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SUPREME COURT
STATE OF WASHINGTON
11/13/2018 1:13 PM
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NO. 95814-9

SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JEREMIAH JAMES GILBERT,

Defendant/Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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ARGUMENT

What do you say to a person who has spent over sixty percent (60%) of his life in prison (15-42 years of age)?

Do you tell him that rehabilitation is really not a goal of the Sentencing Reform Act (SRA)?

Do you say maybe when you have spent seventy-five percent (75%) of your life locked up (15-60 yoa) that will be enough?

Jeremiah James Gilbert was resentenced pursuant to the *Miller*[1]-fix statute. The applicable portion of that statute, RCW 10.95.030, follows:

> (3)(a)(i) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

Mr. Gilbert was 15 years old at the time of his offenses. The offenses included aggravated first degree murder and first degree murder. He was sentenced to life without possibility of parole (LWOP).

The Court, upon resentencing, imposed the mandatory twenty-five year minimum on the aggravated first degree murder conviction. It then imposed a consecutive twenty-year mandatory minimum sentence on the first degree murder conviction.

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[1] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012)

At the resentencing hearing the State asserted that the Court only had authority to reset the minimum term on the aggravated murder charge. The State also argued that the Court could not consider any other modification of the Judgment and Sentence.

It appears that both the State and resentencing Court were operating under a mis-apprehension as to whether or not consideration could be given to all aspects of the prior sentencing. When resentencing is ordered it is based upon the fact that a prior sentence was erroneously imposed.

Life in prison without the possibly of parole for juvenile offenders has been declared unconstitutional. It constitutes cruel and unusual punishment under both the Eighth Amendment to the United States Constitution and Const. art. I, § 14. *See: State v. Bassett, slip opinion*, 94556-0 (October 18, 2018); *Miller v. Alabama, supra*.

Based upon the unconstitutionality of his original sentence Mr. Gilbert maintains that all historical aspects of his case were properly before the trial court for resentencing.

In *State v. Davenport*, 140 Wn. App. 925, 167 P.3d 1221 (2007), the Court ruled at 932:

> At the resentencing hearing, the trial court had the discretion to consider issues Davenport did not raise at his initial sentencing or in his first appeal. *State v. Barberio*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993) (citing *State v. Sauve*, 33 Wn. App. 181, 183, n.2, 652 P.2d 967 (1982), *aff'd* 100 Wn.2d 84, 666 P.2d 894 (1983)).

Moreover, in *State v. Harrison*, 148 Wn.2d 550, 61 P.3d 1104 (2003), which involved the miscalculation of an offender score, and remand for resentencing, the State argued that collateral estoppel applied. The *Harrison* Court ruled at 561:

> … [C]ollateral estoppel does not apply because the original sentence no longer exists as a final judgment on the merits. … As we have stated, the act of "an appeal does not suspend or negate . . . collateral estoppel aspects of a judgment entered after trial in the superior courts," but collateral estoppel can be defeated by later rulings on appeal. [Citations omitted.] … His entire sentence was reversed, or vacated, since "reverse" and "vacate" have the same definition and effect in this context - the finality of the judgment is destroyed. Accordingly, Harrison's prior sentence ceased to be a final judgment on the merits, and collateral estoppel does not apply. [Citation omitted.]

Of particular importance in Mr. Gilbert's case is *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). The Court of Appeals decision sidestepped application of *Houston-Sconiers* by indicating that Mr. Gilbert could pursue that issue under a Personal Restraint Petition (PRP).

Houston-Sconiers is directly on point as to the issues raised by Mr. Gilbert in the Court of Appeals. It was provided as an Additional Statement of Authorities to that Court.

As *Houston-Sconiers* states at 21:

> … [S]entencing courts must have complete discretion to consider mitigating circumstances associated with the youth of **any juvenile defendant**, even in the adult criminal justice system regardless of whether the juvenile is there following a decline hearing or not. To the extent our state's statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. **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.**

(Emphasis supplied.)

