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Court of Appeals
Division II
State of Washington
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No. 53360-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

IN RE PERSONAL RESTRAINT PETITION OF:

ANDREW STEVEN KENNEDY,

PETITIONER.

RESPONDENT'S BRIEF

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TABLE OF AUTHORITIES

Cases

<i>In re Haverty</i> , 101 Wn.2d 498, 681 P.2d 835 (1984).....	6
<i>In re Brown</i> , 143 Wn.2d 231, 453, 21 P.3d 687 (2001).....	7
<i>In re Coats</i> , 173 Wn.2d 123, 267 P.3d 324 (2011).....	6
<i>In re Cook</i> , 114 Wn.2d 802, 792 P.2d 506 (1990).....	6
<i>In re Lord</i> , 123 Wnd.2d 296, 868 P.2d 835 (1994).....	7
<i>In re Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	6
<i>State v. Ha'mim</i> , 132 Wn.2d 834, 940 P.2d 633 (1997).....	10
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981).....	7

Statutes

RCW 10.73. 100.....	7, 10
---------------------	-------

Rules

CrR 7.8.....	4, 5, 8, 11
RAP 16.4.....	7

Other Authorities

<i>In vivo evidence for post-adolescent brain maturation in frontal and striatal regions</i> , Nature Neuroscience, Volume 2, (1999).....	9
<i>Adolescent Brain Development and Drug Use</i> , Treatment Research Inst., (2004).....	11
<i>Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy</i> , 45 J Adolsesc. Health 216 (2009).....	8

I. FACTS

The respondent relies on the statement of facts as written by this court in the unpublished opinion following Petitioner's direct appeal. (EXHIBIT A), reported at 150 Wash.App. 1040. The respondent has also attached the findings of fact and conclusions of law entered by the trial court following the bench trial in this matter. (EXHIBIT B). The judgment became final when the court issued the opinion on June 10th, 2009 and which became the decision terminating review on July 13th, 2009. (EXHIBIT C) The one year time-bar to file a petition elapsed on July 13th, 2010.

II. ARGUMENT

A. THE COWLITZ COUNTY PROSECUTOR'S OFFICE IS CURRENTLY THE LISTED RESPONDENT BUT SEEKS CLARIFICATION REGARDING WHETHER IT SHOULD CONTINUE AS RESPONDENT

As a threshold question, Cowlitz County raises the issue of whether the Cowlitz County Prosecutor's Office may handle this case. Petitioner was prosecuted by the Washington State Attorney General by agreement of the parties due to a conflict that existed because one of the attorneys who worked on Mr. Kennedy's defense case, Megan Ellavsky, became an employee of the prosecutor's office during the

pendency of the case. The defense moved to disqualify the Prosecuting Attorney's Office, but it appears that the matter was resolved before a ruling because the Washington State Attorney General's office agreed to handle the case. The AG's office also handled the appeal. Because of this, this Prosecutor's Office does not have access to the casefiles, appeal files, or verbatim reports from the proceedings.

Two matters have arisen since the filing of the mandate where this office has acted as respondent. The first issue was a *Blazina* motion that did not require any substantive investigation of the file and the second matter was a *Light-Roth* CrR 7.8 motion that was never formally addressed because the Supreme Court decision in *Light-Roth* had not been issued and the matter was stayed. The conflict issue was not discovered in either matter because the original case occurred when the office used the case management system "CRIMES," which was then converted to a custom solution through a company called OnBase, before finally being converted to a new software program made by Karpel, over the course of the last decade. Because of the numerous changes, many things were lost, including in this case the "flag" that would have signaled that the case was actually

handled by outside counsel. The disqualification issue was not discovered until late in the preparation of this response.

Megan Ellavsky no longer works for the Cowlitz County Prosecuting Attorney's Office. She resigned in 2010. It does not appear that there would be any issue with our office handling the case, but because of the prior issue of disqualification, we are providing notice to both court and counsel and defer on how the court would like to proceed. Because of the late filing, we have provided a response to the personal restraint petition in the event this court decides that we should continue as respondent.

B. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT MEET THE REQUIREMENTS FOR A NEW SENTENCING HEARING

This personal restraint petition represents the next logical step after the Supreme Court's decision in *Light-Roth*. In fact, Petitioner currently has an unresolved CrR 7.8 motion filed in the underlying superior court case based on the Court of Appeals decision in *Light-Roth*. (EXHIBIT D) Argument for the motion was stricken and the motion stayed pending the Supreme Court's decision in *Light-Roth*. No further action was taken and the motion remains outstanding. In order to get another shot at a re-sentencing, Petitioner now makes

essentially the same argument for youthfulness in *Light-Roth*, but casts it as an issue of newly discovered evidence.

The Petitioner has not met the substantial burden necessary to prevail on a Personal Restraint Petition. Such petitions are subject to constrained review and relief granted through such a petition should be considered “extraordinary.” *In re Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011) (citing *In re Cook*, 114 Wn.2d 802, 810-12, 792 P.2d 506 (1990)). Courts will not disturb a settled judgment unless petitioner can overcome the high procedural bar set for such petitions. *In re Coats*, 173 Wn.2d at 132, 267 P.3d 324. Collateral review through a personal restraint petition requires Petitioner to make a heightened showing of prejudice. *In re Cook*, 114 Wn.2d at 810, 792 P.2d 506 (citing *In re Haverty*, 101 Wn.2d 498, 504, 681 P.2d 835 (1984)). Such a petition must state “with particularity facts which, if proven, would entitle him [or her] to relief.” *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). “Bald assertions and conclusory allegations” alone are insufficient. *Id.*

Because the petition was filed more than a year after the judgment became final in this case, the petition is untimely unless Petitioner qualifies for relief under an exemption under RCW 10.73.

100. Newly discovered evidence is a potentially exempt ground for relief. RCW 10.73.100(1); RAP 16.4(c)(3); *In re Lord*, 123 Wnd.2d 296, 319-20, 868 P.2d 835 (1994).

In order for this court to grant the petition based on newly discovered evidence, Petitioner must show “that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial due to the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. Absence of any one of the five factors is grounds for the denial of a new proceeding.” *In re Brown*, 143 Wn.2d 231, 453, 21 P.3d 687 (2001), *citing State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). The Petitioner has not made the necessary showing for several of the factors and thus the petition should be denied.

1. THE EVIDENCE IS NOT NEWLY DISCOVERED AND THE PETITIONER FAILED TO ENGAGE IN SUFFICIENT DUE DILLIGENCE

Petitioner failed to demonstrate that this evidence was “newly discovered.” The burden is entirely on the Petitioner to show that the evidence was “newly discovered.” Petitioner used the term “watershed moment” to describe the change necessary to allow a new

trial or sentencing based on newly discovered evidence, but failed to actually describe the “watershed moment.” Indeed their expert’s declaration makes a generalized statement that, “in the past ten years, additional scientific evidence has accrued,” suggesting that this argument and the science behind it has been around for at least 10 years. *Steinberg Declaration*. Petitioner’s expert described the late adolescent “moment” as coming in 2015 when the science became widely accepted by neuroscientists, which also suggests such research had been around for much longer, and thus the argument could have been made much earlier. This statement, of course, is also conclusory and the actual facts that would lead to this conclusion are not discussed at any length, at least in terms of timing.

Petitioner’s own CrR 7.8 motion cites a study for the proposition that the frontal lobes, “home to key components of neural circuitry underlying ‘executive functions’ such as planning, working memory, and impulse control, are the last areas of the brain to mature; they may not be fully developed until halfway through the third decade of life.” *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J Adolsec. Health 216, 216 (2009) (emphasis added), EXHIBIT D)

That 2009 article stated that, “In the last decade, a growing body of longitudinal neuro-imaging research demonstrated that adolescence is a period of continued brain growth and change, challenging long-standing assumptions that the brain was largely finished maturing by puberty.” This certainly suggests that such research existed long before today and before the Petitioner’s time-bar had elapsed in 2010. Further, that study, which was itself a survey of various studies that analyzed the political impact of various neuroscience studies, cited a study involving magnetic resonance imaging of brains from 1999. Elizabeth R. Sowell, Paul M. Thompson, Colin J. Holmes, Terry L. Jernigan & Arthur W. Toga, *In vivo evidence for post-adolescent brain maturation in frontal and striatal regions*, Nature Neuroscience, Volume 2, pages 859–861 (1999). This study used magnetic resonance imaging to show that brain development continued until at least 20 years old and was published 20 years ago and 10 years before Petitioner’s time-bar for collateral attack elapsed. The “newly discovered evidence” existed, with hard data based on medical imaging, ten years before Petitioner’s judgement became final.

