No. _____
Court of Appeals No. 58780-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NGA NGOEUNG,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

Nga Ngoeung was born in an impoverished refugee camp after his family fled from the Cambodian genocide. His family's trauma continued in the United States, where they endured domestic violence, extreme poverty, and gang violence. Suffering from developmental delays and a language barrier, Nga left school after the fourth grade and was forced into gang life.

At age 17, he drove the car from which a 15-year-old shot and killed two teens and wounded two others. Nga shot no one but was convicted of two counts of aggravated murder and two counts of assault. Despite evidence that Nga functioned at a lower level than his peers and his limited role in the crime, the court sentenced him to die in prison in 1995, and again in 2015.

At his 2023 *Miller*[1] resentencing, the court observed Nga "was subject to a level of adverse childhood experiences that in

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

the history of this Court has never been duplicated." The court imposed concurrent 25-life sentences for the aggravated murders and ordered an additional consecutive 140-month sentence for the assaults. The court imposed a "minimum" term of five years on the assaults, despite the parties' protestation that this provision had no basis in law and risked reversal.

The Court of Appeals agreed the "minimum term" for the assaults was unlawful, but instead of reversing for the court to restructure the sentence to achieve the court's intent, the Court of Appeals merely struck the "minimum term," lengthening Nga's total sentence from a minimum 37 years to 42 years.

This Court should accept review. Merely striking a part of the sentence violates this Court's directive to consider the sentence as "a whole" at a *Miller* resentencing. This Court should also accept review to address the difficult interplay between a person's intellectual disability and rehabilitation, and because the court's consecutive, separate, lengthy sentence for the assault convictions was improperly based on ISRB criteria

rather than the *Miller* factors and is unsupported by the overwhelming evidence of Nga's reduced culpability.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Nga Ngoeung, petitioner here and appellant below, asks this Court to accept review under RAP 13.4(b)(1),(3), and (4) of the Court of Appeals opinion in no. 58780-7-II, attached to this petition.

C. ISSUES PRESENTED

1. At Nga's *Miller*-resentencing, the court imposed a "minimum" term of five years on a 140-month determinate sentence for assault convictions, in addition to a minimum 25-life term for aggravated murder when sentencing Nga under RCW 10.95.030. The parties warned the court that its attempt to fashion an indeterminate sentence for the assaults risked reversal, but the court disagreed. While the Court of Appeals agreed the court erred in imposing a five year "minimum" for the assault convictions, it refused to reverse for resentencing, and merely struck this illegal provision. Was the Court of

Appeals' refusal to remand for resentencing that resulted in Nga's sentence increasing beyond what the trial court intended contrary to the principles of a *Miller* resentencing and the requirement that courts "view sentences as a whole?" RAP 13.4(b)(1), (3).

2. The sentencing court's finding that the aggravated murder convictions warranted the most lenient sentence available should have applied equally to the assaults because Nga's reduced culpability was the same for his entire criminal episode in which he drove a car from which another child tragically shot at two youth and killed two others. The court's imposition of an additional, consecutive 140-month sentence for the assault convictions was based largely on a concern for "public safety" which will be considered by the ISRB before it releases Nga on the 25-life sentence to begin serving time on the assault convictions. Was this an invalid consideration for not imposing a minimum sentence? RAP 13.4(b)(3).

3. The *Miller* factors account for the transitory,

diminished culpability of youth. However, these same factors that reduce a child's culpability may endure into adulthood when the person suffers an intellectual disability. Must the sentencing court explicitly account for intellectual disability when assessing a child's capacity for change and history of rehabilitation in an institutional setting, and did the trial court fail to account for this mitigating aspect in Nga's case? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

1. Nga grew up impoverished, educationally and emotionally deprived, and surrounded by violence.

Nga's family was forced to flee the Khmer Rouge's genocide in Cambodia in 1975. CP 130, 153. They escaped to a refugee camp in Thailand where they lived for five years. 4/7/23 RP109; CP 130, 153. There was not enough food, shelter, or medical care in the camp. CP 153. Nga was born into these conditions. CP 154.

In 1980, when Nga was about four years old, his family immigrated to Washington and ultimately settled in the low-income housing projects in Salishan, Tacoma. 4/7/23 RP110; CP 155–56. Salishan was a notoriously dangerous neighborhood riven by gang violence. CP 157.

When Nga's family came to the United States, they had no money, spoke no English, and knew nothing about American culture. CP 177. Like many refugees who fled the genocide, Nga's family was traumatized. His dad was an alcoholic and violent toward the family. Nga's parents could not supervise or emotionally support their children. CP 177, 160-61.

Nga lagged far behind his siblings in major milestones. CP 155. When Nga reached school age it was clear he had difficulty learning. CP 159-60. Nga struggled to learn English and was frequently absent from school. CP 159-60. Nga remained in first grade for three years. CP 159. By fourth grade, he was chronologically older than his peers, but less mature. CP 160. Testing revealed that he read at a first or second grade

level. CP 160. Nga was expelled for truancy after the fourth grade. CP 160.

2. At age 17, but functionally much younger, Nga drove the car from which another child shot two children and wounded two others.

When Nga was 16 years old, he was "jumped" into a gang. 9/6/19RP 17; CP 161. Nga was gullible and easily manipulated by his peers who would order him to get cars when they needed them. CP 162. One night in 1995, when Nga was 17 years old, he was at a gang house when four teenagers drove by and egged the house. CP 89. Believing this was a gang attack, 15-year-old fellow gang member Oloth Insyxiengmay took a rifle from the house. CP 89. Oloth and two other boys pursued the car with Nga driving. CP 89. Oloth aimed the rifle out the window and shot at the other boys' car. CP 89. Two of the boys were killed. CP 89. Nga confessed to police that he drove the car during the shooting. CP 90.

Nga was tried as an adult in 1995, and convicted of two counts of aggravated murder, two counts of first-degree assault

and taking a motor vehicle without permission. CP 90. The court originally sentenced Nga to life without parole and imposed the same sentence again after the Supreme Court declared mandatory life sentences for juveniles unconstitutional. CP 90, 62.

3. Nga's youth, cognitive limitations, and status as a racial minority make prison life particularly perilous.

Nga's life without parole sentence meant he was classified as "close custody" and housed at the penitentiary in Walla Walla, a maximum-security facility notorious for high rates of violence. CP 199.

According to Dr. Michael Stanfill, a psychologist and former psychiatric services clinical director for the King County Jail System, Nga's "young age, relative immaturity and poor cognition" placed him at a high risk for being victimized. CP 200. Prison gangs provide the same kind of protection as they did in Nga's neighborhood, and he sought this known source of protection to protect him from abuse. RP 199-200.

Nga was also targeted for violence because of his race: ethnic Asian gangs made up a relatively small number of inmates in Washington prisons and were targeted by other majority groups. CP 199. Nga's infraction history reflects the dictates of the gang code that protected him. CP 199–200.

3. Nga remains in prison serving an adult-length sentence despite overwhelming of his reduced culpability.

In 2018, after Nga had served nearly 25 years, this Court declared that life without parole for juvenile offenders violated the State Constitution, and Nga's sentence was reversed and remanded for resentencing. CP 64.

Nga presented updated mitigation evidence that specifically addressed his diminished culpability under each of the *Miller* factors, including life circumstances beyond his control: suffering in refugee camps, malnourishment, trauma, low cognition, immaturity, his need to conform, and "a crime-filled environment of American gangs that his culture had to adapt to." 9/6/19 RP71, 81-82.

The court found "considerable evidence of psychological damage, something not behaviorally driven, but indeed part of an organic brain issue, whether that is genetic, related to earlier trauma to the brain." CP 84, FF 18. The court also found significant evidence of cognitive deficiencies that made Nga more "immature, less cognitively complex, overly compliant to antisocial peers, and directly impacted by socioeconomic and geographic and other social factors" that were beyond his control. CP 83, FF 10-11. The sentencing court found that at the time of the offense, Nga was "likely in a borderline range for mental retardation and certainly well below normal functioning." CP 83, FF 14. Nga's mental disabilities continued in prison, where a 2002 report noted "psychomotor retardation, anxiety, and recurrent major depression." CP 84, FF 15. Thus, the deficits present at the time of the crime "persisted" into the present and support the earlier findings of low cognitive functioning. CP 84, FF 17.

Despite finding Nga's youth and personal attributes merited a 25-year minimum term to life under RCW 10.95.030, the lowest term available, the court ordered standard range, consecutive sentences of 195 months for the assault convictions for a total minimum sentence of 41.25 years–life. CP 74.

The Court of Appeals reversed and remanded, finding the sentencing court "failed to explain its reasoning" in imposing standard range, consecutive sentences for his two assault convictions, despite finding Nga was entitled to a minimum, concurrent sentence for the aggravated murders. CP 89, 108-09.

Nga was resentenced by the same judge in April 2023. CP 425. By this time Nga had served over 28 years in prison. CP 113. Since the last sentencing hearing, the ISRB denied Nga's release and added three years to his 25-life sentence. CP 209, 222.

Nga provided an updated psychological evaluation by Dr. Stanfill at the 2023 resentencing. CP 203. Dr. Stanfill reiterated the significant evidence that Nga was "developmentally

immature" at the time of the offense, and that he likely had the behavior and decision-making ability of a 13-15-year-old. CP 214.

Dr. Stanfill also again emphasized how at time of the offense and while incarcerated, Nga was a "product of his environment." CP 215. His limited maturity continued to be affected by the "collective behaviors of his antisocial peer group" in prison, limiting his ability for pro-social decision making. CP 215.

Nga's infraction history in DOC custody resulted from an "immature worldview" and his environment and was not "necessarily representative of who he was now or who he will be in the coming years." CP 216. Dr. Stanfill opined Nga was capable of rehabilitation. 4/7/23RP54.

The court noted Nga "was subject to a level of adverse childhood experiences that in the history of this Court has never been duplicated." 4/7/23RP108. The court viewed the critical deficits in Nga's "early environmental circumstances" made the

resulting crime "not acceptable but predictable in a certain respect." 4/7/23RP112. Nga was unable "to perceive the long-range consequences of his actions." *Id.* The court found the crime "was unplanned in the sense that it was not premeditated, planned out . . . what these three boys were going to do to the other boys, there was no thought other than a spur-of the moment desire to inflict violent harm." *Id*.

