Supreme Court No. 101965-3
NO. 38516-7-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,
v.

TONATIUH A. SANCHEZ LUJANO,

Petitioner.

ON APPEAL FROM THE COURT OF APPEALS DIVISION THREE

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. Tonatiuh Sanchez Lujano (Lujano)[1], Petitioner here and Appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4(b)(1), (3), and (4).

B. COURT OF APPEALS DECISION

In a modified opinion filed April 11, 2023, the Court of Appeals held Mr. Sanchez Lujano's appeal was untimely, denied his motion to extend time to file a notice of appeal, and thereby terminating review of his case. Exhibit A.

C. ISSUE(S) PRESENTED FOR REVIEW

1. Criminal defendants in Washington are guaranteed the constitutional right to appeal in all cases. Defendants maintain this right even after a guilty plea. The State bears the burden of demonstrating the knowing, voluntary, and intelligent waiver of the right to appeal before an appeal can be dismissed as untimely.

[1] This petition will refer to Mr. Tonatiuh Sanchez Lujano as Lujano for consistency and brevity.

Mr. Sanchez Lujano was not advised of his right to directly appeal after entry of his guilty plea and both the Court of Appeals and the State of Washington concede nothing in the record explicitly demonstrates Mr. Sanchez Lujano's knowingly, intelligently, and voluntarily waived his right to appeal. Does the Court of Appeals properly hold that an appeal may be dismissed as untimely when neither the State nor the record demonstrate Mr. Sanchez Lujano knowingly, intelligently, and voluntarily waived his right to appeal?

2. Defendants may waive their right to appeal but the waiver must be knowing, intelligent, and voluntary. Mr. Sanchez Lujano pled guilty but was not advised he had the right to appeal unless the trial court imposed an exceptional sentence. Does the Court of Appeals correctly hold that a guilty plea may be used to demonstrate waiver of the right to directly appeal a guilty plea when the defendant was not independently advised of their right to appeal?

D. STATEMENT OF THE CASE

The State charged Mr. Sanchez Lujano with one count of residential burglary in April 2008. In May 2008 Mr. Sanchez Lujano pled guilty to residential burglary. In a document labeled "Statement of Defendant on Plea of Guilty to Non-Sex Offense," Mr. Sanchez Lujano was advised of the following rights and implications of the guilty plea:

> (a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;
> (b) the right to remain silent before and during trial, and the right to refuse to testify against myself;
> (c) the right at trial to hear and question the witnesses who testify against me;
> (d) the right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;
> (e) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty;
> (f) the right to appeal a finding of guilty after a trial.

CP 5-6. Within that same document, under section (h), Mr. Sanchez Lujano was advised he could not appeal a sentence within the standard range:

> I understand that if a standard range sentence is imposed, the sentence cannot be appealed by

> anyone. If an exceptional sentence is imposed after a contested hearing, either the State or I can appeal the sentence.

CP 7.

The trial court engaged, along with Mr. Sanchez Lujano's assigned counsel, in the guilty plea colloquy. The trial court failed to provide, discuss, or otherwise mention appellate rights. In lieu of confinement, Mr. Sanchez Lujano served a portion of his sentence on work release which was completed in late 2009. In March 2010 a bench warrant was issued for Mr. Sanchez Lujano as a result of missed payments on legal financial obligations. Mr. Sanchez Lujano appeared before the court in June 2011. There was no discussion of "appeal" at that time.

Thirteen years later, on October 18, 2021, Mr. Sanchez Lujano simultaneously filed a notice of appeal and motion to extend time to file the notice of appeal, in Division Three. The Court of Appeals noted that Mr. Sanchez Lujano's motion did "not assert [] he lacked knowledge of his limited right to appeal following a guilty plea or, if he had known of his limited right to

appeal, he would have directed his attorney to file an appeal." Slip Opinion (OP) at 4. A commissioner referred the matter to a full panel where briefing was requested.

Division Three issued an opinion on December 13, 2022, holding Mr. Sanchez Lujano's appeal was untimely, and denying Mr. Sanchez Lujano's motion to extend time to file a notice of appeal. Division Three granted a motion to reconsider and shortly thereafter issued an amended opinion on April 11, 2023. Again, Division Three held Mr. Sanchez Lujano's appeal was untimely and denied his motion to extend time to file a of appeal.