The evolution of juvenile brain science continues to advance and educate those involved in the criminal justice system. It is clear that Mr. Gilbert is not one of those individuals who is incorrigible and incapable of being rehabilitated for reentry into society.

When Mr. Gilbert, as a 15 year-old, was considered for adult prosecution the Klickitat County Juvenile Court Administrator conducted an appropriate evaluation under the *Kent*[2] factors. The eight *Kent* factors are not all applicable to Mr. Gilbert's case. In particular, factor six was found significant by the original evaluator: ("6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.").

Mr. Gilbert argues that factors six, seven, and eight of the *Kent* case all have to be considered in the resentencing of a juvenile offender who was originally sentenced to life without possibility of parole. He urges the Court to declare that these three factors are mandatory for juvenile resentencing cases. He further urges the Court to require that a resentencing court enter findings of fact and conclusions of law to support its sentence.

In addition, the purposes of the SRA should also be taken into consideration. RCW 9.94A.010's delineation of the reasons for consistency in sentencing are all apropos to the resentencing of juvenile LWOP offenders.

The lack of findings of fact and conclusions of law is a critical problem. As recognized in *Houston-Sconiers* at 22-23:

> *Miller* is mainly concerned with what must happen at sentencing because *Miller*'s holding rests on the insight that youth are generally less culpable *at the time of their crimes* and culpability is of primary

[2] *Kent v. United States*, 383 U.S. 541, 88 S. Ct. 1045, 16 L. Ed.2d 84 (1966)

> relevance in sentencing. *See Miller*, 132 S. Ct. 2464. But the part of the *Miller* fix statute that is applicable to this case, RCW 9.94A.730, prioritizes public safety considerations and likelihood of recidivism. It makes no allowance for consideration of any of the mitigating factors of youth that *Miller* requires at the time of sentencing. The fact that a recently enacted statute may offer the possibility of another remedy in the future, or on collateral review, does not resolve whether petitioners' sentences are … in need of correction now and it does not provide for the consideration of mitigating factors to which they are entitled now… .

In addition to the mandate of *Houston-Sconiers*, that mitigating factors be fully considered at a resentencing hearing for juvenile offenders, is the holding in *Tatum v. Arizona*, 580 U.S. _, 130 S. Ct. 11, _ L. Ed.2d _ (2016). The *Tatum* case is a consolidation of several cases involving the resentencing of juveniles in light of *Miller v. Alabama, supra*, and *Montgomery v. Louisiana*, 577 U.S. _, 136 S. Ct. 718, 193 L. Ed.2d 599 (2016).

In referring to all of the consolidated cases, Justice Sotomayor ruled:

> On the record before us, none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 577 U. S. ___ (*slip op.*, at 17).

The decision in *State v. Ramos*, 187 Wn.2d 420, 444, 387 P.3d 650 (2017), even though not considering the *Tatum* case, came to the same conclusion with regard to the need for specificity of the resentencing court's reasoning when considering the difference between juveniles and adults.

The resentencing court in Mr. Gilbert's case failed to abide by the need to explain its ruling. Rather, the Court adopted the State's recommendation *in toto*.

Mr. Gilbert is currently facing a de facto life sentence. He will not be eligible for parole consideration until he is 60 years old. The record reflects that he has been rehabilitated. He has carried his burden of proof as required by *Ramos, supra*, at 436.

The record also reflects that no detailed consideration was given by the trial court to the potential of a mitigated sentence whereby the convictions would all run concurrent.

Mr. Gilbert otherwise relies upon the argument contained in his original petition.

DATED this 13th day of November, 2018.

Respectfully submitted,

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SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. JEREMIAH JAMES GILBERT, Defendant, Appellant.	))))))))))))	**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 13th day of November, 2018, I caused a true and correct copy of the *SUPPLEMENTAL BRIEF OF APPELLANT* to be served on:

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November 13, 2018 - 1:13 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Jeremiah James Gilbert
Superior Court Case Number:	92-1-00108-1

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