

Court of Appeals
Division I
State of Washington

NO. 71723-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRIAN RONQUILLO,

Appellant.

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

APPELLANT'S REPLY BRIEF

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I. THE COURT’S RELIANCE ON A SENTENCING FRAMEWORK THAT BARS MEANINGFUL CONSIDERATION OF YOUTH, HOME ENVIRONMENT, AND REHABILITATION VIOLATES THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 14

A. Current Washington Case Law Prohibiting a Mitigated Exceptional Sentence Based on an Offender’s Youth and Related Characteristics is No Longer Good Law Following *Roper*,¹ *Graham*,² and *Miller*³

During Brian Ronquillo’s sentencing hearing, the judge was constrained by the statutory scheme in effect in 1994 and its prohibition on reducing punishment based on individual circumstances such as immaturity, traumatic life experiences, and subsequent rehabilitation. This scheme has not been reconsidered or reevaluated following the holdings of *Roper*, *Graham*, or *Miller*. As the sentencing court recognized here, current case law construing the SRA bars courts from imposing a sentence less than the standard range based on the offender’s age and accompanying characteristics. RP:64 (citing *State v. Ha’mim*, 132 Wn.2d 834, 940 P.2d 633 (1997)). On appeal, the prosecution’s response failed to address the central argument in Mr. Ronquillo’s opening brief – that the current state of Washington sentencing law, preventing the sentencing court from taking into account an offender’s personal characteristics such as youth and

¹ *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

² *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

³ *Miller v. Alabama*, __ U.S. __, 132 S.Ct 2455, 183 L.Ed.2d 407 (2012).

maturity, is a violation of the principles announced in *Roper*, *Graham*, and *Miller*. See Appellant’s Opening Brief (AOB), pp. 11-16.

Graham affects a dramatic change in the legal rights of young people by allowing their lessened culpability for wrongdoing to be explicitly taken into account by courts. *Miller* was the application of *Graham* in the JLWOP parole context, but it is important to note *Miller* itself emphasizes that nothing said in *Roper*, *Graham*, or *Miller* is “crime specific.” *Miller*, 567 U.S. at ___, 132 S. Ct. at 2465, 183 L. Ed. 2d at 420. *Graham* is best understood as the dawning of a new constitutional principle: “juveniles are different.” See Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 La. L. Rev. 99, 99 (2010). “*Graham* is a case about how and why children are different from adults and states a constitutional principle with broad implications across the entire landscape of juvenile justice.”⁴

Graham stands for something new and extremely important: As a general proposition, at least, children are less culpable than adults; less deserving of sentences commonly meted out to adults; more deserving of sympathy, understanding, and leniency; and more likely than adults to learn from their mistakes and to become rehabilitated. This important list of factors has constitutional meaning for the first time in history. Legislatures may still, subject only to the limitations of the Eighth Amendment, choose to impose

⁴ Martin Guggenheim, *Article: Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*. 47 Harv. C.R.-C.L. L. Rev. 457, 464 (2012).

lengthy prison sentences on juveniles. But, they may no longer automatically impose identical sentences on adults and juveniles who have committed the same crime.

Id. at 500.

Roper, Graham, and Miller's reduced culpability and diminished responsibility rationale provides the bases to categorically recognize youthfulness as a mitigating factor in sentencing: "Adolescents lack the judgment, appreciation of consequences, and self-control of adults, and they deserve shorter sentences when they cause the same harms. . . . it is unjust and irrational to continue harshly punishing a fifty-or sixty-year-old person for a crime that an irresponsible child committed many decades earlier. Barry C. Feld, *ARTICLE: Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 *Law & Ineq.* 263, 329 (2013).

The current Washington sentencing scheme cannot stand under the Supreme Court decisions requiring consideration of an offender's age as a mitigating factor. *Miller*, 132 S.Ct at 2467, (A minor's chronological age is a 'relevant mitigating factor of great weight.');" *Graham*, 560 U.S. at 76).

B. Preclusion of a Mitigated Exceptional Sentence Based on *Ha'mim* Also Ignores the U.S. Supreme Court's Holdings that Age is More Than Just a Chronological Fact

A child's age is far "more than a chronological fact." *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *accord*, *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) (holding that age is relevant when determining police custody for Miranda purposes); *Gall v. United States*, 552 U.S. 38, 58, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In addition, the court "must" take into account the child's "background and emotional development" in assessing culpability. *Miller*, 132 S.Ct at 2467.

