NO. 101004-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

JEREMY DUSTIN HUBBARD,
Respondent.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 55584-1-II
Kitsap County Superior Court No. 05-1-00252-1

PETITION FOR REVIEW

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SERVICE		
	Thomas E. Weaver Po Box 1056 Bremerton, Wa 98337 Email: admin@tomweaverlaw.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 26, 2022, Port Orchard, WA _____ **Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us**

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The petitioner is the State of Washington. The petition is filed by Kitsap County Deputy Prosecuting Attorney Randall Sutton.

II. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals published decision in *State v. Hubbard*, No. 55584-1-II (April 26, 2022).[1]

The trial court granted Hubbard's motion to modify a condition of his sentence to allow unsupervised contact with his child despite Hubbard's only "new" evidence being the fact of his recent paternity. He presented nothing to contradict the finding of a prior psychosexual evaluation that he would be a danger to minor children who resided with him.

The Court of Appeals affirmed, finding that the motion was timely because the fact of Hubbard's paternity was "newly

[1] Published at *State v. Hubbard*, ___ Wn. App. 2d ___, 508 P.3d 691 (2022).

discovered evidence," that the trial court had authority to modify conditions of sentence, and that the trial court acted within its discretion in relieving Hubbard of his condition of sentence that he not have unsupervised contact with minors.

The Court of Appeals amended its original opinion in response to the State's motion for reconsideration.[2] The State seeks review of the amended opinion. A copy of the Court's decision is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals decision below conflicts with decisions of both this Court and the Court of Appeals regarding the application of the newly discovered evidence provisions of RCW 10.73.100(1), with well-established precedent governing trial court authority to modify

[2] In the original opinion the Court had concluded that a motion brought pursuant to CrR 7.8(b)(5) was not subject to the time bar of RCW 10.73.090, and only need be brought within a reasonable time. App. B, at 3.

SRA sentences, and with precedent requiring that a collateral movant must present evidence supporting entitlement to relief?

2. Whether the Court of Appeals decision applying the newly discovered evidence provision of RCW 10.73.100(1) to Hubbard's motion seeking to modify a condition of his sentence is contrary to precedent?

3. Whether the alleged "new evidence," consisting solely of Hubbard's paternity was not material to the evidence that he was likely to reoffend if he found himself in a custodial parental relationship and thus also unlikely to change the outcome of the proceeding?

4. Whether a trial court lacked authority to modify the conditions of community custody absent specific statutory authority?

5. Whether the trial court abused its discretion where Hubbard did not meet his burden of establishing that he was

entitled to relief?

IV. STATEMENT OF THE CASE

Jeremy Dustin Hubbard was charged by information filed in Kitsap County Superior Court with first degree rape of a child, with a special allegation of domestic violence. CP 1. The victim was Hubbard's 7-year old stepdaughter. CP 4-5.

Hubbard pled guilty as charged in exchange for the State's promise to not file further counts of child rape and to recommend a special sex offender sentencing alternative (SSOSA) sentence. CP 8. The presentence investigation recommended a SSOSA sentence. CP 14.

As part of his application for the SSOSA sentence, Hubbard was compelled to be forthcoming about his offense. Hubbard's statement as quoted in the presentence investigation report provides the facts. CP 21-23. In sum, Hubbard reported multiple incidents of child rape on his stepdaughter over a two month time-period in 2004. Each incident involved Hubbard

being left alone with the child. Although he recommended a SSOSA sentence, the psychologist who evaluated Hubbard pointedly noted:

> For Mr. Hubbard to reoffend, it would probably require circumstances similar to the environment of his initial offense.

CP 57.

On May 19, 2005, the trial court imposed 123 months of confinement but suspended that time, less credit for time served, and imposed a SSOSA sentence. CP 61. Among the conditions of Hubbard's sentence was that Hubbard have no contact with "with any children under the age of 18 without the presence of an adult who is knowledgeable of his conviction and who has been approved by Defendant's CCO." CP 63.

Just over a year later, the trial court revoked Hubbard's SSOSA sentence and imposed the 123-month previously suspended minimum term. CP 68. The revocation and imposition was based on the trial court's findings that Hubbard

deliberately manipulated a polygraph test, had sexual contact without permission, had contact with minors without permission, and had extended contact with "C," who appears to been a minor. CP 68. The trial court ordered that the previously imposed conditions remain in full force and effect. CP 70.

On May 1, 2020, Hubbard moved for an order modifying his community custody conditions, alleging release from prison in 2015, continued participation in treatment, gainful employment, a new marriage, and the pregnancy of the new wife. CP 72-73. Hubbard sought unsupervised contact with his biological children and grandchildren, ability for supervised attendance at public settings where children are present, ability to possess, but not consume, alcoholic beverages, and the ability to go to casinos. CP 73-75. At the time of hearing, Hubbard's only child was the one expected and the grandchildren request was based on the expectation that that child might have offspring. RP (5/8/20) 2.

