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NO. 53122-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DANIEL HOLT, JR.,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 08-1-01519-1

BRIEF OF RESPONDENT

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I. INTRODUCTION

Based on plea negotiations, the State reduced Christopher Holt Jr.'s murder charges and removed a firearm enhancement in exchange for a guilty plea to murder in the second degree and an agreed recommendation of 216 months. In 2009, the trial court exercised its discretion and imposed a 216-month sentence as jointly recommended by the parties. Holt did not request a mitigated exceptional sentence and did not appeal the conviction or sentence.

In 2018, more than nine years after his judgment became final, Holt filed a CrR 7.8 motion for relief from judgment and argued that the trial court was required to resentence him and consider the mitigating qualities of his youth based on a significant change in the law under *Houston-Sconiers*.¹ But this Court has held that *Houston-Sconiers* does not apply retroactively to matters on collateral review. Thus, Holt's collateral attack is time-barred, and the trial court did not abuse its discretion by concluding that there is no legal basis to resentence Holt.

The trial court also did not abuse its discretion by concluding that Holt's attempt to introduce mitigating evidence for purposes of resentencing would violate the plea agreement. Holt recognized that he was bound by the plea agreement when he informed the court that he was not

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

asking to be resentenced to anything other than the agreed 216-month recommendation. The trial court did not abuse its discretion in ruling that the only purpose of Holt's mitigation package was to undermine the plea agreement in an attempt to obtain an exceptional sentence. This Court should affirm the trial court's denial of Holt's CrR 7.8 motion.

II. RESTATEMENT OF THE ISSUES

- A. Did the trial court abuse its discretion in denying Holt's CrR 7.8 motion where his motion is time-barred and where this Court has held that *Houston-Sconiers* does not apply retroactively to matters on collateral review?
- B. Did the trial court abuse its discretion by concluding that Holt's attempt to introduce mitigating evidence for purposes of resentencing would violate the plea agreement where the parties agreed to a joint recommendation of 216 months?
- C. Is Holt precluded from challenging legal financial obligations imposed in his January 2009 judgment and sentence where he did not appeal the judgment and where his case was final when the amendments to House Bill 1783 were enacted in June 2018?

III. STATEMENT OF THE CASE

A. Guilty Plea and 2009 Sentencing

On March 26, 2008, the State charged Christopher Holt Jr. with one count of murder in the first degree and one count of murder in the second degree for his role in murdering Javon Holden. CP 1-4. Holt was charged as an accomplice and a firearm enhancement was added to both charges. CP 1-2. Seventeen-year-old Holt and two other defendants participated in a plan to rob Mr. Holden in his home. CP 1-3. Holt and an accomplice

physically attacked Mr. Holden during the robbery. CP 3. Holt punched Mr. Holden and threw an iron at him. CP 3. Holt's other accomplice shot Mr. Holden in the head, killing him. CP 3. The defendants then fled. CP 3. A K-9 tracked Holt from the scene of the murder, and he was found hiding under a car. CP 4. Holt initially lied to the officers and claimed he was not involved in the incident. CP 4. He later changed his story and admitted to his involvement. CP 4.

Based on plea negotiations, the State reduced the charges to murder in the second degree without a firearm enhancement. CP 5-6. On December 2, 2008, Holt pled guilty to the amended charge. CP 7-15. Holt's standard sentencing range for the amended charge was 134 to 234 months. CP 8, 34. As initially charged, Holt was facing 250-333 months in prison plus an additional 60-month firearm enhancement. CP 362. The parties agreed to jointly recommend a sentence of 216 months in prison. CP 10. Holt made the following statement when he entered the guilty plea:

On March 25, 2008 in Pierce County Washington I aided and encouraged James Ellis in assaulting Javon Holden with a deadly weapon w/ intent to make Mr. Holden believe and fear that Mr. Ellis would shoot him. During the assault Mr. Ellis did shoot Javon Holden and caused his death.

CP 14.

At the time of Holt's plea, he was advised that the court does not have to follow anyone's recommendation as to the sentence. CP 10. He was

also informed that the court “must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so” and that the court may impose an exceptional sentence below the standard range if it finds “mitigating circumstances” to support such a sentence. CP 10.

On January 9, 2009, the trial court followed the parties’ joint recommendation and exercised its discretion to sentence Holt to 216 months in prison. *See* CP 10, 36. The court also ordered Holt to pay a \$500 victim assessment fee, a \$100 DNA database fee, and a \$200 criminal filing fee. CP 35. Holt did not appeal the conviction or sentence.

