

No. 96496-3

No. 49863-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

MARVIN LEO,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

BRIEF OF RESPONDENT

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

B. ISSUES PRESENTED

1. 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 appeal a minimum term decision. This Court should dismiss the State's appeal of the trial court's decision setting the minimum term in this case.

2. RCW 10.95.030 requires a trial court to set a minimum term of confinement after considering the mitigating qualities of youth. The statute does not require the trial to impose separate or consecutive sentences if there are multiple convictions. The trial court considered the mitigating qualities of Marvin's youthfulness at the time of his offense and properly set a minimum term of 40 years.

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 dead 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 under the Sentencing Reform Act. CP 430.

D. ARGUMENT

Children are “constitutionally different from adults for purposes of sentencing.” *Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). They are categorically less blameworthy and more likely to be rehabilitated. *Id.*; *Roper v. Simmons*, 543 U.S. 551, 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). The principles underlying adult sentences -- retribution, incapacitation, and deterrence -- do not to extend to juveniles in the same way. *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Children are less blameworthy because they are less capable of making reasoned decisions. *Miller*, 567 U.S. at 471. Scientists have documented their lack of brain development in areas of judgment. *Id.*

Further, children cannot control their environments. *Id.* at 471-22. They are more vulnerable to and less able to escape from poverty or abuse and have not yet completed a basic education. *Id.*

Most significantly, juveniles’ immaturity and failure to appreciate risk or consequence are temporary deficits. *Id.* at 471-72. As children mature and “neurological development occurs,” they demonstrate a substantial capacity for change. *Id.* at 472.

Thus, *Miller* found mandatory sentencing schemes that result in a life sentence for juvenile offenses violate the Eighth Amendment. The Court emphasized “youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.” *Miller*, 567 U.S. at 473

In response to *Miller*, the Legislature amended RCW 10.95.030 to require new sentencing hearings for any person previously sentenced to life without parole for offenses committed when they under the age of 18. At the new sentencing hearing, the court must set a minimum term at which time the person becomes eligible for parole. Consistent with *Miller's* direction, the amended statute commands the resentencing court to consider the mitigating qualities of youth in setting a minimum term. RCW 10.95.030(3)(b).

As required by the statute, the trial court considered the impact of Marvin's youthfulness on his culpability at the time of the offenses. The court considered Marvin capacity for change and rehabilitation. The court set a minimum term of 40 years. That sentence should be affirmed.

1. The State cannot appeal the trial court’s decision setting a minimum term.

While the legislature required new sentencing hearings in response to *Miller*, it substantially limited the ability to appeal 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). Because such decisions were not appealable under RAP 2.2 and 2.3, they were no more appealable by the State than by a defendant. A defendant, however, was able to seek review of such a decision by a personal restraint petition. *Id.*

Because the State did not have the ability to appeal the setting of minimum term prior to 1986, RCW 10.95.035(3) does not permit the State to do so in this case.¹

While RAP 2.2(6) currently permits the State to appeal a sentence in a criminal case in limited circumstances, that was not the case prior to July, 1986. Thus, the limited avenues for a state appeal in the current version of RAP 2.2 cannot permit the current appeal.

RCW 9.94A.585(2) provides

A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with rules adopted by the supreme court.

Again, no standard range exists for offenses under RCW 10.95.030 and thus the sentence cannot be outside the standard range. Additionally, the State's argument on appeal hinges on its claim that the SRA cannot

¹ In some instance prior to 1986, the State was able to challenge a sentence order by seeking a writ of mandamus where the trial court had a duty to act and refused to do so. *State v. Pringle*, 83 Wn.2d 188, 517 P.2d 192 (1973). But here the court's only "duty" was to conduct a resentencing hearing under the statute. The fact that RCW10.95.030(3) plainly affords the court discretion to impose any minimum term between 25 years and life defeats any claim that the court had a "duty" to impose any particular sentence. Granting a writ of mandamus can require the conduct of a mandatory discretionary duty but not how that discretion is exercised. *Peterson v. Dep't of Ecology*, 92 Wn.2d 306, 314, 596 P.2d 285 (1979).

apply to Mr. Leo's case. Thus, the State cannot claim that RCW 9.94A.585 authorizes this appeal.