The trial court largely allowed the requested sentence modifications. CP 76-77. But, while allowing Hubbard contact with his children and grandchildren, required that those contacts be supervised. CP 76.

Seven months later, Hubbard brought another motion to modify his conditions of community custody, seeking to remove the "supervised" requirement from his contact with his children and grandchildren. CP 87-88. The State objected, arguing that the trial court lacked authority to modify the sentence and that even if discretion existed, the motion should be denied, given the facts and circumstance of the case. RP (12/18/20) 2-3; RP (1/11/21) 12-14; CP 90-92. At no point has Hubbard ever presented evidence contradicting the psychologist's conclusion that he would be a danger to children he resides with.

On January 12, 2021, the trial court granted Hubbard's motion and allowed him unsupervised contact with his children

and grandchildren. CP 106. The state timely appealed. CP 108.

The Court of Appeals affirmed, finding that the motion was timely because Hubbard's paternity was newly discovered evidence under RCW 10.73.100(1), that the trial court had authority to modify the sentence, and (apparently) that the trial court did not abuse its discretion.

V. ARGUMENT

A. THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF BOTH THIS COURT AND THE COURT OF APPEALS REGARDING THE APPLICATION OF THE NEWLY DISCOVERED EVIDENCE PROVISIONS OF RCW 10.73.100(1), WITH WELL-ESTABLISHED PRECEDENT GOVERNING TRIAL COURT AUTHORITY TO MODIFY SRA SENTENCES, AND WITH PRECEDENT REQUIRING THAT A COLLATERAL MOVANT MUST PRESENT EVIDENCE SUPPORTING ENTITLEMENT TO RELIEF.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should accept review because the decision of the Court of Appeals criteria (1), (2), and (4) are met. The Court of Appeals decision conflicts with decisions of both this Court and the Court of Appeals that hold that the newly discovered evidence provisions of RCW 10.73.100(1) apply only to trial evidence.

Even if the exception applied, the Court of Appeals application of the newly discovered evidence rule would be contrary to precedent because Hubbard provided no evidence that his newly "discovered" paternity would make him any less of a danger to a child he resided with, in conflict with well-

settled interpretation of the rule.

Moreover, the Court of Appeals decision conflicted with well-established precedent that trial courts lack the authority to modify SRA sentences absent specific statutory authorization.

Finally, the Court of Appeals decision conflicts with precedent holding that a collateral movant must present evidence supporting entitlement to relief. Yet here, Hubbard showed only that he was now a father. He failed to present any evidence that he was not still a danger to children with whom he resided.

B. THE COURT OF APPEALS DECISION APPLYING THE NEWLY DISCOVERED EVIDENCE PROVISION OF RCW 10.73.100(1) TO HUBBARD'S MOTION SEEKING TO MODIFY A CONDITION OF HIS SENTENCE IS CONTRARY TO PRECEDENT.

A CrR 7.8 motion is subject to the one-year time limit on collateral attack under RCW 10.73.090(1). *State v. Gudgel*, 170

Wn.2d 656, 658, 244 P.3d 938, 939 (2010). This is because the one-year limitation of RCW 10.73.090(1) applies generally to all collateral attacks on judgments that are valid on their faces and jurisdictionally competent. *State v. Olivera-Avila*, 89 Wn. App. 313, 320, 949 P.2d 824 (1997). A judgment is valid on its face if it contains all necessary information, including notice of his mandatory community placement. *Id.* (*citing State v. Ammons,* 105 Wn.2d 175, 188, 713 P.2d 719, 718 P.2d 796 (1986)).

Here, the Court of Appeals initially dismissed the contention that Hubbard's motion was subject to RCW 10.73.090. *See* App. B, at 3.[3] On the State's motion for rehearing, the Court found that the RCW 10.73.090 applied. App. A, at 3. It nevertheless found that Hubbard's motion was

[3] The Court distinguished on other grounds an unpublished opinion of the same division that had applied the time bar. *See* Opinion, at 4 (*citing State v. Hoch*, 13 Wn. App. 2d 1073, 2020 WL 2850977 (2020)). *See Hoch*, 2020 WL 2850977 at *5-6.

timely under RCW 10.73.100(1), that his paternity constituted newly discovered evidence, a theory that Hubbard himself never asserted. *Id.*, at 4-5. This conclusion is contrary to established precedent, however.

The Court of Appeals quotes *In re Jeffries*, 114 Wn.2d 485, 493, 789 P.2d 731 (1990), in support of its conclusion that RCW 10.73.100(1) applied to Hubbard's claim. But *Jeffries* was not addressing the exception to the time bar, but grounds for relief under RAP 16.4. Notably, Jeffries's case, decided on April 5, 1990, was not even subject to a time bar. *See* RCW 10.73.130 (providing that RCW 10.73.090 and .100 only apply to petitions filed on or after July 23, 1990).