While the field may have matured and more studies have been done, the evidence is not “newly discovered.” Nor does the entire saga

of *Light-Roth*, *O'Dell*, and *Ha'mim*, make any sense if there wasn't already a body of research that suggested reduced culpability based on youthfulness. Indeed, the argument that an 18 year-old should have an exceptional sentence down based on diminished culpability because of youth was one of the central issues in *State v. Ha'mim*, a case decided 10 years BEFORE Petitioner murdered his god-daughter. *State v. Ha'mim*, 132 Wn.2d 834, 838, 940 P.2d 633 (1997). This research and the argument behind it are simply not new, and certainly do not rise to the level of "newly discovered evidence" for the purposes of a personal restraint petition.

The petitioner has the very high burden of showing that this evidence was "newly discovered" but does not specifically articulate why this evidence is new, exactly when it was discovered, if youthfulness was even addressed at his sentencing, or its timing in relation to the expiration of the one year time-bar under RCW 10.73.100. The Petitioner's expert asserts that 2015 represented the year, but does not provide any specific information other than the broadly conclusory statement. This is insufficient. The burden is on the Petitioner and they have failed to show that this evidence is

actually new, for the purposes of the newly discovered evidence prong.

2. THE PETITIONER DID NOT ENGAGE IN SUFFICIENT DUE DILLIGENCE BEFORE SENTENCING AND IN THE FILING OF THE PRP

Petitioner failed to engage in due diligence in pursuing this issue, which has been around for decades. There are two parts to the argument, (1) that the evidence was available prior to Petitioner's sentencing, and (2) that the evidence was available for at least a decade before they filed their personal restraint petition. Petitioner was sentenced in 2007, Petitioner's mandate was issued on July 13th, 2009, and the one-year time-bar elapsed on July 13th, 2010. Petitioner's CrR 7.8 motion cites numerous studies from 2009, 2010, and even a 2004 study titled *Adolescent Brain Development and Drug Use*, which is cited for the proposition that "Older adolescents are even more prone than their juvenile counterparts to 'act before they think.'" Ken C. Winter, *Adolescent Brain Development and Drug Use*, Treatment Research Inst., at 2 (2004), Exhibit D pg. 6. The research that this argument was based on was available since at least 2004, and in reality much earlier as suggested by *Ha'mim*, so the failure to raise

the issue until 2019 is a two-part failure to act with due diligence, first at the trial level and second at the PRP level.

The burden is on the Petitioner to show that they acted with due diligence in order to overcome the procedural time-bar and they have failed. Simple conclusory statements are insufficient to overcome the high-bar for disturbing settled judgments. At the least, they must show with particularity when the watershed moment occurred, how the change in belief occurred, and on what science it was based. Many of the Petitioners own studies suggest that the neuroscience community was aware of the issue as early as 1999, 11 years before the time-bar slid into place. The legal argument that a person 18 years or older should have diminished legal culpability based on youthfulness was around since at least 1997 per *Ha'mim*. The Petitioner has failed to show how they have acted with due diligence.

3. THE EVIDENCE IS NOT LIKELY TO CHANGE THE OUTCOME OF SENTENCING

The “newly discovered evidence” is unlikely to change the outcome of the sentencing hearing. This case doesn’t merely involve a standard range sentence, where an exceptional downward

departure is at stake. The trial court imposed an exceptional sentence of 380 months, 5 years more than the top end of the standard range, and the exceptional was based on (1) abusing a position of trust, and (2) particularly vulnerable victim due to age. *State v. Kennedy*, 150 Wn.App. 1040 (2009, unpublished, cited for factual information only). Moreover, the Findings of Fact and Conclusions of law certainly suggest that the exceptional sentence was partially based on the deliberate nature of the act, as opposed to an impulsive episode.

