

No. 96496-3

NO. 49863-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

MARVIN LOFI LEO, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 98-1-03161-3

Brief of Appellant

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred by ruling that the aggravated murder sentencing provisions enacted as the *Miller* fix, RCW 10.95.030(3)(a)(ii) and (b) – (i), are supplemented by or subordinate to the exceptional sentence provisions of the Sentencing Reform Act in the setting of the respondent’s minimum term of confinement.
2. The trial court erred by ruling that the exceptional sentence provisions of the Sentencing Reform Act apply to the setting of the respondent’s minimum term of confinement for five aggravated murder crimes.
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5. The trial court erred in concluding that *Miller v. Alabama*, 132 S. Ct. 2455(2012) bars a “sentence of life without possibility of parole for homicide for juveniles. . . .” CP 429-36, p. 5 of 8.
6. The trial court erred in conclusions of law numbers four through nine when it ruled that the exceptional sentence provision of the Sentencing Reform Act applies to an aggravated murder re-sentencing and that the “Court may impose a sentence outside the standard range” in the setting of a minimum term for the aggravated murder counts under RCW 10.95.030(3)(a)(ii).

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Does the aggravated murder sentencing statute apply to an aggravated murder minimum term sentencing hearing rather than the exceptional sentence provisions of the Sentencing Reform Act?
2. Does the aggravated murder sentencing statute mandate separate, that is consecutive, punishment for each aggravated murder count?

3. Does the substantive rule of law announced in *Miller v. Alabama* require that a trial court have complete discretion in setting a minimum term under the *Miller* fix?
4. Should the *Miller* fix aggravated murder minimum term sentencing statute be upheld under the cruel punishments clause?

C. STATEMENT OF THE CASE.

1. *Procedural History.*

Respondent Marvin Lofi Leo (the “defendant”) was convicted by guilty plea of five counts of aggravated first degree murder and five counts of first degree assault in January 2000. CP 429. He was sentenced to five life without parole sentences for the aggravated murders, and a total of 1,100 months for the no-aggravated murder assaults on February 11, 2000. CP 429-36.

After the *Miller* case was decided in 2012, the defendant filed a personal restraint petition which was transferred to this Court by the Supreme Court and assigned case No. 46924-3. On July 21, 2015, this Court dismissed the petition because the defendant was scheduled to appear for a minimum term sentencing hearing in the trial court. That hearing was held on November 28, 2016, and December 5, 2016.

11/28/2016 RP 3, et. seq. 12/5/2106 RP 3 et. seq.

2. *Statement of Facts.*

On July 4, 1998, the defendant participated in a mass shooting at the Trang Dai Cafe in Tacoma's International District. CP 429-30. The defendant's role in the shooting was to accompany the primary perpetrator to the front door of the cafe where they fired indiscriminately at random patrons. In total, the shooting left five people dead and five injured. CP 430. The defendant pled guilty as charged in January 2000. CP 429. Following enactment of the *Miller* fix amendments to the aggravated murder sentencing statute, the defendant was returned to the trial court for a hearing to set his minimum terms for the five aggravated murder counts. *Id.*

At the minimum term hearing, the trial court considered eleven exhibits and testimony from a defense forensic psychologist. CP 394-95. 11/28/2016 RP 7, et. seq. The exhibits included a chronological summary of the defendant's prison record and transcripts from the trial of two of the defendant's codefendants. Exhibits 3 and 4. The defendant was found to be a low risk prisoner as a result of good behavior behind bars. CP 432. The transcripts however included an incident of anti-social behavior in which the defendant testified falsely under oath in support of his codefendants alibi defenses at their 2002 trial. Exhibit 3, p. 5960, et. seq. Exhibit 4, p. 6016 et. seq. This testimony came four years after the shooting and after the defendant had turned 21. CP 430.

The defense psychological testimony was not impeached to any significant degree except for an inquiry about the effect of perjury on the defendant's risk assessment. 11/28/2016 RP 63, et. seq. The trial court viewed the testimony favorably and entered findings that the defendant had been influenced by youth to participate in the shooting and had demonstrated the capacity for rehabilitation by undertaking significant modes of self-improvement even before the *Miller* case offered him a possibility of eventual release. CP 431-33, 436.

The trial court issued oral findings of fact and conclusions of law at the close of the minimum term sentencing hearing. 12/5/2016 RP 36, et. seq. It then sentenced the defendant to concurrent 40 year minimum terms and entered a judgment addendum. CP 401-406. The trial court also entered written findings of fact and conclusions of law in support of an exceptional sentence after concluding that the provisions of the Sentencing Reform Act could be applied to an aggravated murder minimum term sentencing proceeding. CP 429-36. This timely appeal by the state was filed on January 3, 2017. CP 407-414.

D. ARGUMENT.

1. THE AGGRAVATED MURDER SENTENCING STATUTE APPLIES TO THIS AGGRAVATED MURDER MINIMUM TERM SENTENCING HEARING, NOT THE SENTENCING REFORM ACT.

