Supreme Court No. 102033-3
No. 38324-5-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,
v.

D.G.A.,

Petitioner.

ON APPEAL FROM THE COURT OF APPEALS
DIVISION THREE

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
A. IDENTITY OF PETITIONER 1
B. COURT OF APPEALS DECISION 1
C. ISSUE(S) PRESENTED FOR REVIEW 1
D. STATEMENT OF THE CASE 3
E. ARGUMENT 7
1. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND ITS HOLDING CANNOT BE RECONCILED WITH THE CONSTITUTIONAL RIGHT TO APPEAL. 7
a. The Court of Appeals erred holding D.G.A.'s appeal was untimely relying on an impermissible presumption. 8
b. Division Three's use of *Smith* and *Cater* conflict with this Court's opinions and creates impermissible presumptions of waiver of constitutional rights. 13
F. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Miller v. Alabama,
567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) 11

Parke v. Raley,
506 U.S. 20, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992) 14, 15, 18

State v. A.N.J.,
168 Wn.2d 91, 225 P.3d 956 (2010) 13

State v. Cater,
186 Wn. App. 384, 345 P.3d 843 (2015) ..... passim

State v. Houston-Sconiers,
188 Wn.2d 1, 391 P.3d 409 (2017) 10, 13

State v. Johnson,
104 Wn.2d 338, 705 P.2d 773 (1985) 14

State v. Kells,
134 Wn.2d 309, 949 P.2d 818 (1998) ..... passim

State v. Light-Roth,
8 Wn. App. 2d 1061, 2019 WL 1989619 (May 6, 2019) 12

State v. Neff,
163 Wn.2d 453, 181 P.3d 819 (2008) 8, 9

State v. Perkins,
108 Wn.2d 212, 737 P.2d 250 (1987) 8

TABLE OF AUTHORITIES CONT'D

State v. Schoel,
54 Wn.2d 388, 341 P.2d 481 (1959) 8

State v. Sleeper,
21 Wn. App. 2d 1053, 2022 WL 111796 (April 14, 2022)
..... 16

State v. Smith,
134 Wn.2d 849, 953 P.2d 810 (1998) ..... passim

State v. Sweet,
90 Wn.2d 282, 581 P.2d 579 (1978) ..... passim

State v. Warriner,
100 Wn.2d 459, 670 P.2d 636 (1983) 14

State v. Tomal,
133 Wn.2d 985, 948 P.2d 833 (1997) 10, 17

Rules

RAP 1.2(a) 9

RAP 13.4(b) 1, 7, 19, 20

RAP 18.8(b) 9

RAP 5.2(a) 9

Constitutional Provisions

Wash. Const. art. I, sec. 22 8

A. IDENTITY OF PETITIONER

D.G.A., 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

The Court of Appeals, Division Three, in an opinion issued on March 16, 2023, reconsideration denied, April 27, 2023, dismissed D.G.A.'s appeal as untimely, 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. D.G.A. 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 D.G.A. made a knowing, voluntary and intelligent waiver of his right to appeal. Does the Court of Appeals err when holding that an appeal may be dismissed as untimely when neither the State nor the record demonstrate D.G.A. made a knowing, voluntary and intelligent waiver of his constitutional right to appeal?

2. Defendants may waive their right to appeal but the waiver must be knowing, voluntary and intelligent. The state bears the burden to establish this waiver. D.G.A. 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 err holding that a guilty plea on its own demonstrates a knowing, voluntary and intelligent waiver of the right to appeal a guilty plea when the defendant was not independently advised of his right to appeal, and in this case was misadvised as well?

D. STATEMENT OF THE CASE

In 2000, D.G.A. was charged with possession of stolen property in the first degree and trafficking in stolen property. During arraignment, D.G.A> was advised of charges, an order appointing counsel was entered, and D.G.A. was advised of his rights. CP 45. D.G.A.'s mother and father were present. Douglas Anderson was not present but was indicated on the preprinted minutes form. CP 45. Earl & Earl, Inc. P.S., was identified as the "The Grant County Public Defender" appointed to represent D.G.A.. CP 50.

On March 27, 2000, D.G.A. entered a plea of not guilty. CP 52. At the hearing, D.G.A. was represented by Douglas Anderson. CP 52.

On May 16, 2000, another hearing was held in which D.G.A. changed his plea to guilty. CP 58. Douglas Anderson represented D.G.A. at this hearing. CP 58. As part of the plea agreement, the State agreed to dismiss

Count 1, possession of stolen property. CP 58. In a personal statement, D.G.A. wrote, “I am entering an Alford Plea.” CP 66.

