Supreme Court No. _____
Court of Appeals No. 77913-3-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN GREGG,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Sebastian Gregg, the petitioner, participated in a homicide when he was a juvenile. He was sentenced in adult court. On appeal, Sebastian sought a new sentencing hearing because the sentencing court placed the burden on him to prove that his status as a child made him less culpable. Rejecting Sebastian's argument, the Court of Appeals held the state and federal constitutions did not require a presumption of a mitigated sentence for children sentenced in the adult court and that children must prove they should be treated differently than adults.

In the alternative, Sebastian sought to withdraw his guilty plea because he was affirmatively misled by the court about the consequences of his plea. The Court of Appeals rejected this argument, holding the affirmative misrepresentation did not warrant withdrawal because it concerned a "collateral" consequence.

Sebastian asks this Court to review both decisions.[1]

B. ISSUES PRESENTED FOR REVIEW

1. Children are categorically less culpable and have a greater capacity for change. The state and federal constitutional prohibitions against cruel punishment recognize this difference. When sentencing a

[1] A copy of the published opinion, issued on July 8, 2019, is attached in the appendix.

juvenile in adult court, the court has complete discretion to disregard otherwise mandatory minimum sentencing ranges and enhancements. To guard against cruel punishment and the significant risk that juveniles will not receive appropriate sentences in adult court, does article I, section 14 or the Eighth Amendment require a presumption that the juvenile's youth is a mitigating factor and that the prosecution bear the burden to prove otherwise beyond a reasonable doubt?

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 by the prosecutor 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 upon release. The law, however, required the court to impose a registration requirement and the court in fact imposed the registration requirement. Does the affirmative misrepresentation render Sebastian's guilty plea involuntary?

C. STATEMENT OF THE CASE

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

To summarize some of the key facts, in July 2016, Erin Gregg called the police to report that his 17-year-old son, Sebastian Gregg, was missing. 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 his Dylan Mullins, a 19-year-old man. Ex. 40, p. 3; RP 180; CP 12.

Sebastian's father had recently forbade Sebastian from talking to Mr. Mullins, believing him to be bad influence on his son. 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 had been expelled from 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 his friend, Michael Clayton, who was a little older than Mr. Mullins. RP 60, 62. Mr. Mullins and Mr. Clayton had a falling out after Mr. Clayton had beat Mr. Mullins up. RP 16-17, 49; Ex. 14, p. 33-34. Showing Sebastian his injuries, he told Sebastian that Mr. Clayton had said he was next. Ex. 20, p. 32. Mr. Mullins told Sebastian that if he did not help, a criminal syndicate that 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 that Sebastian's father reported Sebastian missing, Sebastian and Mr. Mullins snuck into Mr. Clayton's home. Ex. 49; CP 12. They broke into a safe, which had 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 contained a firearm enhancement allegation. CP 1-2; 14-15. Per 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. CP 123. Sebastian asked the court to depart from the adult sentencing rules and sentence him to 12 years and two months. CP 34. He argued departure and mitigation was appropriate because he was a juvenile at the time of the offense, 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. Among the witnesses called was Dr. Megan Carter, a board certified forensic psychologist, who provided the court 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. Similarly, Valerie Mitchell, a mitigation specialist with a master's in social work, did not "believe Sebastian would have engaged in any type of violent behavior without coercion from a more sophisticated partner whom Sebastian admired so much." Ex 51, p. 7. After conducting a risk assessment, Dr. Carter believed Sebastian had a low risk of committing a violent or similar offense in the future. RP 366, 405, 436.

Despite the evidence, and accepting the prosecution's claim that Sebastian bore the burden of proving mitigation based on his juvenile status was warranted, the court found that Sebastian had not met his burden. RP 675-688. The court imposed the prosecution's recommended sentence of 37 years. RP 711.

On appeal, Sebastian argued the sentencing court had committed constitutional error by placing the burden on him to prove that his status as

a child warranted mitigation and that he should not be treated just like an adult. Br. of App. at 15-33. In the alternative, he argued he should be permitted to withdraw his plea because he was affirmatively misled as to the consequences of his guilty plea. Br. of App. at 33-38. In a published opinion, the Court of Appeals disagreed with both arguments and affirmed. State v. Gregg, No. 77562-6-1 (July 8, 2019).

D. ARGUMENT

1. The state and federal constitutions require a presumption of a mitigated sentence for juveniles sentenced in adult court. Review should be granted to determine whether placing the burden on children to prove their juvenile status warrants mitigation is unconstitutional.

