SUPREME COURT NO. 98111-6

NO. 78782-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RYAN MONTANEZ,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY
The Honorable Bruce I. Weiss, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

A. IDENTITY OF PETITIONER

Petitioner Ryan Montanez, appellant below, asks this Court to review the decision of the Court of Appeals referenced in section B.

B. COURT OF APPEALS DECISION

Montanez seeks review of the decision in State v. Ryan Montanez, Court of Appeals No. 78782-9-I (Slip Op. filed December 23, 2019). A copy of the decision is attached as an appendix.

C. REASONS TO ACCEPT REVIEW

This Court should accept review because Montanez conflicts with this Court's decisions in State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017) and State v. O'Dell, 183 Wn.2d 680, 696, 358 P.3d 359 (2015), and involves an issue of substantial public interest that should be decided by this Court. RAP 13.4 (1) & (4).

D. ISSUE PRESENTED FOR REVIEW

Whether adult sentencing courts have discretion to reduce the term of otherwise mandatory sentence enhancements as a mitigated exceptional sentence based on the offender's youth and upbringing.

E. STATEMENT OF THE CASE

In August 2017, the Snohomish County prosecutor charged Ryan Montanez (d.o.b. 12/24/1998) and three others (two adults and one juvenile) with first degree assault with a firearm. CP 50-51. The affidavit

of probable cause alleges Montanez and his 3 companions, all members of the "Tiny Rascals Gang," were in a white SUV at Fred Meyer Store parking lot in Everett on the afternoon of May 29, 2017, when they challenged Eric Figueroa, a former "South Side Locos" gang member, to a fight. CP 46-49. Figueroa had a juvenile passenger, "A.R." When Figueroa accepted the challenge, Montanez and his companions drove away. Id. Figueroa followed in his Honda Civic and armed himself with a revolver from his glove box. He told A.R. he was "going to get those fools." CP 47. Figuero passed the SUV, then heard several gunshots before A.R. informed him he had been hit in the back and could not feel his legs. Figueroa drove A.R. to a local hospital. Id. A.R. is now paralyzed from the waist down. CP 47; 2RP 4.[1]

Law enforcement was notified of A.R.'s injury by hospital staff. Figueroa and A.R. were interviewed at the hospital and gave consistent accountings of what occurred. CP 46-47.

Montanez and his 3 companions were arrested on June 16, 2017. CP 47. Montanez was a passenger in a white SUV when arrested. Id. The adult SUV driver admitted he was the driver on the day of the

[1] There are two volumes of verbatim report of proceedings referenced as follows: **1RP** – May 29, 2018 (plea hearing); and **2RP** – July 24, 2018 (sentencing).

shooting, and that B.W.C. was the person who held a firearm out the window as they chased Figueroa's car. CP 47-48.

On May 29, 2018, exactly one year after the incident, the prosecution filed an amended information lowering the charge to second degree assault with a firearm in return for Montanez's guilty plea. CP 23-43 (plea statement); CP 44-45 (amended information). The plea agreement precludes Montanez from seeking to withdraw the plea or from challenging his guilt in anyway. CP 37. It also called for an agreed sentence recommendation of 45-months (9 months of standard range plus a 36-month firearm enhancement). CP 35. Sentencing was postponed for 8 weeks at Montanez's request, noting he had a 6-day old newborn he wished to bond with before going to prison. 1RP 7-9.

At sentencing the parties made a joint recommendation of 45 months. 2RP 2, 4. During allocution, Montanez explained how he dropped out of the 8th grade because he was being bullied, and eventually joined a gang for protection, which he later regretted, but feared being killed if he tried to leave. 2RP 5-8.

The court then inquired whether it had authority to impose a mitigated exceptional sentence that would reduce some or all of the 36-month firearm enhancement term in light of Montanez's relatively young age (19.5 years at sentencing), minimal participation in the crime and his

troubled upbringing. RP 11-13. The court noted recent cases stating youth should be taken into consideration at sentencing. 2RP 13. The prosecution argued the court lacked such authority. RP 14. Montanez's counsel admitted he was unaware of the cases to which the court was referencing and that he did not know the answer. RP 15.