The Court cited no authority that has ever applied RCW 10.73.100 to sentencing evidence. The State has found none. *See State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989) (emphasizing the finality principle and prohibiting the sentencer from modifying a sentence for a change of circumstances); *In re*

Faircloth, 177 Wn. App. 161, 311 P.3d 47 (2013) (considering the effect of defendant's recovered memories of abuse on the verdict, not the sentence); *State v. Cirkovich*, 42 Wn. App. 403, 405, 711 P.2d 374 (1985), *review denied*, 106 Wn.2d 1005 (1986) (rejecting sentence modification based on change of defendant's circumstances); *State v. Dorosky*, 28 Wn. App. 128, 132, 622 P.2d 402 (1981) (holding sentence could not be modified based on new evidence of rehabilitation). Not even in death penalty cases has this exemption been applied to sentencing. *See In re Stenson*, 150 Wn.2d 207, 217, 76 P.3d 241 (2003) (not reaching the claim in a mixed petition); *In re Brown*, 143 Wn.2d 431, 462, 21 P.3d 687 (2001) (explaining that petitioner would only be entitled to a new sentencing proceeding if the allegedly new evidence would probably change the result of trial); *In re Lord*, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994) (finding the only new evidence among the many allegations was trial evidence).

Hubbard's motion was not exempt under this provision, because the rule has long been limited to evidence which would probably affect the verdict, not the sentence. *E.g. State v. Peele*, 67 Wn.2d 724, 730-31, 409 P.2d 663 (1966) (referring to the outcome of "trial"). RCW 10.73.100 provides:

> The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:
>
> (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;.

At the time that the statute was enacted in 1989, the courts had developed a well-settled five-point rule defining newly discovered evidence as evidence that would probably change the result of a trial. *State v. Adams*, 181 Wash. 222, 229-230, 43 P.2d 1 (1935); *Libbee v. Handy*, 163 Wash. 410, 418, 1 P.2d 312 (1931); *see also Peele*, 67 Wn.2d at 730 (referring to the formulation as "the now classic statement" in 1966).

Although the plain language of the statute does not

include the settled rule, it also does not define "evidence" in any meaningful way, not even as evidence which would be material to the defendant's case. To determine a statute's plain meaning, the Court engages in a holistic endeavor, looking to legislative history and how the statute has been or will be implemented. *In re Dodge*, 198 Wn.2d 826, 502 P.3d 349 (2022); *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012). The legislative history and case law treatment both before and after the statute's enactment make clear that the provision is limited to evidence of innocence.

In 1989, legislators were drawing on 130 years of experience considering newly discovered evidence in the context of collateral review. Laws of 1989, ch. 395, §2; Laws of 1869, ch. 21, §§277-85, pages 67-68; Laws of 1869, ch. 23, §§260-65, pages 255-56; *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (Legislature is presumably familiar with background facts when it passes

new legislation). Beginning in 1869, Washington defendants could seek a new trial via limited collateral arguments. Laws of 1869, ch. 21, §§277-85, pages 67-68; Laws of 1869, ch. 23, §§260-65, pages 255-56. One of the available grounds for review was "newly discovered evidence," defined as evidence which the proponent "could not with reasonable diligence have discovered and produced *at the trial*." Laws of 1869, ch. 21, §§278(4), 281, page 67; Laws of 1869, ch. 23, §260, page 255, (emphasis added). The Legislature would repeat this "trial" language over the decades, Laws of 1933, ch. 138, § 1; Laws of 1925, ch. 150, 5; Laws of 1909, ch. 34, §1; Laws of 1891, ch. 28, §81, page 62; Laws of 1877, ch. 21, §280(4), page 56; Laws of 1873, ch. 21, §276(4), page 70, and this Court would embrace it in court rules in 1973. CrR 7.5(a)(3); CrR 7.8(b)(2); s*ee also* Fed. R. Crim. P. 33.

By 1935, the courts had developed a "settled" rule, *Adams*, 181 Wash. at 229-230; *Libbee*, 163 Wash. at 418

(quoting 20 R. C. L. 290 (1918)), defining newly discovered evidence as evidence that "'(1) will probably change the result of *the trial*; (2) was discovered since *the trial*; (3) could not have been discovered before *trial* by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.'" *State v. Wheeler*, 183 Wn.2d 71, 82, 349 P.3d 820 (2015) (emphasis added).

This Court presumes the Legislature was aware of this judicial interpretation at the time it enacted RCW 10.73.100(1), reprising the term newly discovered evidence. *State v. Blake*, 197 Wn.2d 170, 190–91, 481 P.3d 521 (2021). Where the courts' interpretation has been clear, where the Legislature has acquiesced to that interpretation, and where the Legislature preserved the same statutory language in a subsequent enactment, the precedent is carried over to the new statute and maintained. *Blake*, 197 Wn.2d 170, 190–91 (because the Legislature was free to enact something different, its adoption

of the term of art gives *stare decisis* "special force"). This Court applies that five-point definition to RCW 10.73.100(1), *Wheeler*, 183 Wn.2d at 82, demonstrating that the previous laws inform the interpretation of the current one.