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. amend. VIII. The Washington Constitution prohibits "cruel" punishment. Const. art. I, § 14.

In interpreting these provisions, both "[t]he "United States Supreme Court and [the Washington Supreme] [C]ourt have concluded that children are less criminally culpable than adults." State v. Bassett, 192 Wn.2d 67, 87, 428 P.3d 343 (2018). "As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of 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. (quoting Graham v. Florida, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (internal quotation marks omitted). 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 juvenile 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).

In contrast, article I, section 14, which provides greater protection than the Eighth Amendment, categorically forbids sentencing juvenile offenders to life imprisonment. Bassett, 192 Wn.2d at 73, 82.

Moreover, in Washington, when sentencing juveniles in adult court, the sentencing court must consider the 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 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. Notwithstanding the constitutional principle that children are different, the Court of Appeals held children must receive an adult sentence unless the child proves his or her status as a child is mitigating. This holding cannot be squared with this Court's jurisprudence interpreting article I, section 14.

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/Houston-Sconiers 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 (Miller requires court to consider "any factors suggesting that the child might be successfully rehabilitated"). The

prosecutor argued further the "court cannot presume that all of the precepts youthfulness that we've talked about over the several day 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.

The court accepted the prosecution's framework[2] 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. The court then followed the prosecution's request and imposed a sentence of 37 years, which included ten years for the 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. Therefore, for children sentenced in adult court,

[2] For example, on impulsivity, the Court found this factor did not weigh in Sebastian's favor, reasoning "I see very little evidence of Mr. Gregg being impulsive." RP 683.

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

Treating children just like adults results in cruel punishment. As the jurisprudence recognizes, when children are sentenced in adult court, courts must consider whether mitigation is appropriate. But placing the burden of proof on children to prove that mitigation is deserving due to the attributes of youth creates an unacceptable risk that children undeserving of adult sentences will receive them. Thus, 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 beyond a reasonable doubt standard is appropriate.

To be sure, the Sentencing Reform Act has generally been interpreted to place the burden on the party seeking an exceptional sentence to prove it is justified. And in Ramos, a case preceding Houston-Sconiers, this Court adhered to this rule in the face of an argument that the Eighth Amendment demanded otherwise for juvenile offenders. Id. at 445-46.

But Washington's jurisprudence on juveniles and punishment has

rapidly evolved since Ramos. The requirement of a Miller hearing has since been extended to all cases where juveniles are sentenced in adult court. Houston-Sconiers, 188 Wn.2d at 21. The Court recently reaffirmed that sentencing court 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).[3]

Moreover, Ramos was a narrow decision that did not address article I, section 14. "[I]n the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment." Bassett, 192 Wn.2d at 82. Washington courts "are free to evolve our state constitutional framework as novel issues arise to ensure the most appropriate factors are considered." Id. at 85. And unlike interpretation of state constitutional provisions, which "focuses on practices, trends, and experiences with our state," interpretation of federal constitutional provisions like the Eight Amendment are constrained by principles of federalism. State v. Gregory, 192 Wn.2d 1, 42-43, 427 P.3d 621 (2018).

Consistent with this Court's recent precedents, article I, section 14 does not tolerate procedures that create an unacceptable risk of cruel

[3] Given this rule of absolute sentencing discretion, the Court held that it is constitutionally tenable to prosecute children charged with certain offenses in adult court without giving them an opportunity to be prosecuted in juvenile court. State v. Watkins, 191 Wn.2d 530, 542-43, 423 P.3d 830 (2018).

punishment. Bassett, 192 Wn.2d at 90 (giving sentencing courts discretion to impose life sentences on juveniles creates too grave a risk of error even when the procedures of Miller are followed); see Gregory, 192 Wn.2d at 18-26 (death penalty unconstitutional because procedures resulted in it being imposed in an arbitrary and racially biased manner). As this Court recognized in Bassett, 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.

Likewise, unless the burden of proof is placed on the prosecution to prove that children in adult court should be sentenced just like adults, there is an unacceptable risk that children will receive cruel punishment in violation of article I, section 14. Before mandatory adult sentencing ranges and enhancements apply to a child, the State should have to prove that a child is the rare offender who deserves to be treated like an adult. Moreover, when sentencing a child just like an adult, the trial court is effectively 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).