This State cannot appeal and this Court should dismiss the matter.

2. Because RCW 10.95.030(3) does not require consecutive sentences, the trial court properly applied the statute when it imposed a 40-year minimum term of confinement.

The outcome of this case turns on whether RCW 10.95.030(3) permits the imposition of a 40-year minimum term of total confinement on a juvenile for five convictions of first degree murder or whether the statute instead mandates five separate and consecutive terms of no less than 25 years each. The statute's plain terms do not include any requirement of separate and consecutive sentences. Instead, the absence of such a requirement permits the court to impose a minimum of no less than 25 years regardless of the number of convictions. That conclusion is further bolstered by the grave constitutional deficiencies which would arise if the statute in fact required a *de facto* life sentence for a juvenile while depriving a sentencing court the ability to consider the migrating qualities of the juvenile's youthfulness. Indeed, the Washington Supreme Court has already determined the latter

requirement violates the Eighth Amendment. The trial court's sentence in this case is permitted by RCW 10.95.030(3).

a. *As directed by RCW 10.95.030(3)(b) the court took into account the diminished culpability of youth in setting the minimum term.*

Not only does RCW 10.95.030(3) require that a court set a minimum term for juveniles such as Marvin, the statute requires the court do so in light of the commands of *Miller*. The statute provides in relevant part:

(a)

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

RCW 10.95.030(3)

Here, the trial court heeded that statutory directive and considered a number of mitigating factors particular to Marvin at the

time of his crime. The court found that at the time of the offense Marvin's "vulnerability and risk level for criminal behavior . . . was exacerbated [b]y a confluence of factors." CP 431. Marvin's "youth and . . . brain development contribute[ed] to poor decision making and his susceptibility to peer pressure." *Id.* Marvin was exposed to physical violence and alcohol abuse by his parents in his home. *Id.* The court found Marvin was "particularly vulnerable to these pressures" due to a number of simultaneous events including his parents' separation and his family's relocation from Hawaii to Tacoma's Hilltop neighborhood. CP 432.

In the Hilltop, Marvin was regularly exposed to gang violence and criminal activity. *Id.* at 432. 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.*

As an adult, Marvin does not exhibit characteristics or traits associate with increased risk of violence and the Department of Corrections has classified him as a "low risk offender." *Id.* This

classification was achieved through good behavior and demonstrates low risk behavior. The court found it “very significant” that Marvin has no history of violent behavior in the 10 years preceding his resentencing and has not been diagnosed as anti-social or as suffering from any major mental illness. *Id.* at 432-33. The court recognized Marvin has matured since the time of his offense and his voluntary engagement in a variety of pro-social and self-improvement programs, even before he had the opportunity for earlier release, demonstrates his capacity for rehabilitation. CP 433-436.

That Marvin’s history of violence ended roughly around his 25th birthday is wholly consistent with the science of brain development that lies at the core of *Roper, Graham* and *Miller*. *State v. O’Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015). It is also wholly consistent with the State’s acknowledgment below that his brain was “certainly not fully developed” at the time of the offense and that research established his brain would not be developed fully until closer to the age of 25. CP 388. It is precisely that science which *O’Dell* relied upon to conclude youthfulness can mitigate a person’s culpability well into what is chronologically adulthood. *Id.* at 695.

The State has not assigned error to any of the court's findings of fact and thus they are verities on appeal. *State v. Alexander*, 125 Wn.2d 717, 723, 888 P.2d 1169 (1995).

As required by RCW 10.95.030 and *Miller*, the trial court properly considered the mitigating effects of Marvin's youth and immaturity on his behavior. The trial court properly examined Marvin's demonstrated capacity for rehabilitation. The court properly found Marvin was not among that small number of juvenile offenders who are irretrievably depraved. Thus, the court properly found it should not sentence Marvin to die in prison. RCW 10.95.030 afforded the trial court authority to impose the sentence it did.

b. RCW 10.95.030 neither permits nor requires separate or consecutive sentences.