The evidence indicated Nga "was a follower, he would basically do what he was asked to do, and was greatly susceptible to the effects of peer pressure," which "play[ed] a role in this crime." *Id.* The court did not believe Nga "appreciated either the risk or the consequences or even necessarily the outcome of what he was doing at the time that he operated the vehicle from which these boys were murdered." *Id.*

These circumstances, the court found, "result[ed] in a lesser degree of culpability based on youth and brain development than would have occurred had these adverse

influences not been present in his life, his lack of education and his cognitive delay and his language barriers." 4/7/23RP113.

However, the court believed Nga's record of rehabilitation had "only recently improved," while also acknowledging that Nga "didn't receive any of the programming that was available" until he was recently transferred to minimum security. 4/7/23RP113-14.

The court again imposed the minimum sentence of 25-life for the aggravated murders. RP116. The court then imposed a separate consecutive sentence of 140 months for the assaults that was intended to begin immediately after the 25-year mandatory minimum on the aggravated murders. RP116. As Nga pointed out, this sentence of 37-years-to-life was consistent with the maximum sentences courts have permitted where the juveniles committed far more calculated premeditated murders. CP 136. And the consecutive term would not begin until Nga was released on the 25-to-life sentence, which was now 28-years-to-life. CP 222.

Additionally, Nga did not believe the court could impose a separate "minimum term" for the assaults, separate from the 25-life sentence the court imposed for the murders. 4/7/23RP120. The prosecutor too was concerned "there is a significant legal issue" with this sentence. 4/7/23RP121.

The court disagreed, believing that "after the assault minimum has been served, then the ISRB will have the authority to do whatever they are going to do with regard to the both the aggravated murder convictions and the assault 1 convictions." 4/18/23RP9.

4. The Court of Appeals decision increases Nga's sentence above what the trial court intended.

The Court of Appeals agreed the "mandatory minimum" for the assaults was unlawful, but instead of reversing and remanding for the trial court restructure the sentence to achieve its stated intent, the Court of Appeals simply struck the provision. Appendix 1. After this Court issued its decision, the DOC recalculated Nga's sentence. Appendix 2. The DOC's

updated calculation no longer begins running the 140-month sentence for the assaults after Nga serves 25 years for counts one and two as the trial court intended. Appendix 2, The DOC has recalculated his sentence to run the assaults consecutive to the current 28-life sentence he is serving on counts one and two. His estimated release date is now 512 months instead of 440 months—above the sentencing court's intended sentence. Appendix 2. This estimated release date will increase with any additional time the ISRB adds to counts one and two, because the judgment and sentence states that counts three and four are consecutive to the 25-life sentence. Appendix 2.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

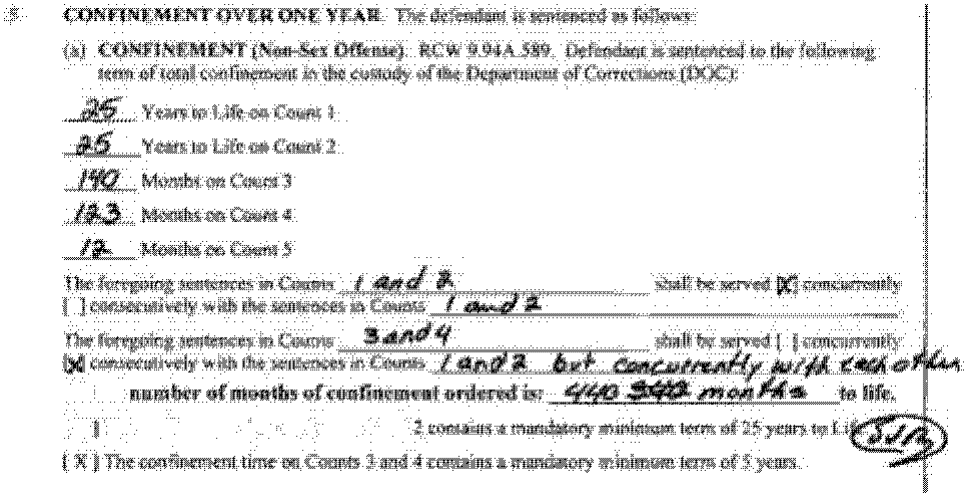
1. In excising a critical part of the court's sentence, rather than remanding for resentencing, the Court of Appeals contravened this Court's directive that *Miller* resentencings require courts to consider the sentence "as a whole."

The sentencing court's erroneous "mandatory minimum" cannot be simply excised from the judgment and sentence because a *Miller* sentencing requires the court consider the

interrelationship of different offenses as the sentencing court here did. This Court should accept review because the Court of Appeals' decision is contrary to this Court's instruction to "view sentences as a whole in sentencing, considering the sentence on one count as relevant to the sentence on another count (determining, for example, whether sentencing on one count runs concurrently or consecutively with other counts)." *State v. Carter,* 3 Wn. 3d 198, 225, 548 P.3d 935 (2024). In Nga's case, the court's sentence on counts three and four cannot be separated from the court's sentence on counts one and two.

This is especially true where the court's consideration of a "mandatory minimum" was integral to its fashioning of Nga's entire sentence. Washington is a written order state. *State v. Molina,* 16 Wn. App. 2d 908, 922, 485 P.3d 963 (2021). A sentencing court's oral statements are viewed as a "verbal expression of its informal opinion at the time." *Id.* The court's judgment and sentence imposed a "mandatory minimum term

of 5 years" for counts three and four:



CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT (Non-Sex Offense). RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

25 Years to Life on Count 1

25 Years to Life on Count 2

190 Months on Count 3

123 Months on Count 4

12 Months on Count 5

The foregoing sentences in Counts 1 and 2 shall be served [X] concurrently [ ] consecutively with the sentences in Counts 1 and 2

The foregoing sentences in Counts 3 and 4 shall be served [ ] concurrently [X] consecutively with the sentences in Counts 1 and 2 but concurrently with each other

number of months of confinement ordered is: 440 360 months to life.

1 2 contains a mandatory minimum term of 25 years to Life

[X] The confinement time on Counts 3 and 4 contains a mandatory minimum term of 5 years.

CP 430. This written judgment and sentence reflects the court's oral ruling. The court repeatedly stated its intent to have the ISRB review Nga for release after the "mandatory minimums" for all offenses have been served:

> I'm going to proceed with the belief that the ISRB review can take place after the mandatory minimums for the murder convictions have been served, which has already occurred, and the mandatory minimums for the Assault 1 convictions have been served, which is in process.

4/18/23 RP4. The court clearly stated it considered the ISRB would be reviewing the assault convictions, stating, "it is anomalous to believe that the ISRB review for release related to

the Aggravated Murder claims would be different than the Assault First Degree claims that would result in inconsistent adjudication." 4/18/23 RP4-5.

The court's reference to an "assault minimum" drove the sentence it ultimately imposed for all offenses:

> And also note that, of course, after the assault minimum has been served, then the ISRB will have the authority to do whatever they are going to do with regard to both the Aggravated Murder convictions and the Assault 1 convictions.

4/18/23 RP9.

The sentencing court's insistence on a "minimum" for the assaults was central to its sentence. On appeal, the Court of Appeals and the parties have different interpretations of what the court intended by the "minimum term." Appendix 1. Without knowing the court's intent, the Court of Appeals should not simply remove this provision. Even if the Court of Appeals believed the sentencing court did not intend for the ISRB to review for release after serving five years on the assaults despite the court's oral ruling and judgment and

sentence, the Court of Appeals should have reversed and remanded for the sentencing court to legally structure Nga's sentence to achieve its intended outcome. By merely striking this provision, the Court of Appeals increased Nga's sentence in a way the sentencing court did not intend. Appendix 2.

This mandatory minimum is unlawful and cannot be excised from the court's sentence. *Carter,* 3 Wn. 3d at 225. This Court should accept review. RAP 13.4(b)(1), (3),(4).

2. The ISRB's considerations of release are different from the *Miller* factors, and should not drive a court's sentence when, as here, a person is sentenced to life with the possibility of release by the ISRB.

The court refused Nga's request for a minimum sentence based purported concerns for "public safety." This was an improper consideration at Nga's *Miller* resentencing because it is the ISRB's primary and required consideration in releasing him on the indeterminate life sentence under RCW 10.95.030.

The purpose of the *Miller*-fix statute "is to correct unconstitutional mandatory life without parole sentences in

accordance with *Miller*." *State v. Delbosque*, 195 Wn.2d 106, 127, 456 P.3d 806 (2020). At a *Miller* sentencing, "the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller*. RCW 10.95.030(3)(b); *State v. Gilbert,* 193 Wn.2d 169, 176, 438 P.3d 133 (2019).

Among the factors the court must consider when setting a minimum term under RCW 10.95.030 are the child's age, their "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(2)(b). The sentencing judge must consider these specific criteria and impose new minimum term consistent with them. *Delbosque,* 195 Wn.2d at 128-29. In applying the *Miller* factors, courts "must *meaningfully* consider how juveniles are different from adults, and how those differences apply to the facts of the case." *Id.* at 121.

The sentencing court's analysis must acknowledge and reconcile any evidence contrary to a finding that a child is "irretrievably depraved." *Id.* at 120. Absent this comprehensive analysis, the court's sentence will be reversed. *Id.* at 119-20.

In 2019 the Court of Appeals reversed Nga's sentence because the sentencing court failed to explain why it imposed "standard range, consecutive sentence for [the] assault convictions, despite finding that he was entitled to a minimum, concurrent sentence for the aggravated murder convictions." CP 411.

On remand, the State asked the sentencing court to comply with the Court of Appeals directive to state its basis for not imposing a minimum term for the assaults when this sentence was warranted for the aggravated murders. CP 411.

In response, the court reviewed the extensive mitigation evidence under the *Miller* factors. 4/18/23RP5-7; *see also* 4/7/23RP109-13. However, the court also noted that Nga's "record for rehabilitation while incarcerated has only recently

improved." 4/7/23RP113. The court also acknowledged this programming had been unavailable to him because he was sentenced to die in prison. 4/7/23 RP114.

The court stated its belief that "for public safety," Nga should continue to be incarcerated "at his current level to determine whether this positive trend continues." 4/7/23RP114. The court believed that Nga "would benefit from the orderly approach to early release provided for in RCW 10.95.030(3)." 4/18/23RP8; CP 412.

