SUPREME COURT NO. 101568-2
COA NO. 54259-5-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL I. NEVAREZ,

Petitioner.

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

The Honorable Stephanie A. Arend, Judge

PETITION FOR REVIEW

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OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Gabriel Nevarez asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Nevarez requests review of the published decision in State v. Gabriel Indelicio Nevarez, Court of Appeals No. 54259-5-II (slip op. filed Oct. 25, 2022), attached as Appendix A. The order denying reconsideration, entered on November 23, 2022, is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Nevarez was 18 years old at the time of offense. He was sentenced to over 30 years in prison, a sentence that included a five-year mandatory firearm enhancement. Is resentencing appropriate because the trial court did not meaningfully consider the requisite factors of youth at sentencing, in violation of the prohibition on

cruel punishment under article I, section 14 of the Washington Constitution?

2. Where defense counsel knew of Nevarez's history of mental illness and intellectual disability, did counsel provide ineffective assistance at the plea stage in unreasonably failing to investigate the possibility of a diminished capacity defense and, if so, should Nevarez be allowed to withdraw his guilty plea?

D. STATEMENT OF THE CASE

1. Background

Nevarez was 18 years old at the time of the charged offense in 2007. CP 1-2. Nevarez fled to Mexico and was extradited in 2016. CP 122. During the course of competency proceedings, expert reports revealed that Nevarez had cognitive limitations and suffered from mental disorders. CP 18-23.

In 1993, when Nevarez was six years old, his intelligence quotients were in the bottom fifth percentile.

CP 20. He was in special education classes, where he struggled with reading, writing, and mathematics. CP 17. He dropped out of school because "it was too difficult." CP 17. He began using marijuana when he was young. CP 17. Nevarez was a kid with poor reasoning, poor judgment, and poor social skills who was easily influenced by his peers. CP 21. He needed medication, external structure and constant supervision. CP 21.

2. Plea

In 2018, Nevarez pleaded guilty to an amended information charging him with first degree murder and a firearm enhancement. CP 50-60; 1RP[1] 17. As part of the plea, the State recommended a base sentence of 271 months in confinement and the 60-month enhancement. CP 53. Nevarez described in his own words what made

[1] The verbatim report of proceedings is cited as follows: 1RP – five consecutively paginated volumes consisting of 5/11/18, 6/29/18, 8/28/18, 9/5/18, 11/15/18; 2RP – 11/18/19.

him guilty: he drove a car and fired a gun out the window, knowing there were pedestrians standing nearby, creating a grave risk of harm and causing someone's death. CP 58.

3. Sentencing

Sentencing took place in 2018. 1RP 24. Nevarez's family described Nevarez's childhood. CP 145, 148. Nevarez and his siblings were born into a life of drugs. CP 148. Nevarez spent the first few months of his life in the hospital being treated for seizures stemming from drug withdrawal. CP 145, 148, 151. He and his siblings were placed in foster care because their biological mother was unable to care for them. CP 145, 148, 149. Nevarez was on heavy medications to treat brain conditions caused by the in-utero drug exposure. CP 145, 149-50. He was a ward of the state. CP 148. He was placed with a loving aunt and uncle, but trauma related to his mother affected his life and contributed to irresponsible and

dangerous decisions made as a teenager. CP 149-50. Nevarez had matured since then and, as an older adult, mentored his nieces and nephews about making good decisions. CP 145, 150, 151. His family was there to provide support for his rehabilitation. CP 145, 148, 150, 151-52.

The judge said she had heard lots of sad stories of children who are born to drug-addicted parents, abandoned and abused, but the majority of them did not grow up to be murderers or gang members. 1RP 37. The judge found it "interesting" that Nevarez had lots of family support now, saying "I wonder where the family support was as he was growing up and how that didn't influence him to lead a – take a different path." 1RP 37. The judge imposed a total sentence of 367 months in confinement, 36 months above the recommended sentence. 1RP 38; CP 69.

4. Post-Sentence Motions

In 2019, within a year of sentencing, Nevarez filed motions in which he argued, among other things, that his attorney was ineffective in failing to investigate the circumstances of the case before advising him to plead guilty, and that the court should have considered his youthfulness as a mitigating factor at sentencing. CP 92-94, 98-112. After an evidentiary hearing on the ineffective assistance claim, the court found no basis to grant relief. CP 121-27; 2RP 67-72. Nevarez appealed from the denial of his CrR 7.8 motion. CP 128-35.

5. Appeal

Nevarez raised two issues on appeal: (1) he should be permitted to withdraw his guilty plea because his attorney was ineffective in failing to investigate a possible mental health defense; and (2) remand for resentencing was required because the court did not consider the requisite factors associated with youth at sentencing.

Brief of Appellant at 1-3, 21-45. The State filed responsive briefing. Nevarez subsequently withdrew the ineffective assistance issue.