More than 15 years later, D.G.A. filed a Personal Restraint Petition (PRP) which was dismissed at time barred. CP 93-6.

On July 15, 2021, D.G.A. filed a notice of appeal with this Court under the cause number in this case as well as under cause number 00-8-00222-8. In the notice of appeal, D.G.A. provided the following statement

> [D.G.A.], Defendant Pro-Se, seeks Review by the Court of Appeals Division Three of the Judgment and Sentence, Circumstances under which the plea was entered and Direct Consequences of the plea, and all pre-trial Motions and order 1/22/1999.

CP 97.

A commissioner of Division Three ruled D.G.A. was not advised he had 30-days to appeal following the entry of his juvenile disposition and determined just cause to

enlarge the time to file a notice of appeal up to the date D.G.A. filed his notice of appeal. CP 111. The State moved to modify the commissioner's ruling challenging the commissioner's ruling enlarging time to file the notice of appeal.

Division Three granted the State's motion to modify the commissioner's ruling and dismissed D.G.A.'s appeal as untimely. Slip Opinion (OP) at 3-4.

Division Three, in addressing the merits of whether D.G.A. waived his right to appeal relied on *State v. Smith*, 134 Wn.2d 849, 953 P.2d 810 (1998), stating that because D.G.A.'s plea was knowing, intelligent, and voluntary, "[t]his creates a strong presumption that his plea was voluntary and that D.G.A. validly waived his right to appeal." OP at 6 (citing *Smith*, 134 Wn.2d at 852 (internal quotations omitted). Division Three stated this was a rebuttal presumption and D.G.A. failed to meet his burden. OP at 6-7.

Division Three likened the facts in D.G.A.'s case to the facts in *State v. Cater*, 186 Wn. App. 384, 345 P.3d 843 (2015). OP at 6-7. The Court in D.G.A. stated that, in *Cater*, a presumption exists which requires the defendant to overcome several factors including the outcome of the plea, a reason for the time delay, explanation of why the defendant was not aware of the right to appeal, and there is a strong inference valid plea constitutes waiver of the right to appeal. OP at 7 (quoting *Cater*, 186 Wn. App. at 397). The Court granted the State's motion holding:

> We find *Cater* persuasive and conclude that D.G.A. has failed to rebut the strong presumption that his plea was knowing, intelligent, and voluntary…

OP at 8.

This petition follows.

E. ARGUMENT

1. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND ITS HOLDING CANNOT BE RECONCILED WITH THE CONSTITUTIONAL RIGHT TO APPEAL.

The Court of Appeals erred when it announced that under *Smith* and *Cater* a strong presumption exists that a defendant waives their right to appeal where the underlying guilty plea is facially valid. This Court holds there is no presumption of waiver in this context. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978); *State v. Kells*, 134 Wn.2d 309, 313, 949 P.2d 818 (1998); *State v. Cater*, 186 Wn. App. 384, 345 P.3d 843 (2015). Moreover, Division Three's interpretation of *Smith* and *Cater* are incorrect and irrelevant to D.G.A.'s case.

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 D.G.A.'s appeal was untimely relying on an impermissible presumption.

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). To be knowing, voluntary and intelligent, the defendant must have "a full understanding of the consequences." *State v. Perkins*, 108 Wn.2d 212, 215, 737 P.2d 250 (1987). This means the defendant must

be accurately informed of the nature of the right to appeal before he or she can waive their right. *Neff*, 163 Wn.2d at 459. 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, 314-15, 949 P.2d 818 (1998).

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)).

Sweet, does not permit a presumption of waiver, without the State providing affirmative evidence of a knowing, voluntary and intelligent waiver. *Sweet*, 90 Wn.2d at 286. What precisely constitutes sufficient evidence of affirmative evidence to support waiver must be considered in light of the unequivocal constitutional right to appeal. *Kells*, 134 Wn.2dd at 314. The question is further complicated when considering a juvenile with limited neurocognitive development. *State v. Houston-Sconiers*, 188 Wn.2d 1, 23, 391 P.3d 409 (2017) (citing *Miller v.*

Alabama, 567 U.S. 460, 132 S. Ct. 2455, 2468, 183 L. Ed. 2d 407 (2012)).