The Court of Appeals did not find Sebastian's argument "compelling." Slip op. at 11. But other courts, albeit in the context of mandatory life sentences, have concluded that there is presumption of mitigation for children and that the prosecution must bear the burden of overcoming this presumption. 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). It also naturally follows from this Court's recent precedents interpreting article I, section 14.

To effectuate the promise of Miller and Houston-Sconiers, article I, § 14 and the Eighth Amendment requires a presumption that a mitigated sentence is appropriate for a juvenile offender in adult court and that the prosecution bear the burden of proving beyond a reasonable doubt that a standard adult sentence is appropriate.

c. Review is warranted to address the significant constitutional question presented, which is also a matter of substantial public interest.

The Court of Appeals' contrary conclusion is out of step with Washington's evolving jurisprudence and should be overruled. Whether article I, section 14 or the Eighth Amendment tolerates placing the burden of proof on children to prove they are different and deserve mitigation is a significant constitutional question that should be decided by this Court.

RAP 13.4(b)(3). Review should be granted.[4]

Review should also be granted because this case involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). The issue will recur in cases where juveniles are prosecuted in adult court.

2. When pleading guilty, Sebastian was affirmatively misinformed that he would not be required to register as a felony firearm offender. Review should be granted to resolve whether affirmative misrepresentations as to sentencing consequences necessarily renders a plea involuntary.

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. Under the court rules, a plea must be "made voluntarily, competently and with an 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.

[4] The Court is considering a related issue in State v. Delbosque, No. 96709-1. The Court of Appeals in Delbosque, a case involving a "Miller fix" hearing, held the trial court had failed to properly apply the Miller factors in sentencing the defendant to a minimum term of 48 years. State v. Delbosque, 6 Wn. App. 2d 407, 418-20, 430 P.3d 1153 (2018), review granted, 193 Wn.2d 1008, 439 P.3d 661 (2019).

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," entitling a defendant to withdraw the plea. 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 positively misinformed that he would not be required to register as a felony firearm offender as a result of his plea. Under this Court's precedent, he is entitled to withdraw his plea.

When a defendant is convicted of a "felony firearm offense," the sentencing court must require the defendant to register as felony firearm offender if that offense is also a serious violent offense. RCW 9.41.330(3)(c). 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 as a felony firearm offender. The standard provision in the form was crossed off, which indicated it did not apply. CP 22. And at the hearing on Sebastian's plea, the prosecutor asked Sebastian if he understood the crossed off paragraphs meant they did not apply to him, to which Sebastian answered, yes. 8/18/17RP 16. But when Sebastian was sentencing, the court ordered that 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. Slip op. at 14. Still, the Court of Appeals held the plea was not involuntary because it deemed the registration requirement a "collateral," rather than a "direct," consequence. Slip op. at 16-17. 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 attached, 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 the defendant was *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 incorrect. 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 entitled him to withdrawal. 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. Slip. op. at 8. According to Reise, affirmative misinformation about a collateral consequence does not make a plea involuntary unless the defendant proves materiality:

> But affirmative misinformation about a collateral consequence may nevertheless create a manifest injustice if the defendant materially relied on that misinformation when deciding to plead guilty.

Reise, 146 Wn. App. at 787 (citing State v. Conley, 121 Wn. App. 280,

285, 87 P.3d 1221 (2004)); State v. Stowe, 71 Wn. App. 182, 187-89, 858 P.2d 267 (1993)).

There are three problems with this rule. First, it is contrary to A.N.J., which did not apply a "materiality" rule in holding that the defendant was entitled to withdrawal based on an affirmative misrepresentation as to a collateral consequence. A.N.J., 168 Wn.2d at 114-18. The Court of Appeals was bound to apply this Court's precedent even if it conflicts with a Court of Appeals' decision. In re Heidari, 174 Wn.2d 288, 293-94, 274 P.3d 366 (2012); 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006).

Second, the language in Reise is dicta. "A statement is dicta when it is not necessary to the court's decision in a case." Protect the Peninsula's Future v. City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914 (2013). The defendant in Reise did not show he was misinformed about *any consequenc*e of pleading guilty. Reise, 146 Wn. App. at 788-89. Thus, the rule set out in Reise was not necessary to the court's decision.