Aggravated murder is Washington's most serious criminal offense and has its own sentencing chapter. RCW Ch. 10.95. "RCW 10.95.030(1)

requires trial courts to sentence persons convicted of aggravated first degree murder to life imprisonment without possibility of release or parole. . . The only statutory exception occurs when the trier of fact finds no mitigating circumstances to merit leniency in a special sentencing proceeding, in which case, the sentence is death.” *State v. Meas*, 118 Wn. App. 297, 306, 75 P.3d 998, 1002 (2003) (citation omitted), citing *State v. Ortiz*, 104 Wn.2d 479, 485-86, 706 P.2d 1069 (1985).

Washington’s current aggravated murder sentencing statutes were enacted in 1981, the same year as the SRA. *See* Laws of 1981, Ch.s 137 and 138. The enactments repealed prior statutory provisions related to punishment of aggravated first degree murder. *Id.* A new section was added to Title 10 that governed the imposition of one of two possible sentences in aggravated murder cases. Laws of 1981, Ch.s 138. *See* former RCW 10.95.030(1) and (2). That provision allowed for only two possible sentences for defendants convicted of aggravated murder, be they juveniles or adults, namely death or life in prison without parole. *Id.* This is no longer the case.

The trial court in this case applied the SRA rather than the aggravated murder sentencing statute. This was error. If the SRA, and in particular its exceptional sentence provisions, applied to aggravated murder, one would have expected a robust jurisprudence to have developed over the past 35 years concerning “mitigating circumstances”

and exceptional sentences “below the standard range” for defendants facing life in prison or the death penalty. *See* RCW 9.94A.535(1). What better way to avoid the harshest of penalties than to seek an exceptional sentence? The reason no such jurisprudence has developed is that the two sentencing statutes are separate and apply to different classes of offenses.

State v. Ortiz, 104 Wn.2d at 485–86. In *Ortiz*, the court stated:

We take this time, however, to express our dissatisfaction with the mandatory sentencing provision in the aggravated first degree murder statute, RCW 10.95. Unlike the Sentencing Reform Act of 1981, RCW 9.94A, which allows the trial judge to depart from the prescribed sentencing range when the prescribed sentence would impose excessive punishment on a defendant, the aggravated first degree murder statute allows for no such flexibility.

Id.

Both the Supreme Court and this Court have adhered to the *Ortiz* conception of the relationship between the two statutes. *State v. Yates*, 161 Wn.2d 714, 784, 168 P.3d 359 (2007), and *State v. Kron*, 63 Wn. App. 688, 694, 821 P.2d 1248, 1252 (1992). In *Yates*, in response to a request to run the defendant’s death penalty consecutive to the defendant’s Spokane County life in prison sentences, the Supreme Court stated that “the SRA provisions on concurrent and consecutive sentences (RCW 9.94A.589) cannot be sensibly applied when a jury in a special sentencing proceeding under chapter 10.95 RCW returns a verdict for a death sentence.” *Id.* In *Kron*, this Court stated, “The Legislature has specified in two separate statutes that death or life in prison without parole will be

the only sentencing alternatives for someone who commits aggravated murder. The Legislature could not have intended any other penalty.”

The Supreme Court has further stated, “The SRA and RCW 10.95 serve two separate functions and are consistent. . . The SRA is a determinate sentencing system for felony offenders. It gives first degree aggravated murder a seriousness score of 15 and provides for two possible sentences, life without parole or death.” *State v. Brett*, 126 Wn.2d 136, 184, 892 P.2d 29 (1995) (citation omitted). This Court citing *Ortiz* stated explicitly that, “Unlike the Sentencing Reform Act of 1981, the aggravated first degree murder statute does not allow a trial judge flexibility to depart from the prescribed sentencing range.” *State v. Meas*, 118 Wn. App. at 306.

The foregoing authorities indicate that the SRA not apply to this case. Further support for this view may be found in the *Miller* fix amendments. Those amendments were passed in 2014 in response to *Miller v. Alabama*, 567 U.S.460, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407 (2012). In *Miller* the Supreme Court held that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” *Id.* The *Miller* fix was enacted in order to provide for less than life, indeterminate sentences for juveniles thereby removing mandatory life imprisonment as a potential punishment for aggravated murder. RCW 10.95.030(3)(i) and (ii). Aggravated murder sentencing was thereby brought into compliance with

the requirements of the Eighth Amendment as articulated by *Miller*. See *In re McNeil*, 181 Wn.2d 582, 590, 334 P.3d 548, 552 (2014) (“The *Miller* fix remedies the unlawfulness of the petitioners' sentences by providing they must be resentenced in a manner that does not violate the Eighth Amendment, consistent with *Miller*.”).