Public safety is the ISRB's "highest priority when making all discretionary decisions regarding the ability for release and conditions of release." RCW 10.95.030(2)(f). This is different from RCW 10.95.030(2)(b)'s focus "on the youth's chances of becoming rehabilitated." Though RCW 10.95.030(2)(b)'s enumerated factors are not exclusive, "public safety" should not be doubly accounted for in the court's imposition of a minimum term for a life sentence, because the

minimum term is the threshold for consideration for release by the ISRB and its subsequent focus on "public safety."

As Nga argued to the court, the ISRB will only consider his release on the aggravated murder convictions under RCW 10.95.030. 4/7/23RP104. He will be released to serve the remainder of the 140-month sentence for the assaults. The ISRB will already have accounted for public safety, yet he will be required to serve additional time on the assaults, after the ISRB finds he is no longer a public safety risk.

The court's recognition that Nga's actions and limited culpability merited the most lenient sentence available was inexplicably limited to the aggravated murder convictions, and the basis for the finding he was not entitled to the same minimum sentence for the assaults is not supported by substantial evidence. 4/7/23RP104.

Ignoring the Supreme Court's recognition that a life without parole sentence "forswears altogether the rehabilitative ideal," *Graham v. Florida*, 560 U.S. 48, 74, 130 S. Ct. 2011,

176 L. Ed. 2d 825 (2010), the sentencing court here seemed concerned that Nga's efforts toward rehabilitation did not improve until he was no longer condemned to die in prison. The court noted the difference between Nga and children who were sentenced to LWOP and "who went on to do remarkable things." 4/7/23RP64. The court appeared to want to account for the difference between "people [who] did it because for their own sake [because] they wanted to become better functioning individuals." 4/7/23RP64; *see also* 9/6/19RP94.

This concern directly contradicts *Graham's* observations and fails to reconcile or account for Dr. Stanfill's report and testimony that tied Nga's infraction history to his need for defense, survival, and lack of decision-making ability beyond the code of violence dictating his reality in prison. CP 202; *See Delbosque,* 195 Wn.2d at 120. Dr. Stanfill concluded that Nga's "environment and circumstances" were the primary driver of his prison infraction history. 4/7/23RP65.

Graham also recognized that prisons may be "complicit in the lack of development." 60 U.S. at 79. Prisoners serving life without parole sentences are denied rehabilitative programming, as was also true for Nga, whose life without parole sentence and ICE detainer made programming less available to him. 4/7/23RP87; CP 147, 210. Despite these barriers, Nga learned to read and earned his GED. CP 133.

Nga's lower cognitive functioning, lack of education, and low English skills when he first entered prison would have limited his access to programs. These factors, all beyond Nga's control, limited his access to programming and ability to complete it. The sentencing court failed to reconcile the mitigating evidence of Nga's infraction history, ignoring the specific vulnerabilities of his age, race, lack of education and lower cognitive functioning that made him less able to transcend the extreme violence that surrounded him, both growing up and in prison. CP 199-202.

The separate, additional 140 months the court added for the assaults was largely based on considerations that the ISRB will make, not *Miller* factors. The reasons the court cited for imposing additional time beyond the minimum 25-life sentence for the aggravated murders are contrary to what should be considered at a *Miller* resentencing and this Court should accept review. RAP 13.4(b)(1),(3).

3. The sentencing court's failure to meaningfully consider how intellectual disability affects rehabilitation contravenes *Miller* and calls for this Court's review.

The sentencing court also failed to consider the fact of Nga's intellectual disability in light of all of the *Miller* factors. This Court should grant review to clarify the state and federal constitutions require consideration of a child's intellectual disability when assessing their capacity for change and rehabilitation.

The court's oral ruling reflected the court perceived Nga's DOC history showed a lack of rehabilitation. *Roper*'s and *Miller*'s focus on a child's reduced culpability due to

neurological underdevelopment in relation to adults is premised on the Court's recognition in *Atkins* that adults with intellectual and cognitive disabilities are less culpable, and thus less deserving of the harshest punishment. *Roper v. Simmons*, 543 U.S. 551, 570-71, 125 S. Ct. 1183, 161 L. Ed.2d 1 (2005) (citing *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)). *Atkins* determined that in the context of adult sentencing, persons with "disabilities in areas of reasoning, judgment, and control of their impulses…do not act with the same level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306.

Mental retardation as considered by *Atkins* applied to people with IQs in the 70 range. *Id.* at 318.

When Nga was a child he had a reported IQ of 55. CP 9, 60, 187. This testing might have been affected by Nga's lack of English language ability, but subsequent testing revealed he was at a minimum in the "low average to borderline" range of intellectual functioning. CP 83, FF 14.

Researchers have observed people with intellectual disability as they progress through the criminal justice system: "confessed more readily, provided incriminating evidence, were less likely to plea-bargain, were more likely to have been convicted, and received longer sentences." Astrid Birgden, *Enabling the Disabled: A Proposed Framework to Reduce Discrimination Against Forensic Disability Clients Requiring Access to Programs in Prison,* 42 Mitchell Hamline L. Rev. 637, 646 (2016).

This is true in Nga's case, where his codefendant, the actual shooter, received a lesser sentence, and was released on parole after 22 years. Different from Nga, Oloth by all measures appears to have notable intellectual aptitude. Once released from prison, he became a full-time student at the University of Washington, where he was on the dean's list every quarter. CP 148.

Lower intellectual functioning inhibits rehabilitation in prison. Birgden, *supra,* at 646. Studies show that people with

intellectual limits in prison "were more likely to have been abused or victimized and engaged in poorer institutional behavior. Therefore, they became over-classified with a higher security level." *Id.* Birgden observed programs in prison are not "generally accessible to offenders with an IQ lower than eighty points." *Id.* at 676.

Nga pointed out the paradox of focusing on prison rehabilitation for people with reduced cognitive ability:

> Dr. Stanfill testified Nga's cognitive deficits will make his maturity a "slower process. It will come along gradually, but the learning curve, that developmental curve, will be slower." 4/7/23RP47.

And though prison creates distress for most people, prisoners with cognitive disabilities "have been found, on psychometric measures, to suffer three times the depression and anxiety levels as general population prisoners." *Id.* at 687. Nga's experience in prison reflects the experiences of those with lower intellectual functioning. In

prison he suffers from "anxiety" and "recurrent major depression." CP 84, FF 15. His prison infractions are not predatory, but show his need for group protection and are driven by vulnerabilities of youth, relative immaturity and "poor cognition." CP 200. Nga was unable to complete his general education requirements (GED) until recently and he worked for only three months of his sentence. CP 133. These aspects that make rehabilitation in prison far more difficult for a person with an intellectual disability must be accounted for in light of *Miller*'s consideration of "any factors suggesting that the child might be successfully rehabilitated." *Gilbert,* 193 Wn.2d at 176. A trial court's failure to account for intellectual disability would untether *Miller* from its moorings, since *Miller's* requirement that the sentencing judge consider the child's personal characteristics derives from the Court's same requirement regarding reduced culpability for those with intellectual disabilities. *See Graham,* 560 U.S. at 61; *Atkins*,

536 U.S. 304 (prohibiting death sentence for those "whose intellectual functioning is in a low range").

Atkins recognized the specific challenge intellectual disability poses to rehabilitation. It "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found." *Atkins*, 536 U.S. at 321. A court's application of *Miller* must ensure a child is not punished for their disability. This Court should accept review. RAP 13.4(b)(3).

C. CONCLUSION

This Court should accept review for the foregoing reasons. RAP 13.4(b)(1),(3), and (4).

DATED this 7th of May 2025.

In compliance with RAP 18.17, this document contains 4,973 words.

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APPENDIX 2

Motion to Reconsider

Court of Appeals Denial of Motion to Reconsider

Filed
Washington State
Court of Appeals
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February 19, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NGA (NMI) NGOEUNG, aka SHAMROCK, Appellant.	No. 58780-7-II UNPUBLISHED OPINION

CRUSER, C.J.—In 1994, Nga Ngoeung was convicted of 2 counts of aggravated murder and 2 counts of assault. At the time of his crimes, Ngoeung was 17 years old, but he was tried as an adult. He received a sentence of life without the possibility of parole (LWOP). Since his conviction, Ngoeung has been resentenced 3 times, pursuant to *Miller v. Alabama* and its progeny.[1] Most recently, Ngoeung was resentenced for the third time in April 2023. The court imposed the following sentence: 25 years to life on each murder conviction, to run concurrently to each other; 140 months on the first assault conviction and 123 months on the second assault conviction, to run concurrently to each other but consecutively to the murder convictions.

Ngoeung appeals from his 2023 sentence, arguing first that the court erred in including a 5-year mandatory minimum term of confinement on Ngoeung's assault convictions, thereby

[1] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); former RCW 10.95.030 (2014) and former RCW 10.95.035 (2014); *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018); *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019); *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

converting the determinate sentences into indeterminate sentences. He also argues that the court erred in imposing a mandatory minimum on his assault convictions absent the specific finding required by the statute. Next, Ngoeung argues, the court erred in imposing sentences above the minimum term of the standard range on his assault convictions. Finally, he argues that due to recent statutory amendments, the victim penalty assessment (VPA) and DNA collection fees previously imposed on him should be stricken. The State concedes that the court erred in imposing the mandatory minimum terms of confinement on Ngoeung's assault sentences. Next, the State argues that the court did not abuse its discretion in imposing a 36-year sentence. Finally, the State concedes that the VPA and DNA collection fees should be stricken.

We hold first, that the superior court did not err in sentencing Ngoeung's assault convictions under the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW. Second, we hold that the court erred in imposing a mandatory minimum in relation to the assault convictions absent the necessary finding required under RCW 9.94A.540(1)(b)—that "the offender used force or means likely to result in death or intended to kill the victim." Third, we hold that the superior court did not abuse its discretion in imposing sentences on the assault convictions above the minimum term, as the court meaningfully considered the mitigating factors of youth and Ngoeung's capacity for rehabilitation, and the court adequately explained it's reasoning behind the sentence. Fourth, we hold that the VPA and DNA collection fees should be stricken. We remand to the trial court to strike the VPA and DNA collection fees as well as the language in the judgment referencing mandatory minimums in relation to the assault convictions.

