No. 97517-5

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN GREGG,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Washington Court of Appeals

Other Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

A. INTRODUCTION

Sebastian Gregg was 17 years old when he made the greatest mistake of life. At the behest of an older, adult friend, Sebastian participated in a homicide. Prosecuted in adult court as mandated by Washington law, Sebastian pleaded guilty and sought a mitigated sentence because he was a child when he committed the offenses. Notwithstanding that one's status as a child is per se mitigating under the state and federal constitutional prohibitions against cruel punishment, the prosecution argued Sebastian should be sentenced just like an adult because he had not proved his status as a child warranted mitigation. Accepting the prosecution's framework —and despite significant evidence supporting mitigation—the trial court found Sebastian had not met his burden and imposed the prosecution's requested sentence of 37 years.

Because placing the burden on Sebastian to prove he was less culpable than an adult violated the constitutional prohibitions against cruel punishment, he is entitled to a new sentencing hearing. Consistent with the prohibition against cruel punishment under article I, section 14 of the Washington Constitution, this Court should hold that children sentenced in adult court are entitled to a presumption of mitigation. And the prosecution must prove otherwise beyond a reasonable doubt.

B. ISSUES PRESENTED FOR REVIEW

1. Children are categorically less culpable and have a greater capacity for change than adults. The state and federal constitutional prohibitions against cruel punishment recognize this difference. When sentencing a child in adult court, the court has complete discretion to disregard otherwise mandatory minimum sentencing ranges and enhancements through an exceptional sentence. Consistent with the constitutional recognition that children are different, must the sentencing court presume that the child's youth is a mitigating factor supporting an exceptional sentence? To overcome this presumption, must the prosecution prove beyond a reasonable doubt that the child is the rare offender whose culpability is more like an adult's?

2. A guilty plea is involuntary if the defendant was affirmatively misled as to a sentencing consequence. Sebastian was affirmatively told in his plea agreement and at his plea hearing that if he pleaded guilty, the sentencing court would not be required to make Sebastian register as a felony firearm offender. The law, however, required the court to impose a registration requirement and the court in fact imposed the registration requirement. Does the affirmative misinformation render Sebastian's guilty plea involuntary?

C. STATEMENT OF THE CASE

In July 2016, Sebastian's father called the police to report that his 17-year-old son was missing.[1] Ex. 40, p. 3. Sebastian left a note stating he was running away to protect his family. Ex. 40, p. 3; RP 213. Sebastian's father believed his son was with Dylan Mullins, a 19-year-old man. Ex. 40, p. 3; RP 180; CP 12.

Sebastian's father had recently forbidden Sebastian from talking to Mr. Mullins, believing him to be bad influence. RP 319. The two had been arrested only weeks earlier for breaking into a house and stealing items. Exs. 43, 61. Mr. Mullins had wanted to get back at the homeowners because they had called the police on him before. RP 212. Mr. Mullins was kicked out of his parents' house and was briefly involuntarily committed after making threats while armed with a knife. Exs. 35, 36.

Mr. Mullins, however, was Sebastian's only "friend." RP 313-14; Ex. 51, p. 7. Using his influence, Mr. Mullins convinced Sebastian to help him kill Michael Clayton, who was a little older than Mr. Mullins. RP 60, 62. Once friends, Mr. Mullins and Mr. Clayton had a falling out after Mr. Clayton beat up Mr. Mullins. RP 16-17, 49; Ex. 14, p. 33-34. Showing Sebastian his injuries, he told Sebastian that Mr. Clayton had said

[1] The facts are set out in detail in Sebastian's opening brief. Br. of App. at 3-15.

Sebastian was next. Ex. 20, p. 32. Mr. Mullins told Sebastian that if he did not help, a criminal syndicate his uncle belonged to, called the "Northwest Militia," would come after Sebastian and his family. RP 427-430; Ex. 51, p. 7. He also told Sebastian that if he helped, the Northwest Militia would help reestablish them with new identities. Ex. 51, p. 7.