Kells should control the outcome of D.G.A.'s case, despite some differences because both involved juveniles. In *Kell*s, the Court of Appeals dismissed the appeal as untimely. The Supreme Court reversed and reinstated the appeal. *Kells,* 134 Wn.2d at 315. In *Kells,* a juvenile signed a guilty plea, waiving his right to appeal the adjudication of guilt. *Kells,* 134 Wn.2d at 312. The trial court did not inform the juvenile that he had the right to appeal the order of declination. *Kells,* 134 Wn.2d at 312. Defense counsel admitted he failed to advise his client he could appeal the decline because "he had been unaware" of the relevant law at the time. *Kells,* 134 Wn.2d at 312.

This Court held that because the declination decision "is a necessary prerequisite to the criminal conviction of a juvenile," the State must demonstrate a voluntary,

knowing, and intelligent waiver of the right to appeal. *Kells,* 134 Wn.2d at 314.

Here, like in *Kells*, the trial court did not inform D.G.A. he had the right to "a limited right to appeal collateral questions such as the validity of the statute, sufficiency of the information, and an understanding of the nature of the offense." *Cater*, 186 Wn. App. at 392. At best, this language present confusion as to what can be appealed. *See State v. Light-Roth*, 8 Wn. App. 2d 1061, 2019 WL 1989619 (May 6, 2019)[1] (defendant was not properly notified of his appellate rights). In D.G.A.'s case his plea form and advisement form similarly failed to accurately advise him of his appellate rights, and likewise created the potential for confusion. While he did not file a declaration, this factor should not be dispositive, because under *Sweet,* and *Kells,* the State bears the burden of establishing a knowing, voluntary and intelligent waiver. To presume a

[1] Cited in accordance with WA GR 14.1.

juvenile made such a waiver is inconsistent with Art. 1 sec. 22, and this Court's understanding of juvenile brain development. *Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

Additionally, this Court has already determined that attorney Anderson operated under an impermissible county contract. *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010).

Division Three erred when it determined that an appeal—a juvenile conviction—can be dismissed as untimely even though the record does not demonstrate a knowing, intelligent, and voluntary waiver of the right to appeal. This Court must accept review to correct this error.

b. Division Three's use of *Smith* and *Cater* conflict with this Court's opinions and creates impermissible presumptions of waiver of constitutional rights.

Division Three resolves D.G.A.'s case by relying on *Smith* and *Cater* stating that a strong presumption is created where the defendant's guilty plea is facially valid.

OP at 7[2]. The Court's reliance on those cases is misplaced and its holding is in err because the presumption the Court relies on can only be used in certain contexts which are not present in D.G.A.'s case. More specifically, the underpinnings of *Smith* and *Cater* are a line of cases establishing presumptions in cases in which the State is attempting to use the prior conviction in a new, independent proceeding. *State v. Warriner*, 100 Wn.2d 459, 460, 670 P.2d 636 (1983); *Parke v. Raley*, 506 U.S. 20, 24, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992).

As an initial matter, *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.

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[2] Division Three recently issued an amended opinion in *State v. Sanchez Lujano*, No. 38516-7-III, addressing similar issues and relying on nearly identical case law. *Sanchez Lujano* is now pending before this Court. *State v. Sanchez Lujano*, Supreme Court No. 1019653.

Nonetheless, the rebuttal presumptions discussed in *Cater*, and relied on by Division Three in D.G.A.'s case, were first recognized 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*, 506 U.S. at 24. *Parke* established 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.

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. 30-13.

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

[3] 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).

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 the Court of Appeals 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 D.G.A.'s case, acknowledged the procedural differences. This is why Division Three's reliance on *Cater*, is misplaced.

In contrast to *Parke* and *Cater*, D.G.A.'s challenge is to the conviction itself—a direct appeal—not a challenge in a new independent proceeding, therefore no presumption applies. *Kells*, 134 Wn.2d at 314. Allowing the use of the Smith/Cater presumption would relieve the State of its burden demonstrating knowing, intelligent, and voluntary waiver. *Id.* Moreover, allowing the Smith/Cater

presumption to continue in this context would blur the lines of when a presumption applies and when the presumption does not apply.

Under RAP 13.4(b), this Court must accept review because Division Three's opinion cannot be reconciled with this Court's holdings that there is no presumption of waiver and thereby relieving the State of its burden proving D.G.A. knowingly, intelligently, and voluntarily waived his right to appeal.

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F. CONCLUSION

D.G.A. 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 30th day of May 2023.

I, Kyle Berti, in accordance with RAP 18.7, certify that this document is properly formatted and contains 2923 words.