Ultimately, the Court of Appeals issued a split decision, with a two-judge majority holding the trial court was not required to consider Nevarez's youth at sentencing. State v. Nevarez, 519 P.3d 252, 253 (2022). Judge Maxa dissented, concluding that, under State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017) and In re Personal Restraint of Monschke, 197 Wn.2d 305, 482 P.3d 276 (2021), "a trial court must consider the mitigating qualities of youth when sentencing an 18-year-old offender." Nevarez, 519 P.3d at 257 (Maxa, J., dissenting).

Nevarez filed a motion to reconsider, asking the Court of Appeals to consider his ineffective assistance claim on its merits, explaining why it was earlier withdrawn from consideration and why it was being

reasserted now. See Motion to Reconsider filed Nov. 14, 2022. The Court of Appeals denied the motion to reconsider without comment. App. B.

E. WHY REVIEW SHOULD BE ACCEPTED

1. The constitutional prohibition against cruel punishment should cover those who are 18 years old at the time of offense, thereby requiring individualized consideration of youth at sentencing and the ability to depart from statutorily mandated sentencing enhancements.

Article I, section 14 of the Washington Constitution prohibits cruel punishment. Are courts required to consider mitigating factors of youth in sentencing those who were 18 years old at the time of offense? Does the constitutional protection against cruel punishment for 18-year-old offenders encompass sentences that are less than mandatory life without parole, including statutorily mandated firearm enhancements? These are significant questions of constitutional law and issues of substantial

public interest warranting review under RAP 13.4(b)(3) and (4).

Nevarez's sentence violates article I, section 14 because the sentencing court did not consider the requisite mitigating factors of youth. He should be resentenced.

In Houston-Sconiers, the Supreme Court held the Eighth Amendment to the United States Constitution requires the trial court to consider a juvenile defendant's youth in sentencing, even for statutorily mandated sentences. State v. Houston-Sconiers, 188 Wn.2d 1, 18-21, 391 P.3d 409 (2017). For juveniles in adult court, a court must consider mitigating qualities of youth when imposing a discretionary, standard range sentence or considering a mandatory sentencing enhancement. In re Pers. Restraint of Ali, 196 Wn.2d 220, 234-35, 474 P.3d 507 (2020); In re Pers. Restraint of Domingo-Cornelio, 196 Wn.2d 255, 264, 474 P.3d 524 (2020).

Houston-Sconiers was limited to the sentencing of juveniles in adult court — those 17 years old and younger. Houston-Sconiers, 188 Wn.2d at 34. Nevarez was not a juvenile when he committed his crime — he was 18 years old. The question here is whether the mandatory consideration of mitigating qualities of youth applies to the sentencing of an 18-year-old offender.

Drawing from Houston-Sconiers, the Supreme Court subsequently held the mandatory imposition of life without parole (LWOP) sentences was unconstitutional under article I, section 14 for offenders who were 18 to 20 years old. In re Personal Restraint of Monschke, 197 Wn.2d 305, 326, 329, 482 P.3d 276 (2021).[2] Monschke reasoned "the protection against mandatory LWOP for

[2] Monschke was a plurality opinion, but the concurring justice agreed with the four-justice lead opinion that the petitioners were entitled to a new sentencing hearing at which their youth must be considered as a mitigating factor. Monschke, 197 Wn.2d at 329 (González, C.J., concurring). The only disagreement was the basis on which the petition was not time-barred. Id.

juveniles should extend to them because they were essentially juveniles in all but name at the time of their crimes." Id. at 312.

Monschke emphasized that neuroscience does not support a distinction between 17- and 18-year-olds. Id. at 312-13. "[M]any youthful defendants older than 18 share the same developing brains and impulsive behavioral attributes as those under 18. Thus, we hold that these 19- and 20-year-old petitioners must qualify for some of the same constitutional protections as well." Id. at 313.

The same factors that supported extension of constitutional protection to juveniles — "juveniles' lack of maturity and responsibility, their vulnerability to negative influences, and their transitory and developing character" — "weigh[ed] in favor of offering similar constitutional protections to older offenders, also, because neurological science recognizes no meaningful distinction between 17- and 18-year-olds as a class." Id. at 321. Because "no

meaningful neurological bright line exists between age 17 and age 18[,] . . . sentencing courts must have discretion to take the mitigating qualities of youth — those qualities emphasized in . . . Houston-Sconiers — into account for defendants younger and older than 18." Id. at 326.

As recognized by Judge Maxa's dissenting opinion in Nevarez's case, "Monschke compels the conclusion that if a trial court is required to consider the mitigating qualities of youth when sentencing a 17-year-old offender, a trial court must be required to consider the offender's youth when sentencing an 18-year-old." Nevarez, 519 P.3d at 257 (Maxa, J., dissenting). Requiring "a trial court to consider the mitigating qualities of youth for a juvenile offender but not for an 18-year-old offender would create a bright line distinction between 17- and 18-year-olds" that is inconsistent with Monschke's insistence that "no meaningful neurological bright line exists between age 17 and age 18." Id. (quoting Monschke, 197 Wn.2d at 326).

