

No. 97517-5

NO. 77913-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN GREGG,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE CHERYL B. CAREY

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. Whether the Sentencing Reform Act comports with the Eighth Amendment and article I, section 14 where it affords sentencing courts the discretion to consider whether the defendant's youth diminished his culpability, and if so, depart from the standard range.

2. Whether the defendant has failed to prove that the Sentencing Reform Act is unconstitutional because it requires defendants to prove diminished culpability.

3. Whether the defendant's plea was voluntary where he was correctly advised of all direct punitive consequences of his plea, and any misinformation that he received did not affect the range of punishment.

B. STATEMENT OF THE CASE

Sebastian Gregg was charged, along with co-defendant Dylan Mullins, with murder in the first degree while armed with a firearm, burglary in the first degree while armed with a firearm and arson in the first degree. CP 1-2.

Gregg and Mullins burglarized the home where their friend, Michael Clayton, lived with his father on July 6, 2016, with the plan to kill Clayton. CP 3; Ex. 20 at 33. Gregg and Mullins stole several

firearms from a gun safe in the home, and then laid in wait for four hours for Clayton to return home. CP 4, 125; Ex. 20 at 33, 44. As they waited, they discussed burning down the house after the murder. CP 125; Ex. 20 at 47. When Clayton entered the home, Gregg and Mullins shot and killed him. CP 4; Ex 20 at 34; RP 157-58. Gregg told the police he aimed toward Clayton's "center mass." Ex. 20 at 41. They then set the home on fire to cover up the murder. CP 4; Ex. 20 at 35. The fire quickly engulfed the home, which burned for an entire day before firefighters could enter and find Clayton's body. CP 4; RP 37, 76-77, 91, 115-16.

Gregg and Mullins stashed the firearms they stole from the Clayton home in the woods adjacent to the Clayton property, and then went to the library to create an alibi. CP 4; Ex. 20 at 64-65. After leaving the library, they stole a Kent Parks Department truck, retrieved the stolen firearms from the woods, and fled to Grays Harbor County. CP 4; Ex. 20 at 65; RP 127-28. There, they were pulled over and arrested for possessing a stolen truck. CP 4; Ex. 20 at 74; RP 130.

On July 8, both Mullins and Gregg confessed to the murder. CP 4; Ex. 20. They also confessed to jointly burglarizing and setting fire to another home on June 23, 2016. CP 5. Clayton was

19 years old when he was murdered. CP 35; RP 175. Mullins was

18 years old when he committed the murder. CP 35; RP 175.

Gregg was 17 years old when he committed the murder. CP 35;

RP 175.

Gregg pled guilty as charged. CP 16, 28, 32-33. As part of his plea, Gregg submitted the following admission:

About three weeks prior to the murder, Dylan Mullins told me that Michael Clayton beat him up. Dylan said that Michael smashed Dylan's head into a rock requiring immediate medical attention. Dylan was rushed to the ER and received staples to his head wound. I observed the staples in Dylan's head.

The day before the murder, Dylan approached me and told me that Michael Clayton beat him up again. I observed visual injuries to Dylan's face. This was the second time that Michael beat up Dylan. Dylan told me Michael was going to beat me up too.

As a result, and without legal justification or excuse, on the morning of July 6, 2016, we unlawfully broke into Michael's home . . . by crawling through Michael's window. We entered the residence with the intent to kill Michael. Dylan told me that Michael wouldn't be home. After unlawfully entering Michael's residence, we waited for Michael's father to leave for work. After he left, we broke into the gun safe and removed the firearms, one of which was a 30.06 rifle. When Michael came home, I fired the 30.06 at Michael. I intentionally missed. I fired my rifle a second time with the intent to kill Michael, and this time my shot struck Michael. Dylan also fired shots at him. I was later told that Michael died as a result of Dylan's gunshot wounds, although I am not sure if it was from mine or Dylan's shots, or from both. We were acting together.

After we shot Michael, we knowingly and maliciously caused a fire by spreading gasoline on the floor of Michael's residence. We did this intending to set fire to the home. The home was burning when we left. It ultimately burned to the ground. I did not personally light the gasoline on fire, but I believe Dylan did and I did not try to stop him.

CP 31.

The total standard range sentence for the crimes, including the two consecutive firearm enhancements, was 401 to 494 months. CP 136; RCW 9.94A.510, .515, .525. At sentencing, the defense requested an exceptional sentence below the standard range of 146 months based on Gregg's youth, arguing that his youth and the peer influence of Mullins contributed to the offense.

