NO. 97517-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN MICHAEL GREGG,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. INTRODUCTION

Sebastian Gregg argues that when sentencing a juvenile in adult court, the State must bear the burden of proving that a standard range sentence is warranted. However, the Sentencing Reform Act (SRA) explicitly places the burden of establishing grounds for a mitigated sentence on the defendant. Gregg argues that this Court must ignore this legislative determination, and instead place the burden on the State to prove beyond a reasonable doubt that a standard range sentence should be imposed. Gregg is mistaken. The Eighth Amendment requires only that sentencing courts have the discretion to consider youth, and the SRA provides that discretion. Washington Constitution article I, section 14 requires only that a life sentence not be imposed. Gregg cannot show that allocating the burden of proving the propriety of a mitigated exceptional sentence to the defendant is unconstitutional.

Gregg also argues that his plea must be withdrawn because he did not understand that he would be required to register as a firearms offender. This argument should be rejected. Gregg has not shown that withdrawal of his plea is required to avoid a manifest injustice because he has not shown that the gun registry requirement (a collateral consequence of the plea) was material to his decision to plead guilty.

B. ISSUES PRESENTED

1. Whether the Sentencing Reform Act comports with the Eighth Amendment and article I, section 14 where it requires offenders to show that a mitigated sentence below the standard range is appropriate because youth diminished their culpability.

2. Whether the defendant's plea was voluntary where he was correctly advised of all punitive consequences of his plea, and the misinformation he received did not affect the range of punishment or influence his decision to plead guilty.

C. STATEMENT OF THE CASE

1. FACTS RELATED TO PREMEDITATED MURDER.

In the days leading up to July 6, 2016, Sebastian Gregg and co-defendant Dylan Mullins plotted to kill their friend, Michael Clayton, who lived with his father (Mr. Clayton), because Michael Clayton had assaulted Mullins. CP 3; Ex. 20 at 33. Gregg and Mullins knew the Claytons' schedules, knew there were guns in the house, and knew their way around the house. On July 6th, Gregg and Mullins climbed into a bedroom window while Mr. Clayton was still in the home. They quietly laid in wait until Mr. Clayton left for work, then they pried open a gun safe, removed several firearms, and laid in wait for several more hours until Michael Clayton returned. CP 4, 125; Ex. 20 at 33, 44. As they

waited, Mullins ate, they discussed burning down the house after the murder, and kept a watch for Michael's arrival. CP 125; Ex. 20 at 47.

When Michael pulled into the driveway, Gregg and Mullins scrambled to hide before he could see them. They took up tactical positions in the home to ensure a clear shot. As Michael entered, Gregg fired the first shot with a rifle. He claimed to have missed on purpose. Mullins began shooting with a .357 magnum pistol. Gregg chambered another round and then fired one or two more shots, aiming at Michael's "center mass," the middle of his chest, "because it's the easiest target to hit and it was just the first thought I had." Ex. 20 at 41. He knew that shot would be lethal. Ex. 20 at 55. When pressed by detectives to say what he did, Gregg told the detectives, "We put him down." Ex. 20 at 34. One of the detectives clarified, "Like a deer?" Gregg agreed. Id.

Michael died face-down just inside the door of his own home. CP 4; Ex 20 at 34; RP 157-58. Gregg and Mullins then set the home on fire to cover up the murder. CP 4; Ex. 20 at 35. The fire quickly engulfed the home, which burned for an entire day before firefighters could enter and find Clayton's body. CP 4; RP 37, 76-77, 91, 115-16.

Gregg and Mullins gathered the firearms from the Clayton home and stashed them in the woods adjacent to the Clayton property, and then went to the library to create an alibi. CP 4; Ex. 20 at 64-65. After leaving

the library, they stole a Kent Parks Department truck, retrieved the stolen firearms from the woods, and fled to Grays Harbor County. CP 4; Ex. 20 at 65; RP 127-28. There, they were pulled over for speeding and arrested for possessing a stolen truck. CP 4; Ex. 20 at 74; RP 130.