The same morning Sebastian's father reported his son missing, Sebastian and Mr. Mullins snuck into Mr. Clayton's home. Ex. 49; CP 12. They broke into a safe holding firearms. RP 70; Ex. 21, p. 45. When Mr. Clayton returned, they shot him. Ex. 20, p. 40; Ex. 21, p. 35. At Mr. Mullin's suggestion, they burned the house to try to destroy the evidence. RP 114; Ex. 21, p. 36; Ex. 20, p. 46, 73. After stealing a government owned truck, they were arrested on their way to Ocean Shores and linked to the homicide. RP 128, 142-43; Exs. 18-19; Ex. 33, p. 8; Ex. 34, p. 3.

The prosecution charged Sebastian with first degree murder, first degree burglary, and first degree arson. CP 1-2, 14-15. The murder and burglary charges each alleged a firearm enhancement. CP 1-2; 14-15. Per Washington statute, Sebastian was prosecuted in adult court even though he was 17 years old. CP 1-3, 12.

About a year after the charges were filed, Sebastian pleaded guilty. CP 16-33; RP 18-20. The prosecution asked the court to impose a total sentence of 37 years, which included ten years for the two firearm

enhancements. CP 123. Sebastian asked the court to depart from the adult sentencing rules and sentence him to twelve years and two months. CP 34. He argued departure and mitigation was appropriate because he was a child at the time of the offenses, his youthfulness was central to his participation, he was influenced by an older peer, he was a first time offender, his risk of reoffending was low, and he was capable of living a productive and crime-free life upon release. CP 25-36.

The court held a fact finding hearing. Dr. Megan Carter, a board certified forensic psychologist, provided an expert opinion. RP 342-44, 366. She believed that Sebastian's youthfulness was a contributing factor to the offense and that Sebastian had been particularly vulnerable to negative peer influences. RP 408, 431-32. Valerie Mitchell, a mitigation specialist with a master's in social work, similarly concluded that Sebastian would not "have engaged in any type of violent behavior without coercion from a more sophisticated partner whom Sebastian admired so much." Ex 51, p. 7. Dr. Carter concluded it was unlikely that Sebastian would commit a violent offense in the future. RP 366, 405, 436.

Accepting the prosecution's claim that Sebastian bore the burden of proving his youthfulness justified mitigation, the court rejected an exceptional sentence and sentenced Sebastian as an adult to 37 years'

confinement. RP 675-688, 711.[2]

D. ARGUMENT

1. The state and federal constitutions require a presumption of a mitigated sentence for children sentenced in adult court.

a. The constitutional prohibition against cruel punishment requires that children be treated differently than adults when sentenced.

The United States Constitution forbids cruel and unusual punishment. U.S. Const. amends. VIII, XIV. The Washington Constitution prohibits "cruel" punishment. Const. art. I, § 14. When state and federal constitutional claims are raised, this Court has a "duty to resolve constitutional questions under our own constitution." State v. Gregory, 192 Wn.2d 1, 16-17, 427 P.3d 621 (2018). "[I]n the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment." State v. Bassett, 192 Wn.2d 67, 82, 428 P.3d 343 (2018).

In interpreting the prohibition against cruel punishment, both this Court and the United States Supreme Court "have concluded that children are less criminally culpable than adults." Id. at 87. "As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of

[2] Mr. Mullins, who was the adult and instigator of the homicide, received a lesser sentence of 35 years in prison. Robert Whale, *Judge sentences man to 35 years in prison for 2016 Auburn murder, arson*, Auburn Reporter, February 14, 2019, available at http://www.auburn-reporter.com/news/judge-sentences-man-to-35-years-in-prison-for-2016-auburn-murder-arson/.

responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." Id. (internal quotation marks omitted).[3] These "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

For these reasons, before a court may sentence a child to a life sentence, the Eighth Amendment requires sentencing courts to consider certain differences between children and adults (the Miller factors) before imposing such a harsh penalty. Id. at 479-80; State v. Ramos, 187 Wn.2d 420, 434, 387 P.3d 650 (2017). Additionally, article I, section 14 categorically forbids sentencing a person convicted as a child to life imprisonment. Bassett, 192 Wn.2d at 73, 82.