Third, the cases cited by Reise do not support the rule, especially given subsequent case law. The first case cited, Conley, applies a defunct rule that, for a plea to be involuntary, a defendant must show materiality for misinformation about *any* consequence, no matter how it is labeled. State v. Conley, 121 Wn. App. 280, 285, 87 P.3d 1221 (2004) (citing State

v. McDermond, 112 Wn. App. 239, 247-48, 47 P.3d 600 (2002)). This materiality test has been overruled. In re Bradley, 165 Wn.2d 934, 940-41, 205 P.3d 123 (2009); Isadore, 151 Wn.2d at 301-02.[5] And the second case, Stowe, concerned a meritorious ineffective assistance of counsel claim. Stowe, 71 Wn. App. at 188-89. Accordingly, it does not set a rule that defendants must show materiality before being entitled to withdrawal.

c. The Court of Appeals' decision conflicts with this Court's decision in *A.N.J.* Review is warranted to resolve the conflict and answer whether an *affirmative* misrepresentation of a sentencing consequence necessarily renders a plea involuntary.

The Reise materiality rule is not good law and is in conflict with this Court's decision in A.N.J. This Court should grant review to overrule Reise and to reaffirm what it held in A.N.J.: *affirmative* misinformation about a sentencing consequence renders a plea involuntary and entitles a defendant to withdrawal. RAP 13.4(b)(1). Moreover, review is warranted to clarify that imposition of a firearm offender registration requirement is a direct consequence because it flows directly from the plea and is imposed as part of the sentence. The issue is one of substantial public interest, meriting review. RAP 13.4(b)(4).

[5] This Court has clarified that a defendant must show prejudice if the issue is raised on collateral review. In re Stockwell, 179 Wn.2d 588, 602-03, 316 P.3d 1007 (2014). Sebastian's case is on direct appeal so prejudice is presumed.

E. CONCLUSION

The Court of Appeals' decision improperly requires juvenile defendants in adult court to prove their status as children warrants mitigation. This creates an unacceptable risk of cruel punishment in violation of the state and federal constitutions. The Court of Appeals' decision also incorrectly holds that *affirmative* misrepresentation about a sentencing consequence does not entitle defendants to withdraw a guilty plea absent proof of prejudice. Sebastian respectfully asks this Court to grant his petition for discretionary review.

Respectfully submitted this 6th day of August 2019.

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Appendix

FILED
7/8/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. SEBASTIAN MICHAEL GREGG, Appellant.	No. 77913-3-I PUBLISHED OPINION FILED: July 8, 2019

VERELLEN, J. — Sebastian Gregg appeals the constitutionality of his standard range sentence. He contends when sentencing a juvenile in adult court, the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution require a presumption that a juvenile's youthfulness is a mitigating factor and the State assumes the burden to overcome the presumption. Neither the federal nor the Washington case law cited by Gregg supports his argument or warrants deviating from the Sentencing Reform Act of 1981 (SRA),[1] which places the burden of proving mitigating factors on the defendant.

Gregg also challenges the voluntariness of his guilty plea. Although Gregg was affirmatively misinformed about his duty to register as a felony firearm offender, Gregg fails to establish manifest injustice.

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[1] Ch. 9.94A RCW.

Therefore, we affirm.

FACTS

The facts of the underlying crimes are not at issue or in dispute.

The State charged Gregg, along with his codefendant, Dylan Mullins, with first degree murder with a firearm, first degree burglary with a firearm, and first degree arson.[2] Although Gregg was 17 years old at the time of the murder, he was "subject to the exclusive original jurisdiction of the adult court" because he was charged with first degree murder.[3]

Gregg pleaded guilty as charged. At sentencing, Gregg requested an exceptional sentence downward based on his youthfulness. Following a six-day sentencing hearing, the court imposed a standard range of sentence of 444 months.

Gregg appeals.

ANALYSIS

I. Challenge to the Standard Range Sentence

Gregg challenges the trial court's imposition of a standard range sentence.

The SRA provides that a standard range sentence "shall not be appealed."[4] But a party may still "'challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing

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[2] Clerk's Papers (CP) at 14-15.

[3] CP at 3.

[4] RCW 9.94A.585(1).

provision.'"[5] The SRA provides, "The court may impose a sentence outside the standard range for an offense if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence."[6] Under the SRA, the defendant has the burden to prove mitigating circumstances by a preponderance of the evidence.[7]

Gregg contends the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution require a presumption that a juvenile's youth is a mitigating factor and that the State assume the burden to prove otherwise beyond a reasonable doubt. Constitutional interpretation is a question of law we review de novo.[8]

Gregg raises these arguments for the first time on appeal. Although "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court," a party may raise a "manifest error affecting a constitutional right" for the first time on appeal.[9] Gregg's claimed error implicates his constitutional rights. And given the State's lack of briefing on whether the error is manifest, the State appears to acknowledge this issue is reviewable for the first time on appeal.

