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No. _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF
D'MARCUS GEORGE,

Petitioner.

BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION

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A. SUMMARY OF ARGUMENTS

Petitioner D'Marcus George was just a few months past his 20th birthday when he shot and killed Isaiah Clark during an altercation at a gas station. At his 2009 jury trial, George was precluded from raising self-defense based on the state's objections. The state also successfully limited the testimony from George about his fear of Clark and whether he thought Clark had a gun, as well as preventing the jury from any instruction on self-defense. In reversing, Division Two of the court of appeals found that Mr. George had presented sufficient evidence to support a claim of self-defense and the trial court had therefore erred in refusing the requested instruction. But the court did not address the exclusion of evidence or George's arguments that the trial court's rulings upholding the state's objections violated George's due process rights to present a defense.

On retrial, over objection and mistrial motions, the same prosecutors who were involved in both the first trial and the appeal "impeached" George with what they claimed was his failure to claim self-defense at the first trial. The prosecutor told jurors in "2009 his testimony was not self-defense," using that "evidence" to impeach

George because, the prosecutor said, George was thus either lying in claiming self-defense at the current trial or had lied at the 2009 proceeding. The prosecutor also implied George was manufacturing self-defense for the first time at the second trial, faulting George for not having said or established certain facts at the first trial because it was important to do so. The trial court allowed these arguments even though it was the prosecutor's own motions which precluded the full development of the self-defense evidence.

The prosecutor also told jurors that, although the case involved George's claim of self-defense, they should not "care" why George said he had fired the gun at Clark. Further, the prosecutor told jurors, the only way that George could show he had acted in self-defense was to show that Clark had been armed with a gun.

Finally, the prosecutor used a "PowerPoint" slide show which showed jurors a state-created montage containing a "booking" photo of Mr. George in jail garb, highlighting the testimony of a witness who had said George had looked "menacing" and "like a monster," again highlighting the state's claim that George had not said it was self-defense at the first trial.

Mr. George is entitled to relief from the restraints of the

conviction resulting from that trial, because he suffered actual and substantial prejudice to his constitutional rights to due process and a fundamentally fair proceeding. Further, the prosecutor's misconduct was extremely pervasive and prejudicial, misleading the jury not only as to the facts and the evidence but also the juror's true role, the state's burden of proof beyond a reasonable doubt and whether self-defense was properly raised. The errors all prevented the jury from fairly and impartially deciding the only issue in the case - whether Mr. George acted in self-defense. These issues were not "heard and determined" in the initial appeal and this Court should grant Mr. George a new trial in the interests of justice.

Even if a new trial is not ordered, Mr. George should be granted relief from the unlawful restraint of the 280-month sentence imposed as a result of the conviction. Mr. George had just turned 20 a few months before the incident. At the time of the sentencing in 2014, the controlling law indicated that the youthfulness of an offender was completely irrelevant to sentencing.

While Mr. George's direct appeal was pending, however, the Washington Supreme Court reversed its position regarding youthfulness and held that the "mitigating qualities of youth"

recognized by recent U.S. Supreme Court precedent could be relevant and help support an exceptional sentence below the standard range in order to ensure constitutionally proportionate sentencing.

The new decision of the state's highest court applied to Mr. George's case, which was pending on direct review. Division Two of the court of appeals erred in refusing to follow the state's precedent on how to handle such a situation. Further, the "waiver" theory relied on by Division Two in the direct appeal has already been rejected in these situations and did not apply. These issues were not "heard and determined" on the merits and this Court should address them. By failing to apply the new caselaw to Mr. George's case pending on direct review, the court of appeals violated Mr. George's rights to due process, proportionate sentencing and a full, fair and meaningful appeal under Article 1, § 22.

Mr. George can more than meet his burden of showing by a preponderance of the evidence that he has suffered actual and substantial prejudice to his state and federal constitutional due process rights to a fair trial and to having the state bear the full weight of its burden and his Article 1, § 22 right to a full, fair and

meaningful appeal. The Court should grant him relief from the conviction and order a new trial or, in the alternative and at a minimum, resentencing.

B. ASSIGNMENTS OF ERROR RELATING TO THE PETITION

1. Petitioner D'marcus George is under restraint pursuant to RAP Title 16 as a result of a conviction for second-degree murder and the resulting sentence of 280 months.
2. The restraint Mr. George is suffering is unlawful under RAP 16.4(c)(2), because the conviction resulted from a trial at which he was denied his Fourteenth Amendment and Article 1, § 22 due process rights to a fundamentally fair proceeding and to have the state bear the full weight of its constitutionally mandated burden of proof.
3. The restraint Mr. George is suffering is unlawful under RAP 16.4(c)(2) , because the court of appeals, Division Two, failed to follow the settled law regarding application of state supreme court decisions when a case is pending on appellate review, thus denying Mr. George state and federal due process, proportionate sentencing and a full, fair, and meaningful appeal as guaranteed by the Washington Constitution, Article 1, § 22.
4. Mr. George has met his burden of proving that it is more likely than not that he suffered actual and substantial prejudice to a substantial constitutional right based on the errors below, relief is not precluded and there are no other available options to seek redress.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. At the first trial, Mr. George was prevented from raising self-defense. The state also repeatedly objected to efforts to establish that George felt any fear or thought the victim had a gun, excluding such testimony and inquiry and preventing full development of the evidence on George's claim of self-defense. In addition, the prosecution succeeded in preventing the jury from being instructed that the state had the burden to disprove self-defense or that self-defense was a proper defense at all. The Court of Appeals, Division Two, reversed, finding there was sufficient evidence to support a claim of self-defense, the trial court had erred and that due process was violated when George was precluded from instructing the jury on self-defense.
 - a. Was Mr. George deprived of a fundamentally fair trial when, at the second trial, the prosecution repeatedly argued that George had not said he had acted in self-defense at the first trial and that George had never claimed that the victim had a gun until the second trial, using this "evidence" to "impeach" George as "lying then or lying now" about acting in self-defense?
 - b. Also in closing argument, the prosecutor displayed a PowerPoint media presentation showing George in a booking photo, repeating the claim that George's testimony at the first trial was somehow evidence he was only now claiming self-defense, describing him as looking like a "monster" and telling jurors that George could not claim self-defense unless he proved that the victim had a gun in his hand. Should Mr. George be granted relief because taken together these errors deprived him of his state and federal due process rights to a fundamentally fair proceeding and to have the

state bear the full weight of its burden of proof and those rights were actually and substantially prejudiced?

- c. Were these issues not “heard and determined” under the law where they were only given cursory or insufficient discussion and it is in the interests of justice to address them?