On July 8, both Mullins and Gregg were questioned and eventually confessed to the murder. CP 4; Ex. 20. They also confessed to jointly burglarizing and setting fire to another home on June 23, 2016. CP 5.

Gregg did not immediately confess to murder, however. Auburn detectives initially asked Gregg only about the stolen truck. Gregg told the officers in great detail about stealing the truck to get away from his overly strict father, how they had picked up some guns that Mullins (he said) had previously stashed, how they made their way toward Ocean Shores, and how they were arrested. Ex. 20 at 2-25. Throughout this portion of the interview, Gregg lied with aplomb to weave a story that omitted mention of the Michael's murder. He was "somewhat boastful" (RP 683), his vocabulary was above par for many young men of his age, and he displayed an understanding of juvenile court matters, for example, that he might not be charged for an offense when charges were not filed in 72 hours. Ex. 20 at 4.

However, when asked when he had last seen Michael – a name that had not yet come up in the interview – Gregg's tone of voice and manner

of speaking changed, but he still showed no emotion or remorse. RP 682 (trial court referring to the audio recording).

Gregg ultimately pled guilty as charged to murder in the first degree. CP 16, 28, 32-33. In his plea, Gregg admitted that he and Mullins crawled through Michael's window with the intent to kill Michael, that they waited for Michael's father to leave, and broke into the gun safe and removed the firearms. CP 31. Gregg admitted that he fired a rifle with the intent to kill Michael and did, indeed, hit him. CP 31. He admitted that after they shot Michael they knowingly and maliciously caused a fire by spreading gasoline on the floor of Michael's residence intending, to set fire to the home. CP 31. On the day he was murdered, Michael Clayton was 19 years old. Mullins was 18 years old and Gregg was two months shy of 18 years old. RP 175.

2. SENTENCING AND COURT'S FINDINGS.

The standard range sentence for first degree murder, including the two consecutive firearm enhancements, was 401 to 494 months. CP 136; RCW 9.94A.510, .515, .525. At sentencing, Gregg requested an exceptional sentence below the standard range of 146 months, arguing that his youth and the peer influence of Mullins contributed to the offense. CP 35. The State recommended a sentence of 444 months. CP 123. The State advised that it had taken Gregg's youth into consideration in filing

the charges, had elected not to charge Gregg with stealing the firearms or the truck, and had also elected not to allege aggravating circumstances that would have applied. CP 132. The State argued that Gregg's youth did not substantially diminish his culpability, noting that the murder was not impulsive or reckless, but carefully planned and executed. CP 133.

The sentencing hearing occurred over six days. RP 1-714. The State called five witnesses regarding the facts of the crime, RP 29-227 and the defense called seven witnesses regarding Gregg's character and youthfulness, including a forensic psychologist who had interviewed Gregg and conducted a risk assessment. RP 227-594. The court listened to the recorded confessions of both Gregg and Mullins. RP 676; Ex. 20.

The sentencing court made detailed factual findings in a 13-page oral ruling. Those findings contrast starkly with the image Gregg paints of himself in his appellate briefing. The court first noted that it had carefully considered all the testimony and listened to the recordings of both Gregg and Mullins's confessions. RP 675-76. It noted that Gregg was two months short of his 18th birthday when he committed these crimes. RP 675. The court made clear that it was evaluating Gregg's youth as a possible mitigating factor and would consider impetuousness, impulsivity, peer pressure, truthfulness, maturity and remorse. RP 677.

The court found Gregg was "exceptionally bright." RP 677. It found that Gregg had been described as suffering from Attention Deficit Disorder (ADHD), and that although there was no specific diagnosis, the court would still consider it. However, the court noted the absence of a formal diagnosis prevented it from finding "what effect this may have had on his youthfulness." RP 678.