EXHIBIT B, Pg. 4. Petitioner admitted that he knew he was going to hurt Kieryn Severson when he took her into his bedroom on August 1st, 2004. *Id.* The court recognized the several month long pattern of abuse. *Id.* 4-5. Specifically factual finding #33 details all of the injuries that Petitioner inflicted on the little girl over the course of the months she was in his home. *Id.* Additionally, the trial court made clear its feelings when it found that “Defendant engaged in a pattern or practice of physically abusing and/or torturing Kieryn Severson prior to August 1st, 2004,” as well as the two aggravators for particularly vulnerable victim and abusing a position of trust. *Id.* at 8.

Nor as the Petitioner specifically stated why they think the argument in this case would be compelling to the trial court, given the

specific factual circumstances of the case. The bar is high for disturbing a settled judgement, in this case one that has been in place for over 10 years. In order to go back and revisit the issue, they must provide compelling arguments that the newly discovered evidence would actually have affected the outcome of the sentencing hearing. The declaration provided by Dr. Steinberg does not engage in **any** specific analysis as it applies to the facts of this case and to the Petitioner. The generalized declaration regarding youthfulness and culpability cannot be sufficient to overcome the strong presumption against revisiting a settled judgment.

The court is unlikely to be persuaded by the declaration of the Petitioner given the specific factual findings made at trial. Petitioner's declaration indicated that he "suddenly lost control of [his] emotions and seriously hurt her," that "[he] never planned to hurt her" and that "All of a sudden, I was hurting her." *Declaration of Andrew Kennedy*. These statements are in direct conflict with findings the court made at the time of trial. Finding XX was that "defendant admitted that Kieryn's death was not an accident and that he knew he was going to hurt her when he took her into his bedroom..." Finding XXI was that "defendant admitted that he wanted to hurt Kieryn

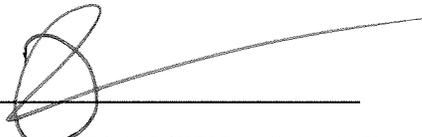
Severson when he saw her during the time she lived in his home...Defendant further admitted that he was having 'dark thoughts.'" Finding XXII was that "defendant admitted that...he would intentionally stop her breathing." Finding XXXIII detailed the numerous acts of abuse by the defendant. Petitioner's declaration fits neatly into the narrative created by Dr. Steinberg, but it is specifically refuted by the numerous findings of fact and conclusions of law. Taking the trial court's findings at face value, expert testimony regarding diminished culpability based on youthfulness leading to impulsive behavior and that the petitioner's act was simply the result of a sudden loss of emotional control is not an argument that would seem to be persuasive, especially in light of the Petitioner's own admission to "dark thoughts." Again, there is a high-bar to clear with respect to a personal restraint petition and the burden is on the Petitioner to show, with specificity, not only how the "newly discovered evidence" would be used to argue for a lower sentence, but that it **likely result** in a lower sentence. Petitioner has not met that burden and the petition should be denied.

III. CONCLUSION

The Petitioner has failed to overcome the significant burden in place regarding untimely personal restraint petitions. The Petitioner's "newly discovered evidence" is not actually new. The Petitioner failed to act with due diligence in pursuing the argument at sentencing and then in filing the personal restraint petition 12 years later. Finally, the Petitioner has failed to show how the outcome of the sentencing hearing would likely be different given the "newly discovered evidence." A failure in any one of these areas is sufficient to deny the petition.

Based on all of these arguments, the State respectfully requests that this court deny the personal restraint petition.

Respectfully submitted this 18th day of September, 2019.



DAVID L. PHELAN/WSBA # 36637
Deputy Prosecuting Attorney
Representing Respondent

APPENDICES

EXHIBIT A (OPINION)

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

DIVISION II

BY _____

DEPUTY

STATE OF WASHINGTON,

No. 36740-8-II

Respondent,

UNPUBLISHED OPINION

v.

ANDREW S. KENNEDY

Appellant.

ARMSTRONG, J. — Andrew S. Kennedy appeals his conviction of homicide by abuse, arguing that he did not validly waive a jury trial because the trial court failed to advise him that he was also waiving a jury on the aggravating sentencing factors. Finding no reversible error, we affirm.

FACTS

In 2004, Kennedy assumed custody of his cousin's 10-month-old daughter, Kieryn Severson. Two months later, Kieryn died when Kennedy took her into his bedroom and intentionally swung her head into a stationary object with violent force. Kennedy had also intentionally hurt Kieryn several times before her death, leaving large bruises on her arms and head, breaking her arm, and intentionally stopping her breathing for short periods.