CP 35. The State recommended a sentence of 444 months of total confinement. CP 123. The State advised the court that it had taken Gregg's youth into consideration in filing the charges, and had elected not to charge Gregg with stealing the firearms or the truck, and had also elected not to allege aggravating circumstances that would have applied. CP 132. The State argued that Gregg's youth did not substantially diminish his culpability, noting that the murder was not impulsive or reckless, but carefully planned and executed. CP 133.

The sentencing hearing occurred over the course of six days. RP 1-714. The State called five witnesses who testified regarding the facts of the crime. RP 29-227. The defense called seven witnesses to testify regarding Gregg's character and youthfulness, including a forensic psychologist who had interviewed Gregg and conducted a risk assessment. RP 227-594. The court also listened to the recorded confessions of Mullins and Gregg. RP 676; Ex. 20.

In view of all the evidence presented, the court concluded that youth did not substantially diminish Gregg's culpability and that there was no substantial and compelling reason to impose a sentence below the standard range. RP 688. The court imposed a standard range sentence of 444 months (37 years), which consisted of 324 months for murder in the first degree plus the two 60-month firearm enhancements. RP 711; CP 138. The other sentences were run concurrently with the murder sentence. CP 138.

C. ARGUMENT

1. THE SENTENCING REFORM ACT'S ALLOCATION OF THE BURDEN OF PROVING MITIGATING CIRCUMSTANCES IS CONSTITUTIONAL.

Gregg argues that when sentencing a juvenile in adult court, the State must bear the burden of proving that a standard range sentence is warranted. However, the Sentencing Reform Act (SRA) explicitly places the burden of establishing grounds for a mitigated sentence on the defendant. Gregg argues that this Court must ignore this legislative determination, and instead place the burden on the State to prove beyond a reasonable doubt that a standard range sentence should be imposed. Gregg is mistaken. The Eighth Amendment and Washington Constitution article I, section 14 require that sentencing courts have the discretion to consider youth, and the SRA provides that discretion. Gregg cannot show that allocating the burden of proving mitigation to the defendant is unconstitutional.

a. The SRA Places The Burden Of Proving Mitigation On The Defendant.

RCW 9.94A.535 governs departures from the standard range under the SRA. RCW 9.94A.535(1)(e) provides that an exceptional sentence below the standard range may be imposed if “the defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.” Age is not per se mitigating. In

re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 335, 422 P.3d 444 (2018). However, the sentencing court is permitted to consider youth as a mitigating factor if it is shown that youth mitigated the defendant's culpability. Id. RCW 9.94A.535(1) provides that a mitigating circumstance must be established by a preponderance of the evidence.

Gregg's argument that there must be a presumption of a mitigated sentence is in direct conflict with the procedure set forth in RCW 9.94A.535(1) and could only be judicially imposed if constitutionally required. Statutes are presumed constitutional, and Gregg has the burden of proving that RCW 9.94A.535 is unconstitutional beyond a reasonable doubt. State v. Hunley, 175 Wn.2d 901, 908, 287 P.3d 584 (2012).

- b. The Eighth Amendment Requires Sentencing Courts To Have The Discretion To Consider Youth Before Imposing A Life Sentence On A Juvenile Offender, But Does Not Require The State To Disprove Mitigating Circumstances.

Gregg's reliance on the Eighth Amendment is misplaced. The Eighth Amendment requires that courts have the discretion to account for youth at sentencing before imposing a life sentence on a juvenile. The Eighth Amendment also bars the imposition of life sentences on most juvenile offenders. But the Eighth Amendment

does not proscribe specific procedures at sentencing. Gregg's argument has been appropriately rejected by the Washington Supreme Court.

Beginning in 2005, the United States Supreme Court issued a series of decisions regarding the imposition of life sentences on juvenile offenders. Taken together, these four cases hold that the Eighth Amendment prohibits States from imposing life sentences on most juvenile offenders.

The first of those cases, Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), barred capital punishment for juvenile offenders. The Court next barred sentences of life imprisonment without parole for juvenile offenders who had not committed homicides in Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Then, in Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the Court expanded its holding in Graham to bar the imposition of mandatory sentences of life imprisonment without parole for juvenile homicide offenders. The Court concluded that a sentencer must take into account the attributes of youth before sentencing a juvenile to life imprisonment for homicide. Id. at 474. The Court refused to absolutely prohibit imposing life in prison without parole on a

juvenile convicted of homicide, but opined that such sentences should be uncommon. Id. at 479. Finally, in Montgomery v. Alabama, \_\_\_ U.S. \_\_\_, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), the Court held that Miller applied retroactively. In sum, the Eighth Amendment prohibits *most* juvenile offenders from being sentenced to life imprisonment without parole; they must be released or given an opportunity for release before the end of their lifetimes. State v. Scott, 190 Wn.2d 586, 586-97, 416 P.3d 1182 (2018).

