NO. 101568-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL INDELICIO NEVAREZ,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 7

A. The Appellate Court's Application of this Court's Recent Decisions in *Kennedy* and *Davis* to Nevarez's Case Does Not Present a Consideration Permitting Review 7

B. There is Nothing For This Court to Review With Respect to Nevarez's Ineffective Assistance Claim Because He Affirmatively Withdrew It and the Court of Appeals Did Not Rule Upon It 15

V. CONCLUSION 19

TABLE OF AUTHORITIES

State Cases

In re the Pers. Restraint of Davis, 200 Wn.2d 75,
514 P.3d 653 (2022)..... 1, 2, 7, 8, 10, 11, 12, 13, 14, 19

In re the Pers. Restraint of Kennedy, 200 Wn.2d 1,
513 P.3d 769 (2022)..... 1, 2, 7, 8, 9, 10, 11, 12, 14, 19

In re the Pers. Restraint of Lord, 123 Wn.2d 296,
868 P.2d 835 (1994)……..18

In re the Pers. Restraint of Monschke, 197 Wn.2d 305,
482 P.3d 276 (2021)..... 8, 9, 11, 12

State v. Barber, 170 Wn.2d 854,
248 P.3d 494 (2011)..... 14

State v. Brown, 13 Wn. App. 2d 288, 466 P.3d 244,
review denied, 196 Wn.2d 1013 (2020)..... 13

State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999),
abrogated with respect to defendants tried in adult court for crimes committed prior to their eighteenth birthday by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017).... 13

State v. Coristine, 177 Wn.2d 370,
300 P.3d 400 (2013)..... 17

State v. Houston-Sconiers, 188 Wn. 2d 1,
391 P.3d 409 (2017)..... 1, 5, 6, 8, 9, 11, 15

State v. Jones, 99 Wn.2d 735,
664 P.2d 1216 (1983)..... 16, 17

State v. Mandefero, 14 Wn. App. 2d 825,
473 P.3d 1239 (2020)..... 13

State v. Mierz, 72 Wn. App. 783, 866 P.2d 65, *aff'd*,
127 Wn.2d 460, 901 P.2d 286 (1995)..... 16

State v. Myers, 86 Wn.2d 419,
545 P.2d 538 (1976)..... 16

State v. Valladares, 99 Wn.2d 663,
664 P.2d 508 (1983)..... 16

State v. Wright, 19 Wn. App. 2d 37,
493 P.3d 1220 (2021), *review denied*,
199 Wn.2d 1005 (2022)..... 13

Federal and Other Jurisdictions

Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525,
45 L.Ed.2d 562 (1975)..... 16

Constitutional Provisions

U.S. Const. amend. VI..... 16

Statutes

RCW 9.94A.030(46)(a)(i)..... 3

RCW 9.94A.030(46)(a)(v)..... 3

RCW 9.94A.510..... 3

RCW 9.94A.515..... 3

RCW 9.94A.525(9)..... 3

RCW 9.94A.533(3)(a) 3

RCW 9.94A.589(1)(a) 3

RCW 10.95.020……..8, 9, 12, 14

RCW 10.95.030……8, 9, 10, 12, 15

RCW 10.95.030(1)……..8, 9, 10, 12

Rules and Regulations

CrR 7.8 ..... 6, 15

CrR 7.8(b) 4, 10, 11

CrR 7.8(c)(2) 5

RAP 13.4 2

RAP 13.4(b) 7

RAP 13.4(b)(1) 13

RAP 13.4(b)(2) 13

RAP 13.4(b)(3) 14, 15

RAP 13.4(b)(4) 14

RAP 18.2 17

I. INTRODUCTION

Petitioner Gabriel Indelcio Nevarez maintains arguments which this Court recently rejected in *In re the Pers. Restraint of Kennedy*, 200 Wn.2d 1, 513 P.3d 769 (2022) and *In re the Pers. Restraint of Davis*, 200 Wn.2d 75, 514 P.3d 653 (2022). Nevarez's case does not differ in any material way from these precedents. This petition attempts to relitigate the now firmly rejected argument that all individuals who were 18 years old when they committed their crimes must automatically be resentenced based on their youth, irrespective of their crimes and sentence. But the "children are different" case of *State v. Houston-Sconiers*, 188 Wn. 2d 1, 391 P.3d 409 (2017), does not apply to adults sentenced under the Sentencing Reform Act (SRA). Because this Court has authoritatively spoken on this issue, there is no basis for review.