Monschke drew its holding from the "individualized sentencing" principle enunciated in Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Monschke, 197 Wn.2d at 307-07, 327, 328 n.20. Monschke demonstrates that this principle is not limited to those under 18 years old. Nor is the individualized sentencing principle limited to those convicted of aggravated murder and serving mandatory LWOP sentences — it also applies to discretionary, de facto life sentences as well as sentences that are less than life. Ali, 196 Wn.2d at 235, 238.

Houston-Sconiers took the Miller approach of valuing "individualized sentencing" and applied it to juveniles who were not sentenced to LWOP. Monschke, 197 Wn.2d at 328 n.20. There is no principled basis to limit Monschke's extension of constitutional protection to only young adults convicted of aggravated murder. It makes no sense to guarantee heightened constitutional

protections for youthful offenders convicted of the most serious crime in Washington — aggravated murder — but not for those convicted of less serious crimes.

In terms of neurological development and attendant culpability, no line can be drawn between a juvenile offender and an 18-year-old offender like Nevarez. In O'Dell, this Court held "a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is." State v. O'Dell, 183 Wn.2d 680, 698-99, 358 P.3d 359 (2015). The rule was applied to the 18-year-old offender in that case. Id. at 696. Science showed "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." Id. at 693. O'Dell was not a mandatory LWOP case.

Under O'Dell and Monschke's extension of Houston-Sconiers, a trial court must consider the

mitigating qualities of youth when sentencing an 18-year-old offender. The trial court failed to meaningfully consider the mitigating qualities of Nevarez's youth. Remand for resentencing is appropriate.

This Court recently held Monschke is not a significant, retroactive change in the law that is material to petitioners who were 19 and 21 years old at the time of the crime and not sentenced to a mandatory life sentence. In re Pers. Restraint of Davis, 200 Wn.2d 75, 77-78, 514 P.3d 653 (2022), and In re Pers. Restraint of Kennedy, 200 Wn.2d 1, 24-25, 513 P.3d 769 (2022). Dissenting in Nevarez's case, Judge Maxa observed "our case involves a direct appeal, not a PRP, so timeliness is not at issue." Nevarez, 519 P.3d at 256 (Maxa, J., dissenting).

The majority, though, cited Kennedy as limiting Monshcke's holding to 18 to 20-year-old perpetrators convicted of aggravated first degree murder and sentenced to a mandatory LWOP. Nevarez, 519 P.3d at

255 (citing Kennedy, 200 Wn.2d at 24). From this, the majority concluded Monschke is inapplicable to Nevarez because he did not receive that sentence. Id.

Neither Kennedy nor Davis involved an 18-year-old offender like Nevarez. Even if Kennedy and Davis limit the reach of Monschke when it comes to 18-year-old offenders and even if Nevarez must show Monschke is material to his case, neither Kennedy nor Davis squarely address whether Monschke is material to mandatory sentencing enhancements, like the firearm enhancement imposed in Nevarez's case.

Although Davis's sentence included 240 months for firearm enhancement time, the Davis court did not address this mandatory aspect of his sentence in its analysis. Davis, 200 Wn.2d at 79.

Kennedy's sentence did not include any mandatory enhancements. Kennedy, 200 Wn.2d at 6. The Kennedy court emphasized "Kennedy's sentence was not

mandatory in any respect and is not akin to an LWOP sentence." Id. at 24. As "Kennedy was sentenced under a 'regular sentencing statute' that allows for discretion," his sentence did not "implicate the same concerns under the Eighth Amendment or article I, section 14" that were present in Monschke. Id.

RCW 9.94A.533(3)(e) mandates imposition of the firearm enhancement and courts have repeatedly held this statute deprives courts of any discretion to deviate from mandatory enhancements when sentencing adult offenders — even youthful ones aged 18. State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999), overruled on other grounds by State v. Houston-Sconiers, 188 Wn.2d 1, 18-21, 391 P.3d 409 (2017); State v. Mandefero, 14 Wn. App. 2d 825, 831, 473 P.3d 1239 (2020). Mandatory sentence enhancements are akin to the mandatory LWOP sentences at issue in Monschke in that both deprive the sentencing court of discretion.

Courts must have discretion to consider individual attributes of youthfulness "as they apply to each individual youthful offender. That is why mandatory sentences for youthful defendants are unconstitutional." Monschke, 197 Wn.2d at 323. The mandatory enhancement in Nevarez's sentence violates article I, section 14 of the Washington Constitution, just as the mandatory life without parole sentences imposed on the 19- and 20-year-old petitioners in Monschke violated article I, section 14. This Court should take the opportunity to definitively address whether Monschke applies to 18-year-old offenders like Nevarez who are subject to mandatory sentencing enhancements.

2. Nevarez should be permitted to withdraw his guilty plea because his attorney was ineffective in failing to investigate a possible mental health defense.