B. Holt’s CrR 7.8 Motion

In February 2018, more than nine years after Holt was sentenced and his judgment became final, he filed a CrR 7.8 motion for relief from judgment. *See* CP 44-51. He argued that the trial court was required to resentence him and consider the mitigating qualities of youth based on a change in the law under *Houston-Sconiers*. CP 44. He claimed that his motion was not time-barred and that the change in the law applied retroactively to his case. CP 44-49.

On July 3, 2018, the trial court entered an order that both denied Holt’s CrR 7.8 motion but also transferred it to this Court as a personal restraint petition (PRP). CP 53-57, 72. The trial court denied the motion, in

part, due to Holt's failure to include any supporting affidavits or present sufficient grounds for relief. CP 55-56. In the same order, the trial court also transferred the motion to this Court, noting that it appeared to be time-barred under RCW 10.73.090. CP 57.²

On August 28, 2018, this Court rejected the transfer and returned the matter to the trial court for further action, noting that the trial court cannot both deny a CrR 7.8 motion and also transfer it for consideration as a PRP. CP 72-73. This Court ruled that if the trial court intended to transfer the motion under CrR 7.8(c)(2), it must vacate the July 3, 2018 order and issue a proper transfer order with the required findings. CP 72-73.

Based on the ruling from this Court, the trial court scheduled a hearing for October 26, 2018 "to determine whether an order to show cause why the Motion for Relief from Judgment should not be granted." CP 59. At the October 26th hearing, the trial court considered the briefing filed by the parties and heard argument as to whether Holt should be resentenced. 10/26/18 RP 3-21; *see* CP 65-70, 74-80. The court set a sentencing date after ruling that it would hear the evidence and asked Holt to provide the

² The trial court's ruling on the time bar issue is a bit unclear. *See* CP 54-57. But the trial court's analysis was based on *In re Pers. Restraint of Light-Roth*, 200 Wn. App. 149, 401 P.3d 459 (2017) (*Light-Roth I*), which was subsequently reversed by *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 422 P.3d 444 (2018) (*Light-Roth II*).

court with a thorough recounting of his institutional behavior and infraction history. 10/26/18 RP 21-26.³

At the January 30, 2019 hearing, the trial court indicated that the purpose of the hearing was to proceed with show cause to determine whether Holt should be resentenced. 1/30/19 RP 3-5. The trial court stated it was willing to proceed with a sentencing hearing because the Court of Appeals rejected the transfer and returned the case for further action. 1/30/19 RP 6. The trial court indicated that the further action will be its ruling on whether Holt's sentence should be modified or whether the original sentence should remain. 1/30/19 RP 6.

Holt obtained records from the Department of Corrections about his behavior in prison since he was sentenced in order to show the court the changes he has made over the years. 1/30/19 RP 8-9, 15-17. He was also prepared to present testimony from numerous individuals who wanted to speak on his behalf in order to show his support network and the changes he has made over the years. 1/30/19 RP 8-10.

However, Holt did not argue that the initial sentence should be modified. CP 369-70; *see also* 1/30/19 RP 8, 24. Rather, he informed the trial court that he was not asking the court to resentence him to "something

³ The court initially set the hearing for December 20, 2018, but subsequently continued the hearing to January 30, 2019. CP 83-84; 10/26/18 RP 25.

other than the agreed recommendation” and that he was continuing to ask **the** court to impose the same sentence of 216 months that he agreed to in the plea agreement. CP 370. He claimed that his Presentence Report “simply addresses the *Miller/Houston-Sconiers* factors that this Court is required to consider.” CP 370. Yet after discussing the cases involving the mitigating circumstances of youth, Holt then asked the court to sentence him “with [that] information in mind.” CP 371-72.

The State objected to the court hearing from the defense witnesses as to sentencing because it would violate the plea agreement under *State v. Sledge*, 133 Wn.2d 828, 947 P.2d 1199 (1997). 1/30/19 RP 18-20. The trial court agreed that what Holt was attempting to do is analogous to *Sledge* and would violate the plea agreement. 1/30/19 RP 20-23; CP 376-77. The court explained that the only purpose in Holt presenting the mitigating evidence would be “to persuade the Court that the wrong sentence was imposed at the time of sentencing.” 1/30/19 RP 23; *see also* 1/30/19 RP 27-28 (“[t]he only goal in putting forward testimony at this time would be to try to undermine the agreement that was made for 216 months of incarceration”).