Respectfully submitted,

KYLE BERTI
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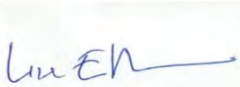

LISE ELLNER
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Kyle Berti, a person over the age of 18 years of age, served the Grant County Prosecutor (kjmccrae@grantcountywa.gov) and D.G.A. a true copy of the document to which this certificate is affixed on 5/30/2023. Service was made by electronically utilizing the Washington Courts E-File service system.

KYLE BERTI
WSBA No. 57155
Attorney for Petitioner

FILED
APRIL 27, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 38324-5-III**
	)	
Respondent,	)	
	)	**ORDER DENYING**
v.	)	**MOTION FOR**
	)	**RECONSIDERATION**
D.G.A.,[†]	)	
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration of this court's opinion dated March 16, 2023, and is of the opinion the motion should be denied.

THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

PANEL: Judges Lawrence-Berrey, Siddoway and Pennell

FOR THE COURT:

GEORGE FEARING
CHIEF JUDGE

[†] To protect the privacy interests of D.G.A., we use his initials throughout this opinion. Gen. Ord. for Ct. of Appeals, *In re Changes to Case Title* (Wash. Ct. App. Aug. 22, 2018) (effective September 1, 2018), http://www.courts.wa.gov/appellate_trial_courts.

FILED
MARCH 16, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. D.G.A.,† Appellant.	)	No. 38324-5-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — D.G.A. appeals a juvenile court disposition order more than 20 years after it was entered. We grant the State's motion to modify the commissioner's ruling of September 24, 2021, and dismiss this appeal.

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† To protect the privacy interests of D.G.A., we use his initials throughout this opinion. Gen. Ord. for Ct. of Appeals, *In re Changes to Case Title* (Wash. Ct. App. Aug. 22, 2018) (effective September 1, 2018), http://www.courts.wa.gov/appellate_trial_courts.

FACTS

On March 3, 2000, D.G.A., then a juvenile, was charged with possession of stolen property in the first degree, a class B felony, and trafficking in stolen property in the second degree, a class C felony. He pleaded guilty to trafficking in stolen property on May 16, 2000, and the second charge was dismissed.

D.G.A.'s plea of guilty acknowledged that he is giving up the right to appeal a finding of guilt after trial. It also stated that if the court sentenced him within the standard range, "no one can appeal the sentence." Clerk's Papers (CP) at 63. The court accepted D.G.A.'s plea of guilty and found that it was "knowingly, intelligently, and voluntarily made." CP at 68.

In its order of disposition, the court did not order any detention, community supervision, community service, or a fine. It ordered a $100 assessment to be converted to 15 hours of community service and required D.G.A. to pay $799.66 in restitution.

On July 15, 2021, D.G.A. filed a notice of appeal, more than 20 years after his adjudication. By clerk's letter, we notified the parties of this court's motion to dismiss for failure to timely file the notice of appeal. Letter from Tristen Worthen, Clerk of Court, Wash. Ct. of Appeals Div. III, *State v. D.G.A.*, No. 38324-5-III (Wash. Ct. App. Aug. 6, 2021). The letter set the matter for consideration on our commissioner's docket

and invited D.G.A. and the State to file memoranda. Neither party filed a memorandum or otherwise responded.

Our commissioner reviewed the record before it, which was limited to D.G.A.'s notice of appeal, order of indigency, order of disposition, and an order authorizing D.G.A.'s transport to juvenile court on March 20, 2000. The commissioner's ruling concluded the State had not met its burden to show that D.G.A. knowingly, intelligently, and voluntarily waived his constitutional right to appeal and therefore extraordinary circumstances existed under RAP 18.8(b) to support extending the period for filing the notice of appeal. Comm'r's Ruling, *State v. D.G.A.*, No. 38324-5-III (Wash. Ct. App. Sept. 24, 2021); *see* Notice of Appeal to Ct. of Appeals Div. Three, *State v. D.G.A.*, No. 38324-5-III (Wash. Ct. App. July 15, 2021);. The State moved to modify the commissioner's ruling, and we deferred the decision to a panel to be determined at the time set for a determination of the case on the merits. Ord. on Mot. to Modify Comm'r's Ruling, *State v. D.G.A.*, No. 38324-5-III (Wash. Ct. App. Dec. 16, 2021).

ANALYSIS

In its motion to modify, the State argues the commissioner erred by granting D.G.A. an extension of time to file this appeal. Based on our present record, which was

not available to our commissioner, we agree. For the reasons explained below, we grant the State's motion to modify and dismiss this appeal as untimely.

