

NO. 49302-1-II
Pierce County Sup. Ct. No. 06-01-02134-9

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

In re Personal Restraint of:

JARRELL MAURICE MARSHALL

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

The Honorable Thomas P. Larkin

SUPPLEMENTAL BRIEF OF PETITIONER

Kimberly N. Gordon
Jason B. Saunders
Attorneys for Petitioner

Law Offices of Gordon & Saunders
1111 Third Avenue, Suite 2220
Seattle, Washington 98101
(206) 340-6034

TABLE OF CONTENTS

A. ARGUMENT 1

1. ANNOUNCING A CHANGE IN LAW, *STATE V. HOUSTON-SCONIERS* HELD THAT BECAUSE CHILDREN ARE DIFFERENT THAN ADULTS UNDER THE EIGHTH AMENDMENT, CRIMINAL PROCEDURE LAWS MUST TAKE A DEFENDANT’S YOUTHFULNESS INTO ACCOUNT AND SENTENCING COURTS HAVE ABSOLUTE DISCRETION TO DEPART AS FAR AS THEY WANT BELOW THE SRA STANDARD RANGE 1

2. *HOUSTON-SCONIERS* DECLINED TO RULE ON WHETHER THE EIGHTH AMENDMENT WAS VIOLATED BY THE AUTO-DECLINE STATUTE, BUT INVITED THIS ISSUE TO BE DECIDED IN A FUTURE CASE. 3

3. *O’DELL AND HOUSTON-SCONIERS* SIGNIFICANTLY CHANGED THE LAW, RENDERING JARRELL’S PRP TIMELY..... 6

 a. *Houston-Sconiers* announced a new rule for juveniles which holds greater protections than its prior *O’Dell* decision..... 7

 b. *Houston-Sconiers* announced a new substantive constitutional rule which demands retroactive application..... 9

B. CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON STATE SUPREME COURT DECISIONS

Houston-Sconiers, No. 92605-1, __ P.3d __, 2017 WL 825654 (March 2, 2017) 1-4, 6-10

In re Boot, 130 Wn.2d 553, 925 P.2d 964 (1996)..... 3

State v. Ha-mim, 132 Wn.2d 834, 846-47, 940 P.2d (1997)..... 3

State v. Law, 154 Wn.2d 85, 103, 110 P.3d 717 (2005) 3

State v. O’Dell, 13 Wn.2d 680, 358 P.3d 359 (2015)..... 1-2, 6-8

WASHINGTON STATE COURT OF APPEALS DECISIONS

In re Dove, 196 Wn.App. 148, 381 P.3d 1280 (2016)..... 9-10

State v. Ha’ mim, 82 Wn.App. 139, 916 P.2d 941 (1996), *aff’d*, 132 Wn.2d 834 (1997)..... 7, 8

UNITED STATES SUPREME COURT DECISIONS

Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)..... 2-4, 8

Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1996)..... 5

Miller v. Alabama, __ U.S. __, 132, S.Ct. 2455, 183 L.Ed.2d 407 (2012) 2, 4, 8-10

Montgomery v. Louisiana, __ U.S. __ 136 S.Ct. 718, 193 L.Ed. 2d 599 (2016)..... 9

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII..... 1-3, 8-9

U.S. Const. amend. XIV 2, 6

STATUTES

RCW 13.04.030 3
RCW 9.94A.390..... 7
RCW 9.94A.510..... 1

COURT RULES

RAP 17.1..... 10

A. ARGUMENT

The Washington Supreme Court's analysis and holding, in *State v. Houston-Sconiers*, mirrors that urged by Jarrell Marshall in Assignment of Error #2. PRP 1-2; *Houston-Sconiers*, No. 92605-1, ___ P.3d ___, 2017 WL 825654 (March 2, 2017). This holding changed the legal landscape for Washington juveniles, and left open the possibility that the Court would later agree with Jarrell on Assignment of Error #1. If *State v. O'Dell* was not a significant change in the law, rendering Jarrell's Personal Restraint Petition ("PRP") timely, *Houston-Sconiers* certainly is.

1. ANNOUNCING A CHANGE IN LAW, *STATE V. HOUSTON-SCONIERS* HELD THAT BECAUSE CHILDREN ARE DIFFERENT THAN ADULTS UNDER THE EIGHTH AMENDMENT, CRIMINAL PROCEDURE LAWS MUST TAKE A DEFENDANT'S YOUTHFULNESS INTO ACCOUNT AND SENTENCING COURTS HAVE ABSOLUTE DISCRETION TO DEPART AS FAR AS THEY WANT BELOW THE SRA STANDARD RANGE

Previously, the Sentencing Reform Act presumed a standard range sentence and had other mandatory provisions, regardless of the age of the defendant. Youth was irrelevant. RCW 9.94A.510; *State v. O'Dell*, 13 Wn.2d 680, 691-93, 358 P.3d 359 (2015). Jarrell was tried in the system that declared youth irrelevant and instead mandated sentences and procedures for all defendants, irrespective of age.