If all along Washington’s aggravated murder sentencing statute provided for a less than life sentence, if an exceptional sentence of less than life in prison were possible, there would have been no need for the *Miller* fix. If a life in prison sentence were not mandatory, *Miller* did not apply. This was not the case, and thus the legislature appropriately took action to ensure Washington’s penalty for its most serious offense did not contravene the Eighth Amendment.

In light of the foregoing, the trial court’s imposition of an “exceptional sentence” lower than the minimum sentence provided for by RCW 10.95.030(3), was improper. Since under *Ortiz*, *Brett*, *Yates* and *Meas*, the SRA does not apply to the crimes for which the defendant’s minimum term was being set, the trial court erred when it ruled that, “The terms of [the exceptional sentence provision of the SRA] govern the imposition of sentences outside the standard range . . .” and that therefore “The Court may impose a sentence outside the standard range” CP 429-36, p. 6 of 8. When it comes to the period of incarceration, for defendants who were younger than sixteen years of age on the date of their offense, RCW 10.95.030(3)(a)(i) states simply that such defendants “shall

be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.” For defendants who were sixteen or older up to age eighteen, RCW 10.95.030(3)(a)(ii) mandates “a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years.”

Statutory construction further undermines the trial court’s ruling. The re-sentencing in this case was about aggravated murder. Review of the entirety of RCW 10.95.030 shows that none of the incarceration provisions of the SRA’s incarceration provisions were cross referenced or incorporated by reference. Other provisions were however. For example, RCW 10.95.030(3)(c) states, “During the minimum term of total confinement, the person shall not be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave or absence from the correctional facility while not in the direct custody of a corrections officer.” A more clear legislative statement about the mandatory character of the incarceration requirements can hardly be imagined.

Other references in RCW 10.95.030 concern post incarceration matters. For example, RCW 10.95.030(3)(a) envisions eventual release of juvenile aggravated murder defendants by the indeterminate sentencing review board. Because this is the case, there is a specific grant of authority for post-incarceration community custody: “Any person

sentenced pursuant to this subsection shall be subject to community custody under the supervision of the department of corrections and the authority of the indeterminate sentence review board. As part of any sentence under this subsection, the court shall require the person to comply with any conditions imposed by the board.” Had the SRA already supplemented the aggravated murder sentencing statute, the community custody provisions would already apply and this section would have been superfluous. *See* RCW 9.94A.701 and 702. The SRA did not apply and thus this provision was necessary.

The legislature could have cross referenced any of the SRA provisions if it had wanted them to apply. One would think that if more than community custody was intended to be part of aggravated murder sentencing, the enactment would have said so. As enacted however, the only actual cross reference to the SRA is the above-referenced provision that specifically states that particular provisions do not apply. *See* RCW 10.95.030(3)(c). These provisions show that where the legislature intended particular provisions to apply it specifically said that they would.

2. THE AGGRAVATED MURDER SENTENCING STATUTE MANDATES SEPARATE, THAT IS CONSECUTIVE, PUNISHMENT FOR EACH AGGRAVATED MURDER COUNT.

Until the *Miller* fix was enacted, a conviction for aggravated murder carried a sentence of either life in prison or death. Laws of 1981, Ch.s 138. *See* former RCW 10.95.030(1) and (2). Perhaps because there

have been relatively few cases in Washington involving multiple aggravated murders, there are few references to whether sentences for more than one count should be served consecutively or concurrently. However, statutory text supplemented by case law discussion indicates that aggravated murder defendants should serve separate, that is consecutive, sentences for each conviction.

The discussion above from *Yates* supports the view that separate punishment was intended for multiple aggravated murder deaths. *State v. Yates*, 161 Wn.2d at 784. Where the death penalty had been imposed for some of a serial killer's murders, and where life in prison was imposed for others, concurrent versus consecutive sentencing "cannot be sensibly applied". *Id.* The reason of course is that the separate penalties for separate takings of life must be carried out separately for obvious reasons. But this supports the view that each aggravated murder conviction should carry its own penalty.

Other references lead to the same conclusion. For instance, references to singular "verdicts" or "convictions" supports separate, consecutive aggravated murder sentencing. *See State v. Hacheney*, 160 Wn.2d 503, 511, 158 P.3d 1152(2007)("A verdict of aggravated first degree murder can subject the defendant to the death penalty, but where the prosecutor has chosen not to seek the death penalty, the sentence must be life without the possibility of release."). *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995) ("Because we find the same criminal conduct rule

inapplicable by its terms, we need not address whether the procedural rules in the Sentencing Reform Act . . . apply to capital cases.”). *State v. Meas*, 118 Wn. App. 297, 307, 75 P.3d 998 (2003) (“[The defendant] also claims, without citing to authority, that the trial court had an option to sentence him on either of his two convictions. But RCW 10.95.030 does not give trial courts an option in sentencing defendants convicted of aggravated first degree murder.”).