The trial court entered written findings of fact and conclusions of law and concluded that there is no legal basis to set aside the plea agreement or alter the original sentence. CP 375-78. Holt appealed the court’s ruling. CP 379-84.

IV. ARGUMENT

A. The trial court did not abuse its discretion in denying Holt's CrR 7.8 motion and concluding that there is no legal basis to resentence him.

Holt's argument that the trial court is required to consider the mitigating qualities of youth and resentence him more than nine years after his judgment and sentence became final reflects a misunderstanding of the law. Holt's CrR 7.8 motion is based on his assertion that *Houston-Sconiers* is a significant change in the law that is material to his sentence and applies retroactively. But this Court has held that *Houston-Sconiers* does not apply retroactively to matters on collateral review. *In re Pers. Restraint of Marshall*, No. 49302-1-II, 2019 WL 4621681 *8 (Wash. Ct. App. Sep. 24, 2019). Holt's collateral attack is time-barred. Further, *Houston-Sconiers* is not material to Holt's sentence because he entered a guilty plea based on plea negotiations where he received the benefit of his bargain and agreed to a joint recommendation of 216 months in prison. The trial court exercised its discretion and imposed the 216-month sentence he requested. Holt is not entitled to be resentenced, and the trial court did not abuse its discretion by concluding that there is no legal basis to alter his original sentence.

Appellate courts review a trial court's ruling on a CrR 7.8 motion for an abuse of discretion and will not reverse absent an abuse of that discretion. *State v. Martinez*, 161 Wn. App. 436, 440, 253 P.3d 445 (2011).

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The issue before this Court is the denial of Holt's CrR 7.8 motion for relief from judgment. The original sentence is not under consideration. *See State v. Larranaga*, 126 Wn. App. 505, 509, 108 P.3d 833 (2005). An unappealed final judgment cannot be restored to an appellate track by filing a motion under CrR 7.8 and appealing the denial of the motion. *Id.* Consequently, appellate review in this case is limited to determining whether the trial court abused its discretion in denying Holt's CrR 7.8 motion. *See id.*

"It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge." *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998). Appellate courts may affirm a lower court's ruling on any grounds adequately supported in the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); RAP 12.2 ("The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case

and the interest of justice may require.”); *State v. Grier*, 168 Wn. App. 635, 644, 278 P.3d 225 (2012) (appellate courts can affirm a trial court’s rulings on any grounds the record and law support).

This Court can affirm on any basis presented in the pleadings and record, even if the trial court did not consider it. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); *Meade v. Nelson*, 174 Wn. App. 740, 751-52, 300 P.3d 828 (2013) (although the trial court’s stated reason for setting aside the order is untenable, the appellate court “may affirm a trial court’s *correct result* on any grounds supported by the record”) (emphasis in original).

1. Holt’s collateral attack is time-barred because *Houston-Sconiers* does not apply retroactively.

The trial court shall transfer a motion to the Court of Appeals for consideration as a PRP unless the court determines it is not barred by RCW 10.73.090 and either: (a) the defendant has made a substantial showing that he is entitled to relief; or (b) resolution of the motion requires a factual hearing. CrR 7.8(c)(2). If the trial court does not transfer the motion, it shall schedule a hearing and direct the adverse party to appear and “show cause why the relief asked for should not be granted.” CrR 7.8(c)(3).

Post-conviction motions must be made within the time limits set forth in CrR 7.8(b), RCW 10.73.090, and RCW 10.73.100. *State v.*

Dallman, 112 Wn. App. 578, 582, 50 P.3d 274 (2002). Generally, a defendant has one year to collaterally attack a final judgment:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

RCW 10.73.090(1). This time limitation is a mandatory rule that bars appellate court consideration of collateral attacks filed after one year, unless the petitioner shows that an exception applies under RCW 10.73.100. *Shumway v. Payne*, 136 Wn.2d 383, 397-98, 964 P.2d 349 (1998). If no appeal is filed, the judgment becomes final on the date it is filed with the court. RCW 10.73.090(3)(a). Here, Holt did not appeal his judgment and sentence. Thus, his judgment became final on January 9, 2009. *See* CP 33.

Unless Holt can establish that an exception to the one-year time bar applies under RCW 10.73.100, he is not entitled to collateral review. Holt argued below that the one-year time limit does not apply to his CrR 7.8 motion because *Houston-Sconiers* is a significant change in law that is material to his sentence and applies retroactively. *See* RCW 10.73.100(6); *see also* CP 44-51, 65-68. This Court has held that the directive in *Houston-Sconiers* that sentencing courts must consider the mitigating qualities of youth when sentencing juveniles does not apply retroactively to matters on collateral review. *Marshall*, 2019 WL 4621681 *8. *Marshall* is dispositive.