The remainder of Nevarez's petition similarly does not present any issues worthy of this Court's consideration. The only decision the court of appeals made with respect to Nevarez's

claim alleging ineffective assistance of counsel was to permit him to withdraw it. Because Nevarez does not challenge any decision of the court of appeals related to this claim, there is nothing for this Court to review.

In sum, none of the issues raised in Nevarez's petition merit review by this Court. This Court should deny review.

II. RESTATEMENT OF THE ISSUES

This case does not meet the criteria for review under RAP 13.4. Nevarez's petition raises the following issues:

A. Whether Nevarez's case, which is materially indistinguishable from this Court's recent decisions *In re the Pers. Restraint of Kennedy*, 200 Wn.2d 1, 513 P.3d 769 (2022) and *In re the Pers. Restraint of Davis*, 200 Wn.2d 75, 514 P.3d 653 (2022), merits review.

B. Whether discretionary review of an issue that Nevarez waived and formally withdrew must be denied as there is no decision of the court of appeals to review.

III. STATEMENT OF THE CASE

Gabriel Nevarez was 18 years old when he killed Kyle Grinnell while shooting at Carlos Ruiz. CP 1-4. The State charged Nevarez with first-degree murder with a firearm

enhancement, first-degree assault with a firearm enhancement, and second-degree unlawful possession of a firearm. CP 1-2.

If convicted of these charges, Nevarez would have had an offender score of 4 on the murder. CP 62 (three points from prior offenses); RCW 9.94A.525(9) (an additional point for the current weapons offense). His standard range would have been 494-617 months (approximately 41-51 years). *See* RCW 9.94A.030(46)(a)(i) and (v) (defining first degree murder and assault as serious violent offenses); RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.533(3)(a) (adding ten years in enhancements); RCW 9.94A.589(1)(a) (explaining sentencing in the case of more than one serious violent offense).

Nevarez subsequently absconded to Mexico and did not return to Washington until he was extradited in August 2016. CP 122. On June 11, 2018, one day before his trial was to begin, Nevarez pled guilty to first-degree murder with a firearm enhancement in exchange for the State's agreement to dismiss the remaining charges and to join in a recommendation for the

low end of the presumptive sentencing range. CP 49, 53; 1RP[1] at 4, 16-17.

The superior court sentenced Nevarez on June 29, 2018. CP 65. Nevarez opted not to request an exceptional mitigated sentence based on his youthfulness because he understood that would have been a breach of the plea deal. *Id*.; 2RP at 21, 40. The court, however, inquired and determined that Nevarez had been 18 years old at the time of the offense. CP 126; 1RP at 36, 38. The court considered letters submitted in support of Nevarez, victim statements, Nevarez's allocution, and the joint sentencing recommendation before imposing a standard range sentence of 367 months, which was 36 months higher than the joint sentencing recommendation. 1RP at 29-35; CP 69, 145-52.

Nevarez subsequently filed timely CrR 7.8(b) motions seeking to withdraw his guilty plea based on a claim of

[1] "1RP" refers to give consecutively paginated volumes consisting of May 11, 2018, June 29, 2018, August 28, 2018, and November 15, 2018. "2RP" refers to the hearing on November 18, 2019.

ineffective assistance of counsel, or, in the alternative, requesting resentencing based on *Houston-Sconiers*. Pursuant to CrR 7.8(c)(2), the superior court retained consideration of the motion because it was filed within one year of his judgment and sentence becoming final and his ineffective assistance of counsel claim required a factual hearing. *Id*. at 119-120.

At the reference hearing, Nevarez's trial counsel testified that she was fully prepared for trial, clearly informed him that the court did not need to follow the joint sentencing recommendation, and she made the strategic decision to not seek a diminished capacity defense because Nevarez had consistently maintained that he was innocent of the charges. 2RP at 26-29, 37, 45. The court did not find that trial counsel's performance was deficient. 2RP at 67, 71.

The court additionally stated that it had considered Nevarez's age at sentencing and determined that he was "three months shy of his 19[th] birthday at the time of this offense" and thus, the court "had no legal obligation … to go through any type

of *Houston-Sconiers* analysis." 2RP at 70. The court stated that any attempt to argue youth-related mitigation "wouldn't have made any difference" and defense counsel did not have a "duty or obligation to argue age at the time of the offense as a factor in requesting the low end" because Nevarez was not a juvenile at the time of his murder. *Id*.

