97459-4

No. 36128-3-III

DIVISION III
SUPREME COURT OF THE
STATE OF WASHINGTON

Respondent, State of Washington	Motion for Petition for Discretionary Review
Appellant, Anthony Vasquez	

NOW COMES The Appellant Anthony Vasquez IN A pro se Motion Seeking That the Supreme Court of the State of Washington Grant Review of this petition and make an Appropriate decision on its Merit

Signature x Anthony Vasquez

Date: July 19th 2019

TABLE OF AUTHORITIES

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STATE V. LightRoth - PRF OF lightroth 191 WN.2d 328 422 P.3d 444 (2018) Pg. 5

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STATE V. MCFARLAND 189 WN.2d 47 399 P.3d 1106 (2017)

State V. HOUSTON SCONIERS 188 WN.2d 1, 391 P.3d 409 (2017) pg 6-7

(2019) WASH LEXIS 206 STATE V. GILBERT pg 6

The Court of Appeals Decision

On June 20th 2019 The Court of Appeals Division III decided that A Remand is Appropriate to correct A clerical error on Judgment and Sentence Following A Remand for Resentencing on First degree Murder While Armed With A Firearm, and Second degree Unlawful Possession of A Firearm, And Tampering With A Witness. Vasquez Also Filed A Statement of Additional Grounds for Review But The Court found Them without Merit. One of Vasquez First Grounds Argued was That Sentencing Court Abused its discretion When it Sentenced Vasquez to An Exceptional Sentence of 660 Months and that it Failed to consider His Youthfulness At the Time of the Crime as A Mitigating Factor Which might have Resulted in An Exceptional Sentence Below Standard Range. However The Court Ruled that An Exceptional Sentence Will Not Be Reversed As Clearly Excessive Absent Abuse of discretion quoting State v. Branch 129 Wn.2d 635-435-96 919 P.2d 1228(1996). The Court Also Ruled that Since Vasquez Never Requested For The Courts to Consider Age As A Mitigating Factor He Waived His Contention. On Another Ground Vasquez the 60 Month Firearm Enhancement must Be Striken As Unauthorized By the Statute 9.94.533 (3)(A)(E) But The Court Rule Vasquez Sentence is within the Maximum So the Sentence was up Held. Vasquez Now Request that the Court Grant this Petition and Take A Second Look At These Two Arguements.

ISSUES PRESENTED FOR REVIEW/STATEMENT OF CASE

Initials The APPELLANT Anthony VASQUEZ ARGUED ON GROUND #2 OF His STATEMENT OF Additional GROUNDS That SENTENCING COURT ABUSED its discretion WHEN it GAVE VASQUEZ AN EXCEPTIONAL SENTENCE OF 660 MONTHS BASED ON the AGGRAVATING FACTOR that VASQUEZ "High offender SCORE RESULTS IN Some OF the CURRENT OFFENSES going "UNPUNISHED" AS DEFINED IN RCW 9.94A.535(2)(C).

ON JUNE 20th 2019 The COURT OF APPEALS AFFIRMED the SENTENCE, Ruling that the SENTENCING COURT did NOT ABUSE its discretion When it RESENTENCED VASQUEZ to A "determinate" SENTENCE OF 660 MONTHS And that AN EXCEPTIONAL SENTENCE Will Not Be REVERSED AS CLEARLY EXCESSIVE Absent AN ABUSE OF DISCRETION quoting State V. BRANCH, 129 Wn.2d 635, 435-46 914 p2d 1228 (1996). ON this SAME Additional GROUND VASQUEZ Requested A Remand to the SENTENCING COURT With INSTRUCTIONS FOR The COURT to Consider Whether VASQUEZ Youthfullness At the TIME OF the CRIME JUSTIFIES AN EXCEPTIONAL SENTENCE Below the Standard RANGE. THE COURT OF APPEALS decided that Vasquez WAIVED His CONTENTION ON the matter SINCE Neither HE OR COUNSEL REQUESTED AN EXCEPTIONAL SENTENCE BELOW the Standard RANGE NOR ASSERTED His AGE AS A Mitigating FACTOR At the RESENTENCING HEARING.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