However, the Court expressly declined to impose specific procedural requirements to implement the new rule. In Montgomery, the Court noted that Miller “did not impose a formal fact-finding requirement.” Id. at 735. In keeping with federalism, the Court has left it to the States to develop appropriate procedures. Id. The Court has never indicated that the burden of proving that the defendant’s youth was mitigating may not be placed on the defendant.<sup>1</sup>

Notably, even in the death penalty context, it is constitutional to place the burden of proving mitigating circumstances on the

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<sup>1</sup> Also, since the maximum sentence that could have been imposed in this case was 41 years, Gregg was not facing a possible functional life sentence, so it is arguable that Gregg’s sentencing hearing did not implicate Miller at all. Washington courts have not yet delineated what potential sentence triggers the need for a Miller hearing.

defendant. Kansas v. Marsh, 548 U.S. 163, 171, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006). While the Constitution requires capital sentencing juries to have discretion, States are free to determine “the manner in which a jury may consider mitigating evidence.” Id. Once the State has proven aggravating circumstances that qualify a murder as death-eligible, the defendant may be required to prove that there are sufficient mitigating circumstances to overcome the aggravating circumstances. Id.

The Washington Supreme Court has expressly declined to judicially impose a presumption of a mitigated sentence in cases involving juveniles. In State v. Ramos, 187 Wn.2d 420, 387 P.3d 650 (2017), cert. denied, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017), the juvenile defendant was convicted of aggravated murder. The court rejected Ramos’s claim that the State must carry the burden of proving that a standard range sentence is appropriate. Id. at 445. The court explained:

Pursuant to the SRA, the offender carries the burden of proving that an exceptional sentence below the standard range is justified. Ramos argues that as a matter of constitutional law, the burden must be shifted to the State to prove that a standard range sentence is appropriate. However, he has not shown that such burden-shifting is required by the Eighth Amendment.

Id. Similarly, in State v. Houston-Sconiers, 188 Wn.2d 1, 23-24, 391 P.3d 409 (2017), the court concluded that the SRA comports with the Eighth Amendment because it affords sentencing courts the discretion to consider youthful attributes affecting culpability as a mitigating factor.

The out-of-state cases that Gregg seeks to rely on are inapposite: they all involve the imposition of a life without parole sentence. State v. Riley, 315 Conn. 637, 110 A.3d 1205 (2015) (holding that Miller suggests a presumption against imposing life without parole on a juvenile offender); State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013) (noting no national consensus but imposing the burden on the State to prove that life without parole is warranted); Commonwealth v. Batts, 640 Pa. 401, 163 A.3d 410 (2017) (creating a presumption against sentencing a juvenile to life in prison without parole); Davis v. State, 415 P.3d 666, 681 (Wyo. 2018) (noting no national consensus but imposing a presumption against life without parole sentence).

The SRA procedure does not prevent sentencing courts from accounting for youth. It affords courts the discretion to account for youthful attributes that diminish culpability. Gregg has failed to

prove that RCW 9.94A.535(1) violates the Eighth Amendment. The burden of proving mitigation was properly allocated to the defense.

c. Art. I, Sec. 14 Does Not Require The State To Disprove Mitigating Circumstances.

Gregg contends that even if the Eighth Amendment does not require the State to prove that a standard range sentence is warranted, then article I, section 14 of the Washington Constitution should. Gregg does not, however, allege that the sentence imposed—37 years for premeditated murder and arson—is cruel and unusual punishment under the Washington Constitution. As such, the question of the burden of proof is better analyzed as a due process question, and there is no basis for independent state constitutional analysis.

In State v. Bassett, \_\_\_ Wn.2d \_\_\_, 428 P.3d 343, 348-50 (2018), the Washington Supreme Court concluded that article I, section 14 is broader than the Eighth Amendment in the context of juvenile sentencing. It held that a sentence of life in prison without parole is categorically barred as cruel and unusual punishment for all juvenile offenders. Id. It did so by extending the categorical bar of Graham, that juvenile non-homicide offenders cannot be

sentenced to life imprisonment without parole, to juvenile homicide offenders. Id. at 354.

However, *no* court has held that a 37-year sentence imposed on a juvenile for premeditated murder is cruel and unusual punishment.<sup>2</sup> Gregg has not argued that the sentence imposed in his case is categorically barred. Thus, the categorical bar analysis of Bassett is inapplicable to Gregg's procedural claim.