On appeal from the denial of his CrR 7.8 motion, Nevarez initially argued that (1) he should be permitted to withdraw his guilty plea because defense counsel rendered ineffective assistance of counsel, and (2) that resentencing was warranted because the trial court failed to consider Nevarez's youthfulness. Br. of App. at 2-3. On January 29, 2021, after the State filed the Brief of Respondent and shortly before Nevarez filed his reply, Nevarez requested to withdraw his first claim.

> Mr. Nevarez has directed undersigned counsel to withdraw all assignments of error and argument related to challenging his guilty plea. Mr. Nevarez believes it is in his best interest to withdraw his plea challenge from consideration as part of this appeal … He only wishes to have this Court review the sentencing issued raised on appeal.

Motion To Withdraw at 2. A Commissioner granted Nevarez's motion. Ruling (filed February 1, 2021).

The court of appeals denied Nevarez's appeal on the remaining claim. Pub. Op. at 2, 6-7.

IV. ARGUMENT

A. The Appellate Court's Application of this Court's Recent Decisions in *Kennedy* and *Davis* to Nevarez's Case Does Not Present a Consideration Permitting Review

This Court recently settled the debate regarding whether *all* individuals who were emerging adults when they committed their crimes are automatically entitled to resentencing based on youthfulness, regardless of their sentence and what they were convicted of. The answer is no. This Court definitively rejected Nevarez's claim in its recent decisions in *In re the Pers. Restraint of Kennedy*, 200 Wn.2d 1, 513 P.3d 769 (2022) and *In re the Pers. Restraint of Davis*, 200 Wn.2d 75, 514 P.3d 653 (2022). The lower courts here tightly adhered to these precedents in deciding Nevarez's claim. Nevarez's petition does not merit review under RAP 13.4(b).

It is now settled in Washington that sentencing courts are *required* to consider the mitigating qualities of youth only (1) for individuals who were juveniles when they committed their crimes, or (2) for persons were between the ages of 18- and 20-years-old when they committed aggravated murder, were convicted of aggravated murder under RCW 10.95.020, and sentenced to mandatory life without parole (LWOP) under RCW 10.95.030. *Houston-Sconiers*, 188 Wn.2d at 21; *Kennedy*, 200 Wn.2d at 24; *In re Pers. Restraint of Davis*, 200 Wn.2d 75, 83-84, 615 P.3d 653 (2022).

This Court held RCW 10.95.030(1) unconstitutional as applied to defendants who were 18-, 19-, or 20-years-old at the time they committed aggravated murder, because the statute did not allow the sentencing court any discretion to consider youth. *In re the Pers. Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021). The opinion is limited to the statute which mandates a life-without-parole sentence. *Monschke* does not require that

Houston-Sconiers be extended to emerging adults sentenced under the SRA.

If the narrowness of the plurality decision was not clear from the plain language in the lead *Monschke* opinion, this Court made it clear in *Kennedy* and *Davis. Davis*, 200 Wn.2d at 84 (explaining *Monschke*'s lead opinion's "holding and reasoning are limited to the statute at issue (RCW 10.95.030) as applied to the petitioners (aged 18-20 years old)"); *Kennedy*, 200 Wn.2d at 23 n.5 (stating there is simply "no reasoning in *Monschke* that extends its holding beyond the context of mandatory LWOP sentences"). *Monschke*'s holding is limited to RCW 10.95.030(1) which mandates life without parole, denying the sentencing judge any discretion to consider youth.

> Even if *Monschke*'s lead opinion could be read as announcing a holding of this court, Kennedy cannot show that such a holding is material to his sentence because he was neither convicted of aggravated first degree murder under RCW 10.95.020 nor sentenced to mandatory LWOP under RCW 10.95.030. … The *Monschke* lead opinion addressed only sentences under RCW 10.95.030, stating that its conclusion " 'flow[ed] straightforwardly from our precedents' "

> … and therefore related specifically to the constitutional concerns about the mandatory nature of an LWOP sentence. The lead opinion recognized that the mandatory nature of LWOP under RCW 10.95.030 makes that statute different from other sentencing statutes.

Kennedy, 200 Wn.2d at 24 (unanimous decision discussing plurality decision) (internal citations omitted); *accord Davis*, 200 Wn.2d at 83. The complete lack of discretion in RCW 10.95.030(1) does not exist under the SRA which explicitly allows courts to consider youth and depart from standard guidelines. *Kennedy*, 200 Wn.2d at 24; RCW 9.94A.535.