The court found, based on testimony from those who knew Gregg for a long time, that he was "incapable of telling the truth," that his "habit of lying was extraordinary," that he knew right from wrong, that he would lie to shift blame onto others, that he had clearly lied in his statements to police, and that he was a compulsive liar. RP 679. The court specifically found that Gregg's story – that he shot Michael because he feared Michael was part of a "militia" that would attack him and his family – was not credible. RP 680-81. Gregg had been given multiple opportunities during his confession to provide a full story, and he never mentioned a "militia" until two years later when talking to a psychologist hired to mitigate his sentence. RP 681.

The court also found the risk assessment to be "not very helpful." RP 682. Witness Carter had never before done a risk assessment, she acknowledged it was subjective, and she admitted it could not capture all relevant factors. RP 682. Carter also gave conflicting testimony

regarding the key "militia" matter. On the one hand, Carter said she did not need to determine whether Gregg was lying about the militia, but on the other hand, she said his risk assessment would be higher if he was lying. RP 682.

Based on listening to the audio recorded interview, the court found Gregg's demeanor troubling. "His responses were void of all emotion. There was no intonation expressing stress, anxiety, or fear." RP 682. When talking about the murder or the prior burglary victims, Gregg was clinical and "matter of fact." RP 683.

The court found "very little evidence of Mr. Gregg being impulsive." RP 683. The court specifically found that Gregg knew right from wrong, but he repeatedly chose to do wrong and lied about it. RP 683-84. The court found Gregg's father and step-mother (who testified about his long history of troubling behavior) to be "very credible." RP 684. The court concluded that Gregg "chose to be defiant. It was not what I am calling youthful impulsivity, nor was it the result of ADHD. ... Mr. Gregg was very capable of thinking through consequences." RP 685.

The court found "that both [Gregg and Mullins] are equally responsible. Mr. Gregg was not under Mr. Mullins' control. They were very much equal actors in everything they did." RP 687. Gregg was

"actively engaged in this homicide." RP 687. The court found that Gregg's youth did not merit leniency:

> And having looked at all of the evidence and listening carefully, taking more notes than I probably should have taken, but tons of notes, I find that this is not about youthful disobedience as it relates to Mr. Gregg. This is not youthful impulsivity. Mr. Gregg knew the consequences of his actions. This court does not find there are substantial and compelling reasons to justify a sentence below the standard range.

RP 688. The court imposed a standard-range sentence of 444 months (37 years), which consisted of 324 months for murder in the first degree plus the two 60-month firearm enhancements. RP 711; CP 138. The other sentences were run concurrently with the murder sentence. CP 138.

D. ARGUMENT

1. THE SENTENCING REFORM ACT PLACES THE BURDEN OF PROVING MITIGATING CIRCUMSTANCES ON THE OFFENDER AND THAT BURDEN IS CONSTITUTIONAL.

RCW 9.94A.535(1) provides that a "court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." The mitigating circumstance alleged here is that "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e). Gregg's argument that there must be a presumption of a

mitigated sentence is in direct conflict with the procedure set forth in RCW 9.94A.535(1). Such a presumption could be judicially imposed only if constitutionally required. Statutes are presumed constitutional, and Gregg has the burden of proving that RCW 9.94A.535 is unconstitutional beyond a reasonable doubt. State v. Hunley, 175 Wn.2d 901, 908, 287 P.3d 584 (2012).

This court has repeatedly held that youth is not per se mitigating. In re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 335, 422 P.3d 444 (2018). Rather, this Court has held that youth can be relevant to mitigation, but only if it is shown that the offender's capacity to appreciate the wrongfulness of his conduct was impaired by youthfulness. State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015); State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997).

Consistent with these decisions, this Court has expressly declined to judicially impose a constitutionally-required presumption of a mitigated sentence in cases involving juveniles. In State v. Ramos, 187 Wn.2d 420, 387 P.3d 650 (2017), cert. denied, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017), the juvenile defendant was convicted of aggravated murder. This court rejected Ramos's claim that the State must carry the burden of proving that a standard-range sentence is appropriate. Id. at 445. The court explained:

> Pursuant to the SRA, the offender carries the burden of proving that an exceptional sentence below the standard range is justified. Ramos argues that as a matter of constitutional law, the burden must be shifted to the State to prove that a standard range sentence is appropriate. However, he has not shown that such burden-shifting is required by the Eighth Amendment.