The sentencing court here determined that it could not use age as a mitigating factor unless it caused an "impairment":

I cannot rely on Mr. Ronquillo's age and the juvenile brain science to impose an exceptional sentence unless there's a demonstration that he lacked the neurological development to -- at the time of his crime such that he did not understand right from wrong or that it impaired his ability to conform his conduct to the law.

RP:64.

As discussed in AOB p. 15, the list of mitigating factors found in RCW 9.94A.535 is nonexclusive; the legislature clearly contemplated that courts may find additional mitigating circumstances other than the ones

identified by the statute: “. . . The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.” RCW 9.94A.535. As such, this provision may be construed consistently with *Miller*, *Graham*, and *Roper*, if interpreted to include age and its attributes as reasons to impose a sentence below the standard range.

C. The Unconstitutional Imposition of a Sentence Cannot Corrected by a Legislative “Fix” that Does Not Even Apply to Mr. Ronquillo

The unconstitutionality of Mr. Ronquillo’s sentence is inherent in the procedure used to impose that sentence – the sentencing court’s inability to consider personal characteristics including age. A legislative fix after the fact cannot cure the unconstitutional imposition of his sentence. If this Court took that approach, Mr. Ronquillo would still be left with a sentence that is facially unconstitutional.

Moreover, SB 5064 does not apply to Mr. Ronquillo. To the extent that the State suggests his inability to benefit from the legislative action is his own fault, it also raises due process and/or ex post facto concerns with the failure to provide any notice to what would essentially amount to an additional penalty for that 1998 conviction.

For these reasons, SB 5064 should be interpreted as a “safety net” as opposed to a cure-all for juvenile sentences that violate the Eighth Amendment.

II. A LENGTHY TERM OF YEARS SENTENCE THAT FAILS TO PROVIDE ANY MEANINGFUL OPPORTUNITY FOR RELEASE VIOLATES THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 14 OF THE WASHINGTON CONSTITUTION

A. Mr. Ronquillo's Sentence Fails to Provide Any Meaningful Opportunity for Release

As discussed in AOB pp. 20-22, Mr. Ronquillo's sentence is 51.3 years.⁵ Whether or not termed "de facto life without parole" based on life expectancy, the problem with this lengthy sentence is that it nonetheless denies him a *meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation. *Graham*, 130 S.Ct. at 2030, emphasis added.) A sentence of that length, no less than a sentence of life without the possibility of parole, impermissibly prejudices that defendant will not be fit to reenter society at an age at which he will still be able to create a productive life for himself outside of prison walls.

The reasoning of the Supreme Court of Iowa in a similar case is persuasive; in *State v. Null*, 836 N.W.2d 41 (Iowa 2013), the Court

⁵ Although the State argues that, with good time, he might be eligible for release at age 59, good time is solely under the discretion of the Department of Corrections, and it is error for courts to take good time into consideration when imposing sentence. The framework of the SRA indicates that earned early release time is to be considered only after the offender has begun serving his sentence. *See State v. Fisher*, 108 Wn.2d 419, 429 n.6, 739 P.2d 683 (1987); *State v. Wakefield*, 130 Wn.2d 464, 477-478 (Wash. 1996). Thus, 51.3 years is the correct sentence length for this analysis.

addressed the “threshold question of whether a 52.5-year minimum prison term for a juvenile based on the aggregation of mandatory minimum sentences for second-degree murder and first-degree robbery triggers the protections to be afforded under *Miller*...” *Id.* at 73-74. That Court concluded that it did. First, it noted that “nothing said in *Roper*, *Graham*, or *Miller* is ‘crime-specific,’” and that the factors that made adolescents less culpable in those cases applied in all juvenile cases. *Id.* at 72-73 (citations omitted). Second, the Court concluded that the prospect of a geriatric release does not provide the meaningful opportunity required by *Graham*:

Second, we believe that while a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections. Even if lesser sentences than life without parole might be less problematic, we do not regard the juvenile’s potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*. The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a “meaningful opportunity” to demonstrate the “maturity and rehabilitation” required to obtain release and reenter society as required by *Graham*. 560 U.S. at ___, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845- 46.