FACTS

I. BACKGROUND

When Ngoeung's case was before this court in 2021, we summarized the factual background of the crime at the center of his case as follows:

> In August 1994, four high school boys drove down a Tacoma street throwing eggs. Some of the eggs hit a house that turned out to be a hangout for a local gang. Ngoeung, then age 17, Oloth Insyxiengmay, age 15, and Soutthanom Misaengsay, age 13, were associated with the gang and were outside the house during the egging. Believing the attack was gang related, Insyxiengmay entered the house and took the owner's rifle. The three boys got in a car, and with Ngoeung driving, followed the other car. Insyxiengmay put the rifle out the window and shot at the other boys' car. Two of the boys in the other car were killed.
>
> Insyxiengmay, Ngoeung, and Misaengsay then returned to the house and Insyxiengmay handed the rifle to someone inside the house, told her to get rid of it, and said, "[w]e shot them up. We shot them up. They threw eggs at us, the Rickets. We shot them up." *Insyxiengmay v. Morgan*, 403 F.3d 657, 661 (9th Cir. 2005). Ngoeung was arrested on September 3, 1994 and confessed to police that he drove the car during the shooting.

State v. Ngoeung, No. 54110-6-II, slip op. at 2-3 (Wash. Ct. App. Dec. 7, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2054110-6-II%20Unpublished%20Opinion.pdf.

II. PROCEDURAL HISTORY

A. Jury Trial & Initial Sentence

In 1995, a jury found Ngoeung guilty of 2 counts of aggravated murder in the first degree, 2 counts of assault in the first degree, and 1 count of taking a motor vehicle without the owner's permission (TMVWP). Ngoeung was 17 years old at the time. Ngoeung was tried as an adult. After the original conviction, the court imposed a nondiscretionary sentence under former RCW 10.95.030(1) (1993) of LWOP for the murder convictions. The court imposed the following sentences on the remaining convictions: 136 months for the first assault conviction, 123 months

for the second assault conviction, and 8 months for the TMVWP conviction. The court ruled that all of Ngoeung's sentences would be served consecutively to one another.

B. First Resentencing (2015)

Ngoeung was resentenced for the first time in January 2015, pursuant to the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, (holding that automatic imposition of LWOP for minors under age 18 violated the US Constitution), and the subsequent "*Miller* fix," former RCW 10.95.035 (2014) and former RCW 10.95.030(3) (2014). The court again imposed a sentence of LWOP for the aggravated murder convictions, and ordered that the sentences run consecutively. The court did not change the original sentences for the assault and TMVWP convictions.

C. Second Resentencing (2019) & Subsequent Appeal

Ngoeung returned to the court for a second resentencing in September 2019, after our supreme court held that a LWOP sentence for a juvenile was categorically barred by the state constitution. *State v. Bassett*, 192 Wn.2d 67, 91, 428 P.3d 343 (2018). At the second resentencing, the court imposed a sentence of 25 years to life for the 2 aggravated murder offenses. The court ordered 102 months of confinement for the first assault conviction, 93 months of confinement for the second assault conviction, and 8 months for the TMVWP conviction. The court ordered for the murder sentences to be served concurrently to each other, and for the TMVWP sentence to be served concurrently, but for the assault sentences to be served consecutively to both each other and to the murder sentences.

Ngoeung appealed the 2019 sentence to this court, arguing, in part, that the trial court "failed to meaningfully consider all of the *Miller* factors, failed to take into account his history

when evaluating his potential for rehabilitation, and failed to explain why it imposed standard range consecutive sentences for his two assault convictions." *Ngoeung*, slip op. at 1-2. Additionally, Ngoeung argued that the superior court "improperly placed the burden to prove his youth as a mitigating factor on him," when it should have been place on the State. *Id.* at 2.

We held that "the trial court both failed to meaningfully consider the *Miller* factors and failed to explain its reasoning in imposing Ngoeung's sentence," and reversed and remanded the case for resentencing. *Id.* We explained that "a sentencing court must *expressly* consider the impact of youth on culpability so that this consideration appears on the record," and that the 2019 resentencing court "failed to thoroughly explain its reasoning on the record." *Id.* at 18. Specifically, we noted, the sentencing court failed to explain "why the mitigating factors of youthfulness warranted an exceptional sentence in the form of running the aggravated murder charges concurrently, while still imposing standard sentence ranges for the assaults and simultaneously running those consecutively." *Id.* at 21. Additionally, we held that the sentencing court "also failed to meaningfully consider all of Ngoeung's evidence regarding his potential for rehabilitation because it did not address how the evidence related to Ngoeung's capacity to change." *Id.* at 18.

D. Third Resentencing (2023)

1. New Sentence

Pursuant to our decision in *State v. Ngoeung*, No. 54110-6-II, Ngoeung was resentenced for the third time in April 2023. According to the judgment and sentence, the standard sentencing ranges for Ngoeung's convictions are as follows: 25 years to life for the two murder convictions; 111-147 months for the first assault charge; 93-123 months for the second assault charge, and; 4-12 months for the TMVWP charge. Ngoeung requested that the court "impose a minimum term of

total confinement of thirty years-to-life on the aggravated murder in the first-degree convictions concurrent with each other and concurrent with two other convictions for assault" as well as the TMVWP conviction. Clerk's Papers (CP) at 112.

The superior court ordered the following sentences: 25 years to life on the first murder conviction; 25 years to life the second murder conviction; 140 months on the first assault conviction; 123 months on the second assault conviction; and 12 months on the TMVWP conviction. The court ruled that the sentences on the murder convictions shall be served concurrently, and that the sentences for the assault convictions would be served concurrently with each other but consecutively with the sentences for the murder convictions. The court ruled that the sentence on the TMVWP conviction would be served concurrently to the other sentences. The court noted that it was imposing an exceptional downward sentence by ordering for the sentences on the murder convictions to be served concurrently with each other, as well as for the sentences on the assault convictions to be served concurrently with each other. In total, the actual number of months of confinement ordered was 440 months to life—55 months less than the sentence Ngoeung received in 2019.

According to the 2023 sentence, Ngoeung's sentences for the murder convictions contain a mandatory minimum term of 25 years to life. The confinement time for the assault convictions contains a mandatory minimum of five years pursuant to RCW 9.94A.540(1)(b). However, the record does not reflect that any finding was made, either by the jury or the sentencing court, that the assaults involved force or means likely to produce death, or that Ngoeung or an accomplice intended to kill the victims of the assaults.

2. Testimony of Dr. Michael Stanfill

During the 2023 resentencing, Ngoeung presented testimony from Dr. Michael Stanfill, a licensed psychologist. Dr. Stanfill discussed the psychological evaluation that he conducted of Ngoeung in 2023. Dr. Stanfill noted that reports from the time of the crime indicated that Ngoeung did not "really appreciate the consequences of his actions," and was a follower, without a "strong sense of independence or autonomy." Verbatim Rep. of Proc. (VRP) (Apr. 7, 2023) at 45. He discussed Ngoeung's low education level and how, at the time of the crime, he was "impulsive" and "reactionary." *Id.* at 46. According to Dr. Stanfill, Ngoeung's IQ score was in the "low average to below average range" *Id.* at 47. Dr. Stanfill opined that Ngoeung has made noticeable improvements from 2019 to 2023, and did not believe that Ngoeung "is irretrievably depraved and unable to be rehabilitated." *Id.* at 59. Dr. Stanfill believed that Ngoeung's behavior began to shift as a result of the change in his sentence in 2019 away from LWOP. He explained that the change in sentence presented Ngoeung with new goals and opportunities, and he suspected that this would encourage continued compliance on Ngoeung's part.

The court noted that the 1991 psychological evaluation of Ngoeung opined that "psychotherapeutic intervention at that time was going to be necessary to have any hope for healthy adaption for Mr. Ngoeung in society and opined that without such intervention those steps could manifest themselves into a personality disorder." VRP (Apr. 7, 2023) at 60-61. In response to the court's questions, Dr. Stanfill stated that Ngoeung had not received much in terms of psychotherapeutic interventions, but Dr. Stanfill noted that in part, this could be due to a paradigm shift within the field of psychology to focus toward symptom-management intervention, especially in correctional facilities.

During cross-examination, the State noted that a psychologist with the ISRB evaluated Ngoeung's risk of recidivism and found that Ngoeung was at a moderate risk for recidivism. The State also highlighted the fact that Ngoeung was in a fight in 2018, for which he received a serious infraction.

3. Discussion of Mitigating Factors of Youth

After Dr. Stanfill's testimony, the court discussed Ngoeung's youthful brain development as well as the challenging circumstances of his life. The court stated, "It is clear that Mr. Ngoeung was subject to a level of adverse childhood experiences that in the history of this court has never been duplicated." *Id.* at 108. The court discussed Ngoeung's family's experience fleeing Cambodia and living in refugee camps, where he was deprived of "positive input to help him form either cognitive levels of achievement or basic social behaviors." *Id.* at 109. The court also discussed Ngoeung's difficulties with learning English and adjusting to life in the States. The court discussed Ngoeung's exposure to violence, recruitment into a gang, and exposure to domestic violence. The court explained that Ngoeung suffered from injuries that potentially created neurological damage and that Ngoeung experienced "social acculturation instability," and educational deficits. *Id.* at 111.

4. Discussion of Capacity for Change

The court also discussed Ngoeung's capacity for change. In discussing Ngoeung's disciplinary record, the court noted that Ngoeung was involved in multiple serious infractions, and that "[i]ntensive management was imposed on at least five different occasions" between when he began his prison sentence and 2018. *Id.* at 113.