The right to effective assistance of counsel at the plea stage includes the right to counsel that competently

investigates possible defenses to the crime charged. Here, counsel was ineffective in not conducting a reasonable investigation into the possibility of a diminished capacity defense before advising Nevarez to plead guilty to murder, despite being aware that Nevarez had a history of cognitive and mental health problems. Review is warranted under RAP 13.4(b)(3).

As a threshold matter, this Court has authority to review the ineffective assistance claim. This claim was initially raised and fully briefed on appeal, subsequently withdrawn from consideration, and then re-raised in the motion to reconsider. The Supreme Court can take review of a claimed constitutional error raised for the first time in a motion for reconsideration from a Court of Appeals decision. Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986). It follows that Nevarez's ineffective assistance claim can be heard now.

Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI. The right to effective assistance of counsel extends to the entry of a guilty plea and attendant plea-bargaining process. Lafler v. Cooper, 566 U.S. 156, 162, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

"To provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.'" In re Pers. Restraint of Fleming, 142 Wn.2d 853, 866, 16 P.3d 610 (2001) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994)). "Counsel's failure to consider alternate defenses constitutes deficient performance when the attorney neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons

for failing to do so." In re Pers. Restraint of Davis, 152 Wn.2d 647, 722, 101 P.3d 1 (2004) (quoting Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002)).

In the plea context, "effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant." State v. A.N.J., 168 Wn.2d 91, 112, 225 P.3d 956 (2010). "Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert." In re Pers. Restraint of Brett, 142 Wn.2d 868, 881, 16 P.3d 601 (2001) (quoting Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir. 1999)).

A defense attorney's "strategic choices made after thorough investigation of law and facts relevant to plausible options" will generally not be constitutionally

deficient. State v. Fedoruk, 184 Wn. App. 866, 880, 339 P.3d 233 (2014) (quoting Strickland, 466 U.S. at 690-91). "Where an attorney makes strategic choices 'after less than complete investigation,' however, a reviewing court will consider them reasonable only 'to the extent that reasonable professional judgments support the limitations on investigation.'" Fedoruk, 184 Wn. App. at 880-81 (quoting Strickland, 466 U.S. at 690-91).

Ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case. Davis, 152 Wn.2d at 722. In many cases, though, "the real issue is not whether the defendant performed the act in question, but whether he had the requisite intent and capacity." State v. Jury, 19 Wn. App. 256, 265-66, 576 P.2d 1302 (1978).

Diminished capacity "allows a defendant to undermine a specific element of the offense, a culpable mental state, by showing that a given mental disorder had

a specific effect by which his ability to entertain that mental state was diminished." State v. Gough, 53 Wn. App. 619, 622, 768 P.2d 1028 (1989). As a defense, "diminished capacity requires an expert diagnosis of a mental disorder and expert opinion testimony connecting the mental disorder to the defendant's inability to form a culpable mental state in a particular case." State v. Clark, 187 Wn.2d 641, 651, 389 P.3d 462 (2017). Showing counsel failed to conduct appropriate factual or legal investigations to determine what matters of defense were available and what witnesses could be called to support a defense can overcome the presumption of reasonable performance. State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816 (1987); Jury, 19 Wn. App. at 263.

In Nevarez's case, defense counsel's failure to conduct investigation into a diminished capacity defense fell below an objective standard of reasonableness. The family had shared documents showing Nevarez had

learning disabilities and was in special education. 2RP 13. Based on information contained in competency reports, counsel also knew Nevarez had a long and documented history of intellectual disability and mental health problems. 2RP 8-9; Ex. 2, 4. Counsel acknowledged the competency report found Nevarez had deficits to his level of intellectual functioning, attention, and concentration. 2RP 10. Such evidence potentially increases the probability that Nevarez did not act with intent or extreme indifference in shooting the gun. It would be up to an expert to determine whether Nevarez's mental conditions rose to the level of diminished capacity. But counsel never sought expert evaluation on this question. 2RP 18, 23 44-45.

The court found: "After reviewing all the discovery and speaking with the witnesses, Ms. Mahoney [sic] determined there was no basis for a diminished capacity defense in this case. Ms. Mahoney [sic] determined the

evidence, including video surveillance evince [sic], witness statements, and physical evidence, would negate any claim of diminished capacity on the part of her client during the incident." CP 125.

This finding is infirm. Ms. Mahony (Nevarez's attorney) never testified that she determined there was no basis for a diminished capacity defense and that the evidence would negate such a defense. Mahony was quite clear that she never looked into the defense of diminished capacity. 2RP 23, 44-45. She focused solely on competency to stand trial in 2017, not Nevarez's state of mind at the time of offense in 2007. 2RP 13-14, 23.

Having never investigated the defense of diminished capacity, counsel was in no position to determine that there was no basis for the defense. That determination requires expert assessment, which counsel never sought. Even if the record showed counsel determined there was no basis for a diminished capacity

defense based on her assessment of the evidence, that determination would be deficient due to lack of expert investigation into the viability of that defense.