VASQUEZ NOW ARGUES that SINCE At His FIRST SENTENCING HEARING youthfulness WAS taken into CONSIDERATION BY the TRIAL COURT Judge BUT WAS SENTENCED

to the mandatory LIFE without PAROLE, That if Relief is GRANTED Then the COURT should Remand to SENTENCING COURT for RESENTENCING with INSTRUCTIONS to CONSIDER the OFFENDERS youthfullness AS A mitigating FACTOR and A POSSIBLE EXCEPTIONAL SENTENCE downward. ON JUNE 15 2019 VASQUEZ WAS RESENTENCED And WAS APPOINTED NEW COUNSEL Who would NOT REQUEST FROM the COURTS to CONSIDER VASQUEZ youthfullness AS A mitigating FACTOR. HOWEVER At the FIRST SENTENCING HEARING DEFENSE COUNSEL Repeatedly Requested that the defendants youthfullness BE MEANINGfully CONSIDERED quoting ARGUEMENT FROM the "Miller Fix". At the Time VASQUEZ WAS Being SENTENCED to AGGRAVATED MURDER ONE Which CARRIES A MANDATORY LWOP SENTENCE SO CONSIDERING the AGGRAVATING FACTORS The COURT had NO Choice BUT to CARRY OUT the MANDATORY SENTENCE.

"The TRIAL COURT MAY IMPOSE AN EXCEPTIONAL SENTENCE Below the STANDARD IF it FINDS Mitigating CIRCUMSTANCES By A PREPONDERANCE OF the EVIDENCE RCW 9.94.535

IN O'dell The SUPREME COURT Held that A defendants YOUTHFULNESS IS A mitigating FACTOR that MAY JUSTIFY AN EXCEPTIONAL SENTENCE BELOW Statutory SENTENCING GUIDELINES, EVEN WHEN the defendant is A legal ADULT O'dell 183 WN.2d. at 688-89. RECENTLY IN the PRP OF Lightroth 191 WN.2d. 328, 422 P.3d 444 (2018) The SUPREME COURT Held O'dell did NOT CONSTITUTE A "SIGNIFICANT Change in LAW" FOR PURPOSES OF RETORUCTIVITY ANALYSIS. LightRoth REASONED that O'dell Had EXPLAINED That State v. Hamm 132 WN2d 834 940 P.2d 633 (1997)

"Did Not PRECLUDE A DEFENDANT FROM ARGUEING youth AS A mitigating factor But Rather, it Held the DEFENDANT MUST Show that His youthfulness Relates to the Commission OF the CRIME." Lightfoot 191 WN.2d AT 336 HENCE "RCW 9.94A.535(1)(E) Has ALWAYS PROVIDED the OPPORTUNITY to Raise you FOR PURPOSE OF REQUESTING AN EXCEPTIONAL SENTENCE downward and mitigating Based ON youth is Within The COURTS DISCRETION." A SENTENCING COURT ABUSES its discretion WHEN the DEFENSE Request AN EXCEPTIONAL SENTENCE BELOW the Standard Range and the COURT FAILS to CONSIDER Mitigating factors Raised BY the DEFENSE. STATE V. O'dell 183 WN.2d AT 97." ALSO See State V. GILBERT 2019 WASH LEXIS 206: GILBERT ARGUED to The COURT OF APPEALS that the RESENTENCING COURT JUDGE ERRED iN its discretion to CONSIDER AN EXCEPTIONAL SENTENCE downward. The COURT OF APPEALS REJECTED this ARGUEMENT and Held that the ONLY ISSUES PRESENTED IN THE RESENTENCING WERE RELATED to the AGGRAVATED MURDER. HOWEVER The SUPREME COURT RECOGNIZED its RECENT Holding IN STATE V. HOUSTON SCONIERS 188 WN.2d 1, 391 P3d 409 (2017) MAY ENTITLE GILBERT to CONSIDERATION OF HIS EXCEPTIONAL SENTENCE downward. VASQUEZ BELIEVES that His RESENTENCING AND STATE V. GILBERT 2019 ARE VERY SIMILAR and that the ONLY DIFFERENCE is SINCE VASQUEZ Had NEW COUNSEL youthfulness WAS NOT Requested to BE TAKEN IN to CONSIDERATION BUT Had He ORIGINAL DEFENSE ATTORNEY FROM His FIRST SENTENCING HEARING that NOT ONLY WOULD AN EXCEPTIONAL SENTENCE BEEN Requested Based upon the Mitigating FACTOR that youth diminished the DEFENDANT CULPABILITY BUT MAYBE EVEN GRANTED.