Houston-Sconiers involved co-defendants who were under the age of eighteen at the time of their offenses and facing sentences of 441-543 months in prison for robbing “mainly other groups of children” and netting “mainly candy.” *Houston-Sconiers*, 188 Wn.2d at 8. The bulk of the sentencing range was based on mandatory firearm enhancements that was required to be served as “flat time” without the possibility of release. *Id.* Both the State and the trial court expressed frustration at the mandatory sentencing enhancements and the inability to exercise greater discretion in the sentence. *Id.* at 13, 20-21.

In accordance with *Miller*,⁴ and based on the Eighth Amendment, *Houston-Sconiers* held that sentencing courts must have discretion to consider mitigating circumstances associated with juvenile defendants and must have complete discretion to depart from the sentencing guidelines and any otherwise mandatory sentence enhancements. *Houston-Sconiers*, 188 Wn.2d at 18-21, 34. *Houston-Sconiers* was concerned with any statute that limited a trial court’s discretion to consider the mitigating qualities of youth at sentencing. *State v. Gilbert*, 193 Wn.2d 169, 175, 438 P.3d 133 (2019). It was the length of the sentence in *Houston-Sconiers* that triggered

⁴ *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

application of the Eighth Amendment. *See State v. Bacon*, 190 Wn.2d 458, 467, 415 P.3d 207 (2018).

In *Marshall*, the defendant filed a PRP nine years after his judgment became final and asserted that the sentencing court erred in failing to consider the mitigating qualities of his youth at sentencing. *See Marshall*, 2019 WL 4621681 *1. Marshall was sixteen years old at the time of his crimes and subsequently pled guilty to murder in exchange for a joint sentencing recommendation of 165 months. *Id.* This Court held that “the directive in *Houston-Sconiers* that sentencing courts must consider the mitigating qualities of youth when sentencing juvenile offenders does not apply retroactively to matters on collateral review.” *Id.* at *8. The Court held that Marshall’s PRP claim is untimely and denied the PRP. *Id.* Because *Houston-Sconiers* does not apply retroactively, Holt’s CrR 7.8 motion seeking collateral review is untimely and must be denied. The trial court did not abuse its discretion in finding no legal basis to resentence Holt.

2. Holt’s reliance on *Houston-Sconiers* and *Miller* is misplaced.

Holt’s reliance on *Miller* and *Houston-Sconiers* is misplaced. These cases involve the application of the Eighth Amendment to sentences that amount to either a mandatory or de facto life sentence. And neither of these

cases involve a plea to reduced charges where the defendant received the **benefit of** a plea bargain and an agreed recommendation for sentencing as in Holt's case.

Miller held that the Eighth Amendment's prohibition on "cruel and unusual punishments" forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. *Miller*, 567 U.S. at 479. The Court explained that trial courts "must have the opportunity to consider mitigating circumstances before imposing *the harshest possible penalty for juveniles.*" *Id.* at 489 (emphasis added). The United States Supreme Court has held that *Miller* applies retroactively to cases on collateral review. *Montgomery v. Louisiana*, — U.S. —, 136 S. Ct. 718, 732, 193 L. Ed. 2d 599 (2016). But giving *Miller* retroactive effect does not require States to relitigate sentences in every case where a juvenile received a mandatory sentence of life without parole (LWOP). *Id.* at 736. Rather, a State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than resentencing them. *Id.*

In *State v. Ramos*, 187 Wn.2d 420, 437, 387 P.3d 650 (2017), the Washington Supreme Court extended *Miller* to de facto LWOP sentences. Neither *Miller* nor *Ramos* apply to Holt's case because Holt is not subject to either a mandatory or de facto LWOP sentence. On the contrary, at the age of eighteen, Holt received an 18-year sentence with 290 days of credit

for time served. See CP 33, 36-37. Thus, he will be released in his mid-thirties. See *State v. Gregg*, 9 Wn. App. 2d 569, 576, 444 P.3d 1219 (2019) (noting that the defendant's sentence of 37 years in prison is not a de facto LWOP sentence). If a 37-year sentence is not a de facto LWOP sentence, neither is an 18-year sentence. Holt not only has the possibility of parole, he has the certainty of it.