Stated otherwise, in RCW 10.73.100(1), the Legislature adopted this Court's well-settled doctrine regarding "newly discovered evidence." Thus, it operates as an exception to the one-year time limit only for new evidence which would probably have changed the result of the trial, not the sentence.

Unlike the federal rule, Washington allows a claim of newly discovered evidence to be raised at any time. *Cf.* Fed. R. Crim. P. 33 (requiring claims of newly discovered evidence to be filed no later than three years from the date of verdict). The absence of any time limitation makes sense only because newly discovered evidence is limited to evidence of innocence. Where a defendant may be actually innocent, finality principles must yield to the imperative of correcting a fundamentally unjust

conviction. *Engle v. Isaac*, 456 U.S. 107, 135, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). The same imperative exists in the context of a sentence that is "in excess of the court's jurisdiction." *See* RCW 10.73.100(5). But there is no imperative to extend the meaning of "newly discovered evidence" to include any fact that may sway a judge to reconsider a sentence.

Unlike a jury's verdict which is appealable on sufficiency grounds, a sentencer's discretion is beyond challenge even on direct appeal so long as it falls within the standard range. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003); *see also State v. Grewe*, 117 Wn.2d 211, 214, 813 P.2d 1238 (1991) (even an exceptional sentence is only reviewable where factual findings are unsupported in the record or do not support an exceptional sentence as a matter of law or where the sentence is clearly excessive or too lenient). Therefore, the facts which might influence a sentencer's

decision may be relatively insignificant, need not be proven beyond a reasonable doubt, and are not even subject to the rules of evidence. ER 1101(c)(3). Also, unlike a verdict, which is a binary decision of guilt or innocence, a sentence can fall anywhere along a spectrum of possibilities, varying by days, months, or years depending upon the sentencer's caprice. This again suggests that a fact relevant to a sentence could be almost anything.

If parties[4] could revisit sentences at any time based on claims of new evidence, no sentence would ever be final, because the circumstances which might influence a sentencer are incalculable. *See*, *e.g.*, RCW 9.94A.535(1) (explaining that the statute does not attempt to circumscribe all possible mitigating circumstances). For example, the State could ask for a resentencing if later behavior belied the defendant's

[4] *See State v. Hall*, 162 Wn.2d 901, 905, 177 P.3d 680 (2008) (allowing either party to seek collateral relief under CrR 7.8).

expression of remorse, including failed treatment and failure to pay restitution. And a defendant could raise any circumstance tending to make the defendant's plight more sympathetic and the victim's less so. *See*, *e.g.*, *Shove*, 113 Wn.2d at 85 (alleging incarceration would harm defendant's business); *Cirkovich*, 42 Wn. App. at 405 (alleging defendant who had fled jurisdiction before he could serve his sentence was a "different person now and not in need of further rehabilitation").

Any change in the health and circumstances of the defendant or the defendant's family would be grounds for a petition. *See*, *e.g.*, RCW 9.94A.655 (permitting a sentencing alternative for persons who become parents or guardians). New evidence could be a new injury, illness, or condition, including a parent's declining health or pregnancy resulting from a conjugal visit. Or it could be some success like completed coursework, treatment, or the acquisition of a new skill or relationship. A surviving victim's healing or forgiveness would

be grounds for a petition, as would the discovery of any information which paints the victim in a bad light. This would motivate defendants to stalk their victims in order to uncover or even provoke, for example, negative performance reviews, failed relationships, and distasteful social media postings.

While Washington has granted limited extensions to the period of collateral review, *cf.* Laws of 1862, ch. 49, §484, page 187; *In re Coats*, 173 Wn.2d 123, 130-31, 267 P.3d 324 (2011) (describing that there was no collateral review for convictions prior to 1869), *with* Laws of 1955, ch. 44, §1 (allowing claims of newly discovered evidence to be brought within a year of judgment), *and* RCW 10.73.100 (allowing six grounds to be raised at any time).

It is plain that in RCW 10.73.100 the Legislature intended to preserve the finality of criminal sentences and that exceptions are narrow. *In re Runyan*, 121 Wn.2d 432, 443-44, 853 P.2d 424 (1993) (explaining that RCW 10.73.100

preserves, rather than extends, the historic scope of habeas relief). As Justice Harlan observed:

> No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

Williams v. United States, 401 U.S. 667, 691, 91 S. Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in part and dissenting in part). Because collateral relief "undermines the principles of finality of litigation," it is intended to be a "safety valve" for the "extraordinary case" which raises a "substantial claim of factual innocence." *Harris v. Reed*, 489 U.S. 255, 271, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989) (O'Connor, J., concurring); *Coats*, 173 Wn.2d at 132; *In re Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004). The Court of Appeals holding in this case if allowed to stand would allow interminable resentencings in direct contradiction of these principles.