2. In State v. Ha’ mim, 132 Wn.2d 834, 940 P.3d 633 (1997), the state’s highest court held that age or the youthfulness of the offender could not be considered in any way in sentencing and was not in any way “mitigating.” In State v. O’Dell, 183 Wn.2d 680, 356 P.3d 359 (2015), the Court rejected that holding, recognized that the U.S. Supreme Court had recently held that youth were different as a matter of law for purposes of criminal liability and concluded that the age or youthfulness of an offender is potentially relevant and may support a mitigating factor at sentencing.

Under In re St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992), when the state’s highest court issues a new decision, that decision applies to all cases pending on appeal. The Supreme Court has also rejected the idea that the failure to raise an argument in advance of a new decision is a sort of prospective “waiver” of any rights which the new case might convey.

- a. Although O’Dell was decided while George’s case was on direct appeal, the court of appeals, Division Two, refused to apply O’Dell. Instead of ruling on the merits, the court dismissed the issue as “waived,” based on the failure to ask for an exceptional sentence prior to O’Dell being decided.

Did Mr. George suffer actual and

substantial prejudice to his state constitutional right to appeal and his state and federal rights to due process and should this Court grant him the resentencing to which he was entitled because Division Two failed to follow the rulings of the highest court in the state and order remand for resentencing in light of O'Dell?

b. Did Mr. George suffer actual and substantial prejudice to his rights to a full, fair and meaningful appeal and due process where the Supreme Court has previously rejected the theories and reasoning upon which Division Two relied in denying Mr. George relief?

c. Was the issue not “heard and determined” on direct appeal and should the Court address it where the original decision was not on the merits but on an improper finding that an issue was “waived?”

3. Has Mr. George met his burden of proving it is more likely than not that he suffered actual and substantial prejudice to his important constitutional rights and that he is therefore entitled to relief?

D. STATEMENT OF THE CASE

1. Procedural facts

Petitioner D'marcus George was tried twice in Pierce County superior court and had two appeals, both of which were only partly successful for Mr. George. This is his first Personal Restraint

Petition.

In 2009, George was tried by jury in front of the Honorable Katherine Stolz, charged by amended information with first-degree premeditated murder (Count I) and second-degree felony murder (assault predicate) (Count II), both with firearm enhancements. See Amended Information (attached to Personal Restraint Petition (PRP) as Appendix B) (“PRP App.”). A jury acquitted George of first-degree murder, were unable to agree on a lesser included charge of second-degree murder and convicted on a lesser of first-degree manslaughter. See 2009 Verdict Forms (PRP App. C). The jury also convicted Mr. George of second-degree murder for count 2 and of being armed with a firearm for both crimes. Id.

After sentencing, George appealed. 2009 Judgment and Sentence (PRP App. D); 2009 Notice of Appeal (PRP App. E). On April 8, 2011, in a published opinion, the court of appeals, Division Two, reversed and remanded both convictions for a new trial. See State v. George, 161 Wn. App. 86, 94, 249 P.3d 202, review denied, 172 Wn.2d 1007 (2011) (PRP App. F). The state’s Petition for Review was denied and the Mandate issued on September 20, 2011. 2011 Mandate (PRP App. G).

On remand, the state filed a second amended information charging count 1 as second-degree intentional murder and count 2 as second-degree felony murder with a first-degree or second-degree assault predicate. See Second Amended Information (PRP App. H). Both counts included firearm enhancements. Id.

The Honorable Ronald E. Culpepper presided over the retrial on August 11-14, 18-21, 25-28, and September 2-4, 2014. Clerk's Minutes (PRP App. I). The jury convicted on both counts and enhancements as charged. 2014 Verdict Forms (PRP App. J). Mr. George appealed and on February 22, 2017, the court of appeals, Division Two, reversed and dismissed the conviction for count 2 as violating double jeopardy, ordering the judgment and sentence amended to properly reflect only one conviction existed. See 2017 Opinion (PRP App. L). The Supreme Court denied George's Petition for Review on June 28, 2017, the Mandate issued on July 5, 2017, and the judgment and sentence was corrected on July 31, 2017. See 2017 Order (PRP App. N).

Mr. George is currently in prison for these offenses, housed in Clallam Bay Corrections Center. DOC Inmate Locator printout (PRP App. X). He is serving a sentence of 235 months, with 60 months (5

years) of that as “flat time” which does not earn early release time.

See Judgment and Sentence (PRP App. A) at 5.

2. Overview of relevant facts¹

In June of 2004, Isaiah Clark was shot and killed during an altercation at a gas station in Tacoma, Washington. See George, 161 Wn. App. at 87-88. There was no question that the person who shot Clark was D’Marcus George. Id. The only question was whether George had shot Clark in self-defense. See id; see also, 2017 George at 2-3 (PRP App. L).

Before the 2009 trial, Mr. George noted his intent to rely on self-defense, but the state objected, arguing that George was not entitled to raise this affirmative defense. George, 161 Wn. App. at 87-88. The state then succeeding in preventing and/or striking testimony throughout trial about George’s fears of Clark or of Clark potentially having a gun. Id; see Brief of Appellant (attached as Appendix I to Appendices, vol 2). The state also successfully objected to instructing the jury on self-defense. See George, 161 Wn. App. at 87-88.

¹More detailed discussion of the relevant facts is contained in the argument section, *infra*.

On appeal, the court of appeals, Division Two, reversed, holding as a matter of constitutional due process that George had presented sufficient evidence to establish the claim of self-defense and shift the burden of disproving that defense to the state. Id. The court held that George had the right to present his theory of the case to the jury in instructions. Id. But the court did not address the issues raised about the trial court's rulings excluding testimony relevant to Mr. George's claim of self-defense, instead declaring that, while the "evidentiary questions are generally likely to arise during retrial on remand, their context will surely differ." Id.

On remand, over objections and mistrial motions, the prosecutors repeatedly implied that George had not claimed self-defense at the first trial. 2017 George (PRP App. L). The prosecutor used this "evidence" to claim that either George had been lying at his first trial or was lying now about self-defense. Id. These statements were repeated through a visual aid, a "PowerPoint" presentation, which emphasized not only this "failure" but also a booking photo of George looking menacing and the description of George looking like a "monster" at the time of the incident. 2017 George (PRP App. L); see Powerpoint (attached as Appendix A in volume 1 (self-

defense/fair trial issues).