Beginning with the statute's plain language, it is clear nothing in RCW 10.95.030(3) permits, much less mandates, separate and consecutive sentences for multiple counts of aggravated murder.

A court determines "legislative intent from the statute's plain language, 'considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole.'" *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015) (citing *Ass'n*

of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd., 182 Wn.2d 342, 350, 340 P.3d 849 (2015)). “Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.” *HomeStreet, Inc. v. State, Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citing *Washington State Human Rights Comm’n v. Cheney School Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982)). If the language of a statute is unambiguous, it alone controls. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); *Tommy P. v. Board of County Commissioners*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

The language of RCW 10.95.030(3) is plain. The statute requires a court set a minimum term of no less than 25 years. Nowhere in its terms does the statute require separate consecutive sentences for multiple convictions.

Yet, throughout its brief, the State repeats its mantra that consecutive 25-year minimum sentences are “an explicit legislatively mandated minimum penalty.” *See* Brief of Appellant at 11, 15, 26. All the while, the State does not and cannot point to any language in RCW 10.95.030(3) that “explicitly mandates” separate and consecutive sentences for each offense. In fact, the statute does not contain the

terms “separate” or “consecutive” or anything that “explicitly mandates” the draconian sentence the State advocates.

Instead, the State points only to the use of the singular terms “crime” and “offense” in RCW 10.95.035 as providing the explicit mandate for consecutive sentences. Brief of Appellant at 14. But the State affords these terms far more import than they can bear. Even if those terms require the court to impose a minimum term for each “crime” or “offense” there is nothing in the statute that requires the resulting terms be served consecutively or separately. While the State may take it as an article of faith that consecutive and separate sentences are “explicitly mandated,” the absence of those terms in the statute indicates the legislature intended no such thing.

Where the legislature has intended consecutive sentences or separate punishment for offenses it has explicitly said so. For example, RCW 9.41.040(6) explicitly permits separate convictions for theft of a firearm, possession of stolen firearm, and unlawful possession of a firearm and requires consecutive sentences. As another example RCW 9A.52.050 specifically permits separate prosecutions and punishment for both a charge of Burglary as well as the predicate felony. In RCW 9.94A.589, the Legislature expressly delineates when multiple felony

sentences must be served consecutively and when they must be concurrent.² In each of these statutes the legislature actually used the terms “separate” or “consecutive.”

In stark contrast to the explicit mandates of those statutes, RCW 10.95.030(3) never uses the word “consecutive.” The statute does not direct each offense be punished “separately.” In short, nowhere in the statute’s language did the legislature hint that separate or consecutive sentences are required. The fact that the Legislature explicitly directed separate convictions and consecutive punishments in several other statutes and yet did not do so in RCW 10.95.030 demonstrates the legislature did not intend separate and consecutive sentences. *See State v. Slattum*, 173 Wn. App. 640, 656, 295 P.3d 788 (2013) (use of particular language in other statutes demonstrate legislature “knew how to say it” when it intended to and thus did not intend same meaning when it did not use that language).

“[I]ndividual subsections are not addressed in isolation from the other sections of the statute.” *In re Adams*, 178 Wn.2d 417, 424, 309

² To be sure the State does not rely on the provisions of RCW 9.94A.589 to argue that consecutive sentences are required. If the State were to rely on the provisions of the SRA to support its argument for mandatory consecutive sentences, that would necessarily lead to the conclusion that the trial court had “complete discretion” to impose an exceptional sentence below such mandatory sentences. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017).

P.3d 451 (2013). Instead, when interpreting the meaning of subsections within a statute, courts look to the preceding and subsequent subsections as well as the remainder of the statute. *Id*; *In re Welfare of A.T.*, 109 Wn. App. 709, 716, 34 P.3d 1246 (2001). If RCW 10.95.030(3)(a)(ii) requires a court to impose a mandatory *de facto* life sentence when multiple convictions exist the court cannot comply with the statute's mandate to consider the mitigating qualities of youth prior to setting the minimum term. RCW 10.95.030(3)(b). Instead, if the only permissible sentence is an aggregate sentence that requires the juvenile to die in prison the requirement that the court consider the mitigating qualities of youth is a hollow and useless exercise. If the legislature intended to require the court to sentence Marvin to die in prison there is no explanation for the requirement that the court first consider the mitigating qualities of youth; they simply do not matter.