Id. at 71.

The *Null* court based its decision not on life expectancy considerations, but based on the importance of a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” It

noted that recent legislative actions in many states have allowed parole eligibility to long prison terms for homicides to being after fifteen or twenty-five years of incarceration. Particularly relevant here, the court concluded that “*Miller*’s principles are fully applicable to a lengthy term-of-years sentence as was imposed in this case because an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*.” *Id.* at 72.

B. The Same Conclusion is Reached Under Both Federal and State Analyses

Washington’s Constitution provides even greater protections for its citizens with respect to permissible punishments than the United States Constitution. *State v. Fain*, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980). Instead of banning “cruel and unusual” punishments, the Washington Constitution bans all punishments that are “cruel.” Wash. Const. art. I §14. The Court evaluates four factors in determining whether a sentence violates article I, section 14: (1) the nature of the offense, (2) the legislative purpose behind the statute, and whether that purpose can be equally well served by a less severe punishment, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction.

Under Supreme Court jurisprudence, mitigating facts about the offender, including his age, must be considered in sentencing for crimes committed by juveniles; indeed, *Graham* constitutionally dictates that his age must be considered in evaluating his culpability for the offense. *Graham*, 560 U.S. at 76 (An offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.). When the *only* inquiry made by the sentencing court is to consult the legislature’s mandatory punishment for the crime, without any further inquiry into whether the punishment is appropriate for a juvenile, for no other reason than it is appropriate for an adult, the Constitution requires more. *See, e.g., Graham*, 130 S.Ct. at 2038 (Roberts, C.J., concurring) (“[J]uvenile offenders are *generally*—though not necessarily in every case—less morally culpable than adults who commit the same crimes.”). Mr. Ronquillo’s current sentence fails to account for this mitigating factor.

The Supreme Court also focuses on the fact that the characteristics of a juvenile rendering them less culpable also impact the purposes of punishment. “States are forbidden after *Graham* to presume that juveniles are equally deserving of the identical sanction the legislature has determined is appropriate for adults. *Graham*’s recognition that it will commonly be inappropriate to be retributive to juveniles, combined with its conclusion

that deterrence will rarely be an equally appropriate penological goal for juveniles as for adults, is just as true for the harshest sentences courts can impose as for lesser sentences.”⁶

Under either analysis, Mr. Ronquillo’s sentence, providing no meaningful opportunity for release, violates the ban on cruel punishment.

C. The Fact that Mr. Ronquillo’s is an Aggregate Sentence Does Not Change This Analysis

It is true that that some courts have held *Miller* does not apply where the lengthy sentence is the result of aggregate sentences. However, it is critical to note that in the *Miller* case itself, one of the juvenile offenders was convicted of multiple crimes. 567 U.S. at ___, 132 S. Ct. at 2461, 183 L. Ed. 2d at 415. The Supreme Court, however, offered no indication in *Miller* that his convictions for multiple crimes affected the analysis. Further, after *Miller*, the Supreme Court in several cases involving aggregate crimes granted certiorari, vacated the sentence, and remanded for consideration in light of *Miller*. See *Blackwell v. California*, 133 S. Ct. 837, 837, 184 L. Ed. 2d 646, 646 (2013) (granting, vacating, and remanding *People v. Blackwell*, 202 Cal. App. 4th 144, 134 Cal. Rptr. 3d 608, 618 (Ct. App. 2011) (upholding discretionary life-without-parole sentence for first-degree murder, burglary of an inhabited dwelling, and

⁶ Guggenheim, *supra* fn. 4, at 400.