Moreover, in Washington, when sentencing children in adult court, the sentencing court must consider the mitigating differences between children and adults in *all* cases. State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). "Trial courts must consider mitigating qualities of youth at sentencing" and have complete discretion to impose a sentence

[3] These propositions are supported by both science and social science on brain development. Miller v. Alabama, 567 U.S. 460, 471-72 & n.5, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); State v. O'Dell, 183 Wn.2d 680, 692-96, 358 P.3d 359 (2015).

below what would otherwise be a mandatory range or sentencing enhancement were the offender an adult. Id. at 21. A sentencing 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." 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]." And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.

Id. at 23 (internal citations to Miller omitted).

b. Article I, section 14 of the Washington Constitution requires a presumption that a child sentenced in adult court receive a mitigated sentence unless the prosecution rebuts the presumption with proof beyond a reasonable doubt that the child's youth is not mitigating.

In this case, the prosecution argued the trial court must sentence Sebastian as an adult unless Sebastian proved his age justified mitigation. CP 127-28; RP 636-40, 674. Although the Miller factors partly look forward in recognizing that children have a greater capacity for change, the prosecutor argued the court could not depart from the adult sentencing rules unless the court found that the "particular characteristics [of youth] affected this crime." RP 647; cf. Houston-Sconiers, 188 Wn.2d at 23 (court must consider "any factors suggesting that the child might be successfully rehabilitated"). The prosecutor argued further the "court

cannot presume that all of the precepts of youthfulness that we've talked about over the several days that we've been here necessarily apply to Sebastian Gregg." RP 639. The prosecutor argued "because this is the defense's burden, which is unusual, and unusual for me, the Court doesn't presume." RP 639. She emphasized, "there's simply no evidence left beyond presumption and assumption which, because they have the burden, doesn't work." RP 658-59. In other words, because Sebastian had purportedly not proved his status as a child at the time of the offenses warranted mitigation, the court lacked discretion to impose an exceptional sentence and was required to sentence Sebastian as an adult.

The court accepted the prosecution's framework and rejected Sebastian's request for a mitigated sentence, ruling: "This court does not find there are substantial and compelling reasons to justify a sentence below the standard range." RP 688. Following the prosecution's request, the court imposed a sentence of 37 years, which included ten years for the "mandatory" firearm enhancements. RP 711.

The framework used by the trial court turned the constitutional rule that children are different on its head. Unless the State proves otherwise, age is necessarily mitigating for children because they are categorically different and less culpable than adults. Miller, 567 U.S. at 471; Bassett, 192 Wn.2d at 87. For children sentenced in adult court, mitigation due to

age is a constitutional presumption, not the exception. Requiring a child to prove that he or she is different than an adult cannot be squared with the premise that children are categorically less culpable than adults. Commonwealth v. Batts, 640 Pa. 401, 452, 163 A.3d 410 (2017).

Placing the burden of proof on children to prove that they deserve mitigation due to the attributes of youth creates an unacceptable risk that children will receive undeserved adult sentences. Applying article I, section 14, this Court should hold that a mitigated sentence is appropriate for a juvenile offender sentenced in adult court unless the prosecution proves otherwise beyond a reasonable doubt.

This is consistent with this Court's recent decision in Bassett. This Court held "that sentencing juvenile offenders to life without parole or early release constitutes cruel punishment and therefore is unconstitutional under article I, section 14 of the Washington Constitution." Bassett, 192 Wn.2d at 73. In reaching this conclusion, the Court emphasized the difficulty of achieving accurate determinations about whether a child should or should not receive a life sentence. Id. at 89-90. Sentencing courts may make "imprecise and subjective judgments" in applying the Miller factors. Bassett, 192 Wn.2d at 89. "[T]his type of discretion produces the unacceptable risk that children undeserving of a life without parole sentence will receive one." Id. at 89-90; accord State v. Sweet, 879

N.W.2d 811, 837-39 (Iowa 2016); Diatchenko v. Dist. Attorney for Suffolk Dist., 466 Mass. 655, 669-71, 1 N.E.3d 270 (2013).