Until 2014 there was little cause for the legislature to consider concurrent or consecutive sentencing for aggravated murder. Before enactment of the *Miller* fix, each conviction resulted in either a life sentence or death. Concurrent or consecutive sentencing was a symbolic or academic issue at best. Thus, it is important to consider carefully the language adopted by the *Miller* fix because after that amendment, for the first time, less than life sentences became a possibility for aggravated murder.

Multiple deaths were an explicit aggravating factor both before and after the *Miller* fix. See RCW 10.95.020(10) (“There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person. . . .”). With that in mind, the first section that applies to aggravated murder sentencing imposes a life sentence or death for anyone “convicted of *the crime* of aggravated first degree murder. . . .” RCW 10.95.030(1) (emphasis supplied). The reference to the singular term “the crime” suggests that each crime was

intended to receive its own punishment. *Id.* For any court called upon to sentence a defendant convicted of multiple aggravated murders, the reference to having been “convicted of the crime” would naturally lead to imposition of consecutive sentences for multiple crimes.

The subsection that applies to the defendant adds strength to that interpretation. It provides for twenty five years to life for any “person convicted of the crime of aggravated first degree murder for an offense” committed at age sixteen to eighteen. RCW 10.95.030(3)(ii). The singular forms of the nouns “the crime” and “an offense” (especially in light of the possibility of a multiple victim aggravator) strongly supports the view that an offender was intended to serve a separate sentence for each aggravated murder, or in other words for each death.

In adult serial killer cases such as *Yates*, it may be much easier to construe the aggravated murder statute as mandating separate, that is consecutive, punishment for each aggravated death. For all of the reasons discussed in *Miller* this construction is more difficult where the perpetrator is a juvenile. Nevertheless, to hold that the statute mandates concurrent punishment would be to ignore the deliberate choice of words by the legislature, words such as “an offense” or “the crime”. It would also mandate concurrent punishment for adult offenders such as Mr. Yates. Such an interpretation of Washington’s most serious criminal punishment provision is not warranted either as a matter of statutory construction or for equitable reasons. Where aggravated murder is

Washington's most serious criminal offense each killing with aggravating circumstances deserves its own punishment for obvious reasons.

3. THE SUBSTANTIVE RULE OF LAW ANNOUNCED BY *MILLER v. ALABAMA* DOES NOT REQUIRE THAT A TRIAL COURT MUST HAVE COMPLETE DISCRETION IN SETTING THE MINIMUM TERM OF A FORMER JUVENILE DEFENDANT'S PERIOD OF INCARCERATION CONTRARY TO LEGISLATIVELY ENACTED MANDATORY MINIMUMS FOR AGGRAVATED MURDER.

The purpose of the *Miller* fix amendments was to require that trial courts consider the “mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*” when sentencing a juvenile who has committed one or more aggravated murders. RCW 10.95.030(3)(b). In light of the Washington Supreme Court's recent decisions in non-aggravated murder cases, the extent of the trial court's discretion in this case must be addressed.

Of the *Miller* fix amendments related to aggravated murder, the Washington Supreme Court has stated that they were a proper legislative response to *Miller* and consistent with the requirements of the Eighth Amendment. *In re McNeil*, 181 Wn.2d 582, 590, 334 P.3d 548, 552 (2014). “The *Miller* fix remedies the unlawfulness of the petitioners' sentences by providing they must be resentenced in a manner that does not violate the Eighth Amendment, consistent with *Miller*.” *Id.* This sentiment was echoed in the court's first post-*Miller* fix, non-aggravated murder case. *State v. Ramos*, 187 Wn.2d 420, 446, 387 P.3d 650(2017).

There, the court paid the legislature a compliment for its responsiveness to fast-developing juvenile justice issues by saying, “We also note our legislature's demonstrated an ongoing concern for juvenile justice issues.” *Id.* citing, *Miller* fix enactments codified as RCW 9.94A.540(3) and .730 and RCW 10.95.030(3).

The *Miller* fix was enacted before the United States Supreme Court’s next significant Eighth Amendment decision. *Montgomery v. Louisiana*, --- U.S. ---, 136 S.Ct. 718, 193 L.Ed. 2d 599(2016). It was however consistent with that decision. In *Montgomery*, the court reviewed a Louisiana defendant’s motion to correct an illegal sentence. The sentence had been imposed decades previously following his conviction of a 1963 murder. The trial court ruled that *Miller* was not retroactive and denied the motion. That decision was affirmed by the Louisiana Supreme Court. *Montgomery v. Louisiana*, 136 S.Ct. at 727. That decision in turn lead to the defendant’s certiorari petition.

The Louisiana courts’ decisions that *Miller* should not be applied retroactively was reversed by the Supreme Court. *Montgomery v. Louisiana*, 136 S.Ct. at 734 (“Like other substantive rules, *Miller* is retroactive . . .”). But the court also determined that it was appropriate to “limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems.” *Montgomery v. Louisiana*, 136 S.Ct. at

735, citing *Ford v. Wainwright*, 477 U.S. 399, 416–417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). Thus, it observed that *Miller's* “substantive rule of constitutional law” could be complied with by enactment of parole eligibility: “A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.” *Montgomery v. Louisiana*, 136 S.Ct. at 727. The court did not go beyond parole eligibility to mandate particular requirements for states to comply with *Miller*.