Further, *Miller* and *Houston-Sconiers* are based on the Eighth Amendment's prohibition against cruel and unusual punishments. *Miller*, 567 U.S. at 465; *Houston-Sconiers*, 188 Wn.2d at 18-20, 23-24, 27 (repeated references to the Eighth Amendment and referring to the decision as "Our Eighth Amendment holding"); *Bacon*, 190 Wn.2d at 467 ("our holding in *Houston-Sconiers* was based squarely on the United States Constitution"). The Eighth Amendment is concerned with "excessive sanctions" and is implicated only when a sentencing scheme denies youthful offenders a "meaningful opportunity to obtain release." *Miller*, 567 U.S. at 469, 479-80.

Houston-Sconiers is distinguishable because it involved a direct appeal of a sentence and a timely PRP. See *Houston-Sconiers*, 188 Wn.2d at 13-14. In *Houston-Sconiers*, the Washington Supreme Court was addressing the appeal of a juvenile offender's sentence that was not yet final. *State v. Scott*, 190 Wn.2d 586, 594-95, 416 P.3d 1182 (2018);

Houston-Sconiers, 188 Wn.2d at 20 (“Critically, the Eighth Amendment requires trial courts to exercise this discretion *at the time of sentencing itself*, regardless of what opportunities for discretionary release may occur down the line.”) (emphasis added). In *Houston-Sconiers*, the Court acknowledged that the Supreme Court had approved a post-sentencing *Miller* fix of extending parole eligibility to juveniles as a remedy where a juvenile’s conviction and sentence were “long final.” *Scott*, 190 Wn.2d at 595 (quoting *Houston-Sconiers*, 188 Wn.2d at 20). Here, Holt’s sentence had been final for nine years before he filed the motion for relief from judgment.

Finally, not only does *Houston-Sconiers* not apply retroactively to cases on collateral review, but it is not material to Holt’s sentence under RCW 10.73.100(6). Unlike the defendant in *Houston-Sconiers*, Holt did not go to trial. Rather, he negotiated a plea agreement with the State and pled guilty after receiving many benefits from his plea bargain, including a reduced charge, no firearm enhancement, and a lower standard range. CP 5-15, 34, 362. Holt also received a joint stipulation by both parties to recommend a specific sentence within the standard range. CP 10.

Holt’s suggestion that trial courts are required to consider the mitigating qualities of youth *sua sponte*, even when not requested by the defendant, is not supported by the law. *Houston-Sconiers* did not create new obligations on judges to engage in investigations on behalf of defendants.

A trial court's independent investigation on behalf of a party would violate the codes of judicial conduct regarding impartiality. And any inquiry by the trial court regarding how an attorney should act in the interests of the client would interfere with the attorney-client relationship. The holding of *Houston-Sconiers* is only that the Legislature cannot limit the trial court's discretion to consider the mitigating factors of youth at the time of sentencing. *Gilbert*, 193 Wn.2d at 175.

Insofar as *Houston-Sconiers* represented a change in the law, it is not material to Holt. Holt was not subject to any mandatory provision affecting the length of his sentence. And nothing prohibited the trial court from considering Holt's youthfulness at his initial sentencing. The Washington Supreme Court has recognized that trial courts have always had the ability to consider a defendant's age as a mitigating factor. *Light-Roth II*, 191 Wn.2d at 336-37.

3. Sentencing courts have always had the discretion to impose mitigating exceptional sentences based on youth.

Generally, a trial court must impose a sentence within the standard range. RCW 9.94A.505(2)(a)(i); *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). The Sentencing Reform Act (SRA) permits departures from the standard range if it finds "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Mitigating circumstances

justifying a sentence below the standard range must be established by a preponderance of the evidence. RCW 9.94A.535(1). One such mitigating circumstance is if the “defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.” RCW 9.94A.535(1)(e).

Although every defendant is entitled to ask the court for an exceptional sentence downward and to have the court consider the request, no defendant is entitled to such a sentence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A trial court abuses its discretion when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.” *Grayson*, 154 Wn.2d at 342. A trial court also abuses its discretion if it incorrectly believes it is prohibited from exercising its discretion. *State v. O’Dell*, 183 Wn.2d 680, 696-97, 358 P.3d 359 (2015). But a trial court that has considered the facts and concluded that there is no factual or legal basis for an exceptional sentence has exercised its discretion, and the defendant cannot appeal that ruling. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