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[5] State v. Ramos, 187 Wn.2d 420, 433, 387 P.3d 650 (2017) (quoting State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003)).

[6] RCW 9.94A.535.

[7] RCW 9.94A.535(1).

[8] Ramos, 187 Wn.2d at 433.

[9] RAP 2.5(a)(3).

a. Eighth Amendment to the United States Constitution

The Eighth Amendment prohibits "cruel and unusual punishment."[10] In the context of this prohibition, the United States Supreme Court and the Washington Supreme Court have repeatedly recognized that children are different from adults and these differences require different sentencing procedures, including full discretion for the court to consider youthfulness at sentencing and a categorical bar of certain levels of punishment for juveniles.

In 2005, in Roper v. Simmons, the United States Supreme Court acknowledged "[t]hree general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders."[11]

> First, . . . "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." . . . .
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . .
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. . . . The personality traits of juveniles are more transitory, less fixed.[12]

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[10] U.S. CONST. amend. VIII.

[11] 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

[12] Id. at 569-70 (alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)).

In consideration of these differences, the Court determined "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."[13] In 2010, in Graham v. Florida, the Court extended the categorical bar from Roper to life without parole sentences for juveniles convicted of nonhomicide offenses.[14]

In 2012, in Miller v. Alabama, the Court barred "mandatory" life without parole sentences for juveniles convicted of any offense.[15] The Court did not completely foreclose a trial court's ability to impose a life sentence without the possibility of parole for juvenile offenders convicted of homicide.[16] But it did announce the Eighth Amendment required courts "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[17]

In 2017, in State v. Ramos, our Supreme Court addressed whether the requirements of Miller applied to literal and de facto life without parole sentences for juveniles convicted of homicide.[18] To support the court's determination that a Miller hearing was required in both circumstances, the court analyzed the Miller factors:

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[13] Id. at 578.

[14] 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[15] 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

[16] Id. at 480.

[17] Id.

[18] 187 Wn.2d 420, 434, 387 P.3d 650 (2017).

> At the Miller hearing, the court must meaningfully consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where a life-without-parole sentence for a juvenile homicide offender is constitutionally permissible. If the juvenile proves by a preponderance of the evidence that his or her crimes reflect transient immaturity, substantial and compelling reasons would necessarily justify an exceptional sentence below the standard range because a standard range sentence would be unconstitutional.[19]

Our Supreme Court expressly determined "Miller does not require that the State assume the burden of proving that a standard range sentence should be imposed, rather than placing the burden on the juvenile offender to prove an exceptional sentence is justified."[20]

Additionally, although our Supreme Court acknowledged in Ramos, "most juvenile homicide offenders facing the possibility of life without parole will be able to meet their burden of proving an exceptional sentence below the standard range is justified,"[21] Gregg is not facing either a literal or a de facto life without parole sentence. The court sentenced Gregg to 444 months (37 years).

Ramos does not endorse the additional procedural protections Gregg advocates. In Ramos, the defendant argued the State must assume the burden of proving the court should impose a standard range sentence. Although the Ramos court avoided "discount[ing] the potential benefits of such procedural requirements," the court determined the defendant had "not shown that the

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[19] Id. at 434-35 (emphasis added).

[20] Id. at 436-37.

[21] Id. at 443.

specific procedures . . . are required as a matter of federal constitutional law."[22] The court's comment concerning the "potential benefits" of additional procedural protections is dicta, and it cannot be read as endorsing Gregg's argument.

Gregg contends our Supreme Court "moved past Ramos"[23] in State v. Houston-Sconiers.[24] In Houston-Sconiers, our Supreme Court considered whether mandatory firearm enhancements for juvenile offenders violated Miller and the Eighth Amendment. The court held,

> In accordance with Miller, . . . sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system . . . . Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.[25]

Houston-Sconiers addresses the effect of the SRA's firearm enhancement provision on the court's considerable discretion when sentencing a juvenile defendant in adult court. RCW 9.94A.533(3)(e) provides, "Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter." Our Supreme Court determined a sentencing court's discretion to consider the juvenile's youthfulness is not

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[22] Id. at 437.