The court stated that at the time of resentencing, Ngoeung's "record for rehabilitation while incarcerated has only recently improved." *Id.* The court noted that Ngoeung did not have access to programming because the Department of Corrections (DOC) "does not offer a lot of programming and rehabilitation services to people who are not at least approaching release, and for a period of 15 or 20 years, there was no approaching relief for Mr. Ngoeung." *Id.* at 114. Recently, Ngoeung began participating in programming. The court noted that Dr. Stanfill agreed that it would be "appropriate for the public safety to continue Mr. Ngoeung's incarceration at his current level to determine whether this positive trend continues." *Id.*

ANALYSIS

Ngoeung appeals from the 2023 sentence, arguing that 1) the court erred in including a five-year mandatory minimum sentence with the assault sentences, thereby turning determinate sentences into indeterminate sentences; 2) the court erred in issuing sentences for the assault convictions separately from the murder convictions, rather than ordering "a total sentence under RCW 10.95.030"; 3) the court erred in imposing assault sentences above the bottom of the standard range when it imposed minimum sentences for the murder convictions; 4) the court failed to meaningfully consider Ngoeung's intellectual disability in the context of his capacity for rehabilitation, and; 5) the VPA and DNA collection fees should be stricken. Finally, in Ngoeung's reply brief, he argues that the court erred in imposing the five-year mandatory minimum on the assault convictions, because doing so requires a finding that the "offender used force or means likely to result in death or intended to kill the victim," and no such finding appears in the record. RCW 9.94A.540(1)(b).

The State responds, arguing that 1) the sentences on the assault convictions remain determinate sentences, and the statutory mandatory minimum does not convert them into indeterminate sentences; 2) the court did not abuse its discretion in running the assault sentences consecutively to the murder sentences and in imposing sentences on the assault convictions above the minimum term of the standard range, and; 3) the court meaningfully considered all evidence relating to Ngoeung's potential for rehabilitation. The State concedes that the VPA and DNA collection fees may be stricken. In regard to Ngoeung's argument that the superior court erred in imposing the five-year mandatory minimum on the assault convictions because the required finding does not appear in the record, the State concedes that the superior court erred in imposing the mandatory minimum on the assault convictions and the appropriate remedy is to strike the language in the judgment stating that the mandatory minimum applies to the assault convictions.

We hold first, that the superior court did not err in sentencing Ngoeung's assault convictions under the SRA rather than under former RCW 10.95.030 (2015). Second, we accept the State's concession that the superior court erred by imposing the mandatory minimum term of confinement under RCW 9.94A.540(1)(b), because the required finding (that the "offender used force or means likely to result in death or intended to kill the victim") does not appear in the record. Third, we hold that the superior court did not abuse its discretion in imposing sentences on the assault convictions that were above the bottom of the standard range, as the court meaningfully considered the mitigating factors of youth and Ngoeung's capacity for rehabilitation, and the court adequately explained its reasoning behind the sentence. Finally, we hold that the VPA and DNA collection fees should be stricken. We remand for the sole purpose of striking the notation of the

mandatory minimum terms on the assault convictions from the judgment, and striking the imposition of the VPA and DNA collection fees.

I. THE SUPERIOR COURT DID NOT ERR IN SENTENCING NGOEUNG'S ASSAULT CONVICTIONS UNDER THE SRA RATHER THAN UNDER FORMER RCW 10.95.030

To the extent Ngoeung's arguments are clear, Ngoeung argues that even though his assault convictions are criminalized under the SRA, "they must be subsumed within the indeterminate sentence the court imposes under RCW 10.95.030." Br. of Appellant at 42. He contends that "[t]he court's minimum term for the assaults is not authorized by any sentencing scheme." *Id.* at 38. Because the ISRB cannot review Ngoeung's determinate sentences related to the assault convictions after the five-year mandatory minimum, Ngoeung argues that he must be "resentenced to a minimum term under RCW 10.95.030 for all offenses." *Id.* at 49. In his reply brief, Ngoeung raises the argument for the first time that the court erred in imposing the mandatory minimum on the assault convictions without the required finding under former RCW 9.94A.540(1)(b) that "the offender used force or means likely to result in death or intended to kill the victim."

The State responds that Ngoeung's citations do not support his argument that "the assault sentences 'must be subsumed within' the murder sentences," Br. of Resp't at 32 (quoting Br. of Appellant at 42). The State disagrees with Ngoeung's argument that the sentence offends *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019). The State concedes that absent the finding necessary for the mandatory minimum to apply, the superior court erred in imposing the five-year mandatory minimum on the assault convictions. The State argues that the appropriate remedy is to remand to strike the language from the judgment referencing the mandatory minimums in regard to the assault convictions.

We hold that the court was correct to sentence Ngoeung's assault convictions under the SRA (chapter 9.94A RCW) rather than under former RCW 10.95.030 (2015), which explicitly deals with sentences for aggravated first degree murder. In regard to the mandatory minimum term imposed on the assault convictions, we agree with the State and remand to the superior court to strike that notation from the judgment.

A. Legal Principles

1. The SRA

The SRA outlines mandatory minimum terms of confinement. RCW 9.94A.540. Under the statute, "[a]n offender convicted of the crime of assault in the first degree . . . where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years." RCW 9.94A.540(1)(b).

Under RCW 9.94A.730, an offender convicted of a crime prior to turning 18 years old may petition the ISRB for early release after serving at least 20 years of confinement, "provided the person has not been convicted for any crime committed subsequent to the person's 18th birthday, . . . and the current sentence was not imposed under RCW 10.95.030 or 9.94A.507."[2]

A court "may impose a sentence outside the standard sentence range for an offense if it finds, . . . that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. A departure from the standards within the SRA that determine the imposition of consecutive versus concurrent sentences is an exceptional sentence. RCW 9.94A.535, .589.[3] A

[2] RCW 9.94A.730 was amended in 2024. Because these amendments do not impact our analysis, we cite to the current version of the statute. *See* LAWS OF 2024, ch. 118, § 4
.

[3] RCW 9.94A.589 was amended in 2020. Because these amendments do not impact our analysis, we cite to the current version. *See* LAWS OF 2020, ch. 276, § 1.

court "may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1).

2. RCW 10.95.030

Chapter 10.95 RCW defines aggravated first degree murder and outlines the sentences for aggravated first degree murder. For our purposes, the most relevant portions of former RCW 10.95.030 (2015) state:

> (3)(a)(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least [16] years old but less than [18] years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than [25] years. . . .
>
> (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.
>
> . . . .
>
> (d) 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.

Subsequent sections within RCW 10.95.030 provide guidelines for procedures and timelines related to ISRB review.

B. Application

1. The Court Correctly Sentenced Ngoeung's Assault Convictions Under the SRA Rather Than Under RCW 10.95.030

Ngoeung maintains that all of his convictions should have been sentenced under former RCW 10.95.030. He claims that even though he "was also convicted of assaults, which are

criminalized under the SRA, they must be subsumed within the indeterminate sentence the court imposes under RCW 10.95.030." Br. of Appellant at 42. RCW 10.95.030 is titled "Sentences for aggravated first degree murder." Ngoeung does not point us to any section of chapter 10.95 RCW that supports his position that all of an offender's convictions relating to their murder conviction(s), including related assault convictions, must be subsumed by and sentenced under former RCW 10.95.030.

Ngoeung cites to *Gilbert*, 193 Wn.2d at 175, for support. In *Gilbert*, the supreme court clarified that under *Houston-Sconiers*, "sentencing courts must account for the mitigating qualities of youth and have absolute discretion to consider an exceptional downward sentence in light of such mitigating factors." *Gilbert*, 193 Wn.2d at 175; *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). *Houston-Sconiers* held that "sentencing courts possess this discretion to consider downward sentences for juvenile offenders regardless of any sentencing provision to the contrary." *Gilbert*, 193 Wn.2d at 175 (citing *Houston-Sconiers*, 188 Wn.2d at 21). The *Gilbert* court stated that sentencing courts should consider mitigating circumstances as well as "the convictions at issue, the standard sentencing ranges, and any other relevant factors—and should then determine whether to impose an exceptional sentence, taking care to thoroughly explain its reasoning." *Id.* at 176.

Ngoeung is incorrect in his assertion that *Gilbert* requires his assault convictions to be subsumed under former RCW 10.95.030. *Gilbert* does not stand for this proposition, and the citation that Ngoeung provides does not support his argument. *See* Br. of Appellant at 42; *Gilbert*, 193 Wn.2d at 175. The specific citations Ngoeung includes to *Gilbert* merely discuss the discretion of judges to consider exceptional downward sentencing of juveniles in light of mitigating factors.

Gilbert, 193 Wn.2d at 175. In Ngoeung's case, the sentencing court took steps to comply with the requirements laid out in *Gilbert*, as we explain below. However, Ngoeung fails to show that *Gilbert* supports his position that the sentences on his assault convictions must be subsumed under former RCW 10.95.030.

With regard to the court's decision not to sentence Ngoeung's assault convictions under former RCW 10.95.030, the court was correct to sentence Ngoeung's assault convictions under chapter 9.94A RCW. The SRA governs sentences for adult felony offenses. RCW 9.94A.505(1) ("When a person is convicted of a felony, the court shall impose punishment as provided in this chapter"); RCW 9.94A.010 ("The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders"); *see also State v. Besio*, 80 Wn. App. 426, 431, 907 P.2d 1220 (1995). Moreover, former RCW 10.95.030, by its plain language, governs the sentencing of the crime of aggravated first degree murder only. Ngoeung points us to no authority either allowing or requiring a trial court to sentence an offender under former RCW 10.95.030 for convictions other than aggravated first degree murder. This court will not consider an argument on appeal if the grounds for that argument are not supported by citation to authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Ngoeung's arguments, unfortunately, are entirely unclear. If he is arguing that whereas assault first degree convictions are normally sentenced under the SRA, if they are being sentenced at the same time as an aggravated first degree murder conviction they must be sentenced under former RCW 10.95.030, he cites no authority for this argument nor is his argument convincing.

If Ngoeung is arguing that the imposition of a mandatory minimum term for an assault first degree conviction under RCW 9.94A.540(1)(b) renders the sentence indeterminate and, therefore, unlawful, we decline to reach this argument because it is no longer relevant as we remand to the superior court to strike the mandatory minimum imposed on the assault convictions from the judgment, as discussed below.

2. The Court Erred in Imposing the Five-Year Mandatory Minimum on the Assault Convictions

Ngoeung maintains that the court's imposition of a five-year mandatory minimum term on the assault convictions error warrants reversal. Ngoeung argues that "[a]ny additional time the court imposes for the assault convictions will be added to [his] life sentence." Reply Br. of Appellant at 18. During oral argument, he reasoned that a full resentencing was necessary because DOC may be executing the sentence differently than the superior court wanted it to. Appellate counsel makes much of the superior court's unmindful use of the term "mandatory minimum," when in context of the entirety of the court's remarks, relating to the assault convictions, the court stated "mandatory minimum," but was in fact referring to the full sentence imposed on the assault convictions—140 months.