Nevarez claims that his case raises significant constitutional questions and issues of substantial public interest because it is distinguishable from *Kennedy* and *Davis*. Pet. at 9, 16-17. Not so. First, he argues that his case was a direct appeal while *Davis* and *Kennedy* filed personal restraint petitions. Pet. at 15. However, Nevarez appealed from a denial of a CrR 7.8(b) motion; thus, his case is reviewed under the same standards as a collateral attack, rendering this argument completely inapposite. Similarly, his argument that his case is distinguishable because

his collateral attack was timely filed is unavailing. *See* Pet. at 15. While he is correct that his CrR 7.8(b) motions were timely filed, this fact is immaterial. *Monschke* did not extend *Houston-Sconiers* to adults and this is true regardless of whether an adult's petition is timely or untimely.

Second, Nevarez attempts to distinguish his case by noting that neither of the petitioners in *Davis* and *Kennedy* were 18 years old at the time they committed their crimes. Pet. at 16. This is immaterial. *Houston-Sconiers* only applies to juvenile offenders. 188 Wn.2d at 21 (sentencing courts must consider the mitigating qualities of youth for juvenile offenders). Like the petitioners in *Davis* and *Kennedy*, Nevarez was not a juvenile at the time he committed his crimes. Thus, *Houston-Sconiers* is immaterial to him. And *Monschke* does not apply to Nevarez for the same reasons it did not apply to the petitioners in *Davis* and *Kennedy*—he was not neither convicted of aggravated murder nor did he face a mandatory LWOP sentence. *Davis*, 200 Wn.2d at 77 ("Even assuming that *Monschke* is retroactive, it is of little

use to Davis because he was convicted of a different offense …"); *Kennedy*, 200 Wn.2d at 24; ("Even if *Monschke*'s lead opinion could be read as announcing a holding of [the Supreme Court], *Monschke* was not material to petitioner Kennedy because "he was neither convicted of aggravated first degree murder under RCW 10.95.020 nor sentenced to mandatory LWOP under RCW 10.95.030."). The fact that the petitioners in *Davis* and *Kennedy* were above 18 years old when they committed their crimes is completely immaterial.

Third, Nevarez claims that firearm enhancements were not discussed in either case. Pet. at 16. Not so. Nevarez had a single firearm enhancement resulting in an additional five years. CP 66, 69. *Davis* involved 20 years of firearm enhancements. 200 Wn.2d at 79. This Court expressly accounted for the multiple firearm enhancements in *Davis*, explaining that the constitutional defect in RCW 10.95.030(1) is that it prevents a court from exercising "any" discretion. *Id*. at 83. But *Davis* does not require that a judge have "complete" discretion when sentencing adults.

See id. Thus, contrary to Nevarez's argument, this Court has already discussed and accounted for mandatory enhancements in *Id.*

Furthermore, the court of appeals has repeatedly rejected Nevarez's claim that a sentencing court must have discretion to reduce firearm enhancements when sentencing emerging adults. *See*, *e.g*., *State v. Wright*, 19 Wn. App. 2d 37, 50, 493 P.3d 1220 (2021), *review denied*, 199 Wn.2d 1005 (2022); *State v. Mandefero*, 14 Wn. App. 2d 825, 836-37, 473 P.3d 1239 (2020); *State v. Brown*, 13 Wn. App. 2d 288, 466 P.3d 244, *review denied*, 196 Wn.2d 1013 (2020). These cases are consistent with this Court's decision in *State v. Brown*, 139 Wn.2d 20, 25-29, 983 P.2d 608 (1999), *abrogated with respect to defendants tried in adult court for crimes committed prior to their eighteenth birthday by State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). Thus, review is unwarranted pursuant to RAP 13.4(b)(1) or (2).

There is, moreover, no material difference between Nevarez's collateral attack and those of *Kennedy* and *Davis*. Refusing to accept the Court's opinions does not raise a significant constitutional question or involve an issue of public interest by ignoring the existence. RAP 13.4(b)(3)-(4). Recognizing that he is unable to meet the requirements to merit resentencing, Nevarez instead implicitly asks that this Court overrule *Kennedy* and *Davis*, which were both decided just a few months ago. But it is well settled in Washington that precedent will be overruled only upon a showing that the rule is both incorrect and harmful. *See*, *e.g.*, *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011). He fails to make this requisite showing and accordingly, review is wholly unwarranted.