[23] Appellant's Br. at 24.

[24] 188 Wn.2d 1, 391 P.3d 409 (2017).

[25] Id. at 21.

constrained by the SRA's requirement that firearm enhancements are mandatory and run consecutively.

Houston-Sconiers neither mentions nor imposes the additional procedural protections Gregg requests. Although Houston-Sconiers does not cite Ramos or discuss the burden of proof, we reject Gregg's contention that this omission leaves the issue open. We are bound by our Supreme Court's holding in Ramos.[26]

In 2019, in State v. Gilbert, our Supreme Court further emphasized the discretion provided to the court to consider youthfulness when sentencing juveniles in adult court.[27] Gilbert "concern[ed] the scope of discretion a judge has in resentencing pursuant to RCW 10.95.035," the "Miller-fix" statute.[28] As to Houston-Sconiers, the Gilbert court stated,

> Our opinion in that case cannot be read as confined to the firearm enhancement statutes as it went so far as to question any statute that acts to limit consideration of the mitigating factors of youth during sentencing. Nor can it be read as confined to, or excluding, certain types of sentencing hearings as we held that the courts have discretion to impose downward sentences "regardless of how the juvenile got there."[29]

The United States and the Washington Supreme Court cases cited by Gregg do not support his proposition that the court is required to presume

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[26] See Ramos, 187 Wn.2d at 436-37 ("Miller does not require that the State assume the burden of proving that a standard range sentence should be imposed, rather than placing the burden on the juvenile offender to prove an exceptional sentence is justified.").

[27] 193 Wn.2d 169, 438 P.3d 133 (2019).

[28] Id. at 171.

[29] Id. at 175-76 (quoting Houston-Sconiers, 188 Wn.2d at 9).

youthfulness and the State assumes the burden of overcoming this presumption. In fact, with the exception of Ramos, none of these cases mention the additional procedural protections requested by Gregg. And in Ramos, our Supreme Court explicitly determined Miller and the Eighth Amendment do not require the additional procedural protections at issue. Neither federal nor Washington Eighth Amendment case law warrant deviating from the basic structure of the SRA, which places the burden of proving the existence of substantial and compelling reasons to support an exceptional sentence on the defendant.

Gregg also cites to several out-of-state cases. Similar to Ramos and several of the cases discussed above, these out-of-state cases interpret Miller as requiring a presumption against life without parole sentences for juvenile offenders.[30] As mentioned above, Gregg is not subject to a life without parole sentence. And even if the out-of-state cases were analogous to these facts, we cannot ignore the binding precedent from our Supreme Court in Ramos.

Gregg has not shown that the Eighth Amendment requires a presumption that a juvenile's youth is a mitigating factor or that the State assumes the burden to prove otherwise beyond a reasonable doubt.

b. Article I, Section 14 of the Washington Constitution

Gregg also argues article I, section 14 of the Washington Constitution independently requires his requested procedural protections.

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[30] State v. Riley, 315 Conn. 637, 110 A.3d 1205 (2015); State v. Hart, 404 S.W.3d 232 (Mo. 2013); Commonwealth v. Batts, 640 Pa. 401, 163 A.3d 410 (2017); Davis v. State, 415 P.3d 666 (Wyo. 2018).

Our Supreme Court has "'repeated[ly] recogni[zed] that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment.'"[31] But "[e]ven where it is already established that the Washington Constitution may provide enhanced protections on a general topic, parties are still required to explain why enhanced protections are appropriate in specific applications."[32]

In Ramos, although the defendant was seeking similar procedural protections, our Supreme Court declined to decide "whether article I, section 14 of the Washington Constitution requires greater procedural protections than the Eighth Amendment when a juvenile homicide offender faces life without parole" because the defendant did not provide any explanation for why enhanced protections were appropriate under the circumstances.[33]

Gregg relies on State v. Bassett from Division Two of this court to argue enhanced protections are appropriate in these circumstances.[34] In Bassett, Division Two criticized the Miller analysis as "speculative" and "uncertain [in] nature."[35] Expanding on this criticism, Gregg contends the Miller factors create a risk that "the juvenile will not receive the possibility of mitigation and will be subject

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[31] State v. Bassett, 192 Wn.2d at 78 (alterations in original) (quoting State v. Roberts, 142 Wn.2d 471, 506, 14 P.3d 713 (2000)).