While the oral order and discussion at the superior court was not abundantly clear due to the confusing nature of this area of law, the court intended for the following order of events: first, for Ngoeung to complete the minimum term of confinement for the murder convictions—25 years, which had already been completed at the time of the resentencing. Next, the court intended for Ngoeung's sentences on his assault convictions to begin running upon the completion of the minimum term for the murder convictions (as in, for the sentences on the assault convictions to run consecutively to the sentences for the murder convictions). Then, the court intended for

Ngoeung to serve the full term of confinement attached to the assault convictions—140 months. Only after completing both the minimum term of confinement for the murder convictions (25 years) and then the full term of confinement for the assault convictions, did the court then intend for Ngoeung to be eligible for review before the ISRB. The trial court signed a pre-printed judgment and sentence, prepared by the prosecution, which included a pre-checked box within the sentence stating "[X] The confinement time on Counts 3 and 4 contains a mandatory minimum term of 5 years." CP at 430.

Ngoeung expressed concern, at oral argument before this court, that instead of following the trial court's orders, DOC could impose the sentence by first running the 25 years to life sentence for the murder convictions, and then, only after the ISRB determines that he is eligible for release under the murder convictions, begin running the 140 months of confinement for the assault convictions. *See* Wash. Ct. of Appeals oral argument, *State v. Ngoeung*, No. 58780-7-II (Dec. 12, 2024) (on file with court).

If Ngoeung were correct and DOC was running the sentence in a manner differently than what the superior court wanted, the court would need the opportunity to recraft his sentence. However, no such opportunity is needed here because DOC is executing Ngoeung's sentence exactly as the superior court intended. Pursuant to RAP 9.11, after oral argument, the State provided the court with Ngoeung's Offender Management Network Information (OMNI) from DOC. According to the OMNI, Ngoeung began serving his sentence for the murder convictions in July 1995. He began serving his sentence under the assault convictions in September 2019, approximately 24 years and 2 months after he began serving the murder conviction sentences. The OMNI confirms that DOC is executing Ngoeung's sentence precisely as the trial court intended,

and appellate counsel's concern that Ngoeung would not begin serving the 140 months for the assault convictions until he was deemed eligible for release under the murder convictions is therefore assuaged.[4]

Under the statute, "An offender convicted of the crime of assault in the first degree . . . where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years." RCW 9.94A.540(1)(b). No such finding exists in Ngoeung's case. We agree with the parties and hold that the superior court erred in imposing the mandatory minimum on the assault convictions absent the necessary finding required under RCW 9.94A.540(1)(b). We agree with the State that the appropriate remedy is to remand to the superior court to strike the notation in the judgment indicating that a five-year mandatory minimum applies to the assault convictions.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A SENTENCE OF 140 MONTHS ON NGOEUNG'S ASSAULT CONVICTIONS

Ngoeung argues that the superior court erred in imposing sentences above the minimum terms on his assault convictions when it found that he was entitled to minimum, concurrent sentences for the murder convictions. He maintains that the sentencing court must "impose a single minimum term for all of [his] offenses," because if his "reduced culpability for the aggravated murders entitled him to a minimum term for that conduct, the same must be true for the assault convictions," because his action and culpability was the same. Br. of Appellant at 50-51. He also

[4] In the response to the State's filing of the OMNI report, Ngoeung's counsel expressed concern that "DOC's calculations are always subject to review and can change." Appellant's Resp. to the State's Filing of DOC/OMNI Rep. at 3. If DOC changes the way it is executing Ngoeung's sentence in a manner that no longer conforms with the trial court's intentions, then Ngoeung may raise that issue in a personal restraint petition.

claims that the court's consideration for public safety in determining his sentence was invalid "because this is the ISRB's primary and required consideration in releasing him," and while the factors found in former RCW 10.95.030 "are not exclusive, 'public safety' should not be doubly accounted for in the court's imposition of a minimum term for a life sentence, because the minim term is the threshold for consideration for release by the ISRB." *Id.* at 51, 55.

Ngoeung also argues that the sentencing court failed to consider his intellectual disability and the ways in which it inhibits rehabilitation. He claims that the sentencing court failed "to address the mitigating aspects under *Miller* in relation to [his] perceived lack of rehabilitation," and that he must be resentenced to ensure that he is "not punished for lacking the same potential for rehabilitation as a juvenile without his cognitive limitations." *Id.* at 68.

The State responds that the court did not abuse its discretion in imposing a sentence of 36 years of total confinement, a significant downward departure from Ngoeung's previous sentence. In regard to the court's consideration of public safety, the State maintains that "[t]he court has broad discretion in fashioning a sentence," and "[c]ommunity safety is an abundantly appropriate factor for consideration in fashioning any sentence." Br. of Resp't at 36-37. The State contends that the sentencing court meaningfully considered mitigating circumstances and barriers to rehabilitation. We agree with the State.

A. Legal Principles

1. Standard of Review

In cases involving the resentencing of juveniles pursuant to RCW 10.95.030, we review for abuse of discretion. *State v. Delbosque*, 195 Wn.2d 106, 116, 456 P.3d 806 (2020); *State v. Rogers*, 17 Wn. App. 2d 466, 479–80, 487 P.3d 177 (2021). "A trial court abuses its discretion

when 'its decision is manifestly unreasonable or based upon untenable grounds.' " *Delbosque*, 195 Wn.2d at 116 (internal quotations omitted) (quoting *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012)). An abuse of discretion exists "only where it could be said no reasonable judge would have taken the view adopted by the trial court." *Rogers*, 17 Wn. App. 2d at 480.

2. Meaningful Consideration of Mitigating Factors

In discussing the holding and implications of *Miller*, our supreme court explained that under *Miller*,

> in exercising full discretion in juvenile sentencing, the court must consider mitigating circumstances related to the defendant's youth—including age and its "hallmark features," such as the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and "the way familial and peer pressures may have affected him [or her]." *Id*. And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. *Id*.

Houston-Sconiers, 188 Wn.2d at 23.

Division One of this court explained in *Rogers* that "when sentencing judges determine that youth is a mitigating factor and exercise their broad discretion to fashion an appropriate sentence, (1) such judges must explain the reasons for their determination and (2) those reasons must be rationally related to evidence adduced at trial or presented at sentencing." *Rogers*, 17 Wn. App. 2d at 480. The court expanded, explaining that "[w]e do not require that sentencing courts explain the calculation leading to the precise length of the sentence imposed. Instead, the court must provide sufficient reasoning to allow for meaningful appellate review as to whether any reasonable judge could make the same decision based on the evidence and information before the sentencing judge." *Id.* at 481.

3. Capacity for Rehabilitation

As the *Houston-Sconiers* court noted, in considering the mitigating factors of youth, the sentencing court must also consider "any factors suggesting that the child might be successfully rehabilitated." *Houston-Sconiers*, 188 Wn.2d at 23. *Miller* explained that the goal of rehabilitation does not justify a sentence of LWOP, and a sentence of LWOP "reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." *Miller*, 567 U.S. at 473 (alteration in original) (quoting *Graham v. Florida*, 560 U.S. 48, 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).

As the *Delbosque* court explained, *Miller* requires sentencing courts to " 'reorient the sentencing analysis to a forward-looking assessment of the defendant's capacity for change or propensity for incorrigibility, rather than a backward-focused review of the defendant's criminal history.' " *Delbosque*, 195 Wn.2d at 122 (quoting *United States v. Briones*, 929 F.3d 1057, 1066 (9th Cir. 2019)). The sentencing court must ask whether the offender is capable of change. *Id.*

B. Application

1. The Court Meaningfully Considered the Mitigating Factors of Youth

Ngoeung argues that because the court imposed a minimum term sentence for the murder convictions, it must do the same for the assault convictions, given that his culpability was the same. Ngoeung does not point us to any case law that stands for the proposition that because a court applies a minimum term sentence for one conviction, it must do the same for another conviction born out of the same criminal conduct.

In Ngoeung's appeal of his 2019 sentence to this court, we explained that "a sentencing court must *expressly* consider the impact of youth on culpability so that this consideration appears

on the record." *Ngoeung*, slip op. at 18. We held that the 2019 sentencing court in this regard, "failed to thoroughly explain its reasoning on the record." *Id.* at 18. We held that the sentencing court failed to articulate "its reasoning in imposing a sentence seemingly inconsistent with its findings of fact." *Id.* at 22. However, we did not hold that, as Ngoeung suggests, that means that the court *must* impose a minimum sentence on the assault convictions.

The 2023 sentencing court imposed an exceptional downward sentence, by ordering that the sentences on the assault convictions be served concurrently with each other, effectively lowering Ngoeung's sentence from 2019 by 55 months. In contrast to the 2019 sentencing court, the 2023 sentencing court did expressly consider the mitigating factors of youth and the impact on culpability.

The court began by stating "I'm going to try very hard to comply with the Court of Appeals' desire for greater linkage between the so-called attributes of youth and youthful brain development and Mr. Ngoeung's circumstances." VRP (Apr. 7, 2023) at 108. The court explained that "[i]t is clear that Mr. Ngoeung was subject to a level of adverse childhood experiences that in the history of this court has never been duplicated." *Id.* The court noted the trauma Ngoeung experienced at a young age, living in refugee camps where he was deprived of "positive input to help him form either cognitive levels of achievement or basic social behaviors." *Id.* at 109. The court discussed the difficulty Ngoeung had in adjusting to life in the States and learning English, and his exposure to domestic violence and gang violence while he was a child.

The court explained that Ngoeung suffered from injuries that potentially created neurological damage and that Ngoeung experienced "social acculturation instability," and educational deficits. *Id.* at 111. The court stated that Ngoeung "grew up basically with little or no

parental support. He was undereducated. He dropped out of school in the third or fourth grade. He had no opportunity to develop social skills, and his society, such as it was, became the members of his gang." *Id.* "[H]e grew up with violence, and that's what he knew." *Id.* The court noted Ngoeung's susceptibility to peer pressure and tendency to be a follower.