In the opinion, Division Three correctly notates criminal defendants have a constitutional right to a direct appeal. OP at 4. The Court correctly recognizes the trial court is responsible for properly advising defendants about their rights to and on appeal. *Id.* Further, the Court highlights generally a party must file a notice of appeal within 30 days under RAP 5.2(a), but that RAP 18.8(b), the appellate court may extend time to file. OP at 5.

Division Three, after articulating these rules, expressly states (1) "[Mr. Sanchez Lujano's] sentencing court failed to follow the prescription found in CrR 7.2(b)"; (2) Mr. Sanchez Lujano was not advised of the 30 day deadline; (3) Mr. Sanchez Lujano was not advise he "possessed a right to appeal the acceptance of his guilty plea;" and (4) that Mr. Sanchez Lujano was told he could only appeal a sentence outside the standard range. OP at 5.

Division Three also held that Mr. Sanchez Lujano did not expressly waive his right to directly appeal following entry of the guilty plea. OP at 6-8. How the "trial court sentenced [Mr. Sanchez Lujano], suggest no express waiver of the right to appeal." OP at 8.

> The sentencing court did not inform [Mr. Sanchez Lujano] of any right and did not question whether [Mr. Sanchez Lujano] wanted to waive the right. The papers [Mr. Sanchez Lujano] signed did not adequately explain the right now ask if [Mr. Sanchez Lujano] wanted to forego the right…

OP at 8.

Despite holding there was no signed waiver, or expressed waiver of the right to appeal, the Court then considered whether Mr. Sanchez Lujano simply waived his right due to the passage of time. OP at 8.

The Court begun its analysis by considering the implication of Mr. Sanchez Lujano's guilty plea. OP at 8-9. Specifically, the Court stated in *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998), this Court "introduced the strong presumption in favor of a voluntary, knowing, and intelligent waiver of the right to appeal when the defendant signs a plea statement that mentions giving up the right." OP at 8-9.

Next, the Court discussed *State v. Cater* highlighting there were four unique circumstances that can be used to find a defendant has knowingly, intelligently, and voluntarily waived their right to appeal. OP at 9-10. Division Three, in Mr. Sanchez Lujano's case, explained that in addition to the presumption discussed in *Smith*, three out of the four "unique" circumstances

discussed in *Cater* were present in Mr. Sanchez Lujano's case which demonstrated he waived his right to appeal.

Similarly, and relying on *Cater*, the Court discussed *State v. D.G.A.*, No. 38325-3-III (Mar. 16, 2023), stating that the "rule" and precedent in *Cater* was that "a voluntary guilty plea acts as a waiver to the appeal right or at least creates a strong presumption of waiver." OP at 10.

This petition follows.

E. ARGUMENT

1. THE COURT OF APPEAL'S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND ITS HOLDING CANNOT BE RECONCILED WITH LONG ESTABLISHED PRINCIPLES.

The Court of Appeals erred when it held Mr. Sanchez Lujano waived his right to appeal even though Mr. Sanchez Lujano was not advised of his right to appeal. Specifically, the Court relied on, and misinterpreted, irrelevant case law which introduced impermissible presumptions in determining whether Mr. Sanchez Lujano waived his right to appeal. Division Three's presumption cannot be reconciled with this Court's holdings that

there is no presumption of waiver in the procedural posture of Mr. Sanchez Lujano's case.

Further, the Court erred when it announced defendants, when seeking to directly appeal their conviction, must demonstrate something more than they were not advised of their right to appeal. Division Three did not invoke, and it has not been argued, abandonment, therefore, this new quasi rule is unworkable and simply not needed because this Court has already determined an appeal cannot be dismissed as untimely when the State cannot demonstrate and knowing, intelligent, and voluntary waiver of that right.

This Court must accept review under RAP 13.4(b)(1), (3), and (4) because Division Three's opinion cannot be reconciled with this Court's holdings and because interpretation of a fundamental constitutional right is paramount.

a. The Court of Appeals erred holding Mr. Sanchez Lujano was not properly advised of his right to appeal but denying his appeal as untimely.

The Washington State Constitution provides that defendants may "appeal in all cases." *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978) (quoting *State v. Schoel*, 54 Wn.2d 388, 341 P.2d 481 (1959)); *State v. Neff*, 163 Wn.2d 453, 459, 181 P.3d 819 (2008); Wash. Const. art. I, sec. 22. "The presence of the right to appeal in our state constitution convinces us it is to be accorded the highest respect by this court." *Sweet*, 90 Wn.2d at 286.