The Supreme Court’s decision in *Montgomery* did not extend *Miller's* “substantive rule of constitutional law”. If anything it limited it. *Miller* had held that “the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.” *Miller v. Alabama*, 132 S. Ct. 2475. But *Miller* did not mandate less than life sentences for all juveniles in all cases under all circumstances. Instead it required that sentencing courts consider the attributes of youth before imposing a life sentence. *Miller v. Alabama*, 132 S. Ct. at 2469. *Montgomery* in turn held that although *Miller* was substantive and had to be given retroactive effect, it was still not mandatory that the defendant be given a less than life sentence. *Montgomery v. Louisiana*, 136 S. Ct. at 736. In fact *Montgomery* recognized the possibility (with obvious skepticism) that Mr. Montgomery might die in prison by saying, “Perhaps it can be established that, due to

exceptional circumstances, [life in prison] was a just and proportionate punishment for the crime he committed as a 17-year-old boy.” *Id.* The *Montgomery* court may have been skeptical of a life sentence for a juvenile but it did not institute a categorical bar as it had previously done in the case of the death penalty for juveniles. See *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

Both *Miller* and *Montgomery* were cases in which the court reviewed life without parole sentences. Neither case dealt with confinement for less than life, nor even with confinement that would be the functional equivalent of life. Thus, neither case had a reason to discuss the Eighth Amendment’s requirements where a sentence of less than life had been imposed. It can certainly be said that those cases established a “substantive rule of constitutional law” whereby the Eighth Amendment lowers the ceiling on permissible juvenile sentencing where an actual life sentence is imposed. But neither case considered the floor - the permissible mandatory minimum term - that may be imposed on a juvenile consistent with the Eighth Amendment.

In non-homicide cases, the United States Supreme Court has made it quite difficult to successfully claim that mandatory minimum sentencing

violates the Eighth Amendment. “Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.” *Rummel v. Estelle*, 445 U.S. 263, 272, 100 S. Ct. 1133, 1138, 63 L. Ed. 2d 382 (1980). *Rummel* was a challenge to a Texas third-strike, life-in-prison sentence for the crime of stealing less than two hundred dollars by fraud. In upholding the sentence the court expressed an overriding concern in Eighth Amendment cases, namely deference to state legislative judgments:

[The recidivist statute’s] primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.

Id. at 284–85.

The result in *Rummel* was not an anomaly. Subsequent to *Rummel* the court upheld a life sentence for distribution of a small amount of crack cocaine. *Harmelin v. Michigan*, 501 U.S. 957, 994–95, 111 S. Ct. 2680, 2701, 115 L. Ed. 2d 836 (1991). “Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having

been employed in various forms throughout our Nation's history. As noted earlier, mandatory death sentences abounded in our first Penal Code. They were also common in the several States—both at the time of the founding and throughout the 19th century. . . There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is “mandatory.” *Id.* (citations omitted).

The court has continued its deferential view of recidivist statutes such as three strikes laws. In *Ewing v. California*, 538 U.S. 11, 20, 123 S. Ct. 1179, 1185, 155 L. Ed. 2d 108 (2003), it upheld a life sentence for theft of three golf clubs, saying, “In weighing the gravity of [the golf club thief’s] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature’s choice of sanctions.” *Ewing v. California*, 538 U.S. 11, 29, 123 S. Ct. 1179, 1189–90, 155 L. Ed. 2d 108 (2003).

While it is not impossible for a state penal statute to violate the Eighth Amendment’s proportionality requirement, it is exceedingly difficult. *Rummel, Harmelin* and *Ewing* illustrate the difficulty in adult cases. But the same degree of difficulty is evident in juvenile cases as well.

In cases leading up to and including *Miller* and *Montgomery*, the court determined that youth affects proportionality in the context of the two most onerous criminal penalties, the death penalty and life without

parole. The court set aside deference to state legislatures in two cases preceding *Miller* by adopting a categorical ban on certain punishments for juveniles. In *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the court held that “The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.” And in *Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 2034, 176 L. Ed. 2d 825 (2010) the court held that “The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”

By contrast, in *Miller* the court continued its examination of the two harshest of all criminal penalties but did not institute a categorical prohibition:

By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children. . . .

* * * *

And this lengthiest possible incarceration is an “especially harsh punishment for a juvenile,” because he will almost inevitably serve “more years and a greater percentage of his life in prison than an adult offender.” . . . The penalty when imposed on a teenager, as compared with an older person, is therefore “the same . . . in name only.”

Miller v. Alabama, 132 S. Ct. at 2466, quoting *Graham v. Florida*, 560 U.S. 48, 69, 130 S.Ct. 2011, 2027, 176 L.Ed. 2d 825(2010) (citation omitted).