The trial court stated it had reviewed the relevant law and concluded it had no discretion to reduce the firearm enhancement portion of Montanez's sentence. RP 15. It was, however, "very troubling" to the court for a "variety" of reasons:

> One of them is . . . [that] when I have a young offender . . who has no criminal history, which is [Montanez], who's never been in . . . prison, sometimes, a lot of times from my perspective, what happens is you just teach them how to become a more and better criminal that they were when they appeared in front of me, and that's one of my concerns.
>
> My other concern is . . that at least in the past, maybe not now, you were gang affiliated. And I've never been to prison, but a lot of things I hear about it, basically, prison is about gangs. So I'm troubled by that, because, if you're telling me now that you're not involved in that lifestyle and you've distanced yourself from it, and I put you back in that prison system and that's really the way it is, I'm not saying it is, I'm saying these are my beliefs, I can't verify it, I'm just sticking you right back in where you got out.

2RP 17.

The court explained it had no problem imposing the high-end standard range sentence of 9 months against Montanez. 2RP 18. The

"real issue" for the court was the 36-month firearm enhancement because it would put Montanez "in prison no matter what." Id. Ultimately the court concluded it did not have discretionary authority to reduce that portion of Montanez's sentence and therefore followed the agreed recommendation of 9 months plus the 36-month firearm enhancement for a total sentence length of 45 months. CP 10; 2RP 18-19.

In concluding the sentencing hearing, the trial court noted it was uncertain whether it would have reduced the firearm portion of Montanez's sentence if it concluded it had the authority to do so. 2RP 22. The court also noted that whether such authority exist might be a basis for Montanez to appeal. Id.

On appeal, Montanez argued the trial court erred in concluding it lacked the authority to reduce or eliminate the 36-month firearm enhancement from his sentence as a mitigated exceptional sentence based on youth and upbringing. Brief of Appellant (BOA) at 6-9. Montanez also argued in the alternative that his trial counsel was ineffective for not knowing the relevant case law that allows reduction of sentence enhancements as a mitigated exceptional sentence. BOA at 9-11.

Relying on RCW 9.94A.533(3) and State v. Brown, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), overruled in part by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), the Court of Appeals

rejected Montanez's claim. Appendix at 2. The court reasoned that because Montanez was 18 years old when he committed the offense, it was bound by this Court's decision in Brown, which "held 'judicial discretion to impose an exceptional sentence does not extend to a deadly weapon enhancement in light of the absolute language' declaring such enhancements mandatory notwithstanding any other provision of law." Appendix at 2 (quoting Brown 139 Wn.2d at 29).

F. ARGUMENTS

1. THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH HOUSTON-SCONIERS AND O'DELL.

"Children are different than adults." Houston-Sconiers, 188 Wn.2d at 21 (citing Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct. 2455, 2457, 183 L. Ed. 2d 407 (2012)). That difference has constitutional ramifications: "An offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." Graham v. Florida, 560 U.S. 48, 76, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); U.S. Const. Amend. VIII; Houston-Sconiers, 188 Wn.2d at 8. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable sentencing reform act range. Houston-Sconiers, 188 Wn.2d at 21; O'Dell 183 Wn.2d at 696.

In O'Dell, this Court found persuasive the scientific and technical advances in understanding the adolescent brain which served as the foundation for the U.S. Supreme Court decisions in Graham, Miller, and Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (which held the constitution precludes the death penalty for juveniles), O'Dell, 183 Wn.2d at 694-98.[2]

More recently, in Houston-Sconiers, this Court found "[a]n offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 188 Wn.2d at 20. Relying on Miller, this Court held that in exercising its discretion, the court must consider circumstances related to the defendant's youth—such as age and its "hallmark features," of "immaturity, impetuosity, and failure to appreciate risks and consequences." Id. at 23. "It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and 'the way familial and peer pressures may have affected him [or her].'" Id. And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. Id. at 23.

[2] At the time of his charged crime, O'Dell was over eighteen years old. Nevertheless, the Court held the trial court could consider whether youth

In Houston-Sconiers, two defendants who committed crimes while under 18 years of age, appealed their sentences of 31 and 26 years on grounds that, in part, the difference between children and adults rendered their mandatory firearm enhancements unlawful. 188 Wn.2d at 13. There, the trial court had imposed no time on the underlying crimes but imposed all of the mandatory "flat time" triggered by the firearm enhancements: 312 months for Roberts and 372 months for Houston-Sconiers. Id. The trial court believed it was precluded from exercising its discretion about the appropriateness of the mandatory sentence increase outlined under Chapter 9.94A RCW. Id.