In Assignment of Error #2, Jarrell challenged this regime, claiming that this

application of the SRA violated the Eight Amendment bar on cruel and unusual punishment, the right to fundamental fairness guaranteed by the Fourteenth Amendment and *State v. O'Dell*.

In *Houston-Sconiers*, the Court affirmed Jarrell's claim, finding sentences unconstitutional under the Eighth Amendment, where the sentencing court did not consider the youth of juvenile defendants before sentencing them in adult court and according to the mandates of the SRA. Slip. Op. at 20.

The *Houston-Sconiers* Court extended the reasoning of *Miller*¹ and *Graham*² to any juvenile sentenced under the SRA provision in adult court. Slip Op. at 19-20. The *Houston-Sconiers* Court recognized this was a decision extending United States Supreme Court precedent to all sentencings of juveniles, even standard range sentences imposed under the SRA. Slip Op. at 19. This was a new rule, not yet even determined by the United States Supreme Court:

In accordance with *Miller*, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. *Trial courts must consider mitigating*

¹ *Miller v. Alabama*, ___ U.S. ___, 132, S.Ct. 2455, 183 L.Ed.2d 407 (2012).

² *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.

(Emphasis added.) Slip Op. at 20.

This is a significant extension of the rule to consider youth as a mitigating factor, not just for life sentences, death sentences, and confessions, but each and every sentence considered in adult court when the defendant is a juvenile. Slip Op. at 20. In doing so, the court overruled prior decisions holding that personal factors, such as an offender's age, may not be a reason for a sentence less than the standard range. *See State v. Law*, 154 Wn.2d 85, 103, 110 P.3d 717 (2005); *State v. Ha-mim*, 132 Wn.2d 834, 846-47, 940 P.2d (1997).

2. *HOUSTON-SCONIERS* DECLINED TO RULE ON WHETHER THE EIGHTH AMENDMENT WAS VIOLATED BY THE AUTO-DECLINE STATUTE, BUT INVITED THIS ISSUE TO BE DECIDED IN A FUTURE CASE.

In *Houston-Sconiers*, the Supreme Court ruled that “‘An offender’s age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.’” Slip Op. at 1-2, citing *Graham*, 560 U.S. at 76. In so ruling, the Court recognized that it’s *In re Boot* decision could be overturned:

Petitioners also argue that we should overrule *In re Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996), and declare the automatic decline statute, RCW 13.04.030(1)(e)(v), unconstitutional. They

are correct that some of our discussion in *Boot* stands in tension with the Supreme Court's holdings in *Roper*, *Graham*, and *Miller*.

Slip Op. at 27. The Court declined to address the issue in *Houston-Sconiers* because the petitioners' cases were already being remanded for resentencing. Slip Op. at 27, 28. Because the Court was already granting the maximum possible relief, the court did not to address the automatic decline statute. *Id.* at 28. The Court specifically noted “[a]lthough we decline to rule on the merits of this argument at this time, we do not intend to foreclose consideration of such an argument in the future.” Slip Op. at 28 n 11.

If this Court does not remand for resentencing in accordance with *Houston-Sconiers*, this Court should reach the auto-decline issue raised in Assignment of Error #1. Petition for Review at 32-37. The automatic decline statute denied Jarrell, a young and immature 16-year-old-boy, of a decline hearing, and instead automatically subjected him to harshness of adult court. This was a mandatory procedure which failed to take the individual circumstances of Jarrell's youth into account. Hence, it should be found unconstitutional under *Houston-Sconiers*. Slip Op. at 1-2, citing *Graham*, 560 U.S. at 76.