The court explained that Ngoeung's "early environmental circumstances certainly made his subsequent behavior related to this event something that was not acceptable but predictable in a certain respect." *Id.* at 112. The court expressly stated its belief that all of these factors "do result in a lesser degree of culpability based on youth and brain development than would have occurred had these adverse influences not been present in his life, his lack of education and his cognitive delay and his language barriers." *Id.* at 113. The record clearly indicates that the superior court meaningfully considered the mitigating factors of youth and explained these considerations for the record.

2. The Court Meaningfully Considered Ngoeung's Capacity for Rehabilitation

In Ngoeung's previous appeal to this court, we held that the 2019 resentencing court "failed to meaningfully consider all of Ngoeung's evidence regarding his potential for rehabilitation because it did not address how the evidence related to Ngoeung's capacity to change." *Ngoeung*, slip op. at 18.

A significant portion of the record from the 2023 resentencing hearing is dedicated to testimony from Dr. Stanfill. Dr. Stanfill opined that Ngoeung has made noticeable improvements from 2019 to 2023, and does not believe that Ngoeung "is irretrievably depraved and unable to be rehabilitated." VRP (Apr. 7, 2023) at 59. Dr. Stanfill believes that Ngoeung's behavior began to shift as a result of the change in his sentence in 2019 away from LWOP. He explained that the

change in sentence presented Ngoeung with new goals and opportunities, and he suspected that this would encourage continued compliance on Ngoeung's part.

The court went on to discuss Ngoeung's disciplinary record, and the multiple serious infractions he has incurred during his prison sentence. The court stated that at the time of resentencing, Ngoeung's "record for rehabilitation while incarcerated has only recently improved." *Id.* at 113. The court noted that Ngoeung did not have access to programming because the Department of Corrections "does not offer a lot of programming and rehabilitation services to people who are not at least approaching release, and for a period of 15 or 20 years, there was no approaching relief for Mr. Ngoeung." *Id.* at 114. Recently, Ngoeung began participating in programming. The court noted that Dr. Stanfill agreed that it would be "appropriate for the public safety to continue Mr. Ngoeung's incarceration at his current level to determine whether this positive trend continues." *Id.* The court's discussion illustrates that the court meaningfully grappled with Ngoeung's capacity for change and potential for rehabilitation.

3. The Court Adequately Explained the Reasoning Behind the Sentence

In Ngoeung's previous appeal, we held that the 2019 sentencing court "abused its discretion by failing to articulate a full and meaningful consideration of Ngoeung's youth as a mitigating factor during sentencing and by failing to explain its reasoning in imposing a sentence seemingly inconsistent with its findings of fact." *Ngoeung*, slip op. at 21-22. As the *Rogers* court explained, "[w]e do not require that sentencing courts explain the calculation leading to the precise length of the sentence imposed. Instead, the court must provide sufficient reasoning to allow for meaningful appellate review as to whether any reasonable judge could make the same decision

based on the evidence and information before the sentencing judge." *Rogers*, 17 Wn. App. 2d at 481.

Here, the court imposed a significant downward departure—55 months—from the sentence Ngoeung received in 2019. Throughout its oral decision, the court discussed its reasoning behind the sentence. First, the court considered the mitigating circumstances of youth and the adversity Ngoeung faced prior to committing the crimes. Then, the court discussed Ngoeung's capacity for change, noting that Ngoeung's "record for rehabilitation while incarcerated has only recently improved." VRP (Apr. 7, 2023) at 113. The court noted that it would "be more appropriate for the public safety to continue Mr. Ngoeung's incarceration at his current level to determine whether this positive trend continues." *Id.* at 114. The court also stated its obligation "to put rehabilitative capacity ahead of punitive sanctions" in considering Ngoeung's resentencing. *Id.* at 115.

While the superior court did not expressly explain its reasoning for fashioning the sentence the way it did, it was not required to. *Rogers*, 17 Wn. App. 2d at 481. The court adequately provided "sufficient reasoning to allow for meaningful appellate review as to whether any reasonable judge could make the same decision based on the evidence and information before the sentencing judge." *Id.* We hold that the superior court did not abuse its discretion, as it cannot "be said no reasonable judge would have taken the view adopted by the trial court." *Id.* at 480.

Finally, Ngoeung's argument that it was "not valid" for the superior court to consider a concern for public safety in determining his sentence is not persuasive. First, as Ngoeung himself admits, the factors to be considered by the ISRB "are not exclusive." Br. of Appellant at 55. Nowhere in former RCW 10.95.030 does it state that a sentencing court is not permitted to consider public safety in imposing a sentence. One of the enumerated purposes of chapter 9.94A RCW is

to "[p]rotect the public." RCW 9.94A.010(4). The superior court was permitted to consider public safety in determining Ngoeung's sentence.

III. VICTIM PENALTY ASSESSMENT

Ngoeung argues that the VPA and DNA collection fees should be stricken under RCW 7.68.035 and RCW 10.01.160(3) because he is an indigent defendant. *See* LAWS OF 2023, ch. 449, § 1; LAWS OF 2022, ch. 260, § 9. He argues that because his "case is not yet final, this change in the law applies to him" under *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) and *State v. Ellis*, 27 Wn. App. 2d 1, 16-17, 530 P.3d 1048 (2023). *Id.* at 69.

The State concedes that the VPA and DNA fees may be stricken. We accept the State's concession and order that on remand, the trial court is directed to strike the VPA and DNA collection fees.

CONCLUSION

We hold first, that the superior court did not err in sentencing Ngoeung's assault convictions under the SRA. Second, we hold that the court erred in imposing the mandatory minimum term of confinement on the assault convictions absent a factual finding that Ngoeung and his accomplices "used force or means likely to result in death or intended to kill the victim," per RCW 9.94A.540(1)(b). We hold, however, that a full resentencing is not required and remand this matter to the sentencing court to strike the notation from the judgment and sentence. Third, we hold that the superior court did not abuse its discretion in imposing sentences on the assault convictions above the minimum term, as the court meaningfully considered the mitigating factors of youth and Ngoeung's capacity for rehabilitation, and the court adequately explained it's reasoning behind the sentence. Fourth, we hold that the VPA and DNA collection fees should be

stricken. We remand solely to strike 1) the language from the sentence referencing mandatory minimums in relation to Ngoeung's assault convictions, and 2) the VPA and DNA collection fees. We affirm the sentence in all other respects.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, C.J.

We concur:

PRICE, J.

CHE, J.

APPENDIX 2

Motion to Reconsider

Court of Appeals Denial of Motion to Reconsider

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON, DIVISION TWO

STATE OF WASHINGTON, Respondent, v. Nga Ngoeung, Appellant.	))))))))	No. 587807-II MOTION TO RECONSIDER

A. IDENTITY OF MOVING PARTY AND RELIEF SOUGHT

Nga Ngoueng requests this Court reconsider its opinion filed February 19, 2025, as described below. RAP 1.2(a); RAP 12.4(a).

B. GROUNDS FOR RELIEF AND ARGUMENT

Nga Ngoeung asks this Court to reconsider its opinion because it misapprehended the relevant facts and law in striking the unlawful part of the court's sentence, rather than reversing and remanding for resentencing. RAP 12.4(c).

This Court's decision to only strike the unlawful minimum term, rather than order a resentencing, has resulted in Nga serving a much lengthier sentence than the sentencing court intended.

Both the trial prosecutor and defense counsel below believed the court's intent was to make Nga eligible for release by the ISRB after 25 years for the aggravated murders, and after five years for the assaults, but were concerned that court's "mandatory minimum" for the assaults was an impermissible means of achieving this goal. That is why the State sought "clarification," of what the court meant by a "minimum term" for counts three and four, noting that Nga was not eligible for parole under RCW 9.94A.730, and the *Miller*-fix statute applies to aggravated murder offenses, not the assaults. CP 410.

But the trial court insisted the ISRB could review the entirety of Nga's sentence after the "mandatory minimums" for all offenses was served, which included the "mandatory minimum" it imposed for the assault convictions in counts three and four:

> I'm going to proceed with the belief that the ISRB review can take place after the mandatory minimums for the murder convictions have been served, which has already occurred, and the mandatory minimums for the Assault 1 convictions have been served, which is in process.

4/18/23 RP 4.

On appeal, Nga argued this five-year minimum for the assaults was unauthorized because the ISRB cannot review a "mandatory minimum" for SRA offenses except under RCW 9.94A.730, which does not apply to Nga's case. If the ISRB was going to consider release after the he served a five-year minimum on the assaults as the court intended, it would need to subsume the entire sentence under RCW 10.95.030.

This Court interpreted the court's sentence differently. It believed the trial court intended

> [F]or Ngoeung to complete the minimum term of confinement for the murder convictions—25 years, which had already been completed at the time of the resentencing. Next, the court intended for Ngoeung's sentences on his assault convictions to begin running upon the completion of the minimum term for the murder convictions (as in, for the sentences on the assault convictions to run

> consecutively to the sentences for the murder convictions).

Op. at 16. This Court found that "Only after completing both the minimum term of confinement for the murder convictions (25 years) and then the full term of confinement for the assault convictions, did the court then intend for Ngoeung to be eligible for review before the ISRB." Slip op. at 16.

This Court's interpretation of the trial court's admittedly unclear oral and ruling depends on a mischaracterization of the central component of the court's sentence—the contested five year "minimum term." This Court struck it under a theory that the court imposed it as a "mandatary minimum" under RCW 9.94A.540(1). Op. at 18. The State argued the court ordered the minimum term under this statute for the first time in its response brief, even though this was not mentioned once in the record.[1] Nga argued in the reply brief that this was not what the

[1] This Court wrongly states Nga raising the legality of the sentence under RCW 9.94A.540(1)(b) for the first time in his Motion to Reconsider

trial court meant by a "minimum term," and there was no legal or factual basis for it, which the State eventually conceded. This Court nevertheless sustained the State's fictional theory of a "minimum term" under RCW 9.94A.540(1) and struck it from the judgment and sentence rather than reversing and remanding for the court to restructure the unlawful sentence. Op. at 10.

But striking the "minimum term" for the assaults distorts and lengthens the trial court's intended sentence. The court's insistence on a "minimum term" for the assaults was central to its sentence, so much so that both parties warned the court that this sentence risked reversal. CP 410; 4/7/23 RP121; 4/18/23 RP10. But the sentencing court nevertheless insisted on imposing a "minimum term" for the assault offenses which it believed would be reviewed by the ISRB:

> And also note that, of course, after the assault minimum has been served, then the ISRB will have the authority to

---

reply brief. Op. at 11. He did not. He merely responded the State's fictitious claim that the court imposed the minimum term under this statute.