Fedoruk is instructive, as it too involved a situation where a defendant was referred for a pretrial competency evaluation that revealed an extensive history of mental illness. Fedoruk, 184 Wn. App. 871-72, 874. Fedoruk held defense counsel's failure to timely retain a mental health expert or investigate the possibility of a mental health defense in that murder case amounted to deficient performance that prejudiced the outcome. Id. at 870. The defendant had a long and documented history of serious mental illness and had previously been found not guilty by reason of insanity in another case. Id. at 871-72, 885. This background information was available to the defense from the beginning of the case. Id. at 881. Defense counsel, however, did not attempt to retain a mental

health expert to investigate a mental health defense until the day before jury selection. Id.

"Even if Fedoruk told counsel that he was not involved in Ischenko's death and did not wish to pursue a mental health defense, counsel could not have assisted him in making an informed decision about the consequences of going to trial on a theory of general denial without first getting an expert opinion regarding Fedoruk's mental health at the time of the killing." Id. at 882. "In light of the State's strong circumstantial evidence against Fedoruk, the failure to obtain an independent expert evaluation appears even less reasonable." Id. In these circumstances, the Court of Appeals concluded the failure to investigate a mental health defense fell below an objectively reasonable standard. Id. at 883.

Similarly, Nevarez could not make an informed decision on whether to take the plea or proceed to trial without knowing whether a defense of diminished

capacity was available to him. The evidence against Nevarez showing he was the shooter was strong. The real question was his mental state. Defense counsel was aware of Nevarez's extensive history of developmental disability and mental illness but looked no further than present competency to stand trial. Counsel performed deficiently in not seeking expert assistance and otherwise failing to investigate a diminished capacity defense prior to advising Nevarez to plead guilty.

Nevarez's attorney claimed the problem with a diminished capacity defense was that Nevarez denied involvement. 2RP 45. Fedoruk shows a client's denial does not absolve counsel of investigating a defense. Fedoruk, 184 Wn. App. 882. Counsel could not assist Nevarez in making an informed decision about taking the plea rather than going to trial without first getting an expert opinion regarding his mental state at the time of the killing. Nevarez's attorney recognized clients often

change their position about being involved. 2RP 45. "So it wasn't as if I stopped there." 2RP 45. But she never explained what if anything else she did. The record is clear that she never investigated a diminished capacity defense because she focused exclusively on competency to stand trial in 2017. 2RP 13-14, 23, 44-45. As in Fedoruk, counsel's failure to investigate a mental health defense constituted deficient performance.

Nevarez establishes prejudice from that deficiency by showing a reasonable probability that, but for counsel's error, he would not have pleaded guilty and insisted on going to trial. State v. Sandoval, 171 Wn.2d 163, 174-75, 249 P.3d 1015 (2011). A "reasonable probability" exists if a decision to reject the plea bargain would have been rational under the circumstances. Id. at 175.

It would be rational to reject the plea bargain and take the case to trial on the premise that a diminished capacity defense would provide a basis for acquittal. A

rational defendant in Nevarez's position, weighing the likelihood of conviction in light of the defense, could decide to risk trial in the hopes of avoiding conviction altogether on the murder and assault charges. This is sufficient to establish prejudice from counsel's failure to investigate the defense

F. CONCLUSION

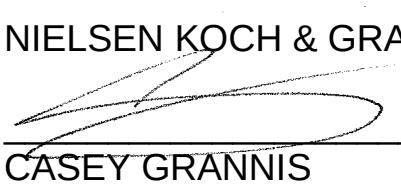
For the reasons stated, Nevarez respectfully requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 4,309 words excluding those portions exempt under RAP 18.17.

DATED this 23rd day of December 2022.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

October 25, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GABRIEL INDELICIO NEVAREZ, Appellant.	No. 54259-5-II PUBLISHED OPINION

CRUSER, A.C.J. – Gabriel Indelicio Nevarez appeals his sentence following his guilty plea to first degree murder with a firearm enhancement. The conviction arose from an incident in which Nevarez shot and killed a bystander while shooting at someone else. Nevarez was 18 years old at the time of the offense. The trial court imposed a sentence that was 36 months above the joint recommendation of the parties but was within the standard range.

Nevarez filed a CrR 7.8(b) motion seeking to withdraw his guilty plea based on ineffective assistance of counsel[1] or, in the alternative, to obtain resentencing because the sentencing court failed to consider the mitigating qualities of youth. After conducting a hearing, the trial court denied Nevarez's motion to withdraw his guilty plea. Nevarez appeals, arguing that resentencing is necessary because under *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), and *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), the trial court erroneously failed to consider

[1] Nevarez withdrew this claim during the pendency of this appeal.

the mitigating qualities of youth when presented with a sentence jointly recommended by the parties.