There is no presumption of waiver in the constitutional right of appeal. *Id.* Defendants may waive their right to appeal but only when that waiver is knowing, intelligent, and voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). Defendants must be informed of the right before they can waive their right. *Neff*, 163 Wn.2d at 459.

In situations where an issue turns on whether the defendant waived their right to appeal, "the State must prove a

defendant understood both his right to appeal and the effect of a waiver." *Neff*, 163 Wn.2d at 460 (citing *State v. Kells*, 134 Wn.2d 309, 314, 949 P.2d 818 (1998)). The State cannot, and did not, meet this burden in Mr. Sanchez Lujano's case. OP at 6-7.

The Rules of Appellate Procedure (RAP) are interpreted liberally "to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). Generally, under RAP 5.2(a) a notice of appeal must be filed within 30 days after entry of the order the aggrieved party wants reviewed. But, under RAP 18.8(b), the appellate court in "extraordinary circumstances and to prevent a gross miscarriage of justice" can "extend the time within which a party must file a notice of appeal." *Also Kells*, 134 Wn.2d at 314 (quoting RAP 18.8(b)).

In the criminal context, RAP 18.8(b)'s policy consideration gives way to "a defendant's constitutional right to appeal." *Kells*, 134 Wn.2d at 314 (citing *Sweet*, 90 Wn.2d 282). Therefore, "a criminal appeal may not be dismissed as untimely unless the State demonstrates that the defendant voluntarily,

knowingly, and intelligently abandoned his appeal right." *Kells*, 134 Wn.2d at 313 (citing *State v. Tomal*, 133 Wn.2d 985, 948 P.2d 833 (1997)).

In *Kells*, this Court continued to protect defendants' right to an appeal. *Kells*, 134 Wn.2d at 315. In *Kells*, the defendnat did not file an appeal after entry of a declination order. *Kells*, 134 Wn.2d at 311-12. On appeal, the Court considered whether Kells was supposed to be advised of his right to appeal the declination order and whether the appeal could be dismissed as untimely without showing knowingly, intelligent, and voluntary waiver. *Kells*, 134 Wn.2d at 312. In reversing, this Court stated "an involuntary forfeiture of the right to a criminal appeal is never valid." *Kells*, 134 Wn.2d at 313. This Court went on to reaffirm its holding in *Tomal* stating "a criminal appeal may not be dismissed as untimely unless the State demonstrates that the defendant voluntarily, knowingly, and intelligently abandoned his appeal right." *Id*.

The facts in Mr. Sanchez Lujano's case are similar to those in *Kells* where here Mr. Sanchez Lujano was not advised of his right to an appeal, either in writing or orally. OP at 5-6, 6-7, 8. Division Three noted that:

> Tonatiuh Sanchez Lujano's sentencing court failed to follow the prescription found in CrR 7.2(b). The statement of plea of guilty signed by Sanchez Lujano read that he can only appeal a sentence outside a standard range sentence. The statement did not inform him that he must file any appeal within thirty days. The statement also did not advise him that he possessed a right to appeal the acceptance of his guilty plea. The judgment and sentence warned that Sanchez Lujano must file any collateral attack within one year, but delivered no warning about a deadline for an appeal.

OP at 5.

Later, Division Three acknowledged "Tonatiuh Sanchez Lujano signed no waiver of the right to appeal…" OP at 6. And again, Division Three acknowledge there was no other indication Mr. Sanchez Lujano was properly advised of his right to appeal and then waived that right:

> The circumstances, under which the trial court sentenced Tonatiuh Sanchez Lujano, suggest no

> express waiver of the right to appeal. The sentencing court did not inform Sanchez Lujano of any right and did not question whether Sanchez Lujano wanted to waive the right. The papers Sanchez Lujano signed did not adequately explain the right nor ask if Sanchez Lujano wanted to forego the right.

OP at 8.

Under *Sweet*, *Tomal*, *Kells*, and *Neff*, there is only one conclusion—Mr. Sanchez Lujano's appeal cannot be dismissed as untimely because (1) Mr. Sanchez Lujano was not properly advised of his right to appeal, and (2) the State cannot demonstrate, in the record, he knowingly, intelligently, and voluntarily waived his right to appeal. *Kells*, 134 Wn.2d at 313 ("an involuntary forfeiture of the righ to a criminal appeal is never valid."). But Division Three disregarded this Court's holdings and still dismissed Mr. Sanchez Lujano's appeal as untimely, even while recognizing Mr. Sanchez Lujano was not advised of his right to appeal and there was no evidence of waiver.