Our state constitution guarantees a criminal defendant the right to appeal in all cases. WASH. CONST., art. I, § 22. Even a defendant who pleads guilty retains a limited right to appeal. *State v. Cross*, 156 Wn.2d 580, 621, 132 P.3d 80 (2006), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). A defendant can waive the right to appeal, but the State must prove the waiver was knowing, intelligent, and voluntary. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). "[A]n involuntary forfeiture of the right to a criminal appeal is never valid." *State v. Kells*, 134 Wn.2d 309, 313, 949 P.2d 818 (1998). A criminal appeal may not be dismissed as untimely unless the State demonstrates that the defendant knowingly, intelligently, and voluntarily abandoned their appeal right. *Id.* A hearing may be necessary to determine whether a defendant effectively waived their right to appeal. *Id.* at 315; *State v. Tomal*, 133 Wn.2d 985, 991, 948 P.2d 833 (1997).

A voluntary guilty plea, however, acts as a waiver of the right to appeal. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). "When a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong

presumption that the plea is voluntary." *Id.* This presumption can be rebutted by evidence the plea was not knowing, intelligent, and voluntary. *Id.*

As an initial matter, the State objects to our commissioner deciding the case based on an issue not raised by the parties. The State relies on RAP 12.1. Subject to RAP 12.1(b), the rule requires courts to decide cases on the basis of the issues briefed by the parties. RAP 12.1(b) provides: "If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court." By its clear terms, the rule applies to cases, not motions. Nevertheless, as explained below, there are reasons to incorporate the procedure outlined in RAP 12.1(b) when deciding whether to dismiss a criminal appeal for untimeliness.

"*Sweet* establishes that the State has the burden to demonstrate a defendant understood his right to appeal and consciously gave up that right before a notice of appeal may be dismissed as untimely." *Kells*, 134 Wn.2d at 314 (citing *Sweet*, 90 Wn.2d at 287). Thus, when deciding a court's motion to dismiss for untimeliness, the commissioner must review the record to ensure the defendant understood and consciously abandoned their right of appeal. Because the appellate record was undeveloped at the time the commissioner is called on to make a ruling, it would be a good practice for the clerk's

letter to *direct* counsel to brief the issue. The letter should set a briefing schedule and expressly remind the parties that under *Kells*, the State has the burden to demonstrate the defendant effectively waived their right to appeal and, absent an affirmative showing, the commissioner may be compelled to sua sponte extend time under RAP 18.8(b) to file the appeal. In this manner, either party can incorporate portions of the trial court record in their response so the commissioner can better decide whether to dismiss the appeal or to extend time pursuant to RAP 18.8(b).

Having addressed the State's objection, we now address its motion to modify. Although our record is imperfect, it is more complete than when our commissioner ruled on the motion to dismiss. Due to the length of time that has passed since D.G.A.'s plea and sentencing, there is no recording or transcript of the hearing. But there is a statement on plea of guilty and, in that statement, the trial court found that D.G.A. entered into the plea knowingly, intelligently, and voluntarily. This creates "a strong presumption" that his plea was voluntary and that D.G.A. validly waived his right to appeal. *Smith*, 134 Wn.2d at 852.

D.G.A. provides nothing to rebut this presumption. He does not assert that he was not advised of the consequences of his guilty plea or his limited right to appeal. Nor does

the record establish any irregularity in the proceedings below that suggests D.G.A. was not fully apprised of his rights before pleading guilty.

D.G.A.'s situation is much like that of the defendant in *State v. Cater*, 186 Wn. App. 384, 345 P.3d 843 (2015). There, the defendant appealed an arson conviction 34 years after he had entered a guilty plea and had been sentenced to probation. *Id.* at 391. He relied on the presumption he did not waive his right to appeal and on language in his statement on plea of guilty, which he alleged misadvised him about his limited right to appeal. *Id.* at 393. We denied his motion to extend time to file a notice of appeal, reasoning that the

> 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 [the defendant'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.

Id. at 397. We noted that while the language in the statement on plea of guilty "was potentially misleading," without a declaration from the defendant or his original defense attorney establishing the defendant was affirmatively misled, it was not appropriate to hold an evidentiary hearing on whether the defendant knowingly, intelligently, and voluntarily waived his right to appeal. *Id.* at 396-97.

We find *Cater* persuasive and conclude that D.G.A. has failed to rebut the strong presumption that his plea was knowing, intelligent, and voluntary. We thus grant the State's motion to modify and dismiss this appeal as untimely.

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.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, C.J.

Pennell, J.

LAW OFFICES OF LISE ELLNER, PLLC

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