Montgomery likewise continued to show the court’s concern with proportionality in juvenile life without parole cases. *Montgomery* was concerned with retroactivity and in support of its view that *Miller* established a retroactive “substantive rule of constitutional law”, it observed that “*Miller* requires a sentencer to consider a juvenile offender’s youth and attendant characteristics before determining that life without parole is a proportionate sentence.” *Montgomery v. Louisiana*, 136 S. Ct. at 734.

In aggravated murder cases, with the exception of the death penalty and life in prison without parole, the United States Supreme Court has not suggested that the Eighth Amendment mandates any limits on state juvenile penal discretion. Nor has the Washington Supreme Court, at least in an aggravated murder case. In *McNeil* the court discussed the *Miller* fix in the context of its compliance with the Eighth Amendment and noted, “If life in prison without the possibility of early release is not imposed, the offender is given an indeterminate sentence with a minimum term of at least 25 years.” *In re McNeil*, 181 Wn.2d at 589. The court in *McNeil* gave no indication that the mandatory minimum 25 year term in the *Miller*

fix would violate the Eighth Amendment because of its mandatory nature.

McNeil discussed the very statute that applies in this case and did not hold nor suggest that it is unconstitutional. It must be acknowledged however that subsequent to *McNeil* the court in a non-aggravated murder, non-life in prison robbery case utilized broad language in its discussion of mandatory sentence enhancements that apply to a much less serious crime. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409(2017).

Houston-Sconiers was a non-aggravated murder, Tacoma serial robbery case. In its Eighth Amendment holding, the court extrapolated from *Miller* and held that the Eighth Amendment prohibits any lower limit on incarceration when a non-aggravated murder juvenile faces a prison term approaching the equivalent of a life sentence:

In accordance with *Miller*, we hold that sentencing 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 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.

Id. at 21.

Houston-Sconiers may or may not have been intended to invalidate all mandatory minimum sentencing for all juveniles under all

circumstances by implication. If so, such a decision would be unusual, particularly since the court did not overturn *McNeil* nor even discuss the fact that the *Miller* fix that was approved of in *McNeil* includes a twenty-five year mandatory minimum sentence. RCW 10.95.030(1) and (2). The court in *McNeil* even allowed for the possibility (just as the United States Supreme Court allowed for the same possibility), of life in prison for juvenile aggravated murder defendants. *In re McNeil*, 181 Wn.2d at 592. *See Montgomery v. Louisiana*, 136 S. Ct. at 736. The *McNeil* court stated, “*Miller*, by contrast, does not set any minimum age for offenders who may be sentenced to life in prison without the possibility of parole or early release. Only the mandatory nature of the punishment, and not the punishment itself, was held unconstitutional as applied to juveniles—all juveniles.” *In re McNeil*, *supra*.

Proportionality appears to be the central concern in *Houston-Sconiers*. That being the case, a life-equivalent sentence for a teenager convicted of taking Halloween candy by force (*Houston-Sconiers*) may well be the “exceedingly rare” case where “proportionality of particular sentences” are considered to be a violation of the Eighth Amendment. *Rummel v. Estelle*, 445 U.S. at 272. But that does not mean that a mandatory twenty-five year sentence for aggravated murder also violates the limited Eighth Amendment proportionality principle. The United States Supreme Court has repeatedly held that the Eighth Amendment’s

proportionality principle is narrow because it runs a risk of interfering with legislative policy choices. Since *Houston-Sconiers* relied upon the Supreme Court’s Eighth Amendment rationale, there is every reason to believe that the broad language used in the opinion was intended to apply to cases where arguably minor criminal behavior results in a draconian sentence.

At first blush it appears difficult to reconcile the twenty-five year minimum terms that applied to Mr. Leo and aggravated murder defendants like him, with the “complete discretion” said by *Houston-Sconiers* to be required by the Eighth Amendment. See RCW 10.95.030(1) and (2). But *Houston-Sconiers* was concerned with stacked firearm sentence enhancements in a non-homicide, no injury case punished under the Sentencing Reform Act. It is easy to understand how proportionality was such a central concern in that case. Furthermore, the court noted that its exceptional sentence decision in *State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015) already authorized the zero month standard range sentence imposed by the trial court independent of the Eighth Amendment. The court extended *O’Dell* by saying first that “*O’Dell* makes clear that the exceptional sentences of zero incarceration on the base substantive offenses that the State proposed and the court accepted in this case were lawful, based on petitioners’ youth at the time of the crimes.” *State v. Houston-Sconiers*, 188 Wn.2d at 24. It then held that the stacked, mandatory firearm enhancements likewise were subject to exceptional

sentencing so that the 31 year flat time sentence of one defendant and 26 year flat time sentence of the other could also be mitigated with an exceptional sentence. *Id.* at 26.