For this reason alone, this Court must accept review under RAP 13.4(b)(1), (3), and (4). Division Three's decision to recognize these principles in light of the facts of Mr. Sanchez Lujano's case but then hold Mr. Sanchez Lujano's appeal is untimely is plainly wrong. *Kells*, 134 Wn.2d at 313 (reaffirming *Tomal*, 133 Wn.2d 985).

b. Division Three introduced a new quasi rule with impermissible presumptions based on irrelevant case law.

Despite acknowledging Mr. Sanchez Lujano was not advised of his right to appeal and that Mr. Sanchez Lujano did not waive his right to appeal, Division Three announced a new rule stating that the Court must consider other facts in determining whether Mr. Sanchez Lujano waived his right to appeal. OP at 8. Specifically, that under *Smith*, there is a presumption the defendant waives their right to an appeal when he pleads guilty. *Id.* (citing and discussing *State v. Smith*, 134 Wn.2d 849 (1998).

This Court must accept review because Division Three's interpretation of *Smith* is incorrect and *Smith* is factually and procedurally irrelevant to Mr. Lujano's case. Not only was the question in *Smith* different, but the cases it relies on and discusses were in a different procedural posture than in Mr. Sanchez Lujano's case.

Smith, and the case underlying it, *State v. Johnson*, 104 Wn.2d 338, 705 P.2d 773 (1985), turn on what issues can be raised on appeal, not whether the defendant can bring an appeal. *Johnson*, 104 Wn.2d at 341. Moreover, *Johnson*'s procedural posture implicates different rules and therefore gives rise to certain rebuttable presumptions. *Johnson*, 104 Wn.2d at 339. Specifically, the State bears the burden of establishing beyond a reasonable doubt the constitutional validity of any predicate offense used to elevate a current charge. *Johnson*, 104 Wn.2d at 339; *also State v. Robinson*, 8 Wn. App. 2d 629, 439 P.3d 710 (2019); *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Warriner*, 100 Wn.2d 459, 460,

670 P.2d 636 (1983). A defendant challenging a prior conviction that is an element of a crime, is not a collateral attack on that conviction. *State v. Summers*, 120 Wn.2d 801, 810, 846 P.2d 490 (1993). Rather, "the challenge instead is to the present use of an invalid plea in a present criminal" case. *State v. Holsworth*, 93 Wn.2d 148, 154, 607 P.2d 845 (1980).

The rebuttal presumptions discussed in *State v. Cater*, 186 Wn. App. 384, 345 P.3d 843 (2015), were first discussed in *Parke*. In *Parke*, the United States Supreme Court clarified the rules and presumptions that are permissible when the State relies on a previous conviction in a persistent offender case. *Parke v. Raley*, 506 U.S. 20, 24, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992). More specifically, *Parke* establishes that there are different rules and presumptions whether the appeal is on direct review, collateral attack, or a challenge to the use of a prior conviction. *Parke*, 506 U.S. at 29-30 ("[Raley] sought to deprive them of their normal force and effect in a proceeding that had an

independent purpose other than to overturn the prior judgments.").

In *Parke*, Kentucky sought to sentence Raley under the persistent offender statute when Raley argued at a motion hearing his prior convictions needed to be suppressed under *Boykin* "because the records did not contain transcripts of the plea proceedings and hence did not affirmatively show that respondent's guilty pleas were knowing and voluntary." *Parke*, 506 U.S. at 23. The Supreme Court affirmed a burden shifting mechanism in these limited situations in which, if there is some evidence to suggest regularity than regularity can be presumed until the defendant sufficiently rebuts that presumption. *Parke*, 506 U.S. 30-1[2].

Similarly, in *Cater*, the defendant was charged with first degree arson in 1979. *Cater*, 186 Wn. App. at 386. Cater

[2] A recent unpublished decision from Division Three notes this burden shifting scheme and how it is used and/or applied in Washington State. *State v. Sleeper*, 21 Wn. App. 2d 1053, 2022 WL 111796 (April 14, 2022).

acknowledged in a "Statement of Defendant on Plea of Guilty" that "he was pleading guilty" as "charged in the information, a copy of which I have received" *Cater*, 186 Wn. App. at 386-87. Further, "The Statement of Defendant on Plea of Guilty states that by entering a plea of guilty, Cater agreed to waive a number of rights, including the right to appeal 'any finding of guilty and the sentence.' " *Cater*, 186 Wn. App. at 387.