The State's reading is contrary to the central tenant of statutory construction that every statutory term is presumed to "effect some material purpose." *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). "The drafters of legislation . . . are presumed to have used no superfluous words and [courts] must accord meaning, if possible, to every word in a statute." *State v. Roggenkamp*, 153

Wn.2d 614, 624, 106 P.3d 196 (2005) (Internal citations and brackets omitted); *accord State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014). In short, when multiple convictions exist, RCW 10.95.030(3)(b) is meaningless if the court must impose consecutive sentences.

The plain language of RCW 10.95.030(3) does not require a sentencing court to impose separate and consecutive sentences on a juvenile convicted of first degree murder. Moreover, reading the statute in that fashion would render the remainder of the statute meaningless. In addition, the State's proposed interpretation would create substantial doubt as to the statute's constitutionality.

c. Accepting the State's reading of RCW 10.95.030 would create grave doubt as to the statute's constitutionality.

Courts must interpret a statute to avoid constitutional deficiencies. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010) (citing *State v. Crediford*, 130 Wn.2d 747, 755, 927 P.2d 1129 (1996)). This is a corollary to the rule that when construing a statute courts presume the legislature did not intend absurd results. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

In *Miller*, the Court explained its ruling, saying

[m]ost fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.

Miller, 567 U.S. at 473. Consistent with that recognition, the Washington Supreme Court has concluded the mandatory imposition of a “de facto” sentence of life without parole for a juvenile violates the Eighth Amendment in the same way as mandatory actual sentences of life without parole. *State v. Ramos*, 187 Wn.2d 420, 437, 387 P.3d 650 (2017). Moreover, *Ramos*, which concerned an aggregate sentence resulting from four separate convictions of murder, made clear this Eighth Amendment violation exists regardless of whether the sentence results from a single conviction or multiple convictions. The Court concluded that “Holding otherwise would effectively prohibit the sentencing court from considering the specific nature of the crimes and the individual’s culpability before sentencing a juvenile homicide offender to die in prison in direct contradiction of *Miller*.” *Ramos*, 187 Wn.2d at 438-39.

Instead, *Ramos* said:

We hold that while not every juvenile homicide offender is automatically entitled to an exceptional sentence below the standard range, **every juvenile offender facing a literal or de facto life-without-parole sentence is automatically entitled to a *Miller* hearing.** At the *Miller* hearing, the court must meaningfully

consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where a life-without-parole sentence for a juvenile homicide offender is constitutionally permissible

Id at 434–35 (Emphasis added).

“*Montgomery* clearly indicates that life without parole is unconstitutional for most juveniles, whether imposed under a mandatory or a discretionary sentencing scheme” *State v. Scott*, 196 Wn. App. 961, 970, 385 P.3d 783 (2016), *review granted*, 188 Wn.2d 1001 (2017) (citing *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016)). In addition, this Court has found that to the extent it permits a juvenile to be sentenced to a term of life without parole, RCW 10.95.030 violates Article I, section 14 of the Washington Constitution. *State v. Bassett*, 198 Wn. App. 714, 743-44, 394 Wn.2d 430 (2017).

Whether a statute can constitutionally mandate a life sentence for a juvenile is no longer an open question in Washington; it cannot.

Miller's reasoning clearly shows that it applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation....
... we also reject the notion that *Miller* applies only to literal, not de facto, life-without-parole sentences. Holding otherwise would effectively prohibit the sentencing court from considering the specific nature of

the crimes and the individual's culpability before sentencing a juvenile homicide offender to die in prison, in direct contradiction to *Miller*. Whether that sentence is for a single crime or an aggregated sentence for multiple crimes, we cannot ignore that the practical result is the same.

Ramos, 187 Wn.2d at 438. If RCW 10.95.030(3) mandates a de facto life sentence, the statute violates both the Eighth Amendment and Article 1, section 14.