ON A SEPERATE GROUND OF VASQUEZ S.A.G, VASQUEZ ARGUES that HIS Sixty/Month FIREARM ENHANCEMENT BE STRIKEN AS UNAUTHORIZED BY The Statute 9.94533(3)(G)(E). The COURT OF APPEALS RULED that VASQUEZ SENTENCE is Within the maximum So is OTHERWISE AFFIRMED. VASQUEZ NOW ASK US to look at State V. MCFarland 189WN.2d 47399 P.3d 1106(2017) In a case, IN Which Standard Range CONSECTIVE SENTENCING FOR MULTIPLE FIREARM RELated CONVICTIONS RESULTS IN A PRESUMPTIVE SENTENCE that is CLEARLY EXCESSIVE in light OF the PURPOSE OF LSRA! A SENTENCING COURT Has DISCRETION to IMPOSE AN EXCEPTIONAL Mitigating SENTENCE BY IMPOSING CONCURRENT FIREARM RELated SENTENCES. ALSO See State V. HOUSTON SCONIERS 188 WN.2d 1 391 P.3d 409(2017) Where The SUPREME COURT REVERSED AND REMAND Back to SENTENCING COURT FOR Failing to CONSIDER A CONCURRENT SENTENCE FOR FIREARM ENHANCEMENTS Based on Youthhood IN The RECENT IN RE PERS. RESTRAINT OF MEIPPEN NO. 95394-5 (2018) The WASHINGTON SUPREME COURT IS CURRENTLY CONSIDERING Whether the HOUSTON-SCONIERS Holding that SENTENCING JUVENILES IN adult CRIMINAL Justice System, A TRIAL COURT HAS discretion to depart from SENTENCING Guidlines and MANDATORY SENTENCING ENHANCEMENTS in light OF the PARTICULLIAR CIRCUMSTANCES SURROUNDING Youth, CONSTITUES A "SIGNIFICANT CHANGE IN law that APPLIES RETROACTIVELY." VASQUEZ REQUEST that IF this PETITION is GRANTED REVIEW That The COURT REMAND to SENTENCING COURT with INSTRUCTIONS to CONSIDER CONCURRENT IMPOSITIONS OF FIREARM ENHANCMENTS.

CONCLUSIONS

IN CONCLUSION VASQUEZ REQUEST that IF REVIEW is GRANTED that the COURT REMAND with INSTRUCTIONS to CONSIDER YOUTHFULNESS AS A Mitigating factor at a RESENTENCING HEARING and to CONSIDER A CONCURRENT SENTENCE FOR FIREARM ENHANCEMENTS.

Signature Anthony Vasquez date July-19-2019

FILED
JUNE 20, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. ANTHONY RENE VASQUEZ, Appellant.	))))))))))	No. 36123-3-III UNPUBLISHED OPINION

FEARING, J. —Anthony Vasquez appeals his sentence following a remand for resentencing on convictions for first degree murder while armed with a firearm, second degree unlawful possession of a firearm, and tampering with a witness. He contends, and we agree, that a remand is appropriate to correct a clerical error on the judgment and sentence. We otherwise affirm Mr. Vasquez's sentence and reject contentions that he raises in a statement of additional grounds for review.

FACTS AND PROCEDURE

In 2015, a jury found Anthony Vasquez guilty of aggravated first degree murder, second degree unlawful possession of a firearm, tampering with a witness, and three counts of drive-by shooting. The drive-by shootings served as the aggravator for the

murder conviction. The court sentenced Anthony Vasquez to life imprisonment without parole for the aggravated first degree murder conviction, plus a sixty-month firearm enhancement.

On appeal, we reversed and dismissed the three drive-by shooting convictions, struck the drive-by shooting aggravator attached to the first degree murder conviction, and affirmed the other convictions. *State v. Vasquez*, 2 Wn. App. 2d 632, 415 P.3d 1205 (2018). Thus, we reduced the aggravated first degree murder conviction to simply first degree murder. We instructed that on remand Anthony Vasquez must be sentenced for nonaggravated first degree murder with the sixty-month firearm enhancement following his ultimate sentence.

Anthony Vasquez's standard range for first degree murder with a seriousness level of "XV" and an offender score of "9 or more" was 411-548 months. RCW 9.94A.510. His actual offender score was 12. On resentencing, the State requested an exceptional sentence, and Vasquez sought a midpoint standard range sentence. The resentencing court imposed a 600-month exceptional sentence for the murder based on the aggravating factor that Vasquez's "high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). The court imposed sixty-month standard range sentences on both the witness tampering and unlawful firearm possession counts. The resentencing court declared that the sentences for all three counts would run concurrently and the firearm enhancement would run consecutively, for a total of 660 months in

confinement. The judgment and sentence includes a space in paragraph 4.1(a) to specify the number of months of total confinement ordered, but the resentencing court left the space blank. Boilerplate paragraph 4.1(b) states that "[a]ll counts shall be served concurrently, except for the portion of those counts for which there is an enhancement[.]" Clerk's Papers at 76.