In 1989, Cater was convicted of other crimes. *Cater*, 186 Wn. App. at 388. At sentencing, Cater acknowledged his 1979 conviction as a point for sentencing purposes. *Id.* The 1989 conviction was appealed and his conviction affirmed. *Cater*, 186 Wn. App. at 389-90.

Then, in 2013 Cater was charged with Second Degree Assault. *Cater*, 186 Wn. App. at 390. The State pursued the case as a third strike under the persistent offender statute. *Id.* Defense counsel immediately moved to enlarge time to file a notice of appeal with regard to the 1979 conviction. Division One after examining most of the cases discussed in this petition including

Kells, *Sweet*, *Tomal*, and *Smith*, reasoned that several factors existed demonstrating Cater waived his limited right to appeal:

> The unique circumstances, including the presumption of a voluntary plea, the exceptionally favorable plea agreement, the unexplained 34–year–delay in filing a notice of appeal, and Cater's complete failure to assert any facts suggesting he was unaware of his limited right to appeal, support the strong inference that he knowingly, intelligently, and voluntarily waived his limited right to appeal following a guilty plea

Cater, 186 Wn. App. at 397.

Parke and *Cater*, are nearly identical in their procedural posture. In both cases the defendants' challenge was a collateral attack, not a direct appeal. *Parke*, 506 U.S. at 29-30; *Cater*, 186 Wn. App. at 390. Neither Division One, in *Cater*, nor Division Three, in Mr. Sanchez Lujano's case, acknowledged the procedural differences. This is why Division Three's reliance on *Cater*, is misplaced.

In contrast to *Parke* and *Cater*, Mr. Sanchez Lujano's challenge is to the conviction itself—a direct appeal— not a challenge in a new independent proceeding. *Id.* And it is because

Mr. Sanchez Lujano's case is at the direct appeal stage, no presumptions of waiver applies. *Kells*, 134 Wn.2d at 314.

Under RAP 13.4(b), this Court must accept review because Division Three's new quasi rule, introducing a presumption of waiver based on a guilty plea, at the direct appeal stage, cannot be reconciled with this Court's opinions holding there is no presumption of waiver. By introducing this presumption Division Three has relieved the State of its burden of proving Mr. Lujano knowingly, intelligently, and voluntarily waived his right to appeal.

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F. CONCLUSION

Mr. Sanchez Lujano asks this Court to accept review under RAP 13.4(b)(1), (3), and (4). Division Three's opinion cannot be reconciled under any of this Court's prior cases. Further, Division Three's opinion introduces a new presumption, on direct appeal, that this Court has determined are impermissible.

DATED this 26th day of May 2023.

I, Kyle Berti, in accordance with RAP 18.7, certify that this document is properly formatted and contains 3598 words.

Respectfully submitted,

KYLE BERTI
WSBA No. 57155
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Kyle Berti, a person over the age of 18 years of age, served the Benton County Prosecutor (prosecuting@co.benton.wa.us) a true copy of the document to which this certificate is affixed on 5/26/2023. Service was made by electronically utilizing the Washington Courts E-File service system. An electronic copy was provided to Mr. Sanchez Lujano.

KYLE BERTI
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Attorney for Petitioner

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

STATE OF WASHINGTON, Respondent, v. TONATIUH A. SANCHEZ LUJANO, Appellant.	)	No. 38516-7-III UNPUBLISHED OPINION

FEARING, C.J. — Tonatiuh Sanchez Lujano challenges the voluntary nature of his guilty plea to residential burglary in 2008. In addition to Sanchez Lujano's appeal raising the question of the voluntariness of his plea, we must decide whether Sanchez Lujano may appeal the plea thirteen years later. Because of the extraordinary untimeliness of the appeal, we decline Sanchez Lujano's request to grant late filing of the appeal.

FACTS

The State of Washington charged Tonatiuh A. Sanchez Lujano with one count of residential burglary in April 2008. A probable cause affidavit in support of the charge revealed that Sanchez Lujano admitted to "forcing his way into the residence and assaulting" a man. Clerk's Papers (CP) at 3.