Nonetheless, and putting form over function, the State insists the title attached to an offense or the sentencing scheme under which a life sentence is imposed is constitutionally significant. The State contends the Washington Supreme Court has not set any limits on “juvenile penal discretion” in an “aggravated murder case.” Brief of Appellant at 22. The State’s effort to limit *Miller*’s reach based wholly upon the title of the offense fails for a number of reasons. First, “to exclusively focus on the nature of the crime and ignore the nature of the offender conflicts with *Miller*’s principles.” *Bassett*, 198 Wn. App. at 443. Second, the distinction the State attempts to draw is not real. The Court has long held there is no crime of “aggravated murder.” Instead, the crime is premeditated first degree murder and the “aggravators” merely affect the available punishment. *State v. Kincaid*, 103 Wn.2d 304 692 P.2d 823 (1985); *State v. Yates*, 161 Wn.2d 714, 758-59, 168 P.3d 359

(2007). *Ramos* did address the limits of mandatory sentences that amount to a life sentence for juveniles in first degree murder cases such as this. 187 Wn.2d at 440. The Court found such sentences violate the Eighth Amendment. *Id.*

Even if the Court were to recognize a distinction between first degree murder and aggravated first degree murder, it is absurd to conclude the legislature responded to *Miller* by mandating certain juveniles die in prison without regard to their lessened culpability. Whether a juvenile's sentence is the product of a single conviction or an aggregate of multiple convictions, "*Miller* plainly provides a juvenile cannot be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation." *Ramos*, 187 Wn.2d at 440.

Even under the portion of the statute which *Bassett* found unconstitutional the legislature authorized imposition of an actual life without parole sentence only after the sentencing court first considered the mitigating factors of youthfulness. RCW 10.95.030(3)(b). Yet, the State insists that such considerations have no application when the court imposes a *de facto* life sentence. It would be truly absurd to conclude the legislature required consideration of youthful mitigation

prior to imposition of the harshest penalty available but prohibits such consideration when the resulting sentence is merely a *de facto* life sentence.

Reading the statute as the State insists, to require a minimum term of 125 years for Marvin, would render the current statute as violative of the Eighth Amendment and Article I, section 14 as its predecessor. It would be absurd to assume the legislature enacted a “*Miller-fix*” statute which fixed nothing. *Ramos* has already rejected the State’s Eighth Amendment argument and *Bassett* has addressed the Article I, section 14 argument.³ Interpreting RCW 10.95.030(3) as requiring consecutive mandatory minimum sentences would render the statute unconstitutional.

³ The State offers a somewhat convoluted argument seemingly contending Article I, section 14 does not offer broader protections with respect to the mandatory imposition of a life sentence for a juvenile offender or to aggregate sentences that require a child to die in prison. Brief of Respondent at 26-32. Specifically, the State takes issue with this Court’s decision in *Bassett* and its failure to conduct a *Gunwall* analysis. Brief of Respondent at 26-28. First, as the State did not raise this argument below it cannot raise it on appeal. RAP 2.5. Second, the Supreme Court has already found that mandatory life sentences for children and aggregate sentences that amount to a *de facto* life sentence violate the Eighth Amendment. *In re the Personal Restraint of McNeil*, 181 Wn.2d 582, 588, 334 P.3d 548 (2014); *Ramos*, 187 Wn.2d at 440. Too, the Court has long construed Article I, section 14 to afford greater protection than does the Eighth Amendment. *State v. Fain*, 94 Wn.2d. 387, 617 P.2d 720 (1980). It necessarily follows that a mandatory sentence requiring Marvin to die in prison violates Article I, section 14 and no *Gunwall* analysis is required. See *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 641–42, 211 P.3d 406 (2009) (if the parties provide argument on state constitutional provisions and citation, a court may consider the issue).