> do whatever they are going to do with regard to both the Aggravated Murder convictions and the Assault 1 convictions.

4/18/23 RP 9.

The sentencing court believed the ISRB could consider release on the assault convictions after Nga served a five-year minimum term, stating, "it is anomalous to believe that the ISRB review for release related to the Aggravated Murder claims would be different than the Assault First Degree claims that would result in inconsistent adjudication." 4/18/23 RP 4-5.

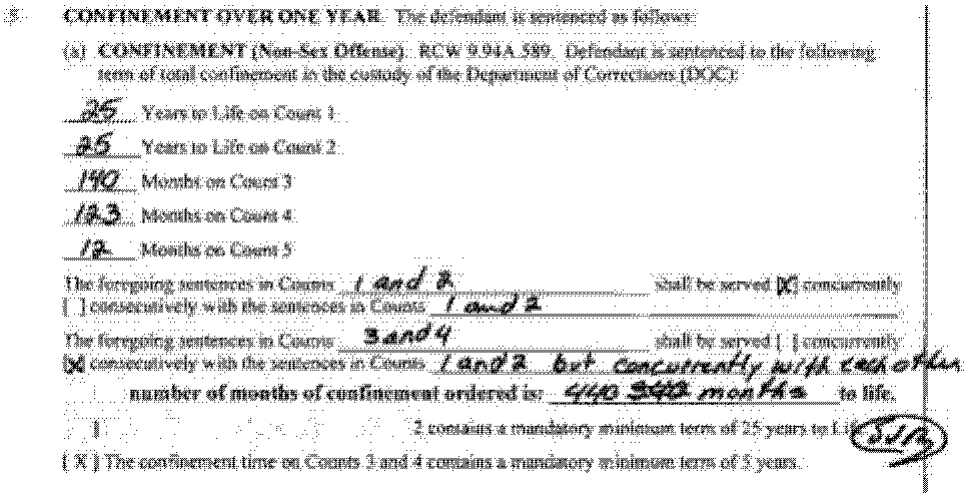
Even if this Court believed the sentencing court did not intend for the ISRB to review after Nga served five years on the assaults as indicated in the court's oral ruling, it cannot be simply excised from the judgment and sentence. By excising the "minimum term" for counts three and four based on the fiction that the court ordered it under RCW 9.94A.5401(1), this Court has lengthened Nga's sentence in a way the trial court did not intend.

Nga's central concern, stated below and on appeal, is that any additional time imposed by the ISRB on counts one and two will be consecutive to the 140 months imposed on counts three and four, because Nga is serving a 25-life sentence for these offenses (now 28-years-to life), not just a 25-year sentence.

After oral argument, the State submitted a DOC OMNI report indicating that the DOC did not interpret Nga's sentence in this way. The OMNI report indicated "Ngoeung began serving his sentence under the assault convictions in September 2019, approximately 24 years and 2 months after he began the murder conviction sentences." Op. at 17. This OMNI report indicated that the assaults would not be added to the three additional years imposed by the ISRB. *Id.*

This Court believed that "appellate counsel's concern that Ngoeung would not begin serving the 140 months for the assault convictions until he was deemed eligible for release

under the murder convictions" was assuaged by this report. Op. at 17-18. But as Nga argued to the trial court, DOC reports are subject to change and ultimately controlled by the court's judgment and sentence. The judgment and sentence in Nga's case does not require counts three and four begin to run after Nga serves 25 years on counts one and two. It states that counts three will run consecutive to the 25-life term:



CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT (Non-Sex Offense). RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

25 Years to Life on Count 1
25 Years to Life on Count 2
140 Months on Count 3
133 Months on Count 4
12 Months on Count 5

The foregoing sentences in Counts 1 and 2 shall be served [X] concurrently [ ] consecutively with the sentences in Counts 1 and 2

The foregoing sentences in Counts 3 and 4 shall be served [ ] concurrently [X] consecutively with the sentences in Counts 1 and 2 but concurrently with each other

number of months of confinement ordered is: 440 3602 months to life.

1 2 contains a mandatory minimum term of 25 years to Life. Life

[X] The confinement time on Counts 3 and 4 contains a mandatory minimum term of 5 years.

CP 430.

After this Court issued its decision, the DOC recalculated Nga's sentence. Appendix. The DOC's updated calculation no longer begins running the 140-month sentence for the assaults

after Nga serves 25 years for counts one and two as the trial court intended. The DOC has recalculated his sentence to run the assaults consecutive to the current 28-life sentence he is serving on counts one and two. His estimated release date is now 512 months instead of 440 months. Appendix. This estimated release date will increase with any additional time the ISRB adds to counts one and two, because the judgment and sentence states that counts three and four are consecutive to the 25-life sentence. Appendix.

But the trial court did not intend for counts three and four to be consecutive to the 25-life sentence, only consecutive to a completed 25-year minimum for the aggravated murders:

> My goal here is to give Mr. Ngoeung credit for 25 years of incarceration for the murders. Whatever number of months has accrued since that 25-year minimum has been *served will be applied against the 140 months for the Assault 1*. Those will both run concurrent, and, at that point, the ISRB can take over and do whatever they are going to do based on their rules. Maybe he's released based on their rules. Maybe he isn't, but that will be in the hands of the Indeterminate Sentence Review Board. RP 117.

Motion to Reconsider

[…]

MR. JOHNSON: Just so I'm clear, the 140 and the 123 are concurrent to each other. Are they also concurrent with the 25 years to life?

THE COURT: No. They are consecutive to that, but the *25-year minimum has been done*, so we are now into the sentence range for Count 3, the assault.

MR. JOHNSON: So he would have to serve another 140 months?

THE COURT: No. *After the minimum was achieved, and I don't have the date of the 25 years for the minimum, then that's when the Assault 1, Count 3, sentence began*, and that's the way it was -- apparently, based on your investigation, that's the way that the DOC was running it anyway, that the murder convictions were served first and then the assaults would follow.

MR. JOHNSON: I don't know procedurally with an ISRB sentence if we can give credit for 25 years. I think that DOC just determines when release is *because they may not start running the sentence on that. I don't know -- again, given this kind of strange, hybrid system, my concern is that there may be some confusion*.

RP 118 (emphasis added).

The trial court repeatedly stated its intent to have the ISRB review Nga for release after the "mandatory minimums" for all offenses have been served:

> I'm going to proceed with the belief that the ISRB review can take place after the mandatory minimums for the murder convictions have been served, which has already occurred, and the mandatory minimums for the Assault 1 convictions have been served, which is in process.

4/18/23 RP 4.

But by excising the "mandatory minimum" on a legally inapplicable theory, this Court has changed the court's sentence, making it so that Nga must serve the entire 140 months consecutive to the 25-life sentence, now 28-life, and subject to further increases by the ISRB, contrary to the sentencing court's intent.

This Court should reconsider its decision to merely excise the unlawful "mandatory minimum" for counts three and four for a reason unrelated to the court's actual sentence. This

Court should instead reverse and remand for the court to impose a lawful sentence.

C. CONCLUSION

Nga asks this Court to reconsider its opinion because the impermissible "mandatory minimum" for counts three and four cannot be excised from the court's sentence. As the DOC's updated calculations demonstrate, this Court's effort to avoid a new sentencing hearing has resulted in a longer sentence than the court intended to impose. This Court should reverse and remand for the court to impose the sentence it intended to, in conformity with both RCW 10.95.030 and the SRA.

Counsel certifies this document contains 1798 words, in compliance with RAP 18.17 and RAP 10.8.

DATED this 11th day of March 2025.

Respectfully submitted,

s/ Kate L. Benward (WSBA 43651)
Attorney for Nga Ngoeung
King County Department of Public Defense
kbenward@kingcounty.gov
206-296-7662

710 Second Ave. Suite 200
Seattle, WA 98104

APPENDIX

Motion to Reconsider

From: DOC Calculations
To: Benward, Kate
Cc: DOC Calculations
Subject: FW: Ngoeung (DOC #738114) ERD request
Date: Tuesday, March 4, 2025 1:45:34 PM

Hi, Kate.

Mr. Ngoeung has an ERD of 07/29/2036.

Since Mr. Ngoeung is under the Board (ISRB), and his ERD has changed, I requested they review the ERD to ensure that the sentence is entered as ordered by the court.

Counts 1 & 2 are running concurrently, counts 3 and 4 are concurrent with each other, but consecutive to counts 1 & 2.

The total was 440 months, which matches the Judgment and Sentence. The Board added 72 months for a total of 512 months.

I hope this helps.

Thank you!

Kelly Walker | Corrections Specialist 3
Washington State Department of Corrections
Statewide Records | HQ Quality Assurance

From: Benward, Kate <kbenward@kingcounty.gov>
Sent: Monday, March 3, 2025 4:16 PM
To: DOC Calculations <doccalculations@DOC1.WA.GOV>
Subject: Ngoeung (DOC #738114) ERD request

Hello, could I get an updated ERD for Ngoeung?
Thank you,

Kate Benward (she/her pronouns)
Associate Special Counsel
King County DPD | Director's Office
710 2nd Avenue, Suite 200
Seattle, WA 98104
Phone: 206-477-4945
Email: kbenward@kingcounty.gov

WASHINGTON APPELLATE PROJECT

March 11, 2025 - 4:17 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	58780-7
Appellate Court Case Title:	State of Washington, Respondent v. Nga Ngoeung, Appellant
Superior Court Case Number:	94-1-03719-8

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Court of Appeals
Division Two

April 7, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NGA (NMI) NGOEUNG, aka SHAMROCK, Appellant.	No. 58780-7-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Nga Ngoeung moves for reconsideration of the Court's unpublished opinion filed on February 19, 2025. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Cruser, Price, Che

FOR THE COURT:

Cruser, C.J.

CHIEF JUDGE

WASHINGTON APPELLATE PROJECT

May 07, 2025 - 4:26 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	58780-7
Appellate Court Case Title:	State of Washington, Respondent v. Nga Ngoeung, Appellant
Superior Court Case Number:	94-1-03719-8

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- wapofficemai@washapp.org

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