We hold that the trial court did not err in denying Nevarez's CrR 7.8 motion to withdraw his guilty plea because Nevarez was 18 years old at the time of the murder, and the trial court, therefore, was permitted but not required to consider the mitigating qualities of Nevarez's youth when sentencing him. Accordingly, we affirm.

FACTS

I. BACKGROUND

Nevarez held a grudge against Juan Carlos Ruiz and had previously threatened to harm him. On February 21, 2007, Nevarez drove by Ruiz, who was standing next to Kyle Grinnell, and fired multiple shots in Ruiz and Grinnell's direction. One of the shots hit and killed Grinnell. Nevarez was 18 years old at the time of the shooting.

The State charged Nevarez with first degree murder with a firearm enhancement, first degree assault with a firearm enhancement, and second degree unlawful possession of a firearm. However, Nevarez fled to Mexico shortly after the shooting and did not return until extradited to Washington in August 2016.

Nevarez entered a plea of guilty to first degree murder with a firearm enhancement in May 2018. As part of the plea agreement, the State filed an amended information dismissing the first degree assault and second degree unlawful possession of a firearm charges. Nevarez and the State agreed to a sentencing recommendation of 271 months of confinement, which was the low end of the standard range, plus a 60-month firearm enhancement. Defense counsel, the State, and the trial

court explained to Nevarez that the court was not required to accept the joint recommendation and that it could sentence him to any term within the standard sentencing range of 271 to 361 months.

II. SENTENCING

The parties asked the trial court to adopt the joint recommendation of 271 months plus 60 months for the firearm enhancement. Defense counsel did not ask the court to impose an exceptional sentence below the standard range and did not ask the court to consider his youth at the time he committed the offense.

At sentencing, immediately following a statement from Nevarez, the trial court asked how old Nevarez was at the time of the shooting, and the parties confirmed that he was 18.

The trial court then gave its reasoning and stated:

> Having reviewed all of these letters and the criminal history of Mr. Nevarez, I am not going to adopt the joint recommendation of the parties, which is my normal course. But I am going to add to the 271 low-end recommendation an additional 36 months, plus the 60 months of firearm sentencing enhancement, 36 months of community custody.

Verbatim Report of Proceedings (VRP) (June 29, 2018) at 38.

III. MOTIONS TO WITHDRAW GUILTY PLEA

Nevarez filed several pro se motions to withdraw his guilty plea. One of these motions, filed in May 2019 under CrR 7.8, sought to withdraw Nevarez's plea on the basis that he was denied effective assistance of counsel or, alternatively, requested resentencing because the trial court did not consider the mitigating qualities of youth when it imposed his sentence. The trial court ordered a merits hearing on Nevarez's motion. Regarding the issue of Nevarez's age as a mitigating factor, the court stated that it confirmed Nevarez's age at sentencing and continued:

> So the Court had no legal obligation under the case law in the State of Washington to go through any type of *Houston-Sconiers* analysis. At the time of the offense he was three months shy of his 19th birthday, and we confirmed the age at the time.
>
> With regard to the -- any obligation of [defense counsel], I suppose she could have argued for the low end, used it to argue for the low end. Although, what I heard from the testimony today was that really wasn't the basis for the parties reaching the agreement that they reached . . .
>
> So I'm not sure that that would have made -- well, I can tell you it wouldn't have made any difference in my opinion, but I don't think she had a duty or an obligation to argue age at the time of the offense as a factor in requesting the low end.

VRP (Nov. 18, 2019) 70.

The court denied Nevarez's motion to withdraw his guilty plea and entered extensive findings of fact and conclusions of law. The court made a finding that it inquired of Nevarez's age at the time of the shooting before accepting his guilty plea, and stated that "the court understood the defendant was three months shy of his 19th birthday and the defendant's [sic] knowledge of the defendant's youth was factored into the court's ultimate sentence it imposed on him." Clerk's Papers at 126.

Nevarez appeals the court's order denying his motion to withdraw his guilty plea and the associated findings of fact and conclusions of law.[2]

DISCUSSION

Nevarez argues that we should remand for resentencing because the trial court failed to fully consider the mitigating qualities of his youth based on the fact that he was 18 years old at the time he committed the offense. Specifically, Nevarez argues that the trial court "erroneously

[2] We issued an opinion in this case on November 16, 2021, which we withdrew on reconsideration.

believed it had no obligation to conduct such [an] analysis before sentencing" him. Br. of Appellant at 35. We disagree.