The State charged Kennedy with first degree murder and homicide by abuse. The State also charged the following aggravating circumstances for sentencing purposes: (1) that Kennedy knew or should have known that the victim of the crime was particularly vulnerable or incapable of resistance due to extreme youth, (2) that Kennedy used a position of trust or confidence to facilitate the commission of the crime, and (3) that Kennedy demonstrated or displayed an egregious lack of remorse. *See* RCW 9.94A.535(3)(b), (n), and (q).

Kennedy filed a written waiver of his right to a jury trial. The waiver stated:

The undersigned defendant acknowledges that he/she is aware of the following matters concerning waiver of right to a jury trial:

1. I have been informed and fully understand that under the Constitution of the United States and the State of Washington, and the Criminal rules for Superior Court, I have the right to have my case heard by an impartial jury selected from the county where the crime(s) is/are alleged to have been committed.
2. I know that I could take part in the selection of the jury who would determine my guilt or innocence.
3. In a jury trial, the State must convince all of the twelve citizens of my guilt beyond a reasonable doubt. In a trial by judge, the State must only convince the judge beyond a reasonable doubt.
4. I have consulted with my lawyer regarding the decision to have my case tried by a jury or by the Court.
5. I freely and voluntarily give up my right to be tried by a jury and request trial by the Court.

Clerk's Papers at 209.

The trial court accepted Kennedy's waiver of a jury trial after engaging in the following colloquy:

[COURT]: Mr. Kennedy, you understand that you have a right to go to trial in front of a jury and in that jury there would be twelve people who would decide whether you are [guilty] or not [guilty]. Do you understand that?

DEFENDANT: Yes, Your Honor.

[COURT]: You would be entitled, along with your attorneys, to question potential jurors and you would be involved in the selection process of the jury. Do you understand that?

DEFENDANT: Yes, Your Honor.

[COURT]: Alright. And you had discussed this with your attorneys, I understand. Is that correct?

DEFENDANT: Yes, Your Honor.

[COURT]: And you now are asking to be tried by judge alone which means by requesting that you are waiving your right to . . . a jury trial and one person, a judge sitting up here will make the decision whether you are guilty or not guilty. Do you understand that?

DEFENDANT: Yes, Your Honor.

[COURT]: Is that your desire to waive your right to a jury trial, to be tried by a judge?

DEFENDANT: Yes, Your Honor.

[COURT]: Alright. Are you entering this request voluntarily?

DEFENDANT: Yes, Your Honor.

[COURT]: Alright. And so instead of having to convince twelve people beyond a reasonable doubt at this point it would be one person beyond a reasonable doubt and that would be the judge. Do you understand that?

DEFENDANT: Yes, Your Honor.

3 Report of Proceedings (RP) (July 23, 2007) at 211-12.

After a bench trial, the trial court found Kennedy guilty of second degree murder and homicide by abuse. It also found two aggravating circumstances: (1) Kennedy knew or should have known that Kieryn was particularly vulnerable and incapable of resisting the crime due to extreme youth, and (2) Kennedy abused a position of trust to facilitate the commission of the crime.

The trial court entered judgment on the homicide by abuse and dismissed the second degree murder conviction to avoid double jeopardy concerns. Kennedy's standard sentencing range was 240 to 320 months, but because of the aggravating factors found at trial, the trial court imposed an exceptional sentence of 380 months.

ANALYSIS

I. WAIVER OF JURY

Kennedy argues that the waiver of his right to a jury trial was invalid because the trial court did not advise him that he was also waiving a jury on the alleged aggravating sentencing factors.

Kennedy's argument presupposes that a waiver of jury trial applies only to the determination of the underlying crime unless the defendant explicitly waives his right as to aggravating factors. But the statutory scheme providing the procedures for deciding aggravating factors undermines this assumption. RCW 9.94A.537(4) provides that "[e]vidence regarding any

facts supporting aggravating circumstances . . . shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing.” And if a jury is waived, that evidence shall be presented to the court. RCW 9.94A.537(3). Because this statutory scheme requires the fact finder to decide the aggravating factors in the same proceeding as the underlying crimes, the right to a jury trial is not bifurcated. Waiver of a jury encompasses both inquiries as a matter of law. Indeed, Kennedy acknowledges that “RCW 9.94A.537 doesn’t permit a hybrid waiver of one right but not the other.” Br. of Appellant at 18.