- d. Gregg Cannot Show That RCW 9.94A.535(1)'s Allocation Of The Burden Of Proof Violates Due Process.

Turning to a due process analysis, Washington courts have consistently found that the due process clause of article I, section 3 of the Washington Constitution is not broader than the Due Process Clause of the federal constitution. In re Dependency of E.H., \_\_\_ Wn.2d \_\_\_, 427 P.3d 587, 592 (2018). The Gunwall<sup>3</sup> factors generally do not support independent state constitutional analysis of the state due process clause. Id. at 592. The texts of the clauses are nearly identical and there is no legislative history supporting independent analysis. Id.

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<sup>2</sup> Moreover, Gregg has a meaningful opportunity for release after serving 20 years of his sentence pursuant to RCW 9.94A.730.

<sup>3</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Under the federal constitution, the Due Process Clause has limited operation outside the specific guarantees enumerated in the Bill of Rights. Medina v. California, 505 U.S. 437, 443, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). The Court has warned that expansion of the specific constitutional guarantees in the Bill of Rights under the guise of due process “invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.” Id. at 443.

Placing an evidentiary burden on the defendant would offend due process under the federal constitution only if “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Id. at 445 (quoting Patterson v. New York, 432 U.S. 197, 201-02, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)). It does not violate due process to place the burden of proving incompetency to stand trial on the defendant. Medina, 505 U.S. at 446. It also does not violate due process to place the burden of proving an affirmative defense of extreme emotional distress on the defendant. Patterson, 432 U.S. at 202. “The Due Process Clause does not . . . require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused.” Medina, 505 U.S. at 451.

Gregg cannot show that RCW 9.94A.535(1) violates due process by placing the burden of proving mitigating circumstances on the defendant. Gregg has failed to prove that RCW 9.94A.535(1) is unconstitutional.

2. THE INFORMATION PROVIDED TO GREGG REGARDING FELONY FIREARM OFFENDER REGISTRATION DID NOT RENDER HIS PLEA INVOLUNTARY.

Gregg claims that his guilty plea was involuntary because he was not advised in the plea form that the trial court would impose a requirement that he register as a felony firearm offender when released from prison. The State agrees that the plea form incorrectly advised Gregg that his crime was not a felony firearm offense to which a registration requirement applied,<sup>4</sup> but Gregg's argument that this information rendered his plea involuntary as a matter of law should be rejected. The registration requirement is not punitive and is a collateral consequence of the guilty plea. Gregg was correctly advised of all direct punitive consequences of his plea. His plea is valid.

a. First Degree Murder Qualifies As A Felony Firearm Offense.

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<sup>4</sup> CP 22 (Gregg initialed paragraphs that did not apply).

RCW 9.41.330 provides that persons convicted of a felony firearm offense may be required to comply with the registration requirements set out in RCW 9.41.333. "Felony firearm offense" is defined as any felony included in RCW Chapter 9.41, drive-by shooting, theft of a firearm, possessing a stolen firearm, and any felony committed while the offender "was armed with a firearm." RCW 9.41.010(8). As of June 9, 2016, the court must impose felony firearm registration on anyone convicted of a felony firearm offense that is also a serious violent offense (such as murder in the first degree). RCW 9.41.330(3). Because Gregg pled guilty to murder in the first degree while armed with a firearm, the trial court was required to impose a requirement that he register as a felony firearm offender.

The duty to register entails the following, set forth in RCW 9.41.333. The offender is required to personally register with the county sheriff in the county in which the offender resides within 48 hours of his release from custody for the felony firearm offense. RCW 9.41.333(5). The offender must provide his name, residence, identifying information and date, place and nature of the qualifying conviction. RCW 9.41.333(2). The sheriff may take the offender's photograph and fingerprints. RCW 9.41.333(4). Registration must

occur every 12 months after the initial registration, or whenever the offender changes residence. RCW 9.41.333(5). The duty to register only continues for four years from the date that the offender is first required to register. RCW 9.41.333(8). An offender who knowingly fails to register as required by RCW 9.41.333 is guilty of a gross misdemeanor. RCW 9.41.335.

b. The Felony Firearm Registration Requirement Is A Collateral Consequence Of The Guilty Plea.

The felony firearm registration requirement is a collateral consequence of Gregg's conviction, and thus the fact that Gregg was not properly advised of the consequence does not render his plea involuntary.