Jarrell has also satisfied the *Kent*³ factors, as evidenced by the Declaration of Janell Wagner, a licensed private investigator and Practicing Mitigation Specialist attached as Appendix H to the PRP:

- (1) murder in the second degree and robbery in the first degree are serious offenses but Jarrell was only an accomplice as a lookout. App. H at 9;
- (2) the offense was committed in a violent manner by Walrond, but Jarrell was only a lookout and did not know the intent of his co-defendants. App. H at 9;
- (3) the offense was against persons and property, but Jarrell only knew of the plan to rob people;
- (4) the prosecutive merit of the complaint was demonstrates Jarrell should have received the consideration of a juvenile court because the record showed he only acted as lookout for a robbery without knowledge of the injury his codefendant would inflict and otherwise was a good student. *Id.* at 9. Also, the victim's family asked the court to take into consideration Jarrell's minor role in the crime and his young age. *Id.*;
- (5) concerning the declination of each defendant: Cyril Walrond was 17, Jarrell Marshall was 16, and only Daniel Harris was 18;
- (6) Jarrell was not sophisticated and immature (See Juvenile Mitigation Report (App. H at 8, noting his immaturity, peer pressure, lack of family support, and impulsiveness.);
- (7) Jarrell had no criminal history; and
- (8) the prospects for adequate protection of the public and rehabilitation of the juvenile through services available in the juvenile system were great.

Jarrell suffered substantial prejudice -- had he been adjudicated in juvenile court, he would have received a 180 *week* sentence (41.4 months) for the murder 2 offense, and 103 to 129 *weeks* (23.7 to 29.7 months) for the two first degree robbery adjudications. RCW 13.40.0357. Instead, in

³ *Kent v. United States*, 383 U.S. 541, 566-67, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1996).

adult court Jarrell received a standard range sentence of 165 to 265 months for murder in the second degree and 51 to 68 months for the first-degree robbery counts. App A at 2. These mandatory, adult sentences violate *Houston-Sconiers*, and the federal cases upon which *Houston-Sconiers* relies.

3. *O'DELL AND HOUSTON-SCONIERS SIGNIFICANTLY CHANGED THE LAW, RENDERING JARRELL'S PRP TIMELY.*

Even though Jarrell seeks review of a final judgment entered more than one year prior to the filing of his PRP, his PRP satisfies the exception to the rule when there is a "significant change in the law ... which is material to the . . . sentence". RCW 10.73.100.

Jarrell argued in the initial petitioner's brief that this Court should consider his petition timely under RCW 10.73.100 because *State v. O'Dell*⁴ was a significant change in the law material to his conviction and sentence.⁵ The latest *Houston-Sconiers* decision extended that ruling much further. Jarrell's petition is timely, because it was filed within one year of *O'Dell* and *Houston-Sconiers*.

⁴ *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

⁵ In his petition, Mr. Marshall's issue statement was "The application of the Sentence Reform Act ("SRA") in this case violates the Eighth Amendment bar on cruel and unusual punishment, the right to fundamental fairness guaranteed by the Fourteenth Amendment and *State v. O'Dell*, 183 Wn.2d 680, 691-93, 358 P.3d 359 (2015)."

a. *Houston-Sconiers* announced a new rule for juveniles which holds greater protections than its prior *O'Dell* decision. The age of defendants distinguishes *Houston-Sconiers* and *O'Dell*. In *O'Dell*, the defendant committed his offense when he was 18 years and 10 days old. *O'Dell*, 183 Wn.2d at 683. The *O'Dell* court disavowed *State v. Ha'mim*, 82 Wn.App. 139, 916 P.2d 941 (1996), *aff'd*, 132 Wn.2d 834 (1997), holding that a sentencing court must consider age under RCW 9.94A.390(1)(e). *Id.* In so doing, the Court relied on scientific studies showing that maturity and brain development continued in individuals sometimes for years beyond their 18th birthday. *Id.* at 695-96. With that new insight into the mind of a young person, not a juvenile but also not a mature adult, the *O'Dell* Court ruled that,

For these reasons, a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like *O'Dell*, who committed his offense just a few days after he turned 18. To the extent that this court's reasoning in *Ha'mim* is inconsistent, we disavow that reasoning.

O'Dell, 183 Wn.2d at 696.

The *O'Dell* Court recognized that some courts understood *Ha'mim*, to be an absolute bar to any exceptional downward departure below the standard range on the basis of youth. *O'Dell*, 183 Wn.2d at 688. The Court held in *O'Dell* that a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult

felony defendant. *Id.* at 698-99. *O'Dell* remanded for a new sentence in which the Court was required to consider whether youth diminished *O'Dell's* culpability. *Id.* at 697-99.

