IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID ANDERSON, Petitioner.	No. 102451-7 RESPONSE TO CROSS-PETITION FOR REVIEW

I. INTRODUCTION

David Anderson, Petitioner/Cross-Respondent, seeks review of the decision of the Court of Appeals to reverse and remand this case for a third sentencing hearing. In Anderson's *Petition for Review*, he contends that review is merited because the lower court applied the wrong prejudice standard—a harm standard that this Court has refused to apply to criminal defendants seeking review of similar issues. See *e.g.*, *Matter of Forcha-Williams*, 200 Wash. 2d 581, 520 P.3d 939 (2022) (procedural error in sentencing based on trial court's erroneous belief that it lacked discretion to a certain term was not substantial prejudice).

The Court of Appeals reversed and remanded for a third sentencing hearing because the trial judge did not accurately understand the scope of discretion. *Opinion*, p. 4. ("Because the trial court misinterpreted controlling case law regarding de facto life sentences of juvenile offenders, we remand for resentencing."); *id*. at 7 (the failure to correctly understand the theoretical "upper limit of the permissible sentencing range" justifies another sentencing.).

The State does not appear to oppose review of that issue.

Instead, the State seeks review of an additional, albeit related issue: what place, if any, does rehabilitation possess in the pantheon of sentencing factors. In short, the State posits that rehabilitation is no longer a "mitigating quality of youth," that it was removed sub silentio in *Anderson* (*Tonelli*), 200 Wash.2d 266, 516 P.3d 1213 (2022).

The State is incorrect.

However, Anderson agrees that review of that issue is warranted because the lower court's opinion is confusing, if not contradictory, on that point. The lower court does not harmonize recent caselaw. Instead, it directs the sentencing court to consider what it concludes are contradictory tests and invites that court to somehow decide which test

to apply. *Opinion,* p. 8 ("Because these tests differ substantially, we cannot say that the record here clearly establishes that the trial court would have imposed the same sentence had it applied the legal framework in *Tonelli Anderson* in addition to the *Miller*-fix analysis in RCW 10.95.030(3)(b).").

Given the State's position herein coupled with the lower court's difficult-to-impossible directive, review of the issue advanced by the State is warranted. Otherwise, an appeal and possible fourth sentencing hearing will follow.

II. ARGUMENT

The State's cross-petition argues that rehabilitation has been removed as one of the "mitigating qualities of youth." That cannot be true for individuals convicted of aggravated murder because the statute (RCW 10.95.030(2)(b)) specifically mandates consideration and weighing of the prospect of rehabilitation when imposing sentence. However, without clarification Anderson is sure that the State will argue at resentencing, as it does in its cross-petition, that this Court has reduced rehabilitation to second-class status—a factor unworthy of any or, at best, only minimal mitigating weight. Anderson contends that

constitutes a misstatement of law. Consequently, Anderson joins in the State's cross-petition.

Anderson does not attempt to set forth his full merits argument why, constitutionally speaking, the prospect of and/or significant actual rehabilitation matters, given that it must be statutorily credited in this case. The short answer is a sentencing judge must consider the prospect of rehabilitation and give it mitigating weight. On the other hand, a sentencing court has broad discretion to decide how much weight to assign to that factor.

Certainly, the *Tonelli Anderson* Court could have clarified that it did not find that the sentencing judge abused its discretion when it concluded that Tonelli Anderson's culpability for the crime was great and was not significantly reduced by his rehabilitative efforts, especially given the facts in that case undercutting his rehabilitative efforts. However, it is clear that this Court did not conclude that rehabilitation has been removed from the factors that must be considered at a juvenile sentencing or even that it now has reduced salience.

Instead, the best way to understand *Haag* in light of *Tonelli Anderson* is that in both cases this Court reviewed the findings of the sentencing judges through the "broad discretion" lens. That is why *Tonelli Anderson* does not overrule past precedent. As long as a judge considers and weighs those factors—including the prospect of rehabilitation—this Court will affirm, provided the judge's conclusions are supported by substantial evidence.

Here, there is substantial evidence of David Anderson's rehabilitation. Likewise, the sentencing judge weighed Anderson's rehabilitation within the zone of discretion. Consequently, this Court should accept review and affirm his sentence. *Tonelli Anderson* did not change the law and it should not change the outcome of this case.

III. CONCLUSION

This Court should grant review.

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CERTIFICATE OF WORD COUNT

This Reply has 821 words.

DATED this 12th day of November 2023

s/Jeffrey Erwin Ellis
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