the adult sentencing rules qualifies as manifest constitutional error.

The formal inquiry asks: (1) is the error of constitutional magnitude, and (2) is the error manifest? Kalebaugh, 183 Wn.2d at 583.

The claimed error is plainly constitutional. Sebastian is arguing the burden of proof at the Miller hearing was improperly allocated to him in violation of the Eighth Amendment and article I, § 14.

It is also “manifest.” To be “manifest,” there must be a showing of “actual prejudice,” meaning “that the claimed error had practical and identifiable consequences in the trial.” State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). This standard is satisfied when “the record shows that there is a fairly strong likelihood that serious constitutional

error occurred.” Id. The analysis previews the claim and should not be confused with establishing an actual violation. Id. at 583.

Here, the claimed error had practical and identifiable consequences at the sentencing hearing. The court allocated the burden to Sebastian to prove the Miller factors justified a departure from the adult sentencing rules. This is significantly different from a presumption that a departure from the adult sentencing rules will be warranted for juveniles in adult court and that the State bears the burden to prove otherwise beyond a reasonable doubt. See A.W., 182 Wn.2d at n.10 (allegation that incorrect standard of proof was used qualified as manifest constitutional error). Further, as explained in greater detail below, the evidence reasonably supported a determination that the Miller factors applied in Sebastian’s favor. A different allocation of proof would have made a difference.

For these reasons, Sebastian’s claim is properly before this Court as manifest constitutional error and must be reviewed. RAP 2.5(a)(3).

f. A new sentencing hearing is required.

As outlined earlier, the prosecution argued that Sebastian must be sentenced as an adult because he had not met his burden to prove the Miller factors warranted mitigation. CP 127-28; RP 636-40, 658-59. The court did not apply a presumption in Sebastian’s favor and did not require

the prosecution prove that the Miller factors did not warrant a departure from the adult sentencing rules. RP 675-88.

Because this was constitutional error, prejudice is presumed and the State bears the burden of proving the error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The State cannot meet this heavy burden.

There was a copious amount of evidence in Sebastian's favor on the Miller factors. Sebastian was neglected as a young child by his mother. RP 297, 230-31. When he returned to his mother, he had significant behavioral problems both at home and at school. RP 229, 557. Despite his intelligence, he did poorly in school. RP 307, 341, 559; Ex 55. Sebastian came under the influence of Dylan Mullins, Sebastian's only "friend." RP 408, 431-32; Ex. 51, p. 7. Dylan, who while a peer was also an adult, recruited Sebastian to kill Michael. RP 17; Ex. 20, p. 32, 48; Sebastian felt that he had to participate to protect himself and his family. RP 427-28. Evidence further indicated that Sebastian was not likely to commit a future criminal act of violence and would be rehabilitated. RP 366, 405, 436.

Accordingly, the State cannot prove beyond a reasonable doubt the result would have been same absent the error. This Court should reverse and remand for a new sentencing hearing with instruction to apply the

proper standard. If the Court agrees, Sebastian asks that the Court not reach the next issue, which is raised in the alternative.

2. Sebastian was affirmatively misinformed that, as a result of his plea, the court would not require Sebastian to register as a felony firearm offender. Sebastian’s plea is involuntary and he should be permitted to withdraw it, should he choose.

a. A guilty plea is involuntary if the defendant was affirmatively misled as to a sentencing consequence.

Due process requires that a defendant’s guilty plea be knowing, voluntary, and intelligent. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); U.S. Const. amend. XIV; Const. art. I, § 3. Under the court rules, a plea must be “made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). Before a guilty plea is accepted, the defendant must be informed of all the “direct” consequences. State v. A.N.J., 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010). “[C]ollateral consequences can be undisclosed,” but “a defendant cannot be positively misinformed about the collateral consequences.” Id. at 114 (emphasis added). Failure to inform a defendant about a direct consequence or affirmative misinformation concerning a collateral consequence means the plea is “involuntary,” entitling a defendant to withdraw the plea. Id. at

116; State v. Turley, 149 Wn.2d 395, 398-99, 402, 69 P.3d 338 (2003). A defendant may raise the issue concerning the voluntariness of a plea for the first time on appeal as manifest constitutional error. RAP 2.5(a)(3); State v. Mendoza, 157 Wn.2d 582, 589, 141 P.3d 49 (2006).

b. Background of the felony firearm registration scheme.

Washington enacted a felony firearm registration scheme into law in 2013. Laws of 2013, ch. 183 (S.H.B. 1612). This law requires sentencing courts to consider imposing a requirement that a defendant register as a “felony firearm offender” when the defendant is convicted of a “felony firearm offense.” RCW 9.41.330(1), .333. For some offenses, the requirement is mandatory. RCW 9.41.330(3). “Felony firearm offender” is defined to mean “a person who has previously been convicted or found not guilty by reason of insanity in this state of any felony firearm offense.” RCW 9.41.010(7). A “felony firearm offense” consists of any felony offense under chapter 9.41 RCW, drive-by shooting, theft of a firearm, possessing a stolen firearm, and “[a]ny felony offense where the defendant is armed with a firearm in the commission of the offense.” RCW 9.41.010(8)(a)-(e).

Upon release or after being sentenced, whichever is later, a person required to register as a firearm offender must personally register with the

county sheriff for the county of the person's residence within 48 hours. RCW 9.41.333(1), (5). The person is required to give information when registering, may be required to provide documentation to verify the information, and may be photographed or fingerprinted. RCW 9.41.333(2)-(4). Offenders must update their registration when moving. RCW 9.41.333(7). When moving to another county, the offender must personally register with the sheriff's office of that county. RCW 9.41.333(7). The Washington State Patrol is required to maintain a database of registered felony firearm offenders. RCW 43.43.822(2).