ANALYSIS

Anthony Vasquez's sole contention on appeal is that the trial court's omission of the number of months of total confinement ordered is a clerical error that requires a remand for the court to correct the judgment and sentence. A clerical error in a judgment and sentence "is one that, when amended, would correctly convey the intention of the court based on other evidence." *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011). If an error is clerical in nature, it does not provide an independent ground for resentencing. *State v. Hayes*, 177 Wn. App. 801, 811, 312 P.3d 784 (2016). The remedy is a remand to the trial court to correct the judgment and sentence. *State v. Hayes*, 177 Wn. App. 801, 811 (2016).

The resentencing court declared that Anthony Vasquez's sixty-month sentences for unlawful firearm possession and witness tampering would run concurrently with the 600-month exceptional sentence for the murder and the 60-month firearm enhancement would be served consecutively for a total sentence of 660 months. The State contends the above-noted boilerplate language in paragraph 4.1(b) of the judgment and sentence

adequately communicates the judge's intent, but the State acknowledges, but the State does not object to a correction of the oversight and agrees to present the matter to the trial court.

We remand to the trial court for the sole purpose of correcting paragraph 4.1(a) of Anthony Vasquez's judgment and sentence to specify that the actual number of months of total confinement is 660. Since the remand involves only a ministerial correction and no exercise of discretion, Vasquez's presence is not required. *State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811, 812 (2011).

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Anthony Vasquez asserts numerous statements of additional grounds for review. He contends the jury rendered irreconcilably inconsistent verdicts when it convicted him of first degree murder under both the premeditation and extreme indifference to human life alternatives. He highlights that the jury's answer on the special verdict form indicated unanimity as to both alternatives, but the general verdict form finding him guilty of first degree murder did not designate any alternatives. Thus, in the first appeal, he argued this created an ambiguity that entitled him to resentencing to nonaggravated first degree murder under the rule of lenity because aggravators, such as the drive-by shooting aggravator, only apply to premeditated first degree murder and not to extreme indifference first degree murder.

Our earlier reversal of Anthony Vasquez's aggravated murder conviction moots Vasquez's contentions. Vasquez now requests us to revisit the inconsistent verdicts and grant him the remedy of a new trial. But his argument amounts to a new challenge to the merits of the nonaggravated first degree murder conviction that is beyond the scope of the remand for resentencing and is not properly before us in this second appeal. A defendant is generally prohibited from raising issues in a second appeal that could have been raised in first appeal. *See State v. Mandanas*, 163 Wn. App. 712, 716, 262 P.3d 522 (2011).

Anthony Vasquez contends the resentencing court abused its discretion when it sentenced him to "another life sentence" of 660 months, after this court previously vacated his life without parole sentence. He complains that the trial court found a way around this court's remand by using a second aggravator without fact-finding by a jury to impose another life sentence at the prosecutor's urging.

On remand, Anthony Vasquez was sentenced anew to a 660-month determinate sentence that is not a "life sentence" because he will become eligible for release. Because Vasquez's high offender score would result in current offenses going unpunished, the court was authorized to use the aggravating factor in RCW 9.94A.535(2)(c) to impose an exceptional sentence above the 548-month high end of the standard range for first degree murder. The legislature expressly authorizes sentencing courts to use this circumstance to impose an aggravated exceptional sentence without a

finding of fact by a jury. RCW 9.94A.535(2). And the consecutive sixty-month firearm enhancement is authorized under RCW 9.94A.533(3)(a), (e).

Anthony Vasquez complains about the length of his sentence. But the length of an exceptional sentence will not be reversed as clearly excessive absent an abuse of discretion. *State v. Branch*, 129 Wn.2d 635, 645–46, 919 P.2d 1228 (1996). A sentence is clearly excessive if it is based on untenable grounds or untenable reasons, or an action no reasonable judge would have taken. *State v. Branch*, 129 Wn.2d at 650. The resentencing court based Vasquez's 600-month exceptional sentence for first degree murder and an overall 660-month sentence on tenable grounds.

Anthony Vasquez next contends his 660-month sentence is cruel punishment based on the Washington Supreme Court's decision in *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018). In *Bassett*, our Supreme Court held that sentencing 16- or 17-year-old juvenile offenders to life without parole or early release is cruel punishment and therefore RCW 10.95.030(3)(a)(ii) is unconstitutional under article I, section 14. *State v. Bassett*, 192 Wn.2d at 90. *Bassett* has no application to Anthony Vasquez's case because he was age 23 when he committed the murder and has not received a mandatory life sentence.