[32] Ramos, 182 Wn.2d at 454 (quoting State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (2009)).

[33] Id.

[34] 198 Wn. App. 714, 394 P.3d 430 (2017).

[35] Id. at 743.

to the same mandatory ranges and enhancements applied to adults."[36] Gregg argues the presumption and burden shift would mitigate the risk identified in Bassett. But at most, Bassett's critique of Miller could support more precise youthfulness factors. Nothing in Bassett suggests the State should have the burden of overcoming a presumption of youthfulness. And Gregg fails to provide any compelling argument to support such an assertion.

Here, the trial court fully considered all of the youthfulness arguments presented by Gregg.

> Mr. Gregg is arguing his youthfulness is a mitigating factor justifying an exceptional sentence below the standard range. . . .
>
> In deciding this issue, I have considered a number of factors, including but not limited to, whether Mr. Gregg's youth, age 17, reduced his sense of responsibility. Did he understand the significance of his actions? Whether he was impetuous, unusually impulsive, had an increased susceptibility to others, including peer pressures, specifically that of Mr. Mullins. His truthfulness, or lack thereof, his level of maturity, and whether he had a genuine sense of remorse before, during, and after the murder.[37]

Nothing in the record suggests the court misunderstood the full discretion it had to consider Gregg's youthfulness. And the court did not lean on the burden of proof when it determined there were no "substantial and compelling reasons to justify a sentence below the standard range."[38]

> And having looked at all of the evidence and listening carefully, taking more notes than I probably should have taken, but tons of

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[36] Appellant's Br. at 28.

[37] Report of Proceedings (RP) (Dec. 14, 2017) at 675-77.

[38] Id. at 688.

> 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.[39]

Gregg has not shown that article I, section 14 requires a presumption that a juvenile's youth is a mitigating factor or that the State assumes the burden to prove otherwise beyond a reasonable doubt.

II. Plea Agreement

Gregg contends his plea is involuntary because he was affirmatively misinformed that he would not be required to register as a felony firearm offender.

Gregg raises this issue for the first time on appeal.[40] Because "[d]ue process requires that a guilty plea be knowing, intelligent, and voluntary,"[41] Gregg's claimed error implicates a constitutional right. But to obtain review, Gregg must still establish the error is manifest.[42] To establish an error is manifest, the

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[39] Id.

[40] See RAP 2.5(a)(3) ("The appellate court may refuse to review any claim of error which was not raised in the trial court," but a party may raise a "manifest error affecting a constitutional right" for the first time on appeal.).

[41] In re Pers. Restraint of Stoudmire, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001) (citing U.S. CONST. amend. 14; Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)).

[42] We are not compelled to analyze this issue under ineffective assistance of counsel, as suggested by the State. First, Gregg does not allege ineffective assistance of counsel. And second, Gregg was arguably misled by the court and the prosecutor, not defense counsel. We rely on the "manifest injustice" analysis rather than the prejudice prong from ineffective assistance of counsel.

defendant must show "'the asserted error had practical and identifiable consequences in the trial of the case.'"[43]

In addition to the constitutional requirements, CrR 4.2(f) governs criminal pleas: "The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice."[44] Prior to the acceptance of a guilty plea, a defendant "'must be informed of all the direct consequences of his plea.'"[45] "A direct consequence of pleading guilty is one having a definite, immediate, and largely automatic effect on the sentence."[46] On the other hand, "[c]onsequences that are not 'automatically imposed' by the sentencing court, that do not 'automatically enhance' the sentence, or that do 'not alter the standard of punishment' are collateral."[47] A manifest injustice occurs if the defendant materially relied on affirmative

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[43] State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (internal quotation marks omitted) (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

[44] (Emphasis added.) Although most cases addressing affirmative misinformation involve defense counsel, the duty to inform the defendant is not limited to defense counsel. We reject the State's suggestion that an appellant must raise this issue under ineffective assistance of counsel. Gregg does not allege ineffective assistance of counsel. And Gregg was arguably misled by the court and the prosecutor, not defense counsel. We rely on the "manifest injustice" analysis rather than the prejudice prong from ineffective assistance of counsel.

[45] A.N.J., 168 Wn.2d at 113-14 (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)).

[46] In re Pers. Restraint of Reise, 146 Wn. App. 772, 787, 192 P.3d 949 (2008).