Neither *Houston-Sconiers* nor *O'Dell* dealt with an explicit legislatively mandated minimum penalty for the most serious crime on Washington's books. Aggravated murder has had its own sentencing scheme longer than the SRA has been in existence. There is no reason to suppose that this statute was intended to be held unconstitutional without discussion merely as a result of broad language used in the analysis of a wholly different statute. As was indicated in *McNeil*, the *Miller* fix should be upheld as a proper legislative response to the updated requirements of the Eighth Amendment.

4. THE *MILLER* FIX AGGRAVATED MURDER
MINIMUM TERM SENTENCING STATUTE SHOULD
NOT BE HELD TO VIOLATE WASHINGTON'S
CRUEL PUNISHMENTS CLAUSE

A party seeking to establish that the state constitution provides greater protection than the United States Constitution must engage in the six-factor analysis set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *State v. Ladson*, 138 Wn.2d 343, 347-48, 979 P.2d 833 (1999). In *Gunwall* the court held that six nonexclusive neutral factors are relevant in determining whether the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: "(1) the textual language; (2) differences in the texts;

(3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.” *State v. Gunwall*, 106 Wn.2d at 58. The court further stated that the reason for this analysis is to ensure “that our decision will be made for well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court.” *Id.* at 62–63.

Once the Washington Supreme Court has conducted a *Gunwall* analysis and has determined that a provision of the state constitution independently applies to a specific legal issue, it is unnecessary in subsequent cases involving the same legal issue to repeat the analysis. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998), *State v. Hendrickson*, 129 Wn.2d 61, 69–70 n. 1, 917 P.2d 563 (1996) (footnote 1), *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). However the court has also made it clear that just because the state constitutional provision has been found to offer broader protections in one context does not necessarily mean that it will be found to be broader in all contexts. *State v. Martin*, 171 Wn.2d 521, 528, 252 P.3d 872 (2011), *State v. Dodd*, 120 Wn.2d 1, 838 P.2d 86 (1992).

In one particular context involving the death penalty, the Supreme Court has completed a *Gunwall* analysis comparing the Eighth Amendment’s protection against “cruel and unusual” punishment with

Washington's protection against "cruel" punishment in Article 1, § 14. *State v. Dodd, supra*. In *Dodd* the court held, "The *Gunwall* factors do not demand that we interpret Const. art. 1, § 14 more broadly than the Eighth Amendment." *Id.* at 22.

In contrast to *Dodd*, in two cases predating *Gunwall*, the Supreme Court did interpret Art. 1, § 14 more broadly than the Eighth Amendment. *State v. Fain*, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980) and *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984). In *Fain* the court considered an adult life sentence for a non-violent, minor-amount theft under the habitual criminal statute. *Fain* held (after applying a four factor analysis) that the state cruel punishment clause offered greater protection than its federal counterpart. *State v. Fain*, 94 Wn.2d at 397-402. In *Bartholomew*, the court held that the admission of non-conviction data in a death penalty case violated the Eighth Amendment, but even if it did not, it would violate the state constitution. *State v. Bartholomew*, 101 Wn.2d at 639. Because these cases predated *Gunwall* no analysis of the *Gunwall* factors was done before concluding the state constitution offers broader cruel punishment protection. Instead factors identified in *Fain* were applied.

The Supreme Court has examined whether a life without parole sentence for an adult is disproportionate under the state constitution in several cases post-*Gunwall*. See *State v. Rivers*, 129 Wn.2d 697, 715, 921 P.2d 495(1996)(persistent offender sentence upheld for second degree

robbery); *State v. Manussier*, 129 Wn.2d 652, 677, 921 P.2d 473 (1996) (same); *State v. Thorne*, 129 Wn.2d 736, 773-74, 921 P.2d 514 (1996) *abrogated on other grounds* by *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (persistent offender sentence upheld for first degree robbery and first degree kidnapping); and *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014) (persistent offender sentence upheld for second degree robbery). These cases applied the four factors set forth in *Fain* and in none of them did the court find that the sentence violated Art. 1, § 14. Furthermore, no case from the Supreme Court has found that the state constitution is more protective of juveniles in sentencing matters compared to the federal constitution.

Considering *Gunwall* and *Fain* and the cases that have applied the factors from those cases, it is evident that a searching examination should be made before a legislative enactment is overturned on independent state cruel punishment grounds. That is before invalidating such an enactment, and before rejecting the considered judgment of our nation's highest court, an appellate court should: 1) either require a *Gunwall* analysis by the parties or identify a prior decision of the Supreme Court that held the state constitutional provision more protective in the same context; 2) determine that the *Gunwall* analysis provides well founded legal reasons supporting broader protections so as to avoid the court substituting its notion of justice for that of duly elected legislative bodies or the United States Supreme Court; and 3) use the four *Fain* factors when assessing whether a

sentence is disproportionately cruel under the state constitution.