Likewise, placing the burden of proof on children to prove they are deserving of mitigation due to the attributes of youth creates an unacceptable risk that children undeserving of adult sentences will receive them. Judges may misapply the mandatory factors on youth, which are subjective, indeterminate, and nonexclusive. In other circumstances, the child may not be able marshal evidence[4] that the trial court finds compelling enough in light of the gravity of the offense[5] to persuade the court to depart from the adult sentencing rules, even when departure is warranted. This may happen due to unconscious judicial bias.[6] In these

[4] Children are less able than adults to provide meaningful assistance to counsel, which may lead to errors in assessing culpability. Graham v. Florida, 560 U.S. 48, 78, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Children may also lack the resources to gather the requisite evidence, such as expert testimony, especially in counties where resources for indigent defendants are scarce. See State v. A.N.J., 168 Wn.2d 91, 109-13, 225 P.3d 956 (2010); Davidson v. State, No. 96766-1 (granting review to consider whether the State has an actionable duty to cure claimed systemic and significant deficiencies in a county's provision of indigent criminal defense services to children).

[5] See Roper v. Simmons, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.")

[6] See People v. Best, 979 N.E.2d 1187, 1189 (N.Y. 2012) (recognizing reality that "judges are human" and that "the sight of a defendant in restraints may unconsciously influence even a judicial factfinder"). Moreover, "[t]here is considerable evidence that bias results in harsher dispositions for children of color . . . . State v. B.O.J., __ Wn.2d __, 449 P.3d 1006, 1016 (2019) (Gonzalez, J., concurring); see Michael J. Leiber, Jennifer H. Peck, Race in Juvenile Justice and Sentencing Policy: An Overview of Research and Policy Recommendations, 31 Law & Ineq. 331 (2013).

circumstances where the sentencing court errs in sentencing the child as an adult, the result is unconstitutional cruel punishment.

To ensure constitutional sentences, the State must bear the burden of proving that the defendant's status as a child does not warrant mitigation. To further guard against the risk of error, the appropriate standard of proof is the beyond a reasonable doubt standard. Other courts have reached similar conclusions, albeit usually in the context of life sentences. See Commonwealth v. Perez, 480 Mass. 562, 571, 106 N.E.3d 620 (2018); Davis v. State, 415 P.3d 666, 681-82 (Wyo. 2018); Batts, 163 A.3d at 451-55 (2017); State v. Riley, 315 Conn. 637, 654-55, 110 A.3d 1205 (2015); State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013).

This is in accord with related areas of the law. For example, children between eight and 12 years of age are presumed to be incapable of committing crimes unless the State proves they have sufficient capacity to understand the alleged conduct and to know that it was wrong. RCW 9A.04.050; State v. Ramer, 151 Wn.2d 106, 112-13, 86 P.3d 132 (2004). Similarly, in cases where the charged offense does not require the child to be automatically prosecuted in adult court, the prosecution bears the burden of proving that the child should be prosecuted in adult court. State v. Massey, 60 Wn. App. 131, 137, 803 P.2d 340 (1990). Children automatically prosecuted in adult court cannot be presumed to be as

culpable as adults, and the prosecution should have to prove that they should be sentenced like adults. See Miller, 567 U.S. at 481 ("our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults") (internal quotation omitted).

The Sentencing Reform Act, which has generally been interpreted to place the burden on the party seeking an exceptional sentence to prove it is justified, is not an obstacle to this holding. As this Court recently reaffirmed, to ensure constitutional sentences, trial courts have absolute "discretion to consider downward sentences for juvenile offenders regardless of any sentencing provision to the contrary." State v. Gilbert, 193 Wn.2d 169, 175, 438 P.3d 133 (2019). Indeed, this is the reason why it is constitutionally permissible to automatically prosecute children charged with particular offenses in adult Court. State v. Watkins, 191 Wn.2d 530, 542-43, 423 P.3d 830 (2018) (reasoning that automatic decline is not unconstitutional "because adult courts can take into account the 'mitigating qualities of youth at sentencing"') (quoting Houston-Sconiers, 188 Wn.2d at 21). But this constitutionally mandated discretion is meaningless if the court errs in finding that this discretion may not be exercised or is unwarranted because the child has not met their "burden."

