

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
CLERK

No. 96496-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Appellant,

v.

MARVIN LEO,

Respondent.

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ON MOTION FOR DISCRETIONARY FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

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ANSWER

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GREGORY C. LINK  
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A. INTRODUCTION

Marvin Leo was sentenced to die in prison for crimes he committed as a child.

Fourteen years after Marvin's crimes, the United States Supreme Court found mandatory life sentences, such as the one Marvin received, violated the Eighth Amendment. The Washington Legislature responded by ordering new sentencing hearings for juveniles sentenced to life in prison. The statutory amendment requires the trial court to consider the mitigating qualities of youth and to set a minimum term of more than 25 years, at which point juvenile becomes eligible for parole.

Here, the trial court conducted the required hearing. The court carefully considered, and entered detailed findings regarding, the mitigating qualities of Marvin's youthfulness at the time of his offenses. The court set a minimum term of 40 years.

The State appealed, contending the court was required to again sentence Marvin to die in prison for the crimes he committed as a child.

B. ISSUE PRESENTED

The legislature substantially limited the ability to appeal a trial court's decision setting a minimum term sentence under RCW 10.95.030. Such decisions are reviewable only to the extent and in the same manner as were minimum term decisions prior to 1986. Prior to 1986, the State did not have the ability to seek review of a minimum term decision. The State has conceded it cannot appeal the minimum term decision in this case but insists it may seek discretionary review. The Court of Appeals dismissed the State's motion for discretionary finding the State could not seek review. Thus, the only question now before this Court is whether RCW 10.95.030 permits the State to seek review of the minimum term decision in this case. It does not.

C. STATEMENT OF THE CASE

During his adolescence, Marvin relocated with his family from Hawaii to Tacoma's Hilltop neighborhood. CP 432. At the same time, his parents were separating and Marvin routinely witnessed violence and drug use in his

home. *Id.* Marvin also witnessed the gang violence that prevailed in his neighborhood. *Id.*

Dr. Nathan Henry, a forensic psychologist, explained “gang association has an important effect on adolescent identity and personality development and often accompanies a disruption in prosocial identity development. Essentially, youth look to other sources of support when they experience family dysfunction and, in this case, major cultural interruption.” *Id.* Marvin joined a gang.

With and at the direction of several older gang members, a 17 year-old Marvin participated in a shooting at the Trang Dai Cafe in Tacoma. CP 429. Five people died and five more were injured. *Id.*

Marvin pleaded guilty and received a life sentence without the possibility of parole. CP 429.

Following the enactment of RCW 10.95.030, Marvin received a new sentencing hearing. CP 430.

Following that hearing, the trial court set a minimum term of 40 years. CP 436. The court found that sentence was

permitted by RCW 10.95.030. CP 430. Alternatively, the court found that sentence was permissible as an exceptional sentence under the Sentencing Reform Act. CP 430.

The State filed a notice of appeal and submitted a brief insisting the trial court was obligated to impose no less than a 125 year sentence.

In his response brief, Marvin argued first that because the State could not seek review of a minimum term decision prior to 1986, RCW 10.95.030 does not permit the State to seek review now.

In response, the State conceded it could not challenge the sentencing by direct appeal. The State, however, insisted it could do so by discretionary review.

Marvin responded that prior to 1986 neither a defendant nor the State could seek discretionary review of a minimum term decision and thus RCW 10.95.030 does not permit the State to seek discretionary review in this case.

A commissioner of the Court of Appeals did not rule on the State's ability to seek review. Instead, the commissioner

stayed the motion for discretionary review pending this Court's decision in *State v. Bassett*, \_ Wn.2d \_\_, 428 P.3d 343 (2018).

Marvin filed a motion to modify the order staying the case, arguing that since the State could not seek review in the first place, there was no reason to stay the case. A panel of the Court of Appeals agreed and entered an order lifting the stay and dismissing the case.

The State then filed a petition for review. Noting that there was no order terminating review pursuant to RAP 12.3, this Court redesignated the State's motion as motion for discretionary review.