Id. Similarly, in State v. Houston-Sconiers, 188 Wn.2d 1, 23-24, 391 P.3d 409 (2017), this Court concluded that the SRA comports with the Eighth Amendment because it gives sentencing courts the discretion to consider youthful attributes affecting culpability as a mitigating factor justifying an exceptionally low sentence. The decision did not, however, hold that courts must *presume* that a youthful offender is entitled to a mitigated sentence.

a. The Eighth Amendment Requires Sentencing Courts To Have The Discretion To Consider Youth Before Imposing A Life Sentence On A Juvenile Offender, But Does Not Require The State To Disprove Mitigating Circumstances.

The Eighth Amendment requires that courts have discretion to account for youth at sentencing before imposing a life sentence on a juvenile. The Eighth Amendment also bars the imposition of life sentences on most juvenile offenders. But the Eighth Amendment does not proscribe specific procedures at sentencing.

Beginning in 2005, the United States Supreme Court issued a series of decisions regarding the imposition of death and life sentences on

juvenile offenders. Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), barred capital punishment for juvenile offenders. Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), barred sentences of life imprisonment without parole for juvenile offenders who had not committed homicides. In Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the Court barred the imposition of mandatory life sentences for juvenile homicide offenders. The Court concluded that a sentencer must consider the attributes of youth before sentencing a juvenile to life imprisonment for homicide. Id. at 474. The Court refused to absolutely prohibit a life sentence on a juvenile convicted of homicide, but opined that such sentences should be uncommon. Id. at 479. In Montgomery v. Alabama, __ U.S. __, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), the Court held that Miller applied retroactively. In sum, the Eighth Amendment prohibits *most* juvenile offenders from being sentenced to life imprisonment without parole; they must be released or given an opportunity for release before the end of their lifetimes. State v. Scott, 190 Wn.2d 586, 586-97, 416 P.3d 1182 (2018).

However, the Supreme Court has expressly declined to impose specific procedural requirements to implement the new rule. In Montgomery, the Court noted that Miller "did not impose a formal fact-finding requirement." Montgomery, 136 S. Ct. at 735. In keeping with

federalism, the Court has left it to the States to develop appropriate procedures. Id. The Court has never indicated that the burden of proving mitigation may not be placed on the defendant.[1] Even in the death penalty context, it is constitutional to place the burden of proving mitigating circumstances on the defendant. Kansas v. Marsh, 548 U.S. 163, 171, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006).

The out-of-state cases that Gregg relies on are inapposite: they all involve the imposition of a life without parole sentence. State v. Riley, 315 Conn. 637, 110 A.3d 1205 (2015) (holding that Miller suggests a presumption against imposing life without parole on a juvenile offender); State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013) (noting no national consensus but imposing the burden on the State to prove that life without parole is warranted); Commonwealth v. Batts, 640 Pa. 401, 163 A.3d 410 (2017) (creating a presumption against sentencing a juvenile to life in prison without parole); Davis v. State, 415 P.3d 666, 681 (Wyo. 2018) (noting no national consensus but imposing a presumption against life without parole sentence).

The SRA procedure does not prevent sentencing courts from accounting for youth. It affords courts the discretion to account for

[1] Also, since the maximum sentence that could have been imposed in this case was 41 years, Gregg was not facing a possible functional life sentence. It is likely that Gregg's sentencing hearing did not implicate Miller at all.

youthful attributes that diminish culpability. Gregg has failed to show that RCW 9.94A.535(1) violates the Eighth Amendment. The burden of proving mitigation was properly allocated to the defense.

b. Art. I, Sec. 14 Does Not Require The State To Disprove Mitigating Circumstances.