In May 2008, Tonatiuh Sanchez Lujano pled guilty to the charge of residential burglary. He signed a statement of defendant on plea of guilty form. The statement declared:

> On 4/18/08 in Benton County with intent to commit a crime therein I entered or remained in another person's residence.

CP at 12.

When signing the statement of guilty plea, Tonatiuh Sanchez Lujano confirmed that he read the document with his attorney and understood the information contained therein. The form included the following overly capitalized language:

> I Understand I Have the Following Important Rights, and I Give Them All Up by Pleading Guilty:
>
> . . . .
>
> (f) The right to appeal a finding of guilt after a trial.
>
> . . . .
>
> I understand that if a standard range sentence is imposed, the sentence cannot be appealed by anyone. If an exceptional sentence is imposed after a contested hearing, either the State or I can appeal the sentence.
>
> . . . .
>
> I make this plea freely and voluntarily.

CP at 5-11. After reading Sanchez Lujano's statement of defendant on the plea of guilty, the trial court signed the document and found the:

> plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

CP at 12.

In September 2008, the superior court sentenced Tonatiuh Sanchez Lujano to four months of confinement, which was within the standard range of three to nine months and which followed the State's recommendation. On delivering Sanchez Lujano's sentence, the court did not verbally inform him of his rights to appeal or any limitations to the rights.

After receiving his sentence, Tonatiuh Sanchez Lujano signed a judgment and sentence. The judgment and sentence form, also signed by the sentencing court, contained the following language:

> Any petition or motion for collateral attack on this judgement and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter.

CP at 20.

The trial court permitted Tonatiuh Sanchez Lujano to serve his time in confinement through work crew beginning September 10, 2008 and lasting for four months. He completed this term of his sentence by the end of 2009.

In March of 2010, the superior court issued a bench warrant for the arrest of Tonatiuh Sanchez Lujano because of his failure to pay legal financial obligations. In May 2011, authorities arrested Sanchez Lujano on the warrant. Sanchez Lujano returned to court in June 2011 when the court entered an order placing him on a pay or appear plan. Sanchez Lujano did not then ask about or assert any right to appeal.

PROCEDURE

On October 18, 2021, thirteen years after Tonatiuh Sanchez Lujano entered his guilty plea, he filed a notice of appeal in this court. Sanchez Lujano simultaneously filed a motion to extend the time to file his notice of appeal. This opinion addresses this motion. As part of his motion, Sanchez Lujano does not assert that he lacked knowledge of his limited right to appeal following a guilty plea or, if he had known of his limited right to appeal, he would have directed his attorney to file an appeal.

LAW AND ANALYSIS

One constitutional provision and three court rules intersect in resolving Tonatiuh Sanchez Lujano's motion to file an untimely appeal. WASH. CONST. art. I, § 22 declares in relevant part:

> In criminal prosecutions the accused shall have . . . right to appeal in all cases.

Under CrR 7.2, the sentencing court must advise the offender of his right to appeal and rights attended to an appeal. CrR 7.2(b) provides:

> Procedure at Time of Sentencing. The court shall, immediately after sentencing, advise the defendant: (1) of the right to appeal the conviction; (2) of the right to appeal a sentence outside the standard sentence range; (3) that unless a notice of appeal is filed within 30 days after the entry of the judgment or order appealed from, the right to appeal is irrevocably waived; (4) that the superior court clerk will, if requested by the defendant appearing without counsel, supply a notice of appeal form and file it upon completion by the defendant; (5) of the right, if unable to pay the costs thereof, to have counsel appointed and portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal;

> and (6) of the time limits on the right to collateral attack imposed by RCW 10.73.090 and .100. If this advisement follows a guilty plea, the court shall advise the defendant that the right to appeal is limited. These proceedings shall be made a part of the record.

(Boldface omitted.)

Under RAP 5.2(a), a party must file a notice of appeal within "30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed." In turn, RAP 18.8(b) reads:

> Restriction on Extension of Time. The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal. . . . The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.

(Boldface omitted.)

Tonatiuh Sanchez Lujano's sentencing court failed to follow the prescription found in CrR 7.2(b). The statement of plea of guilty signed by Sanchez Lujano read that he can only appeal a sentence outside a standard range sentence. The statement did not inform him that he must file any appeal within thirty days. The statement also did not advise him that he possessed a right to appeal the acceptance of his guilty plea. The judgment and sentence warned that Sanchez Lujano must file any collateral attack within one year, but delivered no warning about a deadline for an appeal.