D. ARGUMENT

**The Court of Appeals properly concluded RCW 10.95.035(3) prevents the State from seeking review in this case.**

*a. The State properly conceded below that this matter is not appealable.*

RCW 10.95.030(3) does not permit the State to appeal the trial court's judgment in this case. The State conceded in the Court of Appeals that it may not appeal the trial court's

decision. The State's concession is well taken. The Court should accept that concession.

*b. RCW 10.95.030(3) does not permit the State to seek discretionary review in this matter.*

While the legislature required new sentencing hearings in response to *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the legislature substantially limited review of those decisions and provided no avenue for the State to do so. RCW 10.95.035(3) limits review of the minimum term decision, stating: "The court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986."

Prior to July 1, 1986, the effective date of the SRA, a court set the maximum term and left setting the minimum term to the parole board. "Such decisions were not reviewable by appeal or by discretionary review as they did not meet the criteria of RAP 2.2 or RAP 2.3." *In re the Personal Restraint of Rolston*, 46 Wn. App. 622, 623, 732 P.2d 166 (1987).

In the Court of Appeals, the State insisted RAP 2.3(a) permits it to “seek discretionary review of any act of the superior court not appealable as a matter of right.” Motion to Re-Designate at 2. Indeed, RAP 2.3(a) does contain that language. However, it is prefaced by the qualification “Unless otherwise prohibited by statute or court rule.” *Id.* The State has never discussed the impact of this qualification in this case. RCW 10.95.035(3) in fact prohibits the State’s request for discretionary review for the same reason it bars the State’s direct appeal.

Prior to 1986, minimum term decisions were not subject to **either** direct appeal **or** discretionary review. *Rolston*, 46 Wn. App. at 623. Because the State did not have the ability to seek “review” of a minimum term decision prior to 1986, either by direct appeal or discretionary review, the statute does not permit the State to seek review of Mr. Leo’s minimum sentence. Thus, RAP 2.3(a) does not permit the state to seek discretionary review here as it is “otherwise prohibited by statute.”

The State's present motion for discretionary review to this Court does not even bother to mention RCW 10.95.030 much less discuss the substantial limitation the Legislature has imposed in that statute on the review of minimum term decisions. Nowhere in its motion does the State cite any rule or statute which authorizes the State to seek discretionary review of the Superior Court's decision. The State has never demonstrated that it had the ability to seek review of minimum term decisions prior to 1986. Indeed, as the Court of Appeals properly noted, the State was not even a party to those determinations prior to 1986. Instead, the minimum term was set by an administrative body, the Parole Board, without the State's involvement. Given that history, RCW 10.95.030 does not permit the State to seek review, in any manner, of the minimum term decision made in Marvin's case.

Beyond that, the State has not posited how it was error at all, much less probable or obvious error, for the Court of Appeals to conclude that RCW 10.95.030 does not permit the

State to seek review in this matter. Indeed, the State has not addressed the criteria of RAP 13.5 at all, choosing instead to rely on the inapplicable provisions of RAP 13.4. As it has since the outset, the State insists it is entitled to review without any effort or ability to demonstrate why. The Court of Appeals did not commit any error.

*c. Because the Court of Appeals did not reach any of the State's challenges to Marvin's sentence, the State cannot meet the criteria of RAP 13.5.*

Since the Court of Appeal did not accept review the Court has not addressed the merits of the State's claim regarding the sentence imposed. Because of that, the State cannot demonstrate the Court of Appeals committed any error with regard to its sentencing argument and the State cannot satisfy the criteria of RAP 13.5. This Court should not grant review of the State's challenge to the sentence imposed.

E. CONCLUSION

The Court of Appeals properly concluded that RCW 10.9.030 bars the State from seeking review in this case. This Court should deny review.

Respectfully submitted this 5<sup>th</sup> day of December, 2018.

A handwritten signature in black ink, appearing to read "Gregory C. Link". The signature is written in a cursive style with a large initial "G".

Gregory C. Link – 25228  
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### DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 96496-3**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Pierce County Prosecutor's Office
- respondent
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: December 5, 2018

# WASHINGTON APPELLATE PROJECT

December 05, 2018 - 4:15 PM

## Transmittal Information

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