The court of appeals upheld the conviction, however, declaring that the prosecutor was not arguing that George did not raise self-defense in 2009, just that his “testimony in 2009 was insufficient to establish a claim of self-defense.” PRP App. L at 15-16. The court held that it was not an improper description of self-defense to say “we don’t care what the defendant says” in saying he was acting in self-defense. Id. These comments were characterized as an argument the prosecutor meant to make that no reasonable person would have used deadly force in this situation. Id. Division Two also declared that, “the prosecutor was arguing that because George failed to prove one component of self-defense, the jury did not need to consider the other component.” Id.

Mr. George had celebrated his 20th birthday just a few months before the incident and although his youth was discussed at sentencing, the lower court thought it had no authority to impose a sentence for being, effectively, “young and dumb.” Although O’Dell was then decided, the court of appeals refused to reverse and remand for resentencing in light of O’Dell. Instead, Division Two declared that Mr. George had “waived his challenge to his standard range

sentence by failing to request an exceptional sentence downward at the time of sentencing. “ PRP App. L at 21.

E. ARGUMENT

1. THIS COURT HAS THE AUTHORITY TO GRANT PETITIONER RELIEF

D'marcus George is asking this Court to grant him relief from the unlawful restraints he is suffering as a result of the conviction and resulting sentence. Under RAP 16.4, a petitioner is entitled to relief from a conviction when he is suffering restraint and the restraint is unlawful. RAP 16.4(b) and (c). In addition, where a petitioner is collaterally challenge a conviction in a criminal case, our state's highest court has held that he must meet additional court-imposed "threshold" requirements to receive relief. Personal Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

In this case, Mr. George should be granted relief, because he is suffering restraint which is unlawful and further meets the “threshold” requirements.

a. Relief is not precluded

As a threshold matter, this Court is not precluded from granting petitioner's request for relief under RAP 16.4(d). RAP 16.4(b) provides that relief may not be granted by way of personal

restraint petition if there are other remedies which are available and adequate under the circumstances. Further, the rule provides that relief may only be granted if permitted under RCW 10.73.090,.100 and .130. RAP 16.4(d).

Here, other remedies are inadequate under the circumstances. Petitioner has previously sought relief by way of direct appeal but did not receive full relief. See Opinion (PRP App. L). Further, the Supreme Court denied review. 2017 Mandate (PRP App. M).

In addition, relief is authorized - or at least not prohibited - by RCW 10.73.090, .100 and .130. Under RCW 10.73.090, a personal restraint petition is timely and this Court may grant relief where the petition is brought not more than a year after the judgment became final. See In re Personal Restraint of Runyan, 121 Wn.2d 432, 444-45, 853 P.2d 424 (1993). The judgment becomes final when it is filed with the clerk of the trial court after appeal - here, July 31, 2017. See RCW 10.73.090(3)(a); 2017 Order (PRP App. N). This PRP is being filed within a year of that date and thus is timely under RCW 10.73.090. It is also proper under RCW 10.73.100, which provides a waiver for the one-year time limit in some situations, and RCW 10.73.130, which simply provides that RCW 10.73.090 and RCW

10.73.100 “apply only to petitions and motions” filed after a certain date in the late 1980s. See RCW 10.73.130; Laws of 1989, ch. 395 § 6.

Finally, although not included in RAP 16.4, the prohibitions of RCW 10.73.140 do not preclude relief. That statute prohibits more than one personal restraint petition from being filed in the court of appeals or if the petition is “based on frivolous grounds.” RCW 10.73.140; see Personal Restraint of Johnson, 131 Wn.2d 558, 563, 933 P.2d 1019 (1997). This is Mr. George’s first PRP so there is no prior petition and further Mr. George is raising non-frivolous arguments regarding fundamental constitutional rights in relation to a criminal conviction.

Thus, this Court is not precluded from granting petitioner's request for relief, if he shows that he is under restraint, the restraint is unlawful, and he meets the additional court-imposed threshold requirements.

b. Standard of review

In general, under RAP 16.4, a petitioner seeking relief need only show that he is suffering restraint and that restraint is “unlawful” as that term is defined in RAP 16.4(c). In Cook, supra, however, the Supreme Court added “threshold” requirements to

cases where there is a collateral challenge to a judgment and sentence in a criminal case. Cook, 114 Wn.2d at 812.

If the petitioner argues that the restraint is unlawful due to constitutional error, he must show that the error occurred and that there was “actual and substantial” prejudice to his rights. Id. If he argues that the restraint is unlawful due to nonconstitutional errors, he must show the errors amounted to or caused “a fundamental defect” in the proceedings “which inherently results in a complete miscarriage of justice.” Id.

In either situation, however, the Petitioner’s burden of proof is low. Cook, 114 Wn.2d at 812. A petitioner need not establish that the restraint is unlawful “beyond a reasonable doubt” or even “by clear and convincing evidence.” Id. Nor must he prove he suffered “actual and substantial prejudice” to his rights by those high standards, either. Id.

Instead, the petitioner is required only to establish his case by a preponderance of the evidence. Cook, 114 Wn.2d at 812-13; see In re Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). Under that standard, he need only show that it is “more probably true than not true” that he is suffering restraint and the restraint is unlawful. See Mansour v.

King County, 131 Wn. App. 255, 266, 128 P.3d 1241 (2006).

Indeed, the “more probably true than not true” standard is the lowest legal standard we use in this state - less than proof by a “clear preponderance.” See Nguyen v. State, 144 Wn.2d 516, 524, 29 P.3d 689 (2001).

Thus, Mr. George is entitled to relief if he can show this Court that it is more probable than not that he is suffering restraint which is “unlawful” under RAP 16.4 and that his case meets the “threshold” requirements of Cook. Mr. George can more than meet that burden, both for trial and for sentencing.

2. MR. GEORGE IS SUFFERING “RESTRAINT” UNDER RAP 16.4

A petitioner is under "restraint" for the purposes of RAP 16.4 when he "has limited freedom because of a court decision" in a criminal proceeding, is under a “disability” as a result of a judgement and sentence in a criminal case, or is confined. RAP 16.4(b); see also State v. S.M.H., 76 Wn. App. 550, 553, 887 P.2d 903 (1995). Mr. George is confined as a result of the conviction and sentence he is challenging and thus he is under “restraint.” RAP 16.4(b); see DOC Inmate Locator printout (PRP App. X). Indeed, even post-release Mr. George would still be under “restraint” from the conviction and

sentence, because post-custody supervision, the potential effect of a conviction on future minimum sentences, and difficulties with reestablishing oneself in society are also restraints from which a petitioner may be relieved. See In re Powell, 92 Wn.2d 882, 887, 602 P.2d 711 (1979).