Kennedy argues that his waiver of a jury trial was invalid because the trial court did not advise him that it included a waiver on the aggravating factors. In general, trial courts are not required to engage in a full colloquy with the defendant on the record to establish that the defendant knew the relative advantages and disadvantages of waiving a jury. *State v. Stegall*, 124 Wn.2d 719, 725, 730, 881 P.2d 979 (1994) (citing *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)). Only a “personal expression of waiver” from the defendant is required. *Stegall*, 124 Wn.2d at 725. Nonetheless, the State bears the burden of proving that Kennedy waived his constitutional right knowingly, intentionally, and voluntarily. *Stegall*, 124 Wn.2d at 724, 730. And the validity of any waiver of a constitutional right depends on the circumstances of each case. *Stegall*, 124 Wn.2d at 725.

Here, the trial court and counsel undertook to advise Kennedy of his rights and the consequences of his jury waiver in detail. Yet both the oral and written warnings focused solely on the jury’s determination of guilt or innocence. We are satisfied that under the circumstances of this case, Kennedy knew that his waiver encompassed the aggravating factors. He did not object to the State’s evidence of the aggravating factors or to its closing argument dealing with

the aggravating factors. In fact, Kennedy himself presented substantial evidence on the aggravating factors, particularly that he did not demonstrate an egregious lack of remorse. He called lay witnesses who testified that he typically did not openly show sadness, depression, or other emotional distress, and he also called an expert witness who testified that distress from a child's death can often present as stoic, quiet behavior and that Kennedy had "affectual flatness." 14 RP (Aug. 15, 2007) at 1402. Finally, Kennedy did not raise the jury trial issue when the court orally ruled that the State had proved two of the aggravating factors. We agree with the State that Kennedy's full participation in the aggravating factors portion of the trial shows that he understood that his jury waiver extended to the aggravating factors.

II. STATEMENT OF ADDITIONAL GROUNDS

A. Right to Testify

In a pro se statement of additional grounds for review (SAG), RAP 10.10, Kennedy states that he "was denied his constitutional right to take the stand in his own defen[s]e." SAG at 1. He provides no explanation or citation to the record or legal authority. And our review of the record provides no factual support for the claim. Consequently, we do not further review it. See RAP 10.10(c).

B. Findings of Fact

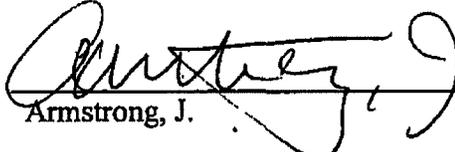
Kennedy also asserts that "[n]umerous eye witness statements were not put into the findings of fact" and that those statements "could have very well changed the outcome of the trial." SAG at 1. But a trial court is not required to make findings of fact on all matters about which there is evidence in the record, only those that "establish the existence or nonexistence of determinative factual matters need be made." *In re Det. of LaBelle*, 107 Wn.2d 196, 219, 728

No. 36740-8-II

P.2d 138 (1986). In this case, the trial court found that Kennedy was alone with Kierny when she died. This finding includes the implicit finding that there were no eyewitnesses to the crime and that, by extension, any witnesses who testified otherwise were not credible. We leave the ultimate issues of weighing the evidence to the fact finder and do not review credibility decisions. *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

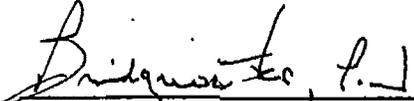
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

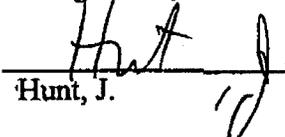


Armstrong, J.

We concur:



Bridgewater, P.J.



Hunt, J.

APPENDIX B (FINDINGS OF FACT AND CONCLUSIONS OF LAW)

FILED
SUPERIOR COURT

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COWLITZ COUNTY
RONI A. BOOTH, CLERK

BY _____ *jk*

STATE OF WASHINGTON
COWLITZ COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-01203-9

vs.