In addressing whether to accept an untimely appeal from Tonatiuh Sanchez Lujano, we must first assess whether Sanchez Lujano waived a right to appeal. To repeat, the Washington constitution guarantees criminal defendants the "right to appeal in all cases." WASH. CONST. art. I, § 22. A defendant may waive this right, but only if he does so intelligently and with a full understanding of the consequences. *State v. Perkins*, 108 Wn.2d 212, 215, 737 P.2d 250 (1987). Before we dismiss an appeal as untimely under RAP 18.8(b), the State must demonstrate that the appellant made a voluntary, knowing, and intelligent waiver of his right to appeal. *State v. Kells*, 134 Wn.2d 309, 315, 949 P.2d 818 (1998). To show his understanding, the State must prove a defendant understood both his right to appeal and the effect of a waiver. *State v. Kells*, 134 Wn.2d 309, 314 (1998). The State goes far in meeting this burden when a defendant signs a waiver statement and admits to understanding it. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). A waiver statement creates a strong presumption of a voluntary waiver. *State v. Smith*, 134 Wn.2d 849, 852 (1998). The presumption is not conclusive, though. *State v. Neff*, 163 Wn.2d 453, 459, 181 P.3d 819 (2008).

Tonatiuh Sanchez Lujano signed no waiver of the right to appeal. So, we consider whether other circumstances warrant a finding of a waiver. The simple reading of CrR 7.2(b) to a defendant may be insufficient to give rise to a conclusion of waiver. *State v. Sweet*, 90 Wn.2d 282, 286-87, 581 P.2d 579 (1978). In addition to showing strict compliance with CrR 7.2(b) by reading appeal rights to a defendant, the circumstances

must at least reasonably give rise to an inference the defendant understood the import of the court rule and willingly and intentionally relinquish a known right. *State v. Sweet*, 90 Wn.2d 282, 287 (1978). The State may best establish a waiver of the right to appeal by a demonstration in the record that the trial judge questioned the defendant about his understanding of the appeal procedure and his intentions with regard to an appeal. *State v. Sweet*, 90 Wn.2d 282, 287 (1978).

Short of a comprehensive colloquy between the trial court and the accused, a conscious, intelligent, and willing failure to appeal may constitute waiver of the appeal right. *State v. Sweet*, 90 Wn.2d 282, 287 (1978). For example, if the trial court clearly advises a convicted individual of the right to appeal and the procedure necessary to vindicate that right in the manner prescribed by CrR 7.2(b), the individual demonstrates understanding, and the individual faces no unfair restraint, his failure to act may constitute the intentional relinquishment of a known right. *State v. Sweet*, 90 Wn.2d 282, 287 (1978). More importantly, a voluntary guilty plea acts as a waiver of the right to appeal. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); *State v. D.G.A.*, No. 38325-3-III, slip op. (Wash. Mar. 16, 2023). When a defendant completes a plea statement and admits to reading, understanding, and signing it, the court applies a strong presumption that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852 (1998); *State v. D.G.A.*, No. 38325-3-III, slip op. (Wash. Mar. 16, 2023).

The circumstances, under which the trial court sentenced Tonatiuh Sanchez Lujano, suggest no express waiver of the right to appeal. The sentencing court did not inform Sanchez Lujano of any right and did not question whether Sanchez Lujano wanted to waive the right. The papers Sanchez Lujano signed did not adequately explain the right nor ask if Sanchez Lujano wanted to forego the right. Nevertheless, the circumstances, under which Sanchez Lujano seeks to extend the time for filing an appeal, warrant careful consideration as to whether Sanchez Lujano waived his right with the passage of time. Although the court rules impose no deadline, after which the Court of Appeals will no longer entertain a late appeal, Sanchez Lujano appeals a guilty plea thirteen years after entering the plea and twelve years after completing his sentence.

An appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal. RAP 18.8(b). Under RAP 18.8(b), the appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant. *State v. Cater*, 186 Wn. App. 384, 391-92, 345 P.3d 843 (2015). Tonatiuh Sanchez Lujano shows no extraordinary circumstances or a gross miscarriage of justice.