On appeal, this Court reversed the sentences and remanded for resentencing. This Court concluded that "[t]he mandatory nature of these enhancements violates the Eighth Amendment protections." Houston-Sconiers, 188 Wn.2d at 25-26. The Court also held that "sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable ranges and/or sentencing enhancements when sentencing juveniles in adult court." Id. at 9.

Like the teen in O'Dell, here Montanez was 18-years-old at the time of the alleged offense, and 19-years-old at the time of sentencing. O'Dell, 183 Wn.2d at 683; CP 50. The trial court imposed 9 months of

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diminished his culpability. Id. at 683.

incarceration on the base offense, but believed it was precluded from exercising any discretion as to the incarceration imposed for the firearm enhancement, explaining that "at this point my belief is the law is such that I have to impose" the entire 36-month firearm enhancement. 2RP 18.

Under Miller, O'Dell, and Houston-Sconiers, the trial court here had discretion to depart from the otherwise "mandatory" 36-month firearm enhancement. By failing to exercise that discretion, the trial court failed to take into consideration Montanez's youth and personal circumstances when sentencing him, thereby violating his Eighth Amendment rights. Reversal and remand for resentencing was required under Houston-Sconiers and O'Dell. The Court of Appeal's reliance on Brown to deny Montanez's claim conflicts with Houston-Sconiers and O'Dell. Review is warranted to address this conflict. RAP 13.4(b)(1).

2. REVIEW IS ALSO WARRANTED TO ADDRESS WHETHER THE SENTENCING REFORM ACT (SRA) AUTHORIZES REDUCING OR ELIMINATING A FIREARM ENHANCEMENT AS A MITIGATED EXCEPTIONAL SENTENCE, AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THIS COURT.

Under the SRA, the only expressed categorical prohibition on reducing the statutory presumptive sentence terms are for those mandatory minimum sentences required under RCW 9.94A.540(1), which provides,

> Except to the extent provided in subsection (3)[3] of this section, the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:[4]
>
> [The statute then list the minimum sentence term for various offenses ranging from aggravate first degree murder (25-year minimum term) to first degree assault (five-year minimum term)]

Emphasis added.

Montanez's conviction does not fall under RCW 9.94A.540(1). As several of this Court's decisions indicate, sentencing courts have greater discretion to impose mitigated exceptional sentences than may be immediately obvious from the language of the SRA. Whether these developments in the law mean a sentencing court abuses its discretion by concluding it lacks legal authority to reduce the firearm-enhancement term of a sentence under RCW 9.94A.535, is an issue of substantial public interest that should be decide by this Court.

One relevant development in the law regarding mitigated exceptional sentences includes In re Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007), where a jury found the defendant guilty of six counts of

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[3] Subsection (3) prohibits application of section (1) to offenses committed after July 24, 2005 or to juveniles tried as adults, neither of which is applicable here.

[4] RCW 9.94A.535 sets forth a nonexclusive list of mitigating and aggravating factors a sentence court may consider for purposes of imposing a sentence other than a standard range sentence.

first degree assault and one count of drive-by-shooting. The jury also found the defendant was armed with a firearm for each of the assaults. At sentencing, the court concluded it lacked the legal authority to order the underlying sentences for the assault convictions to be served concurrently because each was a "serious violent offense" that must be served consecutively under RCW 9.94A.589(1)(b). 161 Wn.2d at 326.

RCW 9.94A.589(1)(b) provides:

> Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under this subsection (1)(b) **shall** be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

Emphasis added.

The Mulholland Court addressed the question of "whether, notwithstanding the language of this statute, a sentencing court may order that multiple sentences for serious violent offenses run concurrently as an exceptional sentence if it finds there are mitigating factors justifying such a sentence." 168 Wn.2d at 327-28. This Court agreed with the Court of

Appeals-Division Two, that despite the seemingly mandatory language in RCW 9.94A.589, as indicated by use of the term "shall,"[5] sentencing courts nonetheless have authority to impose concurrent sentences for "serious violent offenses" as a mitigated exceptional sentence under RCW 9.94A.535. 161 Wn.2d at 328-30. The Mulholland Court also noted that under State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005), it constitutes an abuse of discretion when a sentencing court fails to consider a proper request for an exceptional sentence. 161 Wn.2d at 333-34.