Anthony Vasquez requests a remand for the sentencing court to consider whether his youthfulness at the time of the crime justifies an exceptional sentence below the standard range. But he neither requested an exceptional sentence below the standard

range nor asserted his age as a mitigating factor at his resentencing hearing. Thus, Anthony Vasquez waived the contention.

In another additional ground, Anthony Vasquez contends his convictions for first degree murder and second degree unlawful possession of a firearm should be considered the same criminal conduct for offender score purposes. To constitute the same criminal conduct, two or more criminal offenses must involve the same objective criminal intent, the same victim, and occur the same time and place. RCW 9.94A.589(1)(a). The trial court's determination of whether offenses encompass the same criminal conduct is reviewed for an abuse of discretion or misapplication of law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). Here, the victim of the murder was Juan Jesus Garcia. The victim of the offense of unlawful possession of a firearm is the general public. *State v. Haddock*, 141 Wn.2d at 110-11. Thus, the murder and firearm possession convictions fail the same criminal conduct test as a matter of law, and the resentencing court properly counted them separately in the offender score.

Finally, Anthony Vasquez contends his sixty-month firearm enhancement must be stricken as unauthorized by statute and also renders his overall 660-month sentence for first degree murder in excess of the statutory maximum. We disagree. As noted above, the consecutive sixty-month firearm enhancement is authorized under RCW 9.94A.533(3)(a), (e). The statutory maximum sentence for the class A felony first degree

murder is life imprisonment. RCW 9A.32.030(2); RCW 9A.20.021(1)(a). Anthony Vasquez's sentence is within that maximum.

CONCLUSION

We affirm Anthony Vasquez's convictions to the extent we affirmed the convictions in the first appeal. We remand to the resentencing court solely for the purpose of inserting the total length of commitment in the judgment and sentence. We deny the State costs on appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Pennell, A.C.J.

Siddoway, J.

Renee S. Townsley
Clerk/Administrator

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The Court of Appeals
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June 20, 2019

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CASE # 361233
State of Washington v. Anthony Rene Vasquez
GRANT COUNTY SUPERIOR COURT No. 131005991

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure
c: **E-mail** Honorable John M. Antosz

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OPINION FACT SHEET

Case Name: State of Washington v. Anthony Rene Vasquez
Case Number: 36123-3-III

1. TRIAL COURT INFORMATION:

A. SUPERIOR COURT: Grant County
Judgment/Order being reviewed: Judgment and Sentence
Judge Signing: John M. Antosz
Date Filed: June 15, 2018

2. COURT OF APPEALS INFORMATION:

( )	**Affirmed**	( )	**Other**
(x)	**Affirmed as Modified**	( )	**Reversed and Dismissed**
( )	**Affirmed in Part/Remanded****	( )	**Remanded ****
( )	**Affirmed/Rev'd-in part & Remanded**	( )	**Reversed**
( )	**Affirmed/Vacated in part**	( )	**Reversed In Part**
( )	**Affirmed In Part/Rev'd in Part**	(x)	**Remanded with Instructions****
( )	**Denied (PRP, Motions, Petitions)**	( )	**Reversed and Remanded ****
( )	**Dismissed (PRP)**	( )	**Rev'd, Vacated and Remanded ****
( )	**Granted/Denied in Part**	( )	**Vacated and Remanded ****
( )	**Granted (PRP, Motions, Petitions)**		

* **These categories are established by the Supreme Court**

** **If remanded, is jurisdiction being retained by the Court of Appeals? ( ) YES (x) NO**

3. SUPERIOR COURT INFORMATION:
(IF THIS IS A CRIMINAL CASE, CHECK ONE)
Is further action required by the superior court?
(x) YES ( ) NO

GF

Authoring Judge's Initials

Log Number: U-167
Oral Argument Date:

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 36123-3
Title of Case: State of Washington v. Anthony Rene Vasquez
File Date: 06/20/2019

SOURCE OF APPEAL

Appeal from Grant Superior Court
Docket No: 13-1-00599-1
Judgment or order under review
Date filed: 06/15/2018
Judge signing: Honorable John Michael Antosz

JUDGES

Authored by George Fearing
Concurring: Laurel Siddoway
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INMATE

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Superior Court Case Number:	13-1-00599-1

DOC filing of VASQUEZ Inmate DOC Number 346135

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