Moreover, as long as a sentence may be revisited, a

conviction would never be final. *In re Skylstad*, 160 Wn.2d 944, 946, 162 P.3d 413 (2007) (a judgment is not final until both the conviction and sentence are final). The Court of Appeals interpretation of RCW 10.73.100(1) would, if allowed to stand, effectively repeal RCW 10.73.090. The Court of Appeals decision was thus contrary to over a century of settled precedent. The Court should accept review to clarify that point.

C. THE ALLEGED "NEW EVIDENCE" CONSISTING OF HUBBARD'S PATERNITY WAS NOT MATERIAL TO THE EVIDENCE THAT HE WAS LIKELY TO REOFFEND IF HE FOUND HIMSELF IN A CUSTODIAL PARENTAL RELATIONSHIP AND THUS ALSO UNLIKELY TO CHANGE THE OUTCOME OF THE PROCEEDING.

Even if RCW 10.73.100(1) applied, the evidence did not meet all the necessary criteria to be considered newly discovered. As previously noted, to gain relief via newly discovered evidence, the defendant must show (1) that the evidence would probably have changed the result, (2) was

discovered since the trial; (3) could not have been discovered before trial, (4) is material; and (5) would not be merely cumulative or impeaching. *Wheeler*, 183 Wn.2d at 82. The claim fails in the absence of any of the five factors. *Faircloth*, 177 Wn. App. at 166.

Assuming arguendo that factors (2), (3), and (5) would be met by the fact of Hubbard's post-sentencing siring of a child, the allegedly newly discovered evidence was not material to whether Hubbard should be allowed unsupervised contact with children living in his home and thus could not have changed the outcome of the proceeding.

The mere fact of paternity is immaterial to the question of whether Hubbard would be a danger to reoffend if he lives in an unsupervised parental role with a child. Neither the Court of Appeals, nor Hubbard, who never argued that his paternity constituted newly discovered evidence, has explained how siring a child would be material.

The trial court specifically acknowledged that it did not have any evidence that supported allowing Hubbard to have *unsupervised* contact with his child and other minor family members. RP (1/11/21) 21. The court primarily relied on another judge's determination the previous year to allow *supervised* contact. The only evidence Hubbard offered in support of his motion was that since his release, during a time when he was *not* permitted contact with minors, he did not violate any of the terms of his release.

There is no evidence that it would be safe to place him back in the exact same situation where he initially offended.

D. THE TRIAL COURT LACKED AUTHORITY TO MODIFY THE CONDITIONS OF COMMUNITY CUSTODY.

Moreover, the Court of Appeals affirmance of the relief granted was also contrary to established precedent. In *Shove*, 113 Wn.2d at 89, this Court concluded that the sentencer lacked

authority to modify a sentence for a change of circumstances:

> We hold that SRA sentences may be modified only if they meet the requirements of the SRA provisions relating directly to the modification of sentences.

The only provision providing for modification of the community custody conditions of a sex offender is found in RCW 9.94A.709(1), which grants the court the authority to *extend* the term of community custody to enhance public safety. There is no provision allowing the court to alter the conditions. *Cf. State v. Petterson*, 190 Wn.2d 92, 102, 409 P.3d 187 (2018) (distinguishing *Shove* in context of SSOSA sentence: "the conditions under a SSOSA are intended to be modified by the court" under the statute). Although Hubbard was given a SSOSA sentence that sentence was revoked less than a year after he was sentenced. CP 68. *See also Cirkovich*, 42 Wn. App. at 405 (rejecting sentence modification based on change of circumstances); *Dorosky*, 28 Wn. App. at 132 (sentence could not be modified based on new evidence of rehabilitation).

Because the trial court lacked statutory authority to modify the condition, the Court of Appeals departed from precedent in affirming the trial court.

E. HUBBARD DID NOT MEET HIS BURDEN OF ESTABLISHING THAT HE WAS ENTITLED TO RELIEF.

Finally, even if Hubbard's claim were timely, and even were the granting of the motion within the trial court's discretion, the Court of Appeals also departed from precedent in affirming the trial court because Hubbard failed to meet his burden as a collateral movant to show that relief was justified.

While he may have demonstrated that circumstances have changed, *i.e.*, that he now is a parent, he has not produced any evidence showing that he is less of a risk to minor children living in his home than he was in 2005 when he pled guilty to and was convicted of raping his seven-year-old stepdaughter multiple times. *See* CP 38.

It is well-settled that collateral petitioners bear the burden

of showing entitlement to relief by a preponderance of the evidence. *In re Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). Bare assertions unsupported by references to the record, citation to authority, or persuasive reasoning cannot sustain the petitioner's burden of proof. *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986).