3. THE RESTRAINT IS UNLAWFUL UNDER RAP 16.4(c)

Mr. George is also entitled to relief, because the restraint he is suffering is “unlawful” under RAP 16.4(c). That rule provides, in relevant part:

Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

- (1) The decision in a civil or criminal proceeding was entered without jurisdiction. . .
- (2) The conviction was obtained or the sentence or other order entered in a criminal proceeding . . . instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or
- (3) Material facts exist which have not been previously presented and heard, which in the interests of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding. . .or
- (4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding. . . and sufficient reasons exist to require retroactive application of the changed legal

standard; or

- (5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding. . . or
- (6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or
- (7) Other grounds exist to challenge the legality of the restraint of petitioner.

RAP 16.4(c).

Mr. George can meet his burden of proving that it is more likely than not that the restraint he is suffering is unlawful under RAP 13.4(c)(2).

As a threshold matter, while some of the issues were addressed in Mr. George's direct appeal, this Court may nevertheless address them, because they were not "heard and determined" as that phrase is defined for this case. An issue is "heard and determined" if 1) the same ground was determined adversely to the appellant on direct review, and 2) the prior determination was on the merits, and 3) the ends of justice would not be served by reaching the issue in the current proceeding. See In re Haverty, 101 Wn.2d 498, 503, 681 P.2d 835 (1984). Here, the prior determination was not a full determination on the merits in the case of the sentencing issue, but

rather on a “waiver” theory.” In addition, the ends of justice will only be served by considering the issues in this proceeding, because of the serious violations of fundamental constitutional rights involved and Mr. George’s continuing unlawful restraint.

- a. The conviction was the result of a trial at which Mr. George suffered actual and substantial prejudice to his due process rights to a fundamentally fair proceeding and to having the state bear the full weight of its constitutional burden of disproving the affirmative defense

The state and federal due process provisions require the state to bear the full burden of proving every fact necessary to prove the crime charged, beyond a reasonable doubt, and further mandate that the accused receive a fair trial. State v. W.R. Jr., 181 Wn.2d 757, 761-62, 336 P.3d 1134 (2014); Art. 1, § 3; 14th Amend. It is a violation of the defendant’s due process rights when the state requires a defendant to disprove any fact which is an element of the crime charged. State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). In the context of self-defense, our state’s highest court has held that, because self-defense negates an essential element, the state must retain the burden on that defense. Id.

Put another way, “proof of self-defense negates knowledge,” so the state “must disprove self-defense in order to prove that the

defendant acted unlawfully,” as a matter of constitutional law. Id. It is “impossible for one who acts in self-defense to be aware of facts or circumstances ‘described by a statute defining an offense,’” so self-defense negates the essential element of “knowledge.” Acosta, 101 Wn.2d at 616.

When the accused raises self-defense, it is essential for the jury to have all the relevant evidence in order to take into account all the facts and circumstances known to the defendant as part of its analysis. See State v. Allery, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984). Because the “vital question is the reasonableness of the defendant’s apprehension of danger,” jurors must be able to stand “as nearly as practicable in the shoes of [the] defendant, and from his point of view determine the character of the act.” State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977), quoting, State v. Ellis, 30 Wash. 369, 373, 70 P. 963 (1902). The jurors must find not only that the defendant had the required subjective fear but also that it was objectively reasonable, given what the defendant knew and the circumstances surrounding the offense. Wanrow, 88 Wn.2d at 234.

Here, Mr. George tried to claim self-defense at the first trial and was precluded from bringing that claim and fully presenting

evidence on it by the state - yet the state then used the limits it had asked for as “evidence” to “impeach” George’s claim of self-defense. Further, the prosecutor committed serious, prejudicial misconduct - objected to below - regarding self-defense and in using a wholly inflammatory Powerpoint media display. Division Two’s decision on direct appeal was in error and failed to properly address the issues and this Court should grant Mr. George relief from the unlawful restraint he is suffering as a result of the constitutionally infirm trial.

i. Relevant facts

At the first trial, counsel tried to elicit testimony about George’s subjective fear of Clark and was prevented from fully exploring that evidence by the prosecution’s repeated objections. One example was that George testified that he thought, given how strong the blow was to George’s head, that Clark was armed because he must have hit George “with something,” after which George fell into the car and grabbed his gun in response. 2009RP 1224, 1234-35, 1287-88, 1293 (attached as Appendices E-H).

The trial court sustained objections and struck testimony when George testified at the first trial that Clark “showed no fear” when he saw George’s gun, which George thought was “like he had

one of his own.” 3RP 1235. It also sustained objections to George testifying about his fear of the seriousness of the altercation between his friend, McGrew, and those confronting him, that what “they came there for” that day was “really serious.” Id.

And in redirect, counsel again tried to elicit testimony about George’s perceived fears:

Q: When you were at the Shell gas station, you didn’t see any guns? You didn’t see Ricky or Isaiah with a gun; is that correct?

A: I didn’t see one. **I knew somebody had something.**

[PROSECUTOR]: Objection. I am going to ask the last thing be stricken as speculative.

THE COURT: The last part of the answer will be stricken as being speculative.

Q: Did you feel as if anybody was armed?

[PROSECUTOR]: Objection.

THE COURT: Don’t answer. There is an objection on the floor.

THE COURT: Counsel.

[PROSECUTOR]: Well, it is irrelevant and speculative what he was feeling.

THE COURT: I’ll sustain the objection. He’s testified he hasn’t seen any gun.

RP 1339 (emphasis added). A little later, counsel established that,

when George was grabbing for the gun, he didn't know whether Clark had a gun or not. RP 1342. George said he was concerned that Clark possibly had one. RP 1343.

At the second trial, the prosecution then faulted George for not having established certain parts of his claim of self-defense at the first trial, characterizing George as not having "mention[ed] a weapon at the prior trial even though the "stakes were just as high" at that proceeding. George 2017 (PRP App. L) at 6-7. In initial closing argument, the prosecutor told the jurors they should not be surprised that self-defense was the "focus of this case," recognizing that the only question was "what would a reasonably prudent person do" in regards to self defense. 9/2VRP at 83 (attached as Appendix H). The prosecutor's argument was that "[y]ou don't get to bring a gun to a fistfight," that the force used in self-defense has to be "proportional" with "death or something akin to death" in order to constitute a sufficient threat and that the testimony was "consistent over and over and over again" that only Mr. George had a weapon - not Mr. Clark. 9/2VRP at 83 (attached as Appendix C of Volume 1 of appendices).