Washington law recognizes that a defendant’s youth may amount to a substantial and compelling reason to mitigate a sentence if it significantly impairs his capacity to appreciate the wrongfulness of his conduct or

conform his conduct to the law. *See e.g. O'Dell*, 183 Wn.2d at 696. But age is not a per se mitigating factor automatically entitling every youthful defendant to a mitigated exceptional sentence. *Id.* at 695. Relying on several United States Supreme Court decisions citing studies establishing a link between youth and decreased criminal culpability,⁵ the Washington Supreme Court noted that “age may well mitigate a defendant’s culpability, even if that defendant is over the age of 18.” *O'Dell*, 183 Wn.2d at 695. In *Roper*, *Graham*, and *Miller*, the Court recognized that the neurological differences between adolescent and mature brains make young offenders, in general, less culpable for their crimes. *O'Dell*, 183 Wn.2d at 692. *O'Dell* explained that these differences *might* justify a trial court’s finding that youth diminished a defendant’s culpability. *Id.* at 693.

In *O'Dell*, the defendant asked the trial court to impose an exceptional sentence downward because his youth⁶ significantly impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. *Id.* at 685. The trial court acknowledged this argument, but believed it was *prohibited* from considering youth as a mitigating factor

⁵ *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding that the Eighth Amendment forbids capital punishment for juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (holding that the Eighth Amendment prohibits a life sentence without parole for juvenile nonhomicide offenders); *Miller v. Alabama*, 567 U.S. 460 (holding that the Eighth Amendment forbids a sentencing scheme mandating life without parole for juveniles).

⁶ *O'Dell* was eighteen years old when he committed the offense. *Id.* at 683.

based on *State v. Ha'mim*, 82 Wn. App. 139, 916 P.2d 971 (1996), *aff'd*, 132 Wn.2d 834, 940 P.2d 633 (1997). *O'Dell*, 183 Wn.2d at 685-86. The Court held that youth can be a mitigating factor that diminishes a defendant's culpability and supports an exceptional sentence downward and that 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. *O'Dell*, 183 Wn.2d at 696-99.

The Washington Supreme Court has recognized that trial courts have always had the ability to consider a defendant's age as a mitigating factor. *Light-Roth II*, 191 Wn.2d at 336-37. *Ha'mim* did not bar trial courts from considering a defendant's youth at sentencing; rather, it held only that the trial court may not impose an exceptional sentence *automatically* on the basis of youth absent any evidence that youth actually diminished a defendant's culpability. *Id.*; *Ha'mim*, 132 Wn.2d at 846-47; *O'Dell*, 183 Wn.2d at 689.

"RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward, and mitigation based on youth is within the trial court's discretion." *Light-Roth II*, 191 Wn.2d at 336. Because *O'Dell* only broadened the understanding of youth as it relates to sentencing and did not alter the court's interpretation of RCW 9.94A.535, the Washington Supreme Court held that *O'Dell* does

not constitute a “significant change in the law.” *Light-Roth II*, 191 Wn.2d at 337-38. Trial courts have always had the ability to consider a defendant’s age as a basis for a mitigated sentence.

Holt’s case is distinguishable from *O’Dell*, where the defendant requested a mitigated exceptional sentence based on youth at the initial sentencing, but the trial court mistakenly believed it did not have the discretion to impose such a sentence. See *O’Dell*, 183 Wn.2d at 685-86. Here, Holt waived his challenge to the standard range sentence imposed by the trial court by failing to request a mitigated exceptional sentence at the initial sentencing.

This Court’s unpublished decision in *State v. George*, No. 46705-4-II, 2017 WL 700786 (Wash. Ct. App. Feb. 22, 2017) is instructive.⁷ In *George*, this Court held that the defendant waived any challenge to his standard range sentence by failing to request an exceptional sentence downward based on youth at sentencing. *George*, 46705-4-II, slip op. at *10-11. This Court held that the defendant failed to show that his standard range sentence is appealable. *Id.* at *11.

Holt could have requested a mitigated sentence based on youth at his initial sentencing but chose not to. Instead, he chose to take advantage

⁷ Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

of a negotiated plea agreement and jointly recommend that the court impose a 216-month sentence. CP 10; *see also* CP 369-70. The court and the parties were aware that the court did not have to follow the parties' recommendation as to the sentence and that the court had the discretion to impose an exceptional sentence if it found mitigating circumstances supporting such a sentence. CP 10. The sentencing court exercised its discretion and followed the agreed recommendation from the parties. *See* CP 10, 36. Nothing in the record indicates that the sentencing court refused to consider a mitigated sentence or indicated a lack of discretion to impose such a sentence.