Here, the trial court specifically acknowledged that it did not have any evidence that supported allowing Hubbard to have *unsupervised* contact with his child and other minor family members. RP (1/11/21) 21. It nevertheless granted the order.

The court primarily relied on a different judge's determination the previous year to allow *supervised* contact. The only evidence Hubbard had offered in support of his motion was that since his release, during a time when he was *not* permitted contact with minors, he did not violate any of the terms of his release.

There is no evidence that it would be safe to place him

back in the exact same situation where he initially offended: in a parental role residing with a victim who was a very young child. This is precisely what the trial court's order permits. Yet Hubbard presented no evidence that contradicted the finding made at the time he was sentenced. As such he failed to meet his burden of proof and the trial court therefore abused its discretion.

Courts have recognized prevention of harm to children to be a compelling state interest. *See, e.g., Prince v. Massachusetts,* 321 U.S. 158, 166–67, 64 S. Ct. 438, 88 L. Ed. 645 (1944); *Bering v. SHARE,* 106 Wn.2d 212, 241, 721 P.2d 918 (1986); *In re C.B.*, 79 Wn. App. 686, 690, 904 P.2d 1171 (1995). This case is easily distinguished from cases like *State v. Letourneau*, 100 Wn. App. 424, 997 P.2d 436 (2000), where the Court found no relationship between the crime and any danger to the defendant's children.[5]

[5] The State also notes that cases like *Letourneau* were direct

Thus in *State v. Berg*, 147 Wn. App. 923, 943–44, 198 P.3d 529, 539 (2008), *disapproved on other grounds*, *State v. Mutch*, 171 Wn.2d 646, 663, 254 P.3d 803 (2011), the Court upheld a similar restriction on contact with the defendant's biological daughter where the defendant lived with the minor victim at the time of the crime and committed the sexual abuse in the home. The court noted that "[a]dditionally, unlike in *Letourneau,* this record contains no evidence indicating that Berg is not a danger" to his daughter. Likewise, in *State v. Corbett*, 158 Wn. App. 576, 599, 242 P.3d 52 (2010), where the defendant molested his stepdaughter, the Court concluded that the "no-contact order [was] reasonably necessary to protect Corbett's children because of his history of using the trust established in a parental role to satisfy his own prurient desire to sexually abuse minor children."

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appeals, where the State bore the burden, unlike in a collateral attack, where the burden of proof lies with the defendant.

The trial court abused its discretion in granting Hubbard's motion to modify the condition where he failed to present any evidence that modification was warranted. The Court of Appeals decision thus departed from well-established precedent in affirming the trial court. This Court should therefore grant review.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant review and reverse of the decisions of the Court of Appeals and the trial court.

VII. CERTIFICATION

This document contains 4973 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED May 26, 2022.

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

April 26, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. JEREMY DUSTIN HUBBARD, Respondent.	No. 55584-1-II PUBLISHED OPINION

WORSWICK, J. — The State appeals the trial court's order granting Jeremy Hubbard's motion to modify the conditions of his community custody and allowing him unsupervised contact with his children and grandchildren. The State argues that the motion to modify was time barred and that the trial court lacked authority to modify the conditions of Hubbard's community custody. We disagree and affirm the trial court's order granting Hubbard's motion to modify the terms of his community custody.

FACTS

In 2005, Hubbard pleaded guilty to first degree child rape, domestic violence. The victim was his seven year old stepdaughter. The trial court imposed a special sexual offender sentencing alternative (SSOSA). In June 2006, the trial court revoked the suspension of Hubbard's 123-month prison sentence after finding that Hubbard had violated the conditions of his SSOSA.

Hubbard was released from prison in March 2015, subject to lifetime community custody. Hubbard's community custody conditions included prohibiting him from possessing or accessing sexually explicit materials, prohibiting him from remaining overnight in a residence where minor children live without prior approval from his CCO, prohibiting him from dating individuals or forming relationships with families who have minor children without prior approval from his Community Corrections Officer (CCO), and prohibiting him from using, possessing, or controlling any alcohol.

In May 2020, Hubbard moved to modify his lifetime community custody conditions. Hubbard's new wife was pregnant with their first child, and he sought to modify his community custody conditions to permit unsupervised contact with his biological children and any future grandchildren. Hubbard also sought to be able to attend public events where his children or grandchildren were participating such as concerts, plays, and sporting events. Additionally, Hubbard asked the trial court to modify the community custody conditions to allow alcohol in his home, to allow Hubbard to go to casinos, and to allow Hubbard to view adult, legal pornography. The trial court granted Hubbard's motion to modify but required that Hubbard's contact with his children and grandchildren be supervised.