Regarding Mr. George, the prosecutor told the jury,

“Remember, he’s had ten years to rehearse this,” and “five years to try again, five years to figure it out again, to make it even better,” and “10 years to act this out.” 9/2VRP at 88-89 (App. C (vol. 1)). The prosecutor went on:

This may be stating the obvious, but the defendant’s credibility, your assessment of his credibility, should begin and end with the change in his testimony. By his own acknowledgment, in 2009, when he testified, he was under oath; he understood how serious it was - -

Id. Counsel objected, the court held a sidebar, and the prosecutor then continued:

Understanding how serious is was in 2009, understanding the need to **fully articulate everything that happened that day**, understanding the need to explain here’s why I murdered this man, he just leaves out the fact that the victim had a gun, the most important fact.

...

In 2009 he leaves out the most important fact. And why is that? **Because in 2009 his testimony was not self-defense. In 2009-** -

[COUNSEL]: Your Honor, I’m going to ask for a sidebar again. . . .the curative instruction needs to be given to correct his misstatement of -

Id. (emphasis added). The trial court denied the request for an instruction telling the jurors that George *had* claimed self defense

but had been precluded from fully raising it at the first trial. The judge then said he would let the prosecutor go on and, “I hope he’ll maybe move on.” Id. The prosecutor then declared:

In 2009, remove the fact of the claim of the gun, and what is his testimony? Boil it down. It’s “Isaiah Clark punched me.” It’s “I fell into the car; he’s grappling with me; he’s grabbing me; so I pulled out a gun and I shot him four times.” That’s what’s left when you remove **this new information about a gun.**

And so when he testified in 2009, it wasn’t a story that you would look at and say, well, I understand why he would shoot someone four times. And so **now he has injected that information, injected the most pivotal fact for the first time in 2014, and it’s clear why. . .**

9/2VRP at 91-92 (emphasis added).

- ii. The misconduct and errors deprived George of a fair trial because all of them went directly to the only question: the credibility of the claim of self-defense

In affirming on direct appeal, Division Two applied an incorrect analysis and failed to grant relief despite the serious, prejudicial misconduct and the fact that the only question was the credibility of George’s claim of self-defense. In upholding the conviction, Division Two dismissed the idea that the prosecutor repeatedly telling the jury that George had not testified as to self-defense in 2009 was not a claim that George had changed his stories

- and thus was not credible - but instead just an awkward comment that George's "testimony in 2009 was insufficient to establish a claim of self-defense." PRP App. L at 15-16. But Mr. George was not allowed to *bring* a claim of self-defense in 2009 - and he was precluded from presenting all the evidence he sought to on that point.

Division Two also declared that it was not improper or a misstatement of the law to argue that George could not establish a claim of self-defense unless Clark had a gun at the time of the shooting. PRP App. L at 16-17. The court agreed that "the law does not require George to prove that Clark had a gun in order to establish a self-defense claim," but stated the prosecutor was actually arguing that a self-defense claim in this case would not be supported unless Clark had a gun. PRP App. L at 16-17.

This is directly contrary, however, to Division Two's own ruling and declaration of the relevant law in the published decision in this same case.

Division Two noted in the first appeal, "[t]he imminent threat of great bodily harm does not actually have to be present, so long as a reasonable person in the defendant's situation could have believed

that such threat was present.” PRP App. L at 10.

Indeed, the same argument as used by the prosecutor here was specifically rejected in that appeal when Division Two faulted the trial court for focusing on “Clark’s limited physical battery of George” in the context of the case:

In its reasoning, the trial court discounted the contextual circumstances. For example, the trial court said, “Not a blow that was with sufficient force to cause him to lose consciousness, but a blow that simply knocked him either off his feet or into the car.” Imminent threat is not necessarily an immediate threat but instead acknowledges the circumstance of “hanging threateningly over one’s head; menacingly near.”

Nor does imminent threat require any actual physical assault, let alone an attempted lethal assault. Here, as the trial court correctly opined, “[Y]ou don’t shoot somebody for hitting you.” Nevertheless, the trial court mischaracterized the situation as it appeared to George, especially by incorrectly assuming that Clark’s initial physical battery of George offered the only justification for his fear. George, in contrast, justified his fear by showing dangerous circumstances with the danger escalating.

PRP App. L at 13-14 (citations omitted).

Division Two also held that it was not an improper description of self-defense to say “we don’t care what the defendant says” about why he was acting in self-defense. Id. These comments were characterized as an argument the prosecutor meant to make that no reasonable person would have used deadly force in this situation. Id.

Division Two also described it as that, “the prosecutor was arguing that because *George failed to prove one component of self-defense*, the jury did not need to consider the other component.” *Id.* (Emphasis added).

It was not George’s burden, however, to prove *any* component of self-defense. *Acosta*, 101 Wn.2d at 616. It was the state’s burden to disprove it. *Id.* Division Two’s efforts to recast the state’s already improper argument that jurors should effectively ignore the subjective element of the self-defense law thus depended on an unconstitutional burden shift to Mr. George himself.

Mr. George has met his burden of proving it is more likely than not that he did not receive a constitutionally fair trial. The only issue below was whether George had acted in self-defense. The prosecution’s misstatements of the evidence and process of the first trial was a significant part of its argument that George’s claim of self-defense was not credible and he should be found guilty of the charged crimes. And it was the state, not George, which was required under due process to disprove that George acted with self-defense once the threshold burden of production was met.

This Court should find that Mr. George is suffering unlawful

restraint as a result of the trial at which his due process rights to a fundamentally fair proceeding and to have the state bear the full weight of its burden of disproving self-defense were violated. Even a cursory look at the powerpoint shows the inflammatory nature of the state's arguments below - including a mug shot, emphasis on the claim that George looked "like a monster" and the declaration that George's first trial did not involve self-defense. He was actually and substantially prejudiced by the unfair trial and the interests of justice support ensuring that only those fairly convicted are subjected to punishment in our state. This Court should so hold.

- b. The court of appeals erred in failing to follow *In re St. Pierre* and the settled law on application of new decisions of the Supreme Court to pending cases on appeal, thus violating Mr. George's rights to a full, fair, and meaningful appeal and to due process, as well as to a proportionate sentence

Mr. George is also suffering unlawful restraint, because the court of appeals, Division Two, refused to apply O'Dell to Mr. George's case while pending on direct review, in violation of the standards set forth by our state's highest court about when to apply caselaw in just such a situation. Further, the court of appeals relied on an improper "waiver" theory previously rejected in this situation.