Gregg contends that even if the Eighth Amendment does not require the State to prove that a standard range sentence is warranted, then article I, section 14 of the Washington Constitution should. Gregg does not, however, allege that the sentence imposed—37 years for premeditated murder and arson—is cruel and unusual punishment under the Washington Constitution. As such, the question of the burden of proof is better analyzed as a due process question, and there is no basis for independent state constitutional analysis.[2]

In State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018), the Washington Supreme Court concluded that article I, section 14 is broader than the Eighth Amendment in the context of juvenile sentencing. It held that a sentence of life in prison without parole is categorically barred as cruel and unusual punishment for all juvenile offenders. Id. It did so by extending the categorical bar of Graham, that juvenile non-homicide

[2] The State incorporates by reference its argument below that Gregg's argument is more properly a due process claim. See Brief of Respondent at 13-15.

offenders cannot be sentenced to life imprisonment without parole, to juvenile homicide offenders. Id. at 354.

However, *no* court has held that a 37-year sentence imposed on a juvenile for premeditated murder is cruel and unusual punishment.[3] Gregg has not argued that the sentence imposed in his case is categorically barred. Thus, the categorical bar analysis of Bassett is inapplicable to Gregg's procedural claim.

Gregg argues that shifting the burden is required because there is a danger that a sentencing court will misapply the Miller factors and deprive a juvenile of a mitigated sentence. Brief of Appellant, at 28-29. But the possibility that a court might err is not reason to apply a categorical ban on a certain sentence. Moreover, Gregg has not even argued that the lower court erred in considering his youth. In fact, Gregg barely mentions the sentencing court's careful and detailed rejection of his mitigation theory.

He also argues that age is necessarily mitigating, so there should be a presumption that the standard range is excessive. Reply Brief at 2. Neither the premise nor the conclusion of this argument is correct. The legislature and this Court have recognized that youthfulness *can* be mitigating. But it does not follow from logic, or experience, or science, or

[3] Moreover, Gregg has a meaningful opportunity for release after serving 20 years of his sentence pursuant to RCW 9.94A.730.

law that youthfulness *always* demands a lower sentence. The existing scheme allows a sentencing court to impose an exceptional mitigated sentence where warranted. It was not warranted here, as the judge's findings plainly establish. The constitution does not demand that all young offenders be entitled to a lower sentence than called for by the elected representatives of the state.

Nor do this Court's decisions in State v. Watkins, 191 Wn.2d 530, 423 P.3d 830 (2018) or State v. Gilbert, 193 Wn.2d 169, 438 P.3d 133 (2019) demand a shift in the burden of proof for an exceptional sentence.

Watkins held that that there is no substantive due process right to be charged as a juvenile. Watkins, 191 Wn.2d at 537-38. The court noted that adult courts have discretion to depart from standard sentence ranges to avoid excessive punishment of juveniles. Id. at 545 (citing Houston-Sconiers, 188 Wn.2d at 21). This Court's reasoning in Houston-Sconiers "affirms rather than undermines" this Court's overall rationale—judges retain the discretion to sentence a juvenile in adult court according to the juvenile's culpability. Id. at 545-46. State v. Gilbert simply repeated the point that judges must have discretion to depart from the range. Gilbert, at 175-76. Placing the burden of proof on the proponent of the exceptional sentence – the person best equipped to marshal the relevant evidence – does not diminish the judge's discretion to impose that sentence.

Finally, any error in assigning the burden of proof in this case was harmless. As indicated by the trial court's findings, Gregg was mature, he initiated key components of this crime, he and Mullins were equally culpable, and the centerpiece of his mitigation claim – that he feared a militia might hurt his family – was not credible. Gregg was not entitled to a mitigated sentence no matter where the burden is placed.