YOUTH AS A MITIGATING FACTOR

In general, a defendant cannot appeal a sentence that is within the standard range. RCW 9.94A.585(1); *State v. Osman*, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). "However, a defendant may appeal the process by which a trial court imposes a sentence." *In re Pers. Restraint of Marshall*, 10 Wn. App. 2d 626, 635, 455 P.3d 1163 (2019) (emphasis omitted). This allows the defendant to challenge the trial court's refusal to exercise its discretion or the legal conclusions underlying the trial court's decision. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

Nevarez challenges the trial court's process in imposing a sentence that was within the standard range but above the joint recommendation. *See Marshall*, 10 Wn. App. 2d at 635-36. He relies in part on the directive in *Houston-Sconiers* that trial courts *must* consider the mitigating qualities of youth when sentencing a juvenile defendant. 188 Wn.2d at 21. When sentencing an adult defendant, however, trial courts are merely "*allowed* to consider youth as a mitigating factor." *O'Dell*, 183 Wn.2d at 696 (emphasis added). *O'Dell* does not compel a trial court, to do so, however. Therefore, Nevarez's assertion that *O'Dell* and *Houston-Sconiers* required the trial court to consider the mitigating qualities of youth at his sentencing is without merit.

Notably, in *In re Personal Restraint of Monschke*, 197 Wn.2d 305, 306, 482 P.3d 276 (2021) (plurality opinion), defendants who were 19 and 20 years old were convicted of aggravated first degree murder and given mandatory sentences of life without the possibility of parole (LWOP) under RCW 10.95.030. The lead opinion by our supreme court concluded that the aggravated murder statute was unconstitutional as applied to defendants between the ages of 18

and 20 years old because it required a LWOP sentence for all defendants with no discretion for the trial court to consider individual characteristics at sentencing. *Monschke*, 197 Wn.2d at 326. The court reasoned "that no meaningful neurological bright line exists between age 17 and age 18." *Id.* A more recent supreme court decision explained the fractured nature of the *Monschke* opinion and cabined its holding ("if *Monschke*'s lead opinion could be read as announcing a holding of this court") to 18 to 20-year-old perpetrators convicted of aggravated first degree murder and sentenced to a mandatory LWOP under RCW 10.95.030. *In re Pers. Restraint of Kennedy*, 200 Wn.2d 1, 24, 513 P.3d 769 (2022). Because Nevarez did not receive a mandatory LWOP sentence, the court's conclusion in *Monschke* is inapplicable here. *Id.* at 23-24.[3]

Nevarez did not request an exceptional sentence below the standard range based on his youth. Rather, he and the State submitted a joint recommendation. The court was not *required*, on its own, to consider the mitigating qualities of youth because Nevarez was 18 years old at the time of the murder. *See O'Dell*, 183 Wn.2d at 696 (trial court "allowed to consider youth as a mitigating factor" for defendants 18 and older). Therefore, we reject Nevarez's challenge to the trial court's order denying his CrR 7.8 motion.

[3] We note that we stayed Nevarez's appeal pending the supreme court's decision in *In re Personal Restraint of Davis*, __ Wn.2d __, 514 P.3d 653 (2022). In that case, however, Davis was 21 at the time of the offenses. *Davis*, 514 P.3d at 658. Accordingly, *Monschke* was not material to Davis' sentence both because Davis was not between the ages of 18 to 20 and because he was not faced with a mandatory LWOP sentence, but was sentenced under a statute that afforded discretion to the trial court to impose an exceptional sentence downward. *Id.* at 657-58.

CONCLUSION

We affirm the trial court's order denying Nevarez's request for resentencing under CrR 7.8.

CRUSER, A.C.J.

I concur:

LEE, J.

MAXA, J. (dissenting) – I believe that *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), which requires trial courts to consider the mitigating qualities of youth when sentencing juveniles, applies to Nevarez as an 18-year-old. Therefore, I dissent.

In *Houston-Sconiers*, the Supreme Court held that the Eighth Amendment to the United States Constitution requires the trial court to consider a juvenile defendant's youth in sentencing, even for statutorily mandated sentences. 188 Wn.2d at 18-20. The court stated, "Trial courts *must consider mitigating qualities of youth at sentencing* and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." *Id.* at 21 (emphasis added). *Houston-Sconiers* established that a trial court *must* consider mitigating qualities of youth, even when imposing a standard range sentence. *See In re Pers. Restraint of Ali*, 196 Wn.2d 220, 234-35, 474 P.3d 507 (2020), *cert. denied*, 141 S. Ct. 1754 (2021).

The court's holding in *Houston-Sconiers* that consideration of the mitigating qualities of youth is mandatory was expressly limited to the sentencing of juveniles in adult court. 188 Wn.2d at 34. But Nevarez was not a juvenile when he committed his crime – he was 18 years old. Therefore, the question here is whether the mandatory consideration of mitigating qualities of youth applies to the sentencing of an 18-year-old offender.

In *State v. Bassett*, the Supreme Court held that sentencing juvenile offenders to life without parole or release (LWOP) constitutes cruel punishment in violation of article I, section 14 of the Washington Constitution. 192 Wn.2d 67, 91, 428 P.3d 343 (2018). As in *Houston-Sconiers*, the court's holding was expressly limited to the sentencing of juveniles. *Id.* at 73, 91.