Just as the consecutive-sentence requirement for multiple serious violent offenses set forth under RCW 9.94A.589(1)(b) is subject to exception under RCW 9.94A.535, the requirement for consecutive firearm enhancements set forth under RCW 9.94A.533(3) should be subject to the same exceptions. RCW 9.94A.533(3) provides:

> The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a

[5] "The use of the word "shall" is a mandatory directive." Planned Parenthood of Great Nw. v. Bloedow, 187 Wn. App. 606, 622, 350 P.3d 660 (2015).

firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be:

> (i) Granted an extraordinary medical placement when authorized under RCW 9.94A.728(1)(c); or
>
> (ii) Released under the provisions of RCW 9.94A.730;

Emphasis added.

Just like RCW 9.94A.589(1)(b), the language under RCW 9.94A.533(3)(e), when viewed in isolation, suggests all firearm enhancements must be imposed, served in total confinement, and consecutive to all other sentence terms, including other sentence enhancements. Despite this seemingly mandatory verbiage, there are two explicit exceptions: subsections .533(3)(e)(i) & (ii) allow for early release for medical reasons or for offenses committed before the offender turned 18 years of age. Thus, despite the "Notwithstanding any other provision of law" language, there are in fact "other provisions of law" that provide for exceptions to the rule.

Moreover, similar to RCW 9.94A.589(1)(b), and unlike RCW 9.94A.540(1), subsection .533(3) contains no express categorical prohibition on applying RCW 9.94A.535 to the presumptive standard range sentence it creates. Although there is no prior case law specifically holding RCW 9.94A.535 does apply in the context of multiple sentencing enhancements, other decisions support this conclusion.

In State v. DeSantiago, 149 Wn.2d 402, 410, 68 P.3d 1065 (2003), this Court considered whether an offender could be ordered to serve both a deadly weapon and a firearm enhancement for a single offense committed with two weapons. In concluding in the affirmative, the Court noted the legislature's response to its earlier decision in Matter of Charles, 135 Wn.2d 239, 955 P.2d 798 (1998), which held the SRA allowed for multiple sentence enhancements to run consecutive to the base sentence but concurrently to each other. Following Charles, the legislature amended the statute with the italicized language below to read:

> Notwithstanding any other provision of law, all ... enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, *including other firearm or deadly weapon enhancements*,....

DeSantiago, 149 Wn.2d at 416 (citing) former RCW 9.94A.510(3)(e) (firearm) and former RCW 9.94A.510(4)(e) (other deadly weapon) (emphasis added); Laws of 1998, ch. 235, § 1).

Despite the "Notwithstanding any other provision of law" and the language added by the legislature in 1998, in State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), the majority held that trial courts are "vested with full discretion to depart from the sentencing guidelines and any otherwise mandatory sentence enhancements" when sentencing juvenile offenders in adult court. 188 Wn.2d at 34. This conclusion was

based on Eight Amendment jurisprudence as expressed in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) and Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 2470, 183 L.Ed.2d 407 (2012). 188 Wn.2d at 18-26.

The concurrence in Houston-Sconiers, however, would have reached the same result, but on statutory interpretation grounds instead of the Eight Amendment. The concurrence concluded "the discretion vested in sentencing court under the Sentencing Reform Act (SRA) includes the discretion to depart from otherwise mandatory sentencing enhancements when the court is imposing an exceptional sentence." 188 Wn.2d at 34 (Madsen, J, concurring). In reaching this conclusion, the concurrence relied on the express purpose of the SRA as set forth under RCW 9.94A.010, which provides:

> The purpose of this chapter is to make the criminal justice system accountable to the public *by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences*, and to:
> (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.

188 Wn.2d at 35-36 (emphasis added by Madsen, J.).

The concurrence notes the purposes set forth under RCW 9.94A.010 are furthered by RCW 9.94A.535, which states "The court may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." 188 Wn.2d at 36. Justice Madsen's concurrence in Houston-Sconiers, is consistent with her dissent in Brown, supra.