attempted robbery of an inhabited dwelling)); *Mauricio v. California*, 133 S. Ct. 524, 524, 184 L. Ed. 2d 335, 335 (2012) (granting, vacating, and remanding *People v. Mauricio*, No. B224505, 2011 Cal. App. Unpub. LEXIS 9073, 2011 WL 5995976, at *9 (Cal. Ct. App. Nov. 28, 2011) (unpublished opinion) (upholding three life-without-parole sentences for one juvenile convicted on three counts of first-degree murder)); *Bear Cloud v. Wyoming*, 133 S. Ct. 183, 183- 84, 184 L. Ed. 2d 5, 5 (2012) (granting, vacating, and remanding *Bear Cloud v. State*, 2012 WY 16, 275 P.3d 377, 402 (Wyo. 2012) (upholding life-without-parole sentence for juvenile convicted of first-degree murder, conspiracy to commit aggravated burglary, and aggravated burglary)); *Whiteside v. Arkansas*, 133 S. Ct. 65, 66, 183 L. Ed. 2d 708, 708 (2012), (granting, vacating, and remanding *Whiteside v. State*, 2011 Ark. 371, 383 S.W.3d 859, 866 (Ark. 2011) (upholding juvenile's sentence of life-without-parole for capital murder and thirty-five-years for aggravated robbery)).

These cases show that the imposition of an aggregate sentence does not remove the case from the ambit of *Miller's* principles. *See also Null*, 836 N.W.2d 41 at 73-74.

III. THE RECENT STATE *GRAHAM* DECISION⁷ CLARIFIED THAT RCW 9.94A.535(1)(G) IS APPLICABLE TO MITIGATED EXCEPTIONAL SENTENCES FOR SERIOUS VIOLENT OFFENSES

The sentencing court was precluded from applying the multiple offense policy to impose a mitigated exceptional sentence by the Court of Appeals decision in *State v. Graham*, 178 Wn. App. 580, 314 P.3d 1148 (2013). RP:61. The Washington Supreme Court recently overruled that Court of Appeals decision in *State v. Graham*, 181 Wn.2d 878, 880 (2014), holding that the sentencing court may impose an exceptional sentence downward if the judge finds the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purposes of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW.

There is some question as to what the proper legal standard is for applying this factor. The state Supreme Court's decision also clarified that question:

Finally, *Graham* asks us to clarify the factual finding a sentencing judge must make to invoke the multiple offense policy mitigating factor of .535(1)(g). We decline to do so because we think the statute is also clear on that point. It directs the judge to consider if the presumptive sentence “is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” RCW 9.94A.535(1)(g) (emphasis added). RCW 9.94A.010 lists seven policy goals the legislature intends the SRA to advance:

⁷ *State v. Graham*, 181 Wn.2d 878, 337 P.3d 319 (2014) (referred to as “*State v. Graham*” to avoid confusion with the U.S. Supreme Court decision in *Graham v. Florida*).

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

Sentencing judges should examine each of these policies when imposing an exceptional sentence under .535(1)(g).

State v. Graham, 181 Wn.2d at 886-887.

The invited error doctrine is inapplicable here. The doctrine of invited error “prohibits a party from setting up an error at trial and then complaining of it on appeal.” *In re Pers. Restraint of West*, 154 Wn.2d 204, 222, 110 P.3d 1122 (2005) (quoting *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999)). That is not the case here, where counsel acknowledged that all three divisions of the Court of Appeals had

employed a “nonexistent, trivial or trifling standard” for the incremental harm, and argued the facts of Mr. Ronquillo’s case under that binding precedent. The cases that the state cites in support of its position are inapplicable in this context – in *State v. Momah*, 167 Wn.2d 140, 153,217 P.3d 321 (2009), defense counsel requested in chambers voir dire; a claim of unconstitutional courtroom closure was rejected on appeal; in *City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2002), the court held that the defendant could not request an instruction at trial and then claim on appeal that the instruction was defective.

The proper remedy here is to remand for resentencing so that all parties can have the advantage of this new guidance from the state Supreme Court on the proper statutory interpretation and legal standard to employ when applying RCW 9.94A.535(1)(g).

IV. CONCLUSION

Mr. Ronquillo’s case should be remanded for a new sentencing hearing.

DATED this 17th day of February, 2015.

Respectfully submitted,



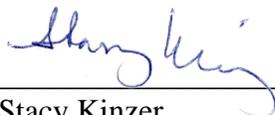
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CERTIFICATE OF SERVICE OF ELECTRONIC MAIL

Today I addressed electronic mail addressed to the attorney for the petitioner, Deborah Dwyer, containing a copy of the Reply Brief in *State v. Brian Ronquillo*, No. 71723-5, in the Court of Appeals, Division I, for the State of Washington.

I certify under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 17th day of February, 2015.



Stacy Kinzer
Done in Seattle, Washington