Constitutional 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 Stoudmire, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001). A defendant need not be informed of all possible consequences of his plea, but he must be informed of all direct consequences. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A guilty plea may be deemed involuntary if a defendant is misinformed as to a direct consequence of pleading guilty. State v. Mendoza, 157

Wn.2d 582, 587-88, 141 P.3d 49 (2006). However, because there are a myriad of non-punitive collateral consequences that may follow from a guilty plea, the failure to advise the defendant of collateral consequences does not render a plea involuntary. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

A consequence of a plea is collateral, and not direct, if it does not alter the standard of punishment for the offense. State v. Ward, 123 Wn.2d 488, 510-11, 869 P.2d 1062 (1994). The firearm offender registration requirement does not alter the standard of punishment because it is not punitive. A comparison to sex offender registration requirements is informative. Washington courts have held that the sex offender registration requirement does not alter the standard of punishment and, as a result, it is a collateral consequence of a guilty plea. Ward, 123 Wn.2d at 510-11; State v. Perkins, 108 Wn.2d 212, 218, 737 P.2d 250 (1987); State v. Clark, 75 Wn. App. 827, 831, 880 P.2d 562 (1994). As a result, the registration requirement could be legislatively imposed on offenders who were not advised of the requirement because it was enacted after they were convicted. Ward, 123 Wn.2d at 513.

In reaching this conclusion, Ward noted that registration has not historically been regarded as punishment. Id. at 507-08. The

court also noted that the primary intent of the registration requirement is to aid law enforcement efforts to protect the community “by providing a mechanism for increased access to relevant and necessary information.” Id. at 508. The court concluded that the registration requirement alone imposed no significant additional burdens on offenders. Id. at 500.

Pursuant to the reasoning of Ward, the felony firearm registration requirement is not punitive. The firearm registration requirement is much less burdensome than sex offender registration. Firearm offenders are required to register only for a period of four years, are required to register only their residence address (not workplace or school), and the database is not available to the public. Compare RCW 9.41.333 (firearm offender registration requirements) and RCW 42.56.240(10) (exempting felony firearm offense conviction database from disclosure under the Public Records Act) with RCW 9A.44.130 (requiring sex offender registration in county of residence, school and employment; requiring notice of travel outside U.S.); RCW 9A.44.140 (duration of sex offender registration for Class A felony is life); and RCW 4.24.550 (providing for public disclosure of registered sex offenders under specified circumstances). Because

it does not increase punishment, it does not represent a “definite, immediate and largely automatic effect on the range of the defendant’s punishment,” and thus is not a direct consequence of the plea. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

Because felony firearm offender registration is a collateral consequence of the guilty plea, not a direct consequence, misinformation about it does not make a guilty plea involuntary.

c. Gregg Has Not Alleged Ineffective Assistance Of Counsel.

A defendant who is affirmatively misadvised about a collateral consequence of a guilty plea may allege that his attorney provided ineffective assistance of counsel. State v. Stowe, 71 Wn. App. 182, 858 P.2d 267 (1993). See also State v. A.N.J., 168 Wn.2d 91, 116, 225 P.3d 956 (2010). Affirmative misinformation about a collateral consequence could require withdrawal of a guilty plea if the defendant can establish that he relied on that misinformation when deciding to plead guilty. Stowe, 71 Wn. App. at 187-89. To establish ineffective assistance of counsel, a defendant who pled guilty must show a reasonable probability that but for counsel’s deficient performance he would not have pled

guilty. In re Pers. Restraint of Riley, 122 Wn.2d 772, 781, 863 P.2d 554 (1993).

Gregg has not alleged ineffective assistance of counsel. The fact that the plea form misinformed Gregg about the applicability of the felony firearm registration suggests deficient performance.<sup>5</sup> The law was clear at the time of the plea, and if indeed defense counsel affirmatively misinformed Gregg that this requirement did not apply, that would be deficient. But while defense counsel could have been deficient, Gregg would be unlikely to establish prejudice. His plea of guilty was a strategic choice in light of his full confession, enabling him to show remorse for Clayton's murder and thus more persuasively argue for a mitigated sentence. It is not plausible that the four-year annual registration requirement would have changed that calculus. Because Gregg has not alleged ineffective assistance of counsel, there is no basis for finding his plea invalid.

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<sup>5</sup>The State is reluctant to concede deficient performance where there is no information in the record as to what defense counsel understood or told Gregg. It is possible that there was simply an error in filling out the form, and Gregg was correctly advised about the requirement.

D. CONCLUSION

Gregg's conviction and sentence should be affirmed.

DATED this 10th day of December, 2018.

Respectfully submitted,

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By:  \_\_\_\_\_

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**KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT**

**December 10, 2018 - 10:50 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 77913-3  
**Appellate Court Case Title:** State of Washington, Respondent v. Sebastian Michael Gregg, Appellant  
**Superior Court Case Number:** 16-1-04408-1

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