The duty to register continues for four years. RCW 9.41.333(8). A person who knowingly fails to comply with any of the registration requirements is guilty of failure to register as a felony firearm offender, a gross misdemeanor. RCW 9.41.335.

c. Sebastian was positively misinformed that he would not be required to register as a felony firearm offender as a result of his plea. If he chooses, he should be permitted to withdraw his plea.

When a defendant is convicted of a "felony firearm offense," the sentencing court must require the defendant to register as felony firearm offender if that offense is also a serious violent offense. RCW 9.41.330(3)(c). Here, Sebastian pleaded guilty to first degree murder and first degree burglary, both with firearm enhancements. First degree murder

is a serious violent offense. RCW 9.94A.030(46)(a)(i). This was also a “felony firearm offense” because Sebastian was armed with a firearm in the commission of this offense. CP 21, 28, 32. Thus, as a consequence of the plea, the sentencing court was required to impose a firearm offender registration upon Sebastian. RCW 9.41.330(3)(c)

Sebastian, however, was affirmatively told in his plea agreement that he would not be required to register as a felony firearm offender. The standard provision in the form was crossed off, which indicated it did not apply:

1 (m) This offense is a ~~felony firearm offense as defined by RCW 9.41.010, (including any~~
2 ~~felony committed while armed with a firearm, drive-by shooting, unlawful possession of a firearm,~~
3 ~~theft of a firearm, and possession of a stolen firearm) and the judge may impose a requirement that I~~
4 ~~register with the sheriff in the County where I reside, for a period of four years from sentencing or~~
5 ~~from my release from confinement for this offense, whichever is later, in compliance with RCW~~
6 ~~9.41.333. If this offense, or an offense committed in conjunction with this offense, involved sexual~~
7 ~~motivation, was committed against a child under 18, or was a serious violent offense, the judge~~
8 ~~must impose this registration requirement. [If not applicable, this paragraph should be stricken and~~
9 ~~initialed by the defendant and judge _____.]~~

CP 22.

At the hearing on Sebastian’s plea, the prosecutor asked Sebastian if he understood the crossed off paragraphs meant they did not apply to Sebastian, to which Sebastian answered, yes:

MS. MCCOY: . . . There are a number of paragraphs throughout this document that have been crossed out and

you have initialed. Do you understand that that means that these paragraphs, they do not apply to you?

THE DEFENDANT: Yes, ma'am.

8/18/17RP 16.

When Sebastian was sentencing, however, the court ordered that Sebastian register as a felony firearm offender as part of his sentence, as required by RCW 9.41.330(3), .333:

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

This offense is a **felony firearm offense** (defined in RCW 9.41.010; includes any felony committed while armed with a firearm, unlawful possession of a firearm, theft of a firearm, and possession of a stolen firearm). **Registration is required** because this offense or an offense committed in conjunction with this offense: involved sexual motivation; was committed against a child under 18; or was a serious violent offense. As mandated by RCW 9.41.330(3), the Court requires that the defendant register as a firearm offender, in compliance with RCW 9.41.333. The registration requirements are explained in the attached **Appendix L**.

CP 137.

The misinformation conveyed to Sebastian in his plea renders his plea involuntary. Regardless of whether the registration requirement is characterized as a “direct” or “collateral consequence,” the result is the same because Sebastian was positively misinformed.

A defendant does not need to prove that a collateral consequence was material to the decision to plead guilty if the defendant was *affirmatively* misled about the collateral consequence. A.N.J., 168 Wn.2d at 114 (“a defendant cannot be positively misinformed about the collateral consequences”). In A.N.J., the court held a juvenile defendant was entitled

to withdraw his guilty plea to first degree child molestation. A.N.J., 168 Wn.2d at 114, 116-17. The record showed that the defendant had been *affirmatively* told that he could remove the conviction from his record. Id. at 116-17. This was incorrect. Id. The court reasoned that while the mere failure to advise the defendant that the conviction would remain on his record would not entitle him to withdrawal, the affirmative misinformation entitled him to withdrawal. Id. at 116.

Here, Sebastian was “positively misinformed” about whether the sentencing court would impose a felony firearm registration requirement upon him as a result of his plea. He was affirmatively told that the court would not because he was incorrectly told the firearm offender registration scheme did not apply to him. Consequently, Sebastian’s plea is not knowing, intelligent, and voluntary, and he should be permitted to withdraw it, should he choose. If the Court does not order a new sentencing hearing, Sebastian asks the Court to remand with instruction that he be given the option to withdraw his plea.

F. CONCLUSION

In violation of the Eighth Amendment and article I, § 14, Sebastian was improperly given the burden to prove that his status as a juvenile made him less culpable than an adult. The state and federal constitutions require a presumption that a juvenile is less culpable than an adult and that

the prosecution prove otherwise beyond a reasonable doubt. The Court should remand for a new sentencing hearing. Alternatively, the court should remand with instruction that Sebastian is authorized to withdraw his plea, if he chooses.

DATED this 14th day of September 2018.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project (#91052)
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 77913-3-I
v.)	
)	
SEBASTIAN GREGG,)	
)	
Appellant.)	

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Phone (206) 587-2711
Fax (206) 587-2710

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