In *State v. Smith*, 134 Wn.2d 849 (1998), this Washington Supreme Court introduced the strong presumption in favor of a voluntary, knowing, and intelligent waiver of the right to appeal when the defendant signs a plea statement that mentions giving up the right. The court, nonetheless, did not apply the presumption because

defense counsel told Tony Smith that, despite pleading guilty, Smith retained the right to appeal the trial court's denial of his motion to suppress evidence. The misadvice pertained to the right to appeal. We do not know the amount of time that passed between the entry of the plea and the filing of the appeal.

The most parallel Washington decision is *State v. Cater*, 186 Wn. App. 384 (2015). In order to avoid a third strike offense, Gregory Cater sought, in 2013, to appeal his 1979 guilty plea to arson. He argued he lacked notice, in 1979, of his right to appeal the guilty plea and thus he did not knowingly, intelligently, and voluntarily waive his right to appeal. He further argued that, because he did not waive his rights on appeal, his circumstances were extraordinary and warranted an extension of time allowing him to file a notice of appeal.

This court in *State v. Cater* distinguished its facts from the circumstances found in other Washington decisions. Gregory Cater did not assert that he lacked knowledge of his limited right to appeal following a guilty plea or, assuming he possessed knowledge of his limited right to appeal, he would have directed his attorney to file an appeal. Cater also did not assert that his attorney misadvised him about the limited right to appeal following a guilty plea or that his attorney's performance was deficient in any manner. When denying Cater's motion to extend time to file a notice of appeal, this court wrote:

> The unique circumstances, including the presumption of a voluntary plea, the exceptionally favorable plea agreement, the unexplained 34-year-delay in filing a notice of appeal, and Cater's complete failure to assert any

> facts suggesting he was unaware of his limited right to appeal, support the strong inference that he knowingly, intelligently, and voluntarily waived his limited right to appeal following a guilty plea.

State v. Cater, 186 Wn. App. 384, 397 (2015).

Three of the four unique circumstances referenced in *State v. Cater* run parallel in Tonatiuh Sanchez Lujano's request for late filing and lead us to conclude that Sanchez Lujano voluntarily waived his right to appeal. This court presumes that Sanchez Lujano made his plea voluntarily. Sanchez Lujano fails to explain his long-term delay in filing a notice of appeal. Sanchez Lujano has not presented any affidavit stating he was misadvised about the consequences of his guilty plea or his right to appeal.

This court recently followed *State v. Cater* in *State v. D.G.A.*, No. 38325-3-III, slip op. (Wash. Mar. 16, 2023). D.G.A. appealed a juvenile court disposition order twenty years after its entry. We dismissed the appeal because of untimeliness. D.G.A.'s plea of guilty read that he forwent the right to appeal a finding of guilt after trial and that no one could appeal a sentence imposed within the standard range. We recognized the burden on the State to show a voluntary, knowing, and intelligent waiver of the right to appeal or a voluntary, knowing, and intelligent abandonment of the appeal right. We followed, however, the rule that a voluntary guilty plea acts as a waiver to the appeal right or at least creates a strong presumption of waiver. D.G.A. provided no evidence to rebut the presumption. Therefore, we followed the precedent of *State v. Cater.*

Tonatiuh Sanchez Lujano warns us about holding that an accused waives the right to appeal merely by the passage of time. In a motion for reconsideration, he argues that we are creating new law by shifting the burden of persuasion on the accused. But we do not rely solely on the passage of time. We also rely on a voluntary plea and the lack of testimony that any incorrect advice was given as to the right to an appeal. We also base our ruling on the absence of any excuse for not filing the appeal and the lack of an assertion that Sanchez Lujano would have appealed earlier if he had been correctly and thoroughly advised of his right to do so. Sanchez Lujano does not supply any facts that his sentencing counsel failed to properly advise him about the right to appeal. We also do not create new law, but rather follow old law that creates a presumption of waiver on the signing of a guilty plea.

Tonatiuh Sanchez Lujano suggests in his motion for reconsideration that he finally appealed his guilty plea because, after seeking advice from an immigration attorney, he learned of the deficiencies in his plea. We deem any erroneous or incomplete immigration advice at the time of the plea to constitute a possible excuse for vacating the plea, not in filing an appeal thirteen years late.

CONCLUSION

We deny Tonatiuh Sanchez Lujano's motion to extend time to file his appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.
Fearing, C.J.

WE CONCUR:

Lawrence-Berrey, A.C.J.
Lawrence-Berrey, J.

Pennell, J.

THE LAW OFFICE OF KYLE BERTI

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