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Division III
State of Washington

No. 95814-9

NO. 33794-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JEREMIAH JAMES GILBERT,

Defendant/Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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ARGUMENT

Jeremiah James Gilbert takes the position that *State v. Ramos,* 187 Wn.2d 420 (2017) does not impede the argument contained in his original brief nor the Additional Statements of Authority that have been submitted to the Court.

Initially, when Mr. Gilbert was resentenced, the sentencing court did not comply with what is required at a *Miller*[1] hearing. As the *Ramos* Court stated at 444:

> When making its decision, the court must be mindful that a life-without-parole sentence is constitutionally prohibited for juvenile homicide offenders whose crimes reflect "'unfortunate yet transient immaturity'" rather than "'irreparable corruption.'" [*Miller* at 2469]. Moreover, due to "children's diminished culpability and heightened capacity for change … appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* **The sentencing court must thoroughly explain its reasoning, specifically considering the differences between juveniles and adults identified by the *Miller* Court and how those differences apply to the case presented. While formal written findings of fact and conclusions of law are not strictly required, they are always preferable to ensure that the relevant considerations have been made and to facilitate appellate review.**

(Emphasis supplied.)

The sentencing court did not provide any individualized reasoning for its decision. Rather, it specifically stated that it was adopting the State's position *in toto.*

[1] *Miller v. Alabama,* 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012)

Mr. Gilbert contends that he presented the necessary information to the sentencing court that would enable it to conclude that he was eligible for a mitigated sentence. The *Ramos* Court noted at 436:

> *Miller* establishes a substantive rule that a life-without-parole sentence cannot be imposed on a juvenile homicide offender whose crimes reflect transient immaturity. Therefore, **where a juvenile offender facing a standard range life-without-parole sentence proves that his or her crimes reflect transient immaturity, the juvenile has necessarily proved that there are substantial and compelling reasons for an exceptional sentence downward**. *Miller* anticipates that most juveniles will be able to meet this burden of proof, and we now explicitly hold that all juvenile homicide offenders must be given the opportunity to do so at a *Miller* hearing.

(Emphasis supplied.)

Mr. Gilbert agrees that he was given the opportunity to present evidence to support an exceptional sentence downward. However, the sentencing court, even though it considered those factors, essentially thrust them aside and adopted the State's position without appropriate reasoning.

The phrase "transient immaturity" has been used by the United States Supreme Court on a number of occasions. The *Ramos* Court cites to *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 735, 193 L. Ed.2d 599 (2016) when discussing "transient immaturity."

The sentencing court does not appear to have taken into consideration the difference between a child exhibiting "transient immaturity" and the rare child whose crime reflects "irreparable corruption." The need to do so is set out in the *Montgomery* case and

was recently reestablished by *Tatum v. Arizona*, 580 U.S. ___, 137 S. Ct. 11, ___ L. Ed.2d ___ (2016).

Mr. Gilbert claims that in the absence of this necessary determination by the trial court on a critical factor that his resentencing hearing failed to comply with the directives of *Miller*. Moreover, as opposed to the *Ramos* resentencing, he did present individualized testimony concerning "transient immaturity." This is set out in more detail in his original brief.

Finally, Mr. Gilbert asserts that he is being denied equal protection under the law as a result of the limited application of RCW 9.94A.540(3) which provides:

> (a) Subsection (1)(a) through (d) of this section, shall not be applied in sentencing of juveniles tried as adults pursuant to RCW 13.04.030(1)(e)(i).
> (b) **This subsection (3) applies only to crimes committed on or after July 24, 2005**.

(Emphasis supplied.)

As a result of this limitation, Mr. Gilbert is subject to RCW 9.94A.540(1) which states, in part:

> Except to the extent provided in subsection (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:
>
> (a) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. …

The question thus becomes whether or not the limitation contained in the statute runs contrary to the ruling in *Personal Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007). It appears to do so in that the language is mandatory and requires consecutive

sentencing on mandatory minimum terms which amounts to a de facto life without parole sentence.

The adequacy of Mr. Gilbert's resentencing hearing is highly questionable. The *Ramos* decision does not alter that fact. Mr. Gilbert is entitled to have his case remanded for resentencing with specific directions that all of the life without possibility of parole factors for juveniles be fully considered on the record and the reasons for granting or denying the exceptional sentence downward be clearly elucidated.

DATED this 22nd day of April, 2017.

Respectfully submitted,

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COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

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