And when sentencing a youth as an adult, the court is effectively concluding they are "the rare juvenile offender" whose culpability is akin

to that of an adult. Miller, 567 U.S. at 479 (internal quotation omitted). In other words, the court is really imposing *an aggravated sentence*. So it is appropriate to place the burden on the State and require proof beyond a reasonable doubt. See RCW 9.94A.537(3); Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

This Court's decision in Ramos, a case preceding Houston-Sconiers, is also no barrier. There, this Court adhered to the general rule that the proponent of an exceptional sentence bears the burden to prove it is warranted in the face of an argument that *the federal constitution* demanded otherwise for juvenile offenders. Ramos, 187 Wn.2d at 445-46. That case was decided under the Eighth Amendment, not article I, section 14. Id. at 444-45. Unlike interpretation of article I, section 14, which "focuses on practices, trends, and experiences with our state," interpretation of the Eighth Amendment is constrained by principles of federalism.[7] Gregory, 192 Wn.2d at 42-43 (Johnson, J., concurring). Article I, section 14 is more protective in the context of juvenile sentencing and is to be interpreted independently. Bassett, 192 Wn.2d at 82; Gregory, 192 Wn.2d at 16. Its scope is dynamic and must be interpreted in light of new evidence. Gregory, 192 Wn.2d at 18.

[7] See Jeffrey S. Sutton, What Does-and Does Not-Ail State Constitutional Law, 59 U. Kan. L. Rev. 687, 708 (2011) (due to federalism, United State Supreme Court may underenforce constitutional guarantees).

Further, Ramos acknowledged "the logical appeal" and "potential benefits" of a rule that placed the burden on the prosecution rather than the child. Id. at 437, 445. But the Court ruled that "at this time," it would not require this rule. Id. at 446. Consistent with this Court's recent decision in Bassett, recognizing greater protection under the state constitution for children sentenced in adult court, now is the time. See also Gregory, 192 Wn.2d at 18-26 (recognizing that death penalty was unconstitutional in light of new evidence showing it was being imposed in an arbitrary and racially biased manner).

To effectuate the constitutional demand that children receive sentences proportionate to their culpability, the state constitution requires a presumption of a mitigated sentence for children sentenced in adult court, unless the prosecution proves otherwise beyond a reasonable doubt. The Court should so hold under article I, section 14 and not reach the Eighth Amendment question. Gregory, 192 Wn.2d at 16-17.

c. The sentencing court presumed that Sebastian should be sentenced as an adult, rather than as a child. This constitutional error requires a new sentencing hearing.

As outlined earlier, the prosecution argued that Sebastian must be sentenced as an adult because he had not met his burden to prove his status as a child at the time of the offenses warranted mitigation. CP 127-28; RP 636-40, 658-59. The court did not apply a presumption in Sebastian's

favor and did not require the prosecution prove that Sebastian was just as culpable as an adult and should be sentenced like one. RP 675-88.

Because this was constitutional error, prejudice is presumed and the State bears the burden of proving the error harmless beyond a reasonable doubt. State v. A.M., 194 Wn.2d 33, 41-42, 448 P.3d 35 (2019). The prosecution cannot meet its burden. Consistent with the constitutional presumption, the evidence showed that Sebastian's youth mitigated his culpability. Br. of App. at 32-33; Reply Br. at 10-11. The prosecution cannot prove the result would have been the same absent the error. A new sentencing hearing is required.[8]

2. Sebastian was affirmatively misinformed that if he pleaded guilty, he would not be required to register as a felony firearm offender. His plea is involuntary and he is entitled to withdraw his plea should he choose.

a. A guilty plea is involuntary if the defendant was affirmatively misled as to a sentencing consequence.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); U.S. Const. amend. XIV; Const. art. I, § 3. A plea must be "made voluntarily, competently and with an

[8] If the Court agrees Sebastian is entitled to a new sentencing hearing, the Court need not reach the next issue, which is raised in the alternative.

understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). Before a guilty plea is accepted, the defendant must be informed of all the "direct" consequences. State v. A.N.J., 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010). "[C]ollateral consequences can be undisclosed," but "a defendant cannot be positively misinformed about the collateral consequences." Id. at 114 (emphasis added). Failure to inform a defendant about a direct consequence or affirmative misinformation concerning a collateral consequence means the plea is "involuntary." Id. at 116; State v. Turley, 149 Wn.2d 395, 398-99, 402, 69 P.3d 338 (2003). A defendant may raise the issue concerning the voluntariness of a plea for the first time on appeal as manifest constitutional error. RAP 2.5(a)(3); State v. Mendoza, 157 Wn.2d 582, 589, 141 P.3d 49 (2006).

b. Sebastian was affirmatively misinformed that he would not be required to register as a felony firearm offender as a consequence of his plea. His plea is involuntary.