ANDREW STEVEN KENNEDY,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: BENCH TRIAL

Defendant.

THIS MATTER having come on before the Honorable James J. Stonier, Judge of the above entitled court, for bench trial on August 1, 2007, and ending on August 17, 2007, the defendant having been present and represented by attorneys Elle Couto and Kevin Blondin, and the State being represented by Assistant Attorney General John Hillman, and the court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

On August 1, 2007, a Second Amended Information was filed charging the defendant with Murder in the Second Degree (Count I) and Homicide by Abuse (Count II).

II.

1 Kieryn Severson was born on August 4, 2003. She was the biological child of the
2 defendant's first cousin, Rebecca Severson.

III.

4 Kieryn Severson was a healthy baby at birth.

IV.

6 Kieryn moved to the state of Arkansas after her birth and lived there with her biological
7 mother.

V.

9 On or about May 12, 2004, Kieryn returned to Longview, Washington. Thereafter,
10 Kieryn lived at 501 Mallard Lane.

VI.

12 On June 2, 2004, the defendant assumed custody of Kieryn Severson and thereafter
13 remained her primary caregiver.

VII.

15 Defendant was Kieryn Severson's godfather.

VIII.

17 Tammy Malchert, Patricia Kennedy, and Steven Kennedy never physically harmed
18 Kieryn Severson during the time she lived at 501 Mallard Lane.

IX.

20 Defendant told others during the time he had custody of her that Kieryn stopped
21 breathing for no apparent reason on multiple occasions. Defendant was alone with Kieryn
22 during these reported episodes.
23
24
25

X.

1 On July 11, 2004, defendant intentionally caused a spiral fracture of Kieryn Severson's
2 left arm.

XI.

3
4 Defendant was alone with Kieryn Severson at the time that she suffered a broken arm on
5 July 11, 2004.

XII.

6
7 Sometime during July 2004 the defendant intentionally hit Kieryn on her arm and left a
8 large bruise.

XIII.

9
10 Sometime during July 2004 the defendant intentionally applied force/trauma to Kieryn
11 Severson's head causing subdural bleeding and a bruise on the back of her head.

XIV.

12
13 On August 1, 2004, the defendant took Kieryn Severson into his bedroom and was alone
14 with her there for 15-30 minutes.

XV.

15
16 Kieryn Severson suffered fatal head injuries during the time she was in the bedroom with
17 the defendant.

XVI.

18
19 Kieryn Severson died as a result of non-accidental inflicted trauma that occurred on
20 August 1, 2004, while alone with the defendant in his bedroom.

XVII.

1 Kiernyn Severson's injuries were not consistent with the version of events described by
2 the defendant.

XVIII.

3
4 Kiernyn Severson's head injuries could not have been caused by Kiernyn striking her head
5 on the defendant's chest.

XIX.

6
7
8 On March 14, 2005, defendant confessed to his wife and her family members that he
9 intentionally assaulted Kiernyn Severson on August 1, 2004.

XX.

10
11 On March 14, 2005, defendant admitted that Kiernyn's death was not an accident and he
12 knew he was going to hurt her when he took her into his bedroom on the night of August 1,
13 2004.

XXI.

14
15 On March 14, 2005, defendant admitted that he wanted to hurt Kiernyn Severson when he
16 saw her during the time that she lived in his home from May 12, 2004, to August 1, 2004.
17 Defendant further admitted that he was having "dark thoughts."

XXII.

18
19
20 On March 14, 2005, the defendant admitted that during the time he had custody of Kiernyn
21 Severson he would intentionally stop her breathing.

XXIII.

22
23 On March 14, 2005, defendant admitted that on August 1, 2004, he took Kiernyn by the
24 legs and "slammed" her head against his back.

XXIV.

1 On March 14, 2005, defendant admitted that he did the worst thing that anyone could do
2 to Kieryn Severson.

3 XXV.

4 On March 14, 2005, defendant admitted that on August 1, 2004, Kieryn was bleeding
5 when he set her head on a pillow in his bedroom.

6 XXVI.

7 On March 14, 2005, the defendant admitted that "the bruising, everything, it was all me."

8 XXVII.

9 On March 14, 2005, the defendant asked his family members for forgiveness for causing
10 Kieryn Severson's death.

11 XXVIII.

12 On March 14, 2005, defendant admitted to his mother Patty Kennedy that he intentionally
13 hurt Kieryn and caused her death.