In December 2020, Hubbard filed another motion to modify his community custody conditions, seeking unsupervised contact with his infant daughter. The State opposed Hubbard's motion, arguing that the trial court lacked jurisdiction to modify the sentence and that even if it had jurisdiction, unsupervised contact was inappropriate. The trial court concluded that it had the authority to modify community custody conditions under CrR 7.8(b)(5) and granted Hubbard's motion to modify his community custody conditions to permit unsupervised contact

with his children and grandchildren. The trial court's modification order provided that if the State developed a reasonable suspicion that Hubbard poses a threat to community safety, including that of his children or grandchildren, it has the authority to immediately reinstate the no contact provisions or require that contact be supervised, subject to later review by the superior court.

The State appeals the trial court's order modifying Hubbard's community custody conditions to allow unsupervised contact with Hubbard's children and grandchildren.

ANALYSIS

I. TIMELINESS

As an initial matter, the State argues that Hubbard's motion is time barred. CrR 7.8(b) provides that a motion brought under CrR 7.8(b)(5) must be made "within a reasonable time." Hubbard's motion to modify satisfies this requirement. He brought his motion to modify three months prior to the birth of his child and renewed the motion six months after she was born. Given that the grounds justifying relief did not arise until Hubbard became a parent, Hubbard brought his motion "within a reasonable time" by filing it when the circumstance arose.

Our timeliness inquiry does not end with CrR 7.8, however. A CrR 7.8 motion "is further subject to RCW 10.73.090, .100, .130, and .140." RCW 10.73.090 provides, "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." The time limit does not apply if the

petition is based on one or more of the statutory exceptions identified in RCW 10.73.100, including newly discovered evidence uncovered with reasonable diligence.[1]

In determining whether the exemption for newly discovered evidence has merit, we employ the same standard as that applicable to motions for a new trial based on newly discovered evidence. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994). Specifically, the evidence must (1) be such that it would probably change the result; (2) have been discovered since trial; (3) not have been discoverable before trial by the exercise of due diligence, (4) be material, and (5) not be merely cumulative or impeaching. *Lord*, 123 Wn.2d at 320. "'[N]ewly discovered evidence' is grounds for relief in a personal restraint proceeding only if '[m]aterial facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction [or] sentence . . .'" *In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 493, 789 P.2d 731 (1990) (quoting RAP 16.4(c)(3)).

The newly discovered evidence here—Hubbard's new status as a parent—meets this standard. Had Hubbard been a biological parent to a non-victim child at the time of sentencing, the trial court would have considered whether the community custody condition prohibiting all contact with minors was reasonably necessary balanced against Hubbard's fundamental right to parent. It is undisputed that this evidence was discovered after trial and that it was not discoverable before trial, as Hubbard did not become a biological parent until 15 years later.

[1] The trial court did not grant Hubbard's motion on the basis that it was timely under RCW 10.73.100(1)'s newly discovered evidence exception. But we can affirm the superior court on any grounds supported by the record. *State v. Streepy*, 199 Wn. App. 487, 500, 400 P.3d 339 (2017).

Further, Hubbard's new status as a biological parent is material to whether the community custody conditions are constitutional. And the new evidence is not cumulative nor impeaching.

Moreover, the newly discovered evidence here—Hubbard's new status as a parent—requires modification of the sentence in the interest of justice. "[T]he right to the care, custody, and companionship of one's children constitutes a fundamental constitutional right, so sentencing conditions burdening this right 'must be sensitively imposed so that they are reasonably necessary to accomplish the essential needs of the State and public order.'" *McGuire*, 12 Wn. App. 2d at 95 (quoting *Rainey*, 168 Wn.2d at 377 (internal quotations omitted)). In the 15 years since his conviction, Hubbard has completed his prison sentence, completed sex offender treatment, obtained and maintained employment and housing, and re-married and had a child. He has not been charged with any additional offenses and has substantially complied with the terms of his community custody.

Accordingly, because Hubbard's motion is based upon newly discovered evidence, his CrR 7.8 motion is not time barred.

II. THE TRIAL COURT'S AUTHORITY

The State also argues that the trial court lacked authority to modify the conditions of Hubbard's community custody. We disagree.

The superior court has authority, on motion and upon such terms as are just, to relieve a party from a final judgment for "'[a]ny other reason justifying relief from the operation of the judgment.'" *State v. Smith*, 159 Wn. App. 694, 700, 247 P.3d 775 (2011) (alteration in original) (quoting CrR 7.8(b)(5)). Final judgments should be vacated or altered "only in those limited circumstances, "where the interests of justice most urgently require." *State v. Shove*, 113 Wn.2d

83, 88, 776 P.2d 132 (1989). "A violation of a fundamental constitutional right, such as the right to parent, would be a reason to justify relief." *State v. McGuire*, 12 Wn. App. 2d 88, 94, 456 P.3d 1193 (2020). "CrR 7.8(b)(5) will not apply when the circumstances used to justify the relief existed at the time the judgment was entered." *Smith*, 159 Wn. App. at 700.