O'Dell and *Ha'mim* dealt specifically with young *adults*, and not *juveniles*, and were decided on statutory grounds under the SRA. But *Houston-Sconiers* involved two juveniles who were 17 and 16 years old. Slip Op. at 2. Relying on United States Supreme Court precedent, the *the* Court declared: “[C]hildren are different.” Slip op. at 1, citing *Miller*, 132 S.Ct. 2455, at _____. The Court then took a new and bold approach, extending United States Supreme Court precedent and holding that the Eighth Amendment requires *any and all criminal procedure law* to consider youthfulness because children are different from adults. *State v. Houston-Sconiers*, Slip Op. at 1-3, citing *Graham v. Florida*, 560 U.S. at 76 ; U.S. Const. amend VIII. Earlier cases such as *Miller v. Alabama*⁶ (whether Eighth Amendment prohibited mandatory life sentence with no possibility of parole for juvenile), *Graham v. Florida*⁷ (violation of Eighth Amendment to sentence juvenile to life in prison without possibility of parole for non-homicide crime); and *Roper v. Simmons*⁸ (whether Eighth

⁶ ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

⁷ 560 U.S. 48, 130 S.Ct. 2011, 175 L.Ed.2d (2010).

⁸ 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

Amendment forbade death penalty for juveniles) dealt with juveniles facing life sentences or the death penalty. But the defendants in *Houston-Sconiers* were simply facing lengthy sentences of 37 to 45 years in prison based mostly on mandatory firearm enhancements. *Houston-Sconiers*, Slip Op. at 8. *Houston-Sconiers* clearly extended these Eighth Amendment cases to defendants like Jarrell.

b. *Houston-Sconiers* announced a new substantive constitutional rule which demands retroactive application. When a Court announces a new substantive rule under the Constitution, that law must be retroactive. *Montgomery v. Louisiana*, __ U.S. __ 136 S.Ct. 718, 736, 193 L.Ed. 2d 599 (2016). When an intervening appellate decision overturns a prior appellate decision that was determinative of a material issue, it is a significant change and an exception to the time limit on PRPs. *In re Dove*, 196 Wn.App. 148, 161, 381 P.3d 1280 (2016). The *Dove* Court ruled,

A significant change in the law occurs “when an intervening appellate opinion overturns a prior appellate decision that was determinative of a material issue.” *Id.* ... One test for whether an intervening decision represents a significant change in the law is whether the petitioner could have asserted the same argument as in the PRP before publication of the decision. *Miller*, 185 Wash.2d at 115, 371 P.3d 528.

Dove, 196 Wn.App. at 161.

Houston-Sconiers Court imposed constitutional limits that even United States Supreme Court had yet to announce. Moreover, Jarrell’s

request for consideration of his standard range sentence under the SRA could not be asserted in the same argument in the PRP before publication of the *Houston-Sconiers* decision, which makes it a significant change in the law. *Dove*, 196 Wn.App. at 161. This is evidenced by the State's motion to stay proceedings pending the *Houston-Sconiers* decision:

But the *spirit* of *Miller*, if it has one is that juveniles, a 14 year old in that case, should not be sentenced to *life without the possibility of parole* absent individualized determination that takes age into account. ... If petitioner served every second of his 15.75 year sentence, he would emerge from prison free at 31....

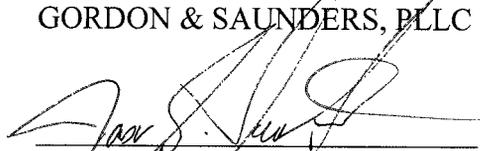
State's RAP 17.1 Motion to Stay at 3. The State cannot now claim that Mr. Marshall could have raised this issue before *Houston-Sconiers*.

B. CONCLUSION

For the reasons set forth above, Petitioner Jarrell Marshall respectfully requests this Court reverse his conviction, remand to juvenile court or remand to adult court for resentencing with consideration of his youth as a mitigating factor.

DATED this 6th day of April, 2017.

Respectfully submitted,
GORDON & SAUNDERS, PLLC



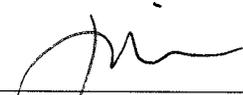
Jason B. Saunders, WSBA# 24963
Kimberly N. Gordon, WSBA# 25401
Attorneys for Petitioner Jarrell Marshall

DECLARATION OF DOCUMENT FILING AND SERVICE

I, Ian D. Saling, state that on this 6th day of April, 2017, I caused the **Supplemental Brief of Petitioner** to be filed in the **Court of Appeals – Division II**, and a true and correct copy of the same to be served on the following in the manner indicated below:

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| [X] | Jarrell Marshall DOC #309755 Cedar Creek Corrections Center PO Box 37 Littlerock, WA 98556-0037 | (x) U.S. Mail () Email () _____ |

Signed in Seattle, Washington on this 6th day of April, 2017.

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Ian D. Saling
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Appellant's Supplemental Brief re: Houston-Sconiers Decision.

Sender Name: Jason B Saunders - Email: jason@gordonsaunderslaw.com

A copy of this document has been emailed to the following addresses:

jason@gordonsaunderslaw.com

ian@gordonsaunderslaw.com

robert@gordonsaunderslaw.com