When a defendant is convicted of a "felony firearm offense," the sentencing court must require the defendant to register as a "felony firearm offender" if that offense is also a serious violent offense. RCW 9.41.330(3)(c). This imposes several requirements upon the "felony firearm offender." RCW 9.41.333. Failure to comply with any of the registration requirements is a criminal offense. RCW 9.41.335.

Here, Sebastian pleaded guilty to first degree murder and first

degree burglary, both with firearm enhancements. First degree murder is a serious violent offense. RCW 9.94A.030(46)(a)(i). This was also a "felony firearm offense" because Sebastian was armed with a firearm in the commission of this offense. CP 21, 28, 32. Thus, as a consequence of the plea, the sentencing court was required to impose a firearm offender registration requirement upon Sebastian. RCW 9.41.330(3)(c).

Sebastian, however, was affirmatively told in his plea agreement that he would not be required to register. The standard provision in the form was crossed off, which meant it did not apply. CP 22. At the guilty plea hearing, the prosecutor asked Sebastian if he understood the crossed off paragraphs meant they did not apply, to which Sebastian answered, "yes." 8/18/17RP 16. But at sentencing, the court ordered he register as a felony firearm offender as part of his sentence. CP 137.

The Court of Appeals agreed that Sebastian was affirmatively misinformed that the sentencing court would impose a firearm offender registration requirement. Still, the court held the plea was not involuntary because it deemed the registration requirement a "collateral," rather than a "direct," consequence. This is incorrect because the requirement for registration flowed directly from the guilty plea. It was "definite, immediate and automatic." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). Further, like community custody, which is also a direct

consequence, registration "furthers the punitive purposes of deterrence and protection." Id. at 286.

Regardless of the label, the misinformation rendered the plea involuntary because it was *affirmative* misinformation about a sentencing consequence. A.N.J., 168 Wn.2d at 114. A defendant does not need to prove that a collateral consequence was material to the decision to plead guilty if they were *affirmatively* misled about the collateral consequence. Id. at 114. In A.N.J., the Court held a juvenile defendant was entitled to withdraw his guilty plea to first degree child molestation. Id. at 114, 116-17. The record showed that the defendant had been *affirmatively* told that he could remove the conviction from his record. Id. at 116-17. This was wrong. Id. The Court reasoned that while the mere failure to advise the defendant that the conviction would remain on his record would not entitle him to withdrawal, the affirmative misinformation did. Id. at 116.

In holding otherwise, the Court of Appeals relied on In re Personal Restraint of Reise, 146 Wn. App. 772, 192 P.3d 949 (2008), an opinion predating A.N.J. According to Reise, affirmative misinformation about a collateral consequence does not make a plea involuntary unless "the defendant materially relied on that misinformation when deciding to plead guilty." Reise, 146 Wn. App. at 787.

This rule is contrary to A.N.J., which did not apply a material

reliance test. A.N.J., 168 Wn.2d at 114-18. In fact, the material reliance test relied on by Reise has been overruled. In re Pers. Restraint of Bradley, 165 Wn.2d 934, 940-41, 205 P.3d 123 (2009); Isadore, 151 Wn.2d at 301-02. Under this Court's precedents, a plea is involuntary if the defendant was *affirmatively* misinformed about a sentencing consequence.

c. An involuntary plea is presumed prejudicial on direct appeal, entitling Sebastian to withdraw his plea, should he choose.

Because Sebastian was positively misinformed about a sentencing consequence, his plea is involuntary. As his case is on direct appeal, prejudice is presumed. In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 596, 316 P.3d 1007 (2014). Absent evidence to rebut this presumption and prove it harmless beyond a reasonable doubt, Sebastian is entitled to withdraw his plea. See Ross, 129 Wn.2d at 288; A.N.J., 168 Wn.2d at 117.

E. CONCLUSION

The constitutional error requires a new sentencing hearing. Alternatively, Sebastian should be authorized to withdraw his plea.

Respectfully submitted this 20th day of December, 2019.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SEBASTIAN GREGG, Appellant.	)))))))))	NO. 97517-5

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