It should be noted that the Supreme Court declined to apply the cruel punishment independent state grounds to the *Miller* fix provisions at issue in this case. *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017). The court in *Ramos* found that *Miller* applied to “de facto” life sentences, not just literal life without parole sentences, and further that the procedures used at the defendant’s resentencing hearing were constitutionally sufficient under *Miller*. *State v. Ramos*, 187 Wn.2d at 437-53. The Court was also asked to review the sentence under the state constitution cruel punishment clause but declined to do so. *Id.* at 453-54. The court noted that the defense had not properly briefed the issue:

Even where it is already established that the Washington Constitution may provide enhanced protections on a general topic, parties are still required to explain why enhanced protections are appropriate in specific applications. *Ramos* does not provide any such explanation and does not address the [*Fain*] factors for determining whether a sentence independently violates the Washington Constitution.

State v. Ramos, 187 Wn.2d at 667-68 (citations omitted).

This Court approached the state cruel punishment issue differently than the Supreme Court. *State v. Bassett*, ---Wn. App. ---, 394 P.3d 430, 2017 WL 1469240 (April 25, 2017). In *Bassett*, this Court held that the *Miller* fix was unconstitutional under independent state grounds in a case where a *Miller* fix juvenile re-sentencing resulted in a life without parole sentence. No *Gunwall* analysis supported the holding. Furthermore,

while *Fain* was discussed and rejected, the Court did not discuss or distinguish the Supreme Court's post-*Gunwall* adult life sentence decisions in which the Supreme Court declined to apply independent state grounds. See *State v. Rivers*, 129 Wn.2d 697, 715, 921 P.2d 495(1996), *State v. Manussier*, 129 Wn.2d 652, 677, 921 P.2d 473 (1996), *State v. Thorne*, 129 Wn.2d 736, 773-74, 921 P.2d 514 (1996), and *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014).

Also missing in *Bassett* is any examination of the lack of reference to juveniles in the Washington Constitution. A separate juvenile justice system did not exist at the time the Washington Constitution was adopted. See, *State v. Schaaf*, 109 Wn.2d 1, 14, 743 P.2d 240 (1987) (jury trials not mandated by Article I § 21). A seventeen year old charged with a crime in 1889 would have been prosecuted in the same system as an adult. It follows that since there is no constitutional right to be tried in a juvenile court under the Washington Constitution, there likewise is little reason to believe the state constitution confers sentencing rights peculiar to juveniles. See *In re Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996).

It was the legislature rather than the state constitution that created a separate juvenile court system. See, *State v. Schaaf*, 109 Wn.2d at 14. This was not “until 1905, and [the legislature] did not pass comprehensive legislation concerning the juvenile justice system until 1913.” *Id.* See also Becker, *Washington State's New Juvenile Code: An Introduction*, 14 Gonz.L.Rev. 289, 290 (1979). The long history in Washington of treating

juveniles differently comes from legislative enactment not the state constitution. There is nothing in that history to suggest that the drafters of our constitution provided greater criminal procedure protection to juvenile criminal defendants. It follows that it would be unreasonable to suppose that greater sentencing protection would have been any more a requirement.

It is not the State's obligation to prove that the state constitution is coextensive with the federal constitution. *State v. Bustamante-Davila*, 138 Wn.2d 964, 978, 983 P.2d 590, 597 (1999) ("When broader rights than its federal counterpart the issue of broader state constitutional protections arises, the party seeking that broader protection must discuss reasons for reading the state provision differently from its federal counterpart."), *State v. Ladson*, 138 Wn.2d 343, 347, 979 P.2d 833, 837 (1999) ("Absent controlling precedent, a party asserting a provision of the state constitution offers more protection than a similar provision in the federal constitution must persuade the court this is so by means of the [Gunwall analysis]."). It is the proponent's (the defendant's) obligation to show that the cruel punishments requires more than the Eighth Amendment.

The Washington Supreme Court has directed that when raising a claim that a sentence is disproportionately cruel under the state constitution, it is to be analyzed by examining the *Fain* factors. In *Bassett*, the Court did not recognize *Fain* as controlling because the *Fain* factors were not

thought to be adequate. *State v. Bassett*, at p. 23. This was error. Just three months prior to *Bassett*, in another juvenile case, *Ramos*, the Supreme Court directed that a juvenile challenging a *de facto* life sentence under the state constitution had to provide briefing of the *Fain* factors. *State v. Ramos*, 187 Wn.2d at 667-68. Accordingly, this Court should decline to apply *Bassett* and should instead apply *Ramos*. Until and unless the defendant carries his burden of showing that the *Gunwall* and *Fain* factors warrant application of independent state grounds, in this case the *Miller* fix should not be invalidated as a violation of the Washington cruel punishments clause.

E. CONCLUSION.

For the foregoing reasons the state respectfully requests that the minimum term sentence imposed for the five counts of aggravated murder be reversed. This case should be remanded for a new minimum term sentencing hearing.

DATED: Friday, June 30, 2017.

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Certificate of Service:

The undersigned certifies that on this day she delivered by E U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and ~~appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-30-15 [Signature]
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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