[47] Id. (quoting State v. Ward, 123 Wn.2d 488, 513-14, 869 P.2d 1062 (1994)).

misinformation concerning a collateral consequence when deciding to plead guilty.[48]

Here, the plea agreement included the following provision:

> This offense is a felony firearm offense . . . and the judge may impose a requirement that I register with the sheriff in the [c]ounty where I reside . . . . If this offense, or an offense committed in conjunction with this offense . . . was committed against a child under 18, or was a serious violent offense, the judge must impose this registration requirement.[49]

This provision was crossed out and signed by Gregg. At the plea hearing, the State asked Gregg, "There are a number of paragraphs throughout this document that have been crossed out and you have initialed. Do you understand that that means that these paragraphs, they do not apply to you?"[50] Gregg answered in the affirmative. At sentencing, the court imposed a requirement that Gregg register as a felony firearm offender.[51]

On this record, it is clear that Gregg was affirmatively misinformed about his duty to register as a felony firearm offender. To determine whether registration is a direct or collateral consequence, we turn to cases addressing the analogous sex offender registration.

In State v. Ward, one of the defendants challenged the sex offender registration statute, arguing he was not informed of the requirement in his plea

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[48] Id.

[49] CP at 22.

[50] RP (Aug. 18, 2017) at 15.

[51] CP at 137.

agreement.[52] The defendant was released from confinement before the registration statute went into effect. Our Supreme Court considered whether there was a constitutional duty to advise a defendant of the requirement to register as a sexual offender at the time of his guilty plea.[53] The court concluded there was no duty because "[a]lthough the duty to register flows from [the defendant's] conviction for a felony sex offense, it does not enhance [the defendant's] sentence or punishment."[54] "Because registration as a sex offender does not alter the standard of punishment, we hold the duty to register is a collateral, and not a direct, consequence of a guilty plea."[55] Consistent with Ward, registration as a felony firearm offender does not alter the standard of punishment. The duty to register is a collateral, and not a direct, consequence of a guilty plea.

Gregg relies on A.N.J. to argue the question whether registration requirements are direct or collateral consequences is unresolved.[56] In A.N.J., the defendant sought to withdraw his guilty plea "because, he contends, his counsel misled him about the consequences of his plea."[57] Our Supreme Court determined although the defendant was informed that he had an obligation to

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[52] 123 Wn.2d 488, 494, 869 P.2d 1062 (1994).

[53] Id. at 513.

[54] Id.

[55] Id. at 513-14.

[56] Appellant's Br. at 37 (citing A.N.J., 168 Wn.2d at 114).

[57] A.N.J., 168 Wn.2d at 114.

register as a sex offender, he was misinformed that his conviction could be removed from his record.

In A.N.J., our Supreme Court acknowledged, "This court has never held that a preexisting automatic statutory requirement of sex offender registration is not a direct consequence of a plea, though we decided a related but different issue in State v. Ward."[58] The court distinguished Ward on the basis that "Ward considered a statutory consequence that came into existence only after the conviction, not an existing, automatic statutory consequence."[59]

But ultimately the court determined "since [the defendant in A.N.J.] was correctly informed that he had an obligation to register as a sex offender, it is unnecessary for us to decide whether a current statutory duty to register as a sex offender is a direct consequence of a plea for the purposes of establishing whether a plea was involuntarily made."[60] In these circumstances, Ward's thoughtful emphasis on whether the consequence enhances the sentence or punishment is compelling. Registration as a felony firearm offender does not alter the standard of punishment, even when automatically imposed. The felony firearm registration requirement is a collateral consequence of pleading guilty.

Gregg contends "regardless of whether the registration requirement is characterized as a 'direct' or 'collateral consequence,' the result is the same

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[58] Id.

[59] Id. at 115.

[60] Id.

because [Gregg] was positively misinformed."[61] But affirmative misinformation about a collateral consequence does not automatically render a guilty plea involuntary. Affirmative misinformation about a collateral consequence may create a manifest injustice "if the defendant materially relied on that misinformation when deciding to plead guilty."[62]

Gregg does not claim that the misinformation concerning the firearm registration requirement materially influenced his decision to plead guilty. And the record on appeal does not include any facts regarding how he arrived at his decision to plead guilty. We conclude, on this record, this misinformation did not render Gregg's plea involuntary and does not constitute manifest constitutional error.

Therefore, we affirm.

WE CONCUR:

[61] Appellant's Br. at 37.

[62] Reise, 146 Wn. App. at 787.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77913-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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