Holt did not request an exceptional sentence. By failing to request what he always had the ability to request, Holt is subject to the time bar in the same manner that Light-Roth was. Holt has waived any challenge to his standard range sentence and has failed to show that the trial court abused its discretion in denying his motion for relief from judgment.

B. The trial court did not abuse its discretion by concluding that Holt's attempt to introduce mitigating evidence would violate the plea agreement.

The trial court did not abuse its discretion by denying Holt's motion for resentencing and concluding that allowing Holt to introduce evidence of mitigating circumstances for purposes of resentencing would violate the plea agreement between the parties.

Plea agreements are favored by the courts and can benefit all parties when properly administered. *State v. Armstrong*, 109 Wn. App. 458, 461, 35 P.3d 397 (2001). Plea agreements are contracts between the State and the defendant. *Sledge*, 133 Wn.2d at 838, 839 n. 6. “The agreement binds the State *and* the defendant.” *State v. Church*, 5 Wn. App. 2d 577, 584, 428 P.3d 150 (2018) (emphasis added). But the trial court is not bound by any recommendations contained in the plea agreement. RCW 9.94A.431(2); *Sledge*, 133 Wn.2d at 839 n. 6.

“The implied duty of good faith and fair dealing inherent in every contract extends to both parties.” *State v. McInally*, 125 Wn. App. 854, 867, 106 P.3d 794 (2005). After either party breaches the plea agreement, the nonbreaching party may either rescind the agreement or specifically enforce it. *Armstrong*, 109 Wn. App. at 462; *State v. Thomas*, 79 Wn. App. 32, 36-37, 899 P.2d 1312 (1995). A party may not undercut the terms of a plea agreement either explicitly or by conduct evidencing an intent to circumvent the terms of the agreement. *Sledge*, 133 Wn.2d at 840; *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781 (1999). In determining whether a party breached a plea agreement, the focus is on the effect of the party’s actions, not the intent behind them. *Sledge*, 133 Wn.2d at 843 n. 7. The test is whether the party contradicts, by words or conduct, its recommendation in the plea agreement. *See Jerde*, 93 Wn. App. at 780.

In *Sledge*, although the prosecutor adhered to the recommended standard range sentence in the plea agreement, she insisted on a hearing with live witnesses where she questioned the probation counselor and parole officer on numerous aggravating factors that supported an exceptional sentence above the standard range. *Sledge*, 133 Wn.2d at 830-38. The prosecutor then summarized the aggravating factors supporting an exceptional sentence, but ultimately recommended a standard range sentence. *Id.* at 837-38. The Washington Supreme Court held that even though the State indicated it was recommending a standard range sentence, it violated its duty of good faith and fair dealing and breached the plea agreement by undercutting the recommendation and effectively advocating for an exceptional sentence. *Id.* at 843, 846.

As the Supreme Court explained, “[i]f it was the State's purpose to have the trial court adopt its standard range recommendation, there was no need for the State to insist upon a hearing with witnesses[.]” *Id.* at 842. The Court noted that the State’s conduct reveals “unmistakable advocacy for an exceptional sentence” and that the only purpose in calling the parole officer was to vitiate and contradict the State’s standard range sentence recommendation. *Id.* at 843. The Court further explained that the State’s summation of the aggravating factors was a transparent attempt to obtain an exceptional sentence. *Id.*

Similarly, in *Jerde*, the State recommended a mid-range standard range sentence consistent with the plea agreement, but then emphasized aggravating factors that supported an exceptional sentence. *Jerde*, 93 Wn. App. at 775-79. This Court held that the State's conduct effectively undercut the plea agreement and was a transparent attempt to obtain an exceptional sentence. *Id.* at 782. The Court explained that the State's factual and legal arguments that would support an exceptional sentence was "completely unnecessary in light of the State's mid-range recommendation." *Id.*

Although *Sledge* and *Jerde* involved the State's breach of the plea agreement, the analysis applies equally to defendants. *See Church*, 5 Wn. App. 2d at 584 (plea agreement binds both the State and the defendant). Here, the trial court was properly concerned with the effect of Holt's proposed mitigating evidence and the integrity of the plea bargaining process.

At the January 30, 2019 hearing, Holt sought to introduce testimony from several witnesses about his behavior "since the time of the plea" and the changes he has made over the years. CP 376; 1/30/19 RP 9-12, 15-17; *see also* CP 93-95. Relying on *Sledge*, the trial court properly declined to hear this testimony because it would have violated the plea agreement. *See* CP 376-77; 1/30/19 RP 19-23. Consistent with *Sledge*, the trial court explained that the only goal in putting forward the testimony would be to

undermine the *agreed* 216-month sentencing recommendation. 1/30/19 RP 27-28.