This Court has clearly held that courts will order resentencing based on a defendant who was 18 years old when they committed their crimes based on youthfulness only if that individual was convicted of aggravated murder under RCW 10.95.020 and sentenced to mandatory LWOP under RCW

10.95.030. Here, the trial court tightly adhered to this standard, stating that Nevarez was "three months shy of his 19[th] birthday at the time of this offense" and thus, the court "had no legal obligation under the case law in the State of Washington to go through any type of *Houston-Sconi*ers analysis." 2RP at 70. And the court of appeals properly applied this Court's well settled standard in concluding that "the trial court did not err in denying Nevarez's CrR 7.8 motion to withdraw his guilty plea because Nevarez was 18 years old at the time of the murder, and the trial court, therefore, was permitted but not required to consider the mitigating qualities of Nevarez's youth when sentencing him." Pub. Op. at 2. This Court should decline to revisit this freshly plowed ground.

B. There is Nothing For This Court to Review With Respect to Nevarez's Ineffective Assistance Claim Because He Affirmatively Withdrew It and the Court of Appeals Did Not Rule Upon It

Nevarez argues that because the constitution requires effective assistance of counsel, his challenge satisfies RAP 13.4(b)(3). Pet. at 19. But that is not the issue before this Court.

It cannot be, because the court of appeals did not review any ineffective assistance claim and because Nevarez has affirmatively waived the claim by withdrawing it.

It is settled that if a defendant waives or affirmatively abandons a claim, a reviewing court is not required to consider such a claim. *E.g.*, *State v. Valladares*, 99 Wn.2d 663, 671-72, 664 P.2d 508 (1983) (a reviewing court need not consider an issue that was affirmatively waived or abandoned previously, even one of constitutional magnitude) *see also State v. Mierz*, 72 Wn. App. 783, 789, 866 P.2d 65, *aff'd*, 127 Wn.2d 460, 901 P.2d 286 (1995). It is well-settled law that even constitutional rights can be waived. *State v. Myers*, 86 Wn.2d 419, 426, 545 P.2d 538 (1976).

Parties have the right to choose their own issues and arguments. *See Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 25252, 45 L.Ed.2d 562 (1975); *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983). Implicit in the Sixth Amendment is a criminal defendant's right to control his defense. *Faretta*, 422

U.S. at 819; *Jones*, 99 Wn.2d at 740. This includes the right to strategically control appellate litigation. *See* RAP 18.2 (appellate court may dismiss review of a case with the written consent of the defendant). The defendant's right to control the litigation is necessary "to respect individual dignity and autonomy." *State v. Coristine*, 177 Wn.2d 370, 376, 300 P.3d 400 (2013).

It is indisputable that Nevarez affirmatively withdrew his assignments of error related to his ineffective assignment of counsel claim on appeal. Motion to Withdraw at 1-2. Indeed, as stated in the motion, "Mr. Nevarez has directed undersigned counsel to withdraw all assignments of error and argument related to challenging his guilty plea. Mr. Nevarez believes it is in his best interest to withdraw his plea challenge from consideration as part of this appeal … He only wishes to have this Court review the sentencing issues raised on appeal." *Id*. at 2. In addition to being a knowing, intelligent, and voluntary waiver of this issue on appeal, Nevarez's decision is consistent with the long-standing proposition that appellate counsel will

exercise "independent judgment in deciding which issues may be the basis of a successful appeal." *In re the Pers. Restraint of Lord*, 123 Wn.2d 296, 314, 868 P.2d 835 (1994) (internal citations omitted). Stated otherwise, appellate counsel will separate the wheat from the chaff and that is precisely what happened here. Nevarez, with the advice of appellate counsel, made the strategic decision to conclude that "it is in his best interest" to opt not to seek appellate review of his ineffective assistance claim. Motion to Withdraw at 2.

A petition for review seeks review of a decision of the court of appeals. Nevarez does not argue that the court of appeals erred in granting his motion to withdraw the claim. *See* Pet. at 19. Therefore, there is no decision of the court of appeals on this matter and there is nothing for this Court to review. In sum, it is improper for Nevarez to ask this Court to review a decision of the superior court which Nevarez withdrew from consideration of the appellate courts.

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V. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny review where Nevarez's case is materially indistinguishable from *Davis* and *Kennedy*, and there is no court of appeals decision regarding his ineffective assistance claim to for this Court to review.

This document contains 3,181 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 22nd day of February, 2023.

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2/22/2023	*s/ Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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