In Brown, a four-Justice dissent authored by Justice Madsen noted the Court's prior holding that "An enhancement increases the presumptive or standard sentence." 188 Wn.2d at 32 (quoting State v. Silva–Baltazar, 125 Wn.2d 472, 475, 886 P.2d 138 (1994)). Thus, statutorily authorized sentence enhancements are distinct from "mandatory minimum" sentences as set forth in RCW 9.94A.540(1), supra. 188 Wn.2d at 32. Thus, the concurrence reasoned that unlike statutorily imposed mandatory minimum sentences, which are expressly exempt from application of RCW 9.94A.535, statutorily imposed sentence enhancement are part of the

presumptive standard range sentence that is subject to modification, up or down, as provided under RCW 9.94A.535. 188 Wn.2d at 32-40.

This Court should accept review to reconsider adopting Justice Madsen's reasoning in her concurrence in Houston-Sconiers and dissent in Brown, and conclude RCW 9.94A.535 provides sentencing courts the discretion to alter the otherwise presumptive terms of sentence enhancement when it furthers the goals of the SRA and meets the requirements for a mitigated exceptional sentence as set forth in that statute.

Review is also warranted to address to whether the language in RCW 9.94A.533(3)(e),[6] can be harmonized with the Eight Amendment and this Court's decisions in Houston-Sconiers and O'Dell. The two-justice concurrence in Houston-Sconiers would have harmonized the statutory language with the Eight Amendment as follows:

> Recognizing that sentencing courts have the discretion to modify firearm enhancements when imposing an exceptional sentence would align these cases with the rest of our sentencing jurisprudence. In In re Personal Restraint of Mulholland, 161 Wn.2d 322, 331, 166 P. 677 (2007), we found that sentencing courts have the discretion to impose

[6] RCW 9.94A.533(3)(e) provides: "Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter."

> an ceptional sentence—by running the sentences concurrently—for multiple serious violent offenses. See RCW 9.94A.589(1)(b). This is true even though the legislature provided that sentences for multiple serious violent offenses "shall be served consecutively to each other." Id. And it is true despite the fact that we had said, in *dicta*, two years prior that such sentences must be applied consecutively. See State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005). In the 18 years since Brown, we have continued to develop our sentencing jurisprudence by allowing courts to exercise the discretion given to them byhe legislature when they are imposing exceptional sentences. Continuing to deny sentencing courts such discretion in cases involving firearm enhancements is untenable. Under RCW 9.94A.535, a sentencing court has discretion to depart below or above a standard range sentence by imposing an exceptional sentence. This standard range sentence includes any applicable enhancement. The failure to exercise discretion—for example, by failing to consider an exceptional sentence authorized by statute—is an abuse of that discretion. O'Dell, 183 Wn.2d at 697 (citing State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)).

188 Wn.2d at 38 (emphasis added).

Although not conclusive, "'[L]egislative inaction following a judicial decision interpreting a statute is often deemed to indicate legislative acquiescence in or acceptance of the decision.'" State v. Sandoval, 8 Wn. App. 2d 267, 273, 438 P.3d 165, review denied, 445 P.3d 562 (2019) (quoting State v. Stalker, 152 Wn. App. 805, 813, 219 P.3d 722 (2009). Houston-Sconiers was decided on March 2, 2017. O'Dell was decided on August 13, 2015. The Legislature has taken no relevant action following O'Dell and Houston-Sconiers. Therefore, this Court can

assume the Legislature agrees sentencing courts have broad discretion under both the Eight Amendment and RCW 9.94A.535.

To the extent Montanez's appeal falls outside the scope of the majority decisions in O'Dell and Houston-Sconiers, this Court grant review to address the issue of substantial public importance of whether the reasoning of the concurrence in Houston-Sconiers should be adopted by this Court such that it will be clear that in addition to the Eight Amendment protections, there is also statutory authority for sentencing court's to exercise discretion with respect to otherwise mandatory sentence enhancement in light of an offender's youth and upbringing, even when sentencing an eighteen year-old offender. 188 Wn.2d at 38.

G. CONCLUSION

For the reasons stated, this Court should grant review.

DATED this 21st day of January, 2020

Respectfully submitted,

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APPENDIX

FILED
12/23/2019
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. RYAN WILLIAM MONTANEZ, Appellant.	)	No. 78782-9-I UNPUBLISHED OPINION FILED: December 23, 2019

PER CURIAM — Ryan Montanez appeals the sentence imposed following his guilty plea to second degree assault with a firearm. Montanez contends the court erred in concluding it did not have discretion to shorten the mandatory firearm 36-month enhancement by imposing an exceptional sentence based on mitigating factors of youth and upbringing. He asks this court to remand for the sentencing court to exercise discretion. We affirm.