2. MISINFORMATION PROVIDED TO GREGG REGARDING FIREARM OFFENDER REGISTRATION DID NOT RENDER HIS PLEA INVOLUNTARY.

Gregg claims that his guilty plea was involuntary because the felony firearm registry language in the plea form was crossed out. Petition for Discretionary Review at 16-17; CP 22. The State agrees that the plea form was incorrect. However, Gregg's argument that this mistake makes his plea involuntary should be rejected. Firearm registration is a collateral rather than a direct consequence of the plea. Improper advice as to a collateral consequence is a "manifest injustice" only if the erroneous information was material to Gregg's decision to plead guilty. Gregg has not even alleged that firearm registration was material to his guilty plea.

a. Firearm Registry Is A Collateral Consequence Of A Guilty Plea Because It Is Neither Punitive Nor Burdensome.

Constitutional 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 Stoudmire, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001). A defendant need not be informed of all possible consequences of his plea, but he must be informed of all direct consequences. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The failure to inform a defendant of the direct consequences of his plea establishes, per se, that the plea was not voluntary. CrR 4.2(d); State v. Mendoza, 157 Wn.2d 582, 587-88, 141 P.3d 49 (2006). A direct consequence is one which has a definite, immediate and largely automatic effect on the range of the defendant's punishment. 13 Seth A. Fine, Washington Practice: Criminal Law § 3711, at 86 (3d ed.); Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976) (mandatory minimum term); State v. Ross, 129 Wn.2d at 284-85 (term of community custody).

Collateral consequences do not render a plea involuntary. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). Consequences are collateral if they do not alter the standard of punishment for the offense. Barton, 93 Wn.2d at 305 (possibility of a habitual offender proceeding); State v. Olivas, 122 Wn.2d 73, 98, 856 P.2d 1076 (1993) (mandatory DNA testing of sex offenders is a collateral consequence). In State v. Ward, 123 Wn.2d 488, 510-11, 869 P.2d 1062 (1994), this court held that sex offender registration requirements do not alter the standard of

punishment and are therefore not punitive. The primary intent of registration requirements is to aid law enforcement efforts to protect the community "by providing a mechanism for increased access to relevant and necessary information." Ward, 123 Wn.2d at 507-08. Such requirements do not alone impose significant additional burdens on offenders, so the requirement did not violate *ex post facto* principles. Id. at 500, 513. See also State v. Perkins, 108 Wn.2d 212, 218, 737 P.2d 250 (1987); State v. Clark, 75 Wn. App. 827, 831, 880 P.2d 562 (1994).

RCW 9.41.330 provides that a person convicted of a felony firearm offense may be required to comply with the registration requirements in RCW 9.41.333. An offender must register with the county sheriff in the county where the offender resides within 48 hours of his release from custody for the felony firearm offense and registration must be renewed every 12 months for a four-year period. RCW 9.41.333(5), (8). An offender must provide his name, residence, identifying information and date, place and nature of the qualifying conviction. RCW 9.41.333(2). Photos and fingerprints may be taken. RCW 9.41.333(4).

The firearm registry is far less burdensome than the sex offender registry. Firearm offenders are required to register only for a period of four years, are required to register only their residence address (not workplace or school), and the database is not available to the public.

Compare RCW 9.41.333 (firearm offender registration requirements) and RCW 42.56.240(10) (exempting felony firearm offense conviction database from disclosure under the Public Records Act) with RCW 9A.44.130 (requiring sex offender registration in county of residence, school and employment; requiring notice of travel outside U.S.); RCW 9A.44.140 (duration of sex offender registration for Class A felony is life); and RCW 4.24.550 (providing for public disclosure of registered sex offenders under specified circumstances). Moreover, there is no social stigma attached to a firearm registry. Thus, because placement on the firearm registry does not increase punishment and does not represent a "definite, immediate and largely automatic effect on the range of the defendant's punishment," it is not a direct consequence of the plea. State v. Barton, 93 Wn.2d at 305.

b. Faulty Advice As To A Collateral Consequence Of A Guilty Plea Renders The Plea Invalid Only If The Advice Was Material To The Defendant's Plea; Gregg Has Not Shown Materiality.