In this state, our constitution guarantees the right for a person convicted of a crime to have a full, fair and meaningful appeal. At the outset, where, as here, the state's highest court issues a decision, the application of that decision to a particular defendant in a criminal case will depend in large part on the procedural posture. Where the Court interprets a statute or provision for the first time, that decision is held to relate back to the very drafting of the statute, and thus that interpretation applies to all defendants, regardless of the posture of their case. See, In re Personal Restraint of Tsai, 183 Wn.2d 91, 104, 351 P.3d 138 (2015). Where, however, the decision is a departure from prior holdings the question of "retroactivity" is raised. See Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); Tsai, 183 Wn.2d at 104. Under "retroactivity" theory in the federal courts, if the U.S. Supreme Court announces a newly declared constitutional rule, it "violates basic norms of constitutional adjudication" to refuse to apply that decision to cases pending on review. Teague v. Lane, 489 U.S. 288, 304, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), citing, Griffith, supra.

In our state, our highest Court has adopted this "bright line" rule, but it departs from to be more lenient in some ways. See St.

Pierre, supra; Tsai, supra. First, the Court had already reaffirmed the importance of allowing “all defendants whose cases are not yet final to benefit from the application of the new rule.” State v. Jackson, 124 Wn.2d 359, 361-62, 878 P.2d 452 (1994).

In addition, the Court has held that a significant, material change in the law in this state, whether substantive or procedural, applies to all cases pending review. Tsai, 183 Wn.2d at 104. This is because our state provides greater relief on collateral review than allowed under the federal system. Id. In contrast with the limited federal right to collateral relief, in this state the statutes creating those rights were intended to “**reduce** procedural barriers to collateral relief in the interests of fairness and justice.” 183 Wn.2d at 104 (emphasis in original). Thus, a significant, material change in the law, whether substantive or procedural, which applies retroactively to the case is a separate grounds for finding restraint unlawful under RAP 16.4.

An intervening opinion of an appellate court is a “significant change in the law” if it effectively overturns a prior decision which was determinative on the relevant issue. In re the Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005). This is in contrast to an

appellate decision which merely settles a point of law without overturning it. See In re Pers. Restraint of Greening, 141 Wn.2d 687. 696, 9 P.3d 206 (2000).

To understand why the court of appeals erred in holding that Mr. George was not entitled to relief under O'Dell and St.Pierre, it is important to understand 1) the significance of O'Dell and 2) the long line of cases stemming from St.Pierre and our state's standards of "retroactivity" on appeal.

i. The fundamental shift in our understanding of the youthful brain and its weaknesses

At the 2014 sentencing, the law in effect was the Supreme Court's decision in Ha'mim, dismissing the idea that the defendant's relative youthfulness could be considered by an adult sentencing court as a "mitigating factor" supporting a lesser sentence than the "standard range." Ha'mim, 132 Wn.2d at 847. Reflecting the times, in Ha'mim the state Supreme Court not only rejected the idea that youth could ever be a mitigating factor in a criminal case but in fact declared that it "borders on the absurd" to suggest a difference in culpability or responsibility based on an offender's relative youth. 123 Wn.2d at 847.

Ha'mim was consistent with then-existing beliefs about the

Eighth Amendment, as well as assumptions about how juveniles should be treated in our criminal justice systems. At the time, the Eighth Amendment prohibition against cruel and unusual punishment was interpreted as recognizing no difference whatsoever between a youth and an adult in our criminal law system. See Sanford v. Kentucky, 492 U.S. 391, 109 S. Ct. 2969, 106 L. Ed.2d 306 (1989), overruled by, Roper v. Simmons, 543 U.S. 551, 561-63, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (upholding death for child crimes and rejecting the idea age was relevant).

By 2005, however, “our society’s evolving standards of decency” had led to “evidence of a national consensus” against the death penalty for juveniles[.]” Roper, 543 U.S. at 561-63. This consensus was based on recognition of three “general differences” between juveniles and adults, which “demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” 543 U.S. at 569-70.

First, youthful offenders have a the “lack of maturity and an underdeveloped sense of responsibility,” which “often result in impetuous and ill-considered actions and decisions.” 543 U.S. at 569, quoting, Johnson v. Texas, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed.

2d 290 (1993). Second, compared to adults, “juveniles are more vulnerable” and “susceptible to negative influences and outside pressures, including peer pressure.” Roper, 543 U.S. at 569. This also made juveniles less culpable when they engage in conduct than if that conduct was committed by a full-grown adult, because of the relative lack of control and experience juveniles have over themselves and their own environment. Id. Third, “the character of a juvenile is not as well formed as that of an adult,” so that the youthful offender has personality traits which are “more transitory, less fixed.” 543 U.S. at 569.

Because of their susceptibility to “immature and irresponsible behavior,” the Roper Court concluded, the “irresponsible” conduct of a youthful offender is not evidence of permanent inability to be responsible as it might be with an adult. Id. And this is true even with the most heinous of crimes. Id.

The Roper majority ultimately held that, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult.” Roper, 543 U.S. at 370. Instead, youth is a “mitigating factor” because its “signature qualities” can be “transient.” Roper, 543 U.S. at 570, quoting, Johnson, 509 U.S. at 368. Further, the

diminished capacity of juveniles makes it such that “the case for retribution is not as strong with a minor[.]” Roper, 543 U.S. at 569-71.

In 2010, the U.S. Supreme Court extended this same reasoning to a sentencing scheme mandating life without the possibility of parole for juveniles who commit crimes other than murder. See Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Put simply, the Graham Court declared, “[a]n offender’s age” is “relevant to the Eighth Amendment,” so that “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” And in 2012, the Court extended this reasoning to hold that only a judge may decide to impose a life sentence upon an offender who committed murder. Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). A juvenile court had remanded the defendant to adult court after considering things like his “mental maturity,” and the young man was sentenced to life without the possibility of parole, and the state appellate court found the punishment “not overly harsh when compared to the crime.” 132 S. Ct. at 2463.

On review, however, the U.S. Supreme Court disagreed, focusing on the basic “precept of justice that punishment for crime

should be graduated and proportioned” to both the offender and the offense.” Miller, 132 S. Ct. at 2463, quoting, Roper, 543 U.S. at 560 (quoting, Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)). Put simply, the Miller Court said, the “concept of proportionality is central to the Eighth Amendment.” Miller, 132 S. Ct. at 2463.