Even where the legislature has expressly mandated consecutive sentences, the Court has insisted *Miller* requires the juvenile be afforded a sentencing hearing at which the sentencing court must consider the mitigating qualities of youth. *In re the Personal Restraint of McNeil*, 181 Wn.2d 582, 588, 334 P.3d 548 (2014); *Ramos*, 187 Wn.2d at 440; *Houston-Sconiers*, 188 Wn.2d at 21. Indeed, the Court held “sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant.” *Houston-Sconiers*, 188 Wn.2d at 21.⁴ There is no reason to believe that when Court said “any juvenile defendant” it meant anything other than “every” juvenile defendant. Swimming against this tide, the State insists that there remains a class of juveniles for which no such discretion is required nor permitted prior to imposition of the harshest available remedy. That conclusion would be both absurd and unconstitutional. This Court must avoid that outcome. *Eaton*, 168 Wn.2d at 480.

⁴ In light of this command, it is not at all clear that a mandatory minimum sentence of 25 years under RCW 10.95.030(3) is truly mandatory rather than subject to the complete discretion *Houston-Sconiers* describes.

d. The trial court's minimum term sentence is permitted by RCW 10.95.030 and is not appealable by the State.

In setting the minimum term the trial court did precisely what RCW 10.95.030(3) directs it to do. The court considered the mitigating factors of youth and set a minimum term of more than 25 years. Even if it could appeal, there is nothing for the State to challenge.

3. Assuming for sake of argument that RCW 10.95.030 actually requires five consecutive sentences, the exceptional sentence provisions of the SRA permit a sentencing court to impose a lower sentence.

Even if RCW 10.95.030 could be read to require separate and consecutive sentences, the trial court could properly rely on the mitigating sentence provisions of the SRA.

Courts have already applied the SRA's exceptional sentence provisions to sentences imposed under RCW 10.95. In *McNeil* the Supreme Court recited the facts of the cases:

Rice was given two life sentences without the possibility of early release, the mandatory minimum sentence for aggravated first degree murder. As an *exceptional sentence*, the trial court ordered Rice's sentences be served consecutively, rather than concurrently, based on findings of fact and conclusions of law determining that the Nickoloffs were targeted because they were particularly vulnerable.

McNeil 181 Wn.2d at 587 (italics added). In Mr. *McNeil*'s direct appeal, this Court affirmed the imposition of consecutive sentences under the provisions of the SRA. *State v. McNeil*, 59 Wn. App. 478, 480, 798 P.2d 817 (1990). Thus, the exceptional sentence provisions of the SRA do apply to proceedings under RCW 10.95.

By relying on the provisions of the SRA to justify the consecutive sentences *McNeil* makes a second point clear as well: that 10.95.030 has never mandated consecutive sentences. Indeed, it is nonsensical to interpret 10.95 as concerning anything other than concurrent sentences. Regardless of the number of convictions under the statute, a person may only be executed once, and he can only serve one life in prison. As a matter of simple biology, there can never in actuality be a consecutive death sentence or a consecutive life sentence. "The question whether two consecutive life sentences is excessive is academic; the sentence is ultimately limited by Mr. *McNeil*'s life span." *McNeil*, 59 Wn. App. at 480–81.

The State's current argument that the SRA cannot apply to an offense sentenced under RCW 10.95.030 is belied by the State's own decision to charge Mr. Leo with having committed the offenses while armed with a firearm in violation of former RCW 9.94A.310. RP 403.

Firearm enhancements are a part of the SRA. The State apparently believes at least some portions of the SRA can apply under RCW 10.95, and makes no effort to explain how or where it draws this distinction.

The trial court properly relied upon the exceptional sentence provisions in this case. Pursuant to *Houston-Sconiers* the trial court had “complete discretion to consider mitigating circumstances associated with the youth” to set the appropriate sentence. *Houston-Sconiers*, 188 Wn.2d at 21. The court properly exercised that discretion.

E. CONCLUSION

The trial court properly applied the provisions of RCW 10.9.030 and the State may not appeal Mr. Leo’s minimum sentence. This court should affirm the trial court.

Respectfully submitted this 20th day of September, 2017.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

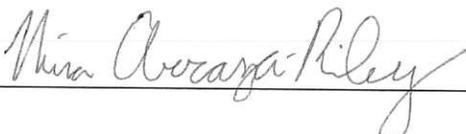
STATE OF WASHINGTON,)	
)	
Appellant,)	
)	
v.)	NO. 49863-4-II
)	
MARVIN LEO,)	
)	
Respondent.)	

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