We review a trial court's decision on a CrR 7.8(b)(5) motion for abuse of discretion. *State v. Bratton*, 193 Wn. App. 561, 563, 374 P.3d 178 (2016). "A trial court abuses its discretion when it bases its decisions on untenable or unreasonable grounds." *Bratton*, 193 Wn. App. at 563.

The State contends that this case is nearly identical to our recent unpublished opinion in *State v. Hoch*.[2] *Hoch* is instructive but easily distinguishable. There, Hoch appealed the trial court's denial of his CrR 7.8 motion to modify the conditions of his community custody arguing that the prohibition against having contact with any minors violated his fundamental right to the care and companionship of his biological children. *Hoch*, No. 52256-0-II, slip op. at 1. We held that the trial court lacked the authority to modify the conditions of his custody because Hoch did not establish that the circumstances he used to justify relief did not exist at the time the judgment was entered. *Hoch*, No. 52256-0-II, slip op. at 8. Specifically, we noted that Hoch failed to show that his children did not exist or that he had no parental rights to protect at the time the judgment was entered. *Hoch*, No. 52256-0-II, slip op. at 8.

[2] *State v. Hoch*, No. 52256-0-II (Wash. Ct. App. June 2, 2020), https://www.courts.wa.gov/opinions/pdf/D2%2052256-0-II%20Unpublished%20Opinion.pdf. Unpublished opinions filed on or after March 1, 2013, may be cited as persuasive authority per GR 14.1.

Here, unlike in *Hoch*, it is well established that Hubbard did not have any biological children at the time the trial court entered his judgment and sentence in 2005. Hubbard had no parental rights to protect until the birth of his child in 2020. The facts of this case are more similar to *McGuire*, 12 Wn. App. 2d at 88. There, we held that McGuire was entitled to relief under CrR 7.8(b)(5) from a no contact order prohibiting him from contacting the mother of his child under any circumstances where the child had not yet been born when the no contact order was entered. *McGuire*, 12 Wn. App. 2d at 93-95.

Because Hubbard's argument to modify the community custody condition involved a fundamental constitutional right to parent, which did not exist at the time the judgment was entered, CrR 7.8(b)(5) applies, and the trial court had the authority to exercise its discretion. We affirm.

Worswick, J.

We concur:

Maxa, J.

Nevin, J. Pro Tempore*

* Judge Nevin is now serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

February 1, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. JEREMY DUSTIN HUBBARD, Respondent.	No. 55584-1-II UNPUBLISHED OPINION

WORSWICK, J. — The State appeals the trial court's order granting Jeremy Hubbard's motion to modify the conditions of his community custody and allowing him unsupervised contact with his children and grandchildren. The State argues that the motion to modify was time barred and that the trial court lacked authority to modify the conditions of Hubbard's community custody. We disagree and affirm the trial court's order granting Hubbard's motion to modify the terms of his community custody.

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where minor children live without prior approval from his CCO, prohibiting him from dating individuals or forming relationships with families who have minor children without prior approval from his CCO, and prohibiting him from using, possessing, or controlling any alcohol.

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ANALYSIS

As an initial matter, the State argues that Hubbard's motion is time barred. CrR 7.8(b) provides that a motion brought under CrR 7.8(b)(5) must be made "within a reasonable time." Hubbard's motion to modify satisfies this requirement. He brought his motion to modify three months prior to the birth of his child and renewed the motion six months after she was born. Given that the grounds justifying relief did not arise until Hubbard became a parent, Hubbard brought his motion "within a reasonable time" by filing it when the circumstance arose.

The State also argues that the trial court lacked authority to modify the conditions of Hubbard's community custody. We disagree.

The superior court has authority, on motion and upon such terms as are just, to relieve a party from a final judgment for "'[a]ny other reason justifying relief from the operation of the judgment.'" *State v. Smith*, 159 Wn. App. 694, 700, 247 P.3d 775 (2011); CrR 7.8(b)(5). Final judgments should be vacated or altered "only in those limited circumstances where the interests of justice most urgently require." *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989). "A violation of a fundamental constitutional right, such as the right to parent, would be a reason to justify relief." *State v. McGuire*, 12 Wn. App. 2d 88, 94, 456 P.3d 1193 (2020). "CrR 7.8(b)(5) will not apply when the circumstances used to justify the relief existed at the time the judgment was entered." *Smith*, 159 Wn. App. at 700.

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Because Hubbard's argument to modify the community custody condition involved a fundamental constitutional right to parent, which did not exist at the time the judgment was entered, CrR 7.8(b)(5) applies, and the trial court had the authority to exercise its discretion. We affirm.

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

Worswick, J.

We concur:

Maxa, J.

Nevin, J., Pro Tempore[2]

[2] Judge Nevin is now serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

KITSAP CO PROSECUTOR'S OFFICE

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