Subsequently, in a split decision[4] the Supreme Court in *In re Personal Restraint of Monschke* held that the mandatory imposition of LWOP sentences also was unconstitutional for offenders who were 18 to 20 years old. 197 Wn. 2d 305, 326, 329, 482 P.3d 276 (2021). The lead opinion noted the holdings of *Bassett* and *Houston-Sconiers* regarding juvenile offenders. *Id.* at 311. The lead opinion then agreed with the petitioners' argument that "the protection against mandatory LWOP for juveniles should extend to them because they were essentially juveniles in all but name at the time of their crimes." *Id.* at 312.

The lead opinion emphasized that neuroscience does not support a distinction between 17- and 18-year-olds. *Id.* at 312-13. The lead opinion stated, "The petitioners have shown that many youthful defendants older than 18 share the same developing brains and impulsive behavioral attributes as those under 18. Thus, we hold that *these 19- and 20-year-old petitioners must qualify for some of the same constitutional protections as well*." *Id.* at 313 (emphasis added). Later, the lead opinion noted that the same factors that supported extension of constitutional protection to juveniles – "juveniles' lack of maturity and responsibility, their vulnerability to negative influences, and their transitory and developing character" – "weigh[ed] in favor of offering similar constitutional protections to older offenders, also, because neurological science recognizes no meaningful distinction between 17- and 18-year-olds as a class." *Id.* at 321.

[4] In his concurring opinion, Chief Justice González agreed with the lead opinion that "the petitioners are entitled to a new sentencing hearing to determine whether their ages at the time of their crimes are a mitigating factor justifying a downward departure from the standard sentence." *Monschke*, 197 Wn.2d at 329 (González, C.J. concurring). He disagreed only with the lead opinion's conclusion that RCW 10.73.100(2) allowed the petitioners to pursue their otherwise untimely PRPs.

The lead opinion concluded that because "no meaningful neurological bright line exists between age 17 and age 18[,] . . . sentencing courts must have discretion to take the mitigating qualities of youth – those qualities emphasized in . . . *Houston-Sconiers* – into account for defendants younger and older than 18." *Id.* at 326.

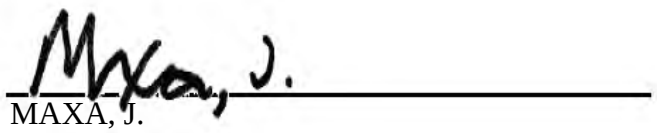
Regarding whether a personal restraint petition is timely, *Monschke* is not material for petitioners subject to LWOP sentences. *In re Pers. Restraint of Davis*, 200 Wn.2d 75, 83-84, 514 P.3d 653 (2022); *In re Pers. Restraint of Kennedy*, 200 Wn.2d 1, 24-25, 513 P.3d 769 (2022). However, our case involves a direct appeal, not a PRP, so timeliness is not at issue. And the reasoning of the lead opinion in *Monschke* clearly supports extending the holding in *Houston-Sconiers* to the sentencing of an 18-year-old.

The foundation of the holding in *Monschke* was the lead opinion's conclusion that there is no meaningful distinction between 17-year-olds and 18-year-olds regarding brain development. 197 Wn.2d at 313, 321, 326. Based on this conclusion, the lead opinion emphasized that 19- and 20-year-olds are entitled to the same constitutional protections as juveniles. *Id.* And the lead opinion expressly referenced *Houston-Sconiers* when discussing those constitutional protections and stating that trial courts must be allowed to consider the mitigating qualities of youth for offenders older than 18. *Id.* at 311, 326. *Monschke* compels the conclusion that if a trial court is required to consider the mitigating qualities of youth when sentencing a 17-year-old offender, a trial court must be required to consider the offender's youth when sentencing an 18-year-old.

Conversely, requiring a trial court to consider the mitigating qualities of youth for a juvenile offender but not for an 18-year-old offender would create a bright line distinction

between 17- and 18-year-olds regarding sentencing. Allowing that distinction would be inconsistent with the lead opinion's insistence in *Monschke* that "no meaningful neurological bright line exists between age 17 and age 18." *Id.* at 326.

I conclude that under *Houston-Sconiers* and *Monschke*, a trial court must consider the mitigating qualities of youth when sentencing an 18-year-old offender. And here, the trial court failed to meaningfully consider the mitigating qualities of Nevarez's youth as outlined in *Houston-Sconiers*. Therefore, I would reverse and remand for resentencing.



MAXA, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

November 23, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON Respondent, v. GABRIEL INDELICIO NEVAREZ, Appellant.	No. 54259-5-II ORDER DENYING MOTION FOR RECONSIDERATION

This court filed a published opinion in this matter on October 25, 2022. Appellant filed a motion for reconsideration on November 14, 2022. No answer was requested. After consideration, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

PANEL: Jj. Maxa, Lee, Cruser

FOR THE COURT

Cruser, A.C.J.

NIELSEN BROMAN & KOCH, PLLC

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