As set forth above, there is no manifest injustice where a defendant is given no advice at all on a collateral consequence. If silence as to such a consequence is not a manifest injustice, then it follows necessarily that faulty advice matters only when the advice was material to the defendant's decision to plead guilty. This reasoning is in accord with CrR 4.2(f)

which requires withdrawal of a plea only if "necessary to correct a manifest injustice." "Manifest injustice" is a demanding standard. State v. Taylor, 83 Wn.2d 594, 597-98, 521 P.2d 699 (1974). There is no manifest injustice if the defendant is misadvised on an immaterial point.

Case law is in accord with this reasoning. Although cases often analyze the question where ineffective assistance of counsel is alleged, the reasoning is effectively the same. State v. Stowe, 71 Wn. App. 182, 858 P.2d 267 (1993) is illustrative. Stowe was vehement that he would risk a trial and a long sentence rather than jeopardize his career in the Army. His lawyer told him (incorrectly) that entering an Alford[4] plea would not imperil his career. On that advice, Stowe pled guilty. The lawyer was mistaken, however, and Stowe was discharged from the Army after entry of his plea. Stowe, 71 Wn. App. at 185-86. The court in Stowe held that counsel's mistaken advice could render a plea involuntary if there were "additional consequences of an unquestionable serious nature..." and if the defendant could establish that misinformation was material to his plea. Stowe, 71 Wn. App. at 187-89. This was a manifest injustice.

Gregg has not demonstrated a manifest injustice. His plea of guilty was a strategic choice in light of his full confession. It enabled him to

[4] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

show remorse for Michael Clayton's murder and thus more persuasively argue for a mitigated sentence. He understood even before being charged that his firearm rights would be taken away. Exhibit 20 at p. 55. That understanding was confirmed at his plea hearing. RP 16. It is simply not plausible that a four-year annual firearm registration requirement would have changed that calculus. Because Gregg never objected to the registry in the trial court and because he did not allege ineffective assistance of counsel, there is no factual basis for finding a manifest injustice. Any manifest injustice argument must rely on extra-record evidence and, thus, a personal restraint petition is the appropriate vehicle for such a claim. State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

Gregg seems to argue, relying on State v. A.N.J., 168 Wn.2d 91, 22 P.3d 956 (2010), that an incorrect advice renders a plea involuntary. He is mistaken. A.N.J. was a 12-year old who pleaded guilty to a sex offense upon the mistaken advice that the conviction would be removed from his record. State v. A.N.J., 168 Wn.2d at 96, 104. A.N.J. consulted with a new lawyer after his plea was entered and he moved to withdraw it mere weeks later. A.N.J., at 102-03. This Court held that A.N.J. was entitled to withdraw his plea because he had been told falsely that the sex offense could be removed from his record. That issue was of obvious import to A.N.J. at the time of the plea and, thus, was a "consequence[] of

an unquestionable serious nature." A.N.J., 168 Wn.2d at 116 (quoting Stowe, 71 Wn. App. at 188). This was a manifest injustice. A.N.J. did not hold that improper advice on *any* collateral matter necessarily invalidates a plea. It held that faulty advice on a collateral matter could be a manifest injustice where the advice was on a serious matter. See also In re Pers. Restraint of Yim, 139 Wn.2d 581, 989 P.2d 512 (1999) (mis-advice as to immigration consequences); State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011) (mis-advice as to deportation consequences).

Firearm registration pales in comparison to removing a sex offense from your record or deportation. There is no record that firearm registration was material to Gregg's decision. He fails to establish a manifest injustice.

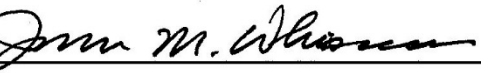
E. CONCLUSION

Gregg's conviction and sentence should be affirmed.

DATED this 20th day of December, 2019.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Note: The Filing Id is 20191220152350SC439895