On May 29, 2018, Montanez pleaded guilty to second degree assault with a firearm. In the plea agreement, he agreed to a sentence recommendation of 45 months confinement -- 9 months for second degree assault plus 36 months for a mandatory firearm enhancement.

At sentencing, the court asked whether it had discretion to impose an exceptional sentence on the firearm enhancement based on mitigating factors such as Montanez's age and upbringing. The prosecutor told the court it only had such discretion in juvenile

cases. Defense counsel was not sure. The court concluded it did not have discretion and imposed the 45-month sentence recommended by the parties. Montanez appeals.

DECISION

Montanez contends the trial court erred in concluding it lacked discretion to reduce the mandatory firearm enhancement by imposing an exceptional sentence. Citing RCW 9.94A.533(3) and State v. Brown, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), overruled on other grounds by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), the State maintains the court correctly ruled it lacked such discretion because Montanez was 18 years old when he committed the offense.[1] We agree with the State.[2]

RCW 9.94A.533 (3) (b) imposes a three-year sentence enhancement for all class B felonies, including Montanez's, committed with a firearm. RCW 9.94A.533 (3) (e) makes the enhancement "mandatory" and requires its imposition "notwithstanding any other provision of law [.]" Washington courts have recognized no exception to these statutes in adult criminal prosecutions. In State v. Brown, the Washington Supreme Court held "judicial discretion to impose an exceptional sentence does not extend to a deadly weapon enhancement in light of the absolute language" declaring such enhancements mandatory notwithstanding any other provision of law. Brown, 139 Wn.2d at 29.

[1] The State also argues that Montanez invited any error because he recommended the 45-month sentence that the court imposed. But as Montanez notes, the assigned error does not involve the agreement between Montanez and the State, which was not binding on the court, or an erroneous statement of the law by defense counsel. Rather, it involves *the trial court's* alleged failure to recognize its alleged discretion. In any event, we need not decide the invited error question because we conclude there was no error.

[2] We review questions of law de novo. State v. Reeves, 184 Wn. App. 154, 158, 336 P.3d105 (2014).

Contrary to Montanez's assertions, State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) and State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017) did not alter Brown's holding with respect to adult offenders.

In O'Dell, the defendant committed his offense ten days after his 18th birthday. Recognizing recent advances in the scientific understanding of adolescent cognitive and emotional development, the court wrote, "we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." O'Dell, 183 Wn.2d at 695. The court remanded for a new sentencing hearing to consider whether O'Dell's youth diminished his culpability and justified an exceptional sentence. O'Dell, 183 Wn.2d at 683. O'Dell did not, however, address a downward departure from *mandatory* sentencing enhancements in adult cases.

In Houston-Sconiers, the Court extended a trial court's discretion to consider youth as a mitigating factor to mandatory sentence enhancements:

> Because "children are different" under the Eighth Amendment and hence "criminal procedure laws" must take the defendants' youthfulness into account, sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there.

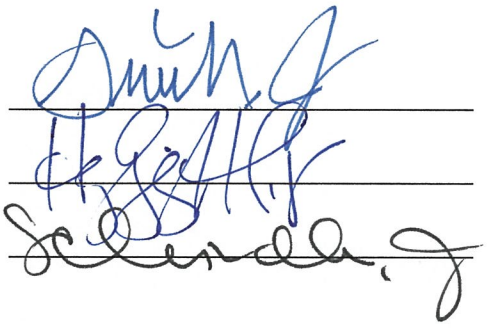
188 Wn.2d at 9. Houston-Sconiers thus modified Brown, but only with respect to juvenile offenders. The Court did not modify Brown's holding with respect to adults.

Because neither O'Dell nor Houston-Sconiers authorizes enhancement reduction in adult cases, and because this court is bound by Brown, State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (Once the Supreme Court "has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court"), Montanez's claim fails. In light of our conclusion, Montanez's claim that his counsel was

ineffective for failing "to alert the trial court to its discretion" to reduce the firearm enhancement fails.

Affirmed.

FOR THE COURT:



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