The Miller Court cited the studies in Roper establishing that a “relatively small proportion” of the adolescents who were involved in illegal activity were shown to later “develop entrenched patterns of problem behavior.” Id., quoting, Roper, 543 U.S. at 570 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). The Court also cited the developments in brain science and psychology which had continued to establish that there were fundamental differences “between juvenile and adult minds,” in many areas including the “parts of the brain involved in behavior control.” Miller, 132 S. Ct. at 2464-65, quoting, Graham, 130 S. Ct. at 2026. Ultimately, the Miller Court declared, Roper and Graham “establish that children are constitutionally different from adults for purposes of sentencing.”

In O'Dell, a majority of our state Supreme Court extended the reasoning of Miller to cases involving a youthful adult, departing from Ha'mim and the uninformed decisions of the past. 183 Wn.2d at 692-93. Recognizing that the decision in Ha'mim and other cases had appeared to hold that youth could not be considered as a mitigating factor by the sentencing court, the O'Dell Court now rejected that idea.

In reaching its conclusion, the O'Dell Court recognized that the holding of Ha'mim and similar cases could have made it seem that the decision in Ha'mim was “absolutely barring any exceptional downward departure sentence below the range on the basis of youth.” O'Dell, 183 Wn.2d at 364, 366-67.

As the Court itself would describe it, Ha'mim “rejected the use of age as a mitigating factor,” concluding that, because “age does not relate to the crime” or the prior record of the defendant, it is “not a substantial and compelling reason to impose an exceptional sentence.” State v. Law, 154 Wn.2d 85, 92, 110 P.3d 717 (2005). Indeed, the Court made it clear that youth was deemed irrelevant under the presumptive - and mandatory - guidelines and sentencing requirements of the Sentencing Reform Act. That was consistent with

our state's other cases recognizing no difference in defendants based on age. See In re Boot, 130 Wn.2d 553, 570, 925 P.2d 964 (1996) (youthful offender tried and convicted as adult not in violation because no constitutional differences based on age).

O'Dell, however, recognized that youth was not irrelevant, even for adults:

Having embraced this reasoning [in Ha'mim] - that it is "absurd" to believe that youth could mitigate culpability - this court went on to explain that youth alone could not be a nonstatutory mitigating factor under the SRA because "[t]he age of the defendant *does not relate to the crime* or the previous record of the defendant."

When our court made that sweeping conclusion, it did not have the benefit of the studies underlying Miller, Roper, and Graham - studies that establish a clear connection between youth and decreased moral culpability for criminal conduct. **And as the United States Supreme Court recognized in Roper, this connection may persist well past an individual's 18th birthday: "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18. . .**

Today, we do have the benefit of those advances in the scientific literature. Thus, **we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18.** It remains true that age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence. . . . But in light of what we know today. . . a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence [on a youthful adult offender].

(Emphasis added).

- ii. The court of appeals erred in failing to follow the law regarding application of new caselaw while a case is pending on review and the “waiver” concept applied by the court of appeals has already been rejected

O’Dell was decided on August 13, 2015, after Mr. George was sentenced and while his case was on direct appeal in this court. See O’Dell, 183 Wn.2d at 680. In refusing to reverse and remand for resentencing in light of O’Dell as Mr. George argued on direct appeal, the court of appeals declared that Mr. George had “waived his challenge to his standard range sentence by failing to request an exceptional sentence downward at the time of sentencing. PRP App. M at 21. The court of appeals erred and this Court should grant Mr. George relief on this issue, because Mr. George was entitled to resentencing in light of O’Dell under St.Pierre and established law and thus George’s rights to a full, fair and meaningful review and to a proportional sentence were violated.

Over time, both the state and federal supreme courts have wrestled with the issue of whether new rulings should be applied to pending cases or should be applied only prospectively. See St. Pierre, supra; see also, Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), overruled, Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct.

708, 93 L. Ed. 2d 649 (1987). In Stovall, the U.S. Supreme Court called the practice of applying new decisions to cases pending on review “retroactivity,” then crafted a rule it felt considered all the competing interests involved in applying a new case. 388 U.S. at 297. This rule asked 1) the purpose of the new holding, 2) the “reliance” of law enforcement and others on the old holding or rule and 3) whether the “administration of justice” would be affected by applying the new rule to cases already pending. Id.

This balancing test was quickly seen as unfair and unworkable, starting with a concern expressed by the Honorable Justice Harlan about “basic principle” and fundamentals of law. See Desist v. U.S., 394 U.S. 244, 256, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969) (Harlan, J., dissenting), overruled, Griffith, supra. The justice issued a scathing critique of the seeming lack of consistency and fairness in applying a new ruling to only the appellant in a particular case, arguing that those “similarly situated” must be granted the same relief unless the court has “a principled reason for acting differently.” Id. Justice Harlan was concerned that the Court’s balancing, three-part test departed “from this basic judicial tradition” by allowing for disparate application of a “new” rule of constitutional law to some “who alone

will receive the benefit.” 394 U.S. at 258-59.

Finally, the majority of the U.S. Supreme Court rejected the three-part balancing test of Sanford. See Johnson v. United States, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997). In Johnson, the Court recognized the inequities wrought by the three-part test, reviewing the history of its adoption and rejecting the idea that defendants whose cases were still pending on direct appeal at the time of the decision should be denied the same benefit as the one who won the issue in the court. Johnson, 457 U.S. at 545. In addition to serving the goal of treating similarly situated persons similarly, applying new decisions to all cases pending on review satisfied the requirements that principled decisions with consistent constitutional rulings were issued, as well as satisfying the appellate court’s judicial responsibility to decide cases before it “in light of our best understanding of governing constitutional principles.” Johnson, 457 U.S. at 555-56.

Notably, in reaching its conclusion, the Court specifically rejected the idea that the defendant was not entitled to rely on the new decision because his trial or arrest or relevant procedure at issue occurred *before* the new case. 457 U.S. at 555-56. The Court noted

that “it goes without saying” that the defendant who had won the issue in the case establishing the new rule had also been arrested before his own case on appeal was decided holding that the procedure used was wrong, “and he received the benefit of the rule in his case.” 457 U.S. at 555-56.

In Griffith, supra, the federal Supreme Court finally ended all reliance on the old balancing rule, adopting the bright line requirement that an appellate court must resolve all cases before it still on direct review “in light of our best understanding” of the law at the time the appellate court issued the decision. 479 U.S. at 322-23. The Court was offended by the idea of continuing the type of judicial review which had them “fishing one case from the stream of appellate review, using it as a vehicle” to pronounce new constitutional standard and then allowing “a stream of similar cases” to go through the appellate court system “unaffected by that new rule.” Griffith, 479 U.S. at 322-23.