In response to the State's argument that Holt's attempt to present mitigating circumstances for an exceptional sentence was a violation of the plea agreement, Holt *claimed* that he was not asking the court to resentence him to "something other than the agreed recommendation" and that he was continuing to ask the court to impose the same sentence of 216 months that he agreed to in the plea agreement. CP 370. Similar to *Sledge*, Holt's insistence on a resentencing hearing for the court to consider his proposed mitigation packet would undercut the plea agreement to jointly recommend a 216-month sentence. The effect of Holt's request was to undermine the plea agreement. If Holt's purpose was to have the court adopt the same sentence as previously recommended, there was no need for Holt to present mitigating evidence. *See Sledge*, 133 Wn.2d at 842-43. Rather, Holt's conduct and request for resentencing was a transparent attempt to obtain an exceptional sentence. *See id.* The trial court properly concluded that Holt's proffer of mitigating evidence would undermine the plea agreement.

Holt appears to argue that he was entitled to an evidentiary hearing when faced with allegations of violating the plea agreement. *See Br. of App. at 20.* His claim that "no such hearing was conducted" is not supported by the record. *See id.* The trial court conducted that hearing on January 30,

2019 where it considered the evidence presented by Holt and heard his argument in support of resentencing. 1/30/19 RP 6-28. Holt had the opportunity to contest the allegations from the State, and the matter was fully briefed and argued by the parties. *See* CP 358-72; 1/30/19 RP 6-28; *see also* CP 85-357. Unlike the defendant in *State v. Townsend*, 2 Wn. App. 2d 434, 443, 409 P.3d 1094 (2018), who was never provided the opportunity to present his position regarding the alleged violation of the plea agreement, the trial court fully considered Holt's argument at the hearing and rejected it.

C. Holt did not timely challenge the legal financial obligations imposed in his 2009 judgment and sentence.

Holt did not timely challenge the legal financial obligations imposed in his 2009 judgment and sentence and is precluded from doing so now.

Nearly ten years after Holt was sentenced, the Legislature passed House Bill 1783—ch. 269, Laws of 2018. Effective June 7, 2018, HB 1783 amends former RCW 10.01.160(3) to prohibit the imposition of any discretionary costs on defendants who are indigent at the time of sentencing. *State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018). Specifically, courts are now prohibited from imposing the \$200 criminal filing fee on indigent defendants. Laws of 2018, ch. 269, § 17 (amending former RCW 36.18.020(2)(h)). The Washington Supreme Court held that HB 1783

applies prospectively to cases “pending on direct review and thus not final when the amendments were enacted.” *Ramirez*, 191 Wn.2d at 747.

Holt was sentenced on January 9, 2009. CP 31-43. The trial court imposed legal financial obligations (LFOs) that were mandatory under the law in effect at the time of sentencing on January 9, 2009. The court imposed a \$500 victim assessment fee, a \$100 DNA database fee, and a \$200 criminal filing fee. CP 35. Holt’s judgment and sentence also included a provision that he shall pay supervision fees as determined by the Department of Corrections. CP 38.

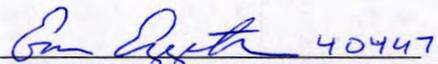
HB 1783 and *Ramirez* are not applicable to Holt’s case. Unlike the defendant in *Ramirez*, Holt’s case was final when the amendments were enacted. Holt did not appeal from his January 9, 2009 judgment and sentence. Thus, his judgment became final on January 9, 2009. *See* RCW 10.73.090(3)(a); *see also* CP 33. His indigency status at the January 30, 2019 hearing, which was more than ten years after the judgment became final, is simply not relevant. Holt was never resentenced by the trial court. *See* 1/30/19 RP 3-28; *see also* CP 378 (concluding that there is no legal basis to alter the original sentence). HB 1783 does not apply to Holt’s 2009 judgment and sentence that he did not appeal and that became final on January 9, 2009.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's denial of Holt's CrR 7.8 motion for relief from judgment. The trial court did not abuse its discretion in ruling that there is no legal basis to resentence Holt more than nine years after his judgment became final. Holt's motion collaterally attacking his judgment and sentence is time-barred.

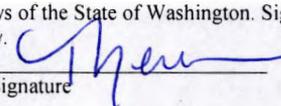
RESPECTFULLY SUBMITTED this 26th day of December, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney


KRISTIE BARHAM WSB# 32764
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

12-26-19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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