This state’s highest court first followed, then expanded on this concept of “retroactivity.” In St. Pierre, the Court traced the “erratic” development of federal law and the rejection of the three-pronged balancing approach. 118 Wn.2d at 324. Since that decision, the Court

has emphasized the importance of treating all defendants the same by making it a requirement to apply the new rule to cases which are not yet final. State v. Jackson, 124 Wn.2d at 361-62). And the Supreme Court has rejected the theory of an effective “pre-existence” waiver of any right to have the new caselaw apply when there was not a record made below on the issue, finding that this “waiver” theory offends basic principles of logic, fairness, the law and judicial economy. It is well-established that a person cannot “waive” an issue by failing to raise it before it exists; a waiver is the intentional relinquishing of “a known right of privilege.” State v. Edwards, 93 Wn.2d 162, 168, 606 P.2d 1224 (1980). The requirement that a defendant raise an issue at his lower court proceeding in order to “preserve” it for review is based on concepts of economy - i.e., “[t]he appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct.” State v. Scott, 110 Wn.2d 582, 685, 757 P.2d 492 (1988). This gives the trial court the chance to correct an error and avoids the expense of retrial. See Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 251 (1983).

But a person cannot “waive” that which they do not yet have. As the U.S. Supreme Court has made clear, where there is “near-

uniform precedent” holding that the law was a particular way and that changes, to hold that the defendant “waived” raising that previously unavailable issue made no sense. Johnson, 520 U.S.at 468. In fact, holding a defendant to having “waived” an issue not raised based on existing law but later made available by a change in the law would wreak serious havoc on judicial economy:

The Government contends that for an error to be “plain,” it must have been so both at the time of trial and at the time of appellate consideration. In this case, it says, petitioner should have objected to the court’s deciding the issue [under the then-existing law] . . . even though near uniform precedent . . . held that course proper. Petitioner, on the other hand, urges that such a rule would result in counsel’s inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent. We agree with petitioner on this point.

520 US. at 468.

The court of appeals here erred in failing to apply the proper standard of St. Pierre and ordering resentencing under O”Dell in this case. State v. Robinson, 171 Wn.2d 292, 253 P.3d 84 (2011), is instructive. In Robinson, two consolidated cases were pending on direct appeal when the U.S. Supreme Court issued a new decision holding that a search incident to arrest which had been deemed proper was no longer. Arizona v. Gant, 556 U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)). Our state’s lower appellate courts then

struggled with how and when to apply the new ruling, with some failing to follow the dictates and reasoning of St. Pierre. Compare, State v. McCormick, 152 Wn. App. 536, 216 P.3d 475 (2010); State v. Millan, 151 Wn. App. 492, 494-95, 212 P.3d 603 (2009), reversed sub nom, State v. Robinson, 171 Wn.2d 292, 253 P.3d 84 (2011).

In one of those cases, the Petitioner Francisco Millan had an appeal pending in Division Two of the court of appeals when Gant was decided, so he filed a supplemental brief arguing that he was entitled to relief under Gant and In re St. Pierre. Millan, 151 Wn. App. at 495. While Division Two agreed that Gant *technically* applied, the court then applied a “waiver” theory similar to the one applied here. Because Millan had not made a motion to suppress at trial, Division Two held, there was an insufficient record to prove that there was an error and this was a “waiver” of the suppression issue on appeal. Millan, 151 Wn. App. at 495.

In reaching this conclusion, Division Two recognized that it was problematic to hold someone responsible for failing to anticipate a change in the relevant law. Id. The court declared that trial counsel’s failure to make the suppression hearing could not be labeled “ineffective,” because counsel could not have known that a change

was coming. Id. But the court then held that, because Millan had not made the required motion to suppress, Millan was not entitled to relief under Gant on appeal. Id.

Ultimately, the Supreme Court granted review in order to answer the issue and in Robinson it rejected the idea used by Division Two in Millan and again here - that someone could waive an opportunity before it exists. Robinson, 171 Wn.2d at 295-97. The Court noted that, prior to Gant, caselaw had held that the relevant searches were permissible, so that Gant amounted to a change in the law in our state. Robinson, 171 Wn.2d at 296. The Robinson Court then cited to St. Pierre, rejecting the idea that “issue preservation” prevented the appellants from the benefit of the new law, despite the general rule that failure to waive an issue below “waives” that issue on appeal. Robinson, 171 Wn.2d at 304. And even before Robinson, the court of appeals had correctly applied the same reasoning - which should have been applied here. See State v. Rodriguez, 65 Wn. App. 409, 828 P.2d 636, review denied, 119 Wn.2d 1019 (1992).

Mr. George had a constitutional right to a full, fair and meaningful appeal. State v. Giles, 148 Wn.2d 449, 450-51, 60 P.3d 1208 (2003); Art. 1, § 22. Due process also applies to ensure that the

procedures and processes used in such an appeal are fundamentally fair. Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). Mr. George had the right to have O'Dell applied to his case under St. Pierre just as Mr. Millan had a right to have Gant applied to his. The failure to move to suppress evidence and thus give a court a chance to rule on the issue was not fatal in Robinson, because the remedy was remand for the missing hearing at which both parties had the chance to make a record. Similarly, here, the fact that trial counsel did not ask for an exceptional sentence based on Mr. George's relative youth of 20 did not preclude Mr. George from being entitled to relief under O'Dell. The error of Division Two in this case is similar to that it made in Millan. Further, the failure to follow settled caselaw and properly decide Mr. George's direct appeal implicates his state constitutional right to such an appeal, which guarantees a full, fair and meaningful appeal.

Mr. George has shown by more than a preponderance that the restraint he is suffering in this case is unlawful. He was entitled to remand for resentencing based on O'Dell after his constitutionally guaranteed appeal. The court of appeals decision depriving him of that remand and the opportunity to seek an exceptional sentence

downward based on O'Dell was in error and implicates Mr. George's fundamental rights. Mr. George has ample evidence that the criminal conviction was the result of the transient vulnerabilities of youth and that he has grown and changed - gaining a G.E.D., a higher degree and even teaching others while in custody. See Accomplishments, attached as Appendices C-K (vol. 3) Further, the trial judge sentencing George believed he could only impose a standard range sentence because there was no grounds to impose a sentence down for "young, dumb males who do stupid, terrible things." S2RP 55. Under O'Dell, that is no longer the law. Coupled with failed self-defense, Mr. George was entitled to seek an O'Dell sentence.

E. CONCLUSION

Mr. George has met the burden of proving that it is more likely than not that he has suffered actual and substantial prejudice to his constitutional rights and this Court should grant Mr. George relief.

DATED this 31st day of July, 2018.
Respectfully submitted,



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