14 XXIX.

15 The testimony of Diana Ruiz, Kyle Ruiz, Tammy Malchert, Kaye Malchert, and Christie
16 McKinney was credible with respect to their descriptions of the events of March 14, 2005.

17 XXX.

18 In April 2005, defendant admitted to Tammy Malchert that he heard Kieryn Severson's
19 arm "pop" on the night of July 11, 2004.

20 XXXI.

21 In April 2005, defendant admitted to Tammy Malchert that he hit Kieryn Severson on the
22 arm and left a large bruise that was subsequently attributed to a fall from a chair.

XXXII.

1 The testimony of Tammy Malchert was credible with respect to statements the defendant
2 made to her at the Cowlitz County Jail in April 2005.

XXXIII.

3
4 The following acts were intentional acts by the defendant against Kierny Severson prior
5 to the fatal injuries inflicted on August 1, 2004: (1) stopping her breathing on multiple
6 occasions, (2) hitting her in the arm and leaving a large bruise, (3) breaking her left arm on July
7 11, 2004, and (4) inflicting head injuries that were evidenced by older blood in the subdural
8 space, subarachnoid space, and subscalpular region at autopsy. Defendant was alone with
9 Kierny Severson during the infliction of all of these injuries.
10

XXXIV.

11 The court cannot find beyond a reasonable doubt that the defendant caused the fractures
12 of Kierny Severson's legs.
13

XXXV.

14 The court discounts the majority of the testimony of Dr. Janice Ophoven as not credible.
15 Dr. Ophoven's testimony was riddled with non-scientific logic and major inconsistencies.
16
17

XXXVI.

18 Dr. Ophoven's opinion that Kierny Severson died from hypoxia due to pneumonia was
19 not supported by the evidence.
20

XXXVII.

21 Dr. Ophoven's testimony that she knows that Kierny was not assaulted on August 1,
22 2004, was not credible.
23
24
25

XXXVIII.

1 Dr. Ophoven's testimony that Kiernyn Severson did not suffer leg fractures was not
2 credible.

XXXIX.

3
4 Kiernyn Severson had an ear infection on June 15, 2004. Dr. Ophoven's testimony to the
5 contrary was not credible.
6

XL.

7
8 On July 31, 2004, and August 1, 2004, Kiernyn Severson was not feverish, was not
9 vomiting, was active, interactive, and playful.

XLI.

10
11 The doctors who actually examined and cared for Kiernyn Severson on August 1 and 2,
12 2004, were credible witnesses. This includes Dr. Hoyt, Dr. Kato, Dr. Hicks, Dr. Cristofani, Dr.
13 Metrick, ~~Dr. Bennett~~, Dr. Quint, Dr. Heskett, and Dr. Goodman.

XLII.

14
15 The opinions of those medical doctors who testified that Kiernyn Severson died from non-
16 accidental inflicted head trauma was credible.
17

XLIII.

18
19 On August 1, 2004, the defendant took Kiernyn Severson into his bedroom and
20 intentionally swung her head into a stationary object with violent force.

XLIV.

21
22 On August 1, 2004, defendant recklessly inflicted substantial bodily harm and caused the
23 death of Kiernyn Severson. Kiernyn died on August 2, 2004, from the injuries she sustained on
24 August 1, 2004.
25

XLV.

1 Defendant's act of swinging Kierny Severson by her legs and striking her head against an
2 object manifested an extreme indifference to the life of Kierny Severson.

3
4 XLVI.

5 Defendant engaged in a pattern or practice of physically abusing and/or torturing Kierny
6 Severson prior to August 1, 2004.

7 XLVII.

8 Defendant's act of causing the death of Kierny Severson occurred on August 1, 2004, in
9 Cowlitz County, Washington.

10 XLVIII.

11 Kierny Severson was 362 days old, weighed 23 lbs., and could not walk on August 1,
12 2004.

13 XLIX.

14 Kierny was a particularly vulnerable victim and she was incapable of resisting the crimes
15 due to extreme youth.

16 L.

17 Defendant used his position of trust as godfather and primary caregiver to facilitate the
18 commission of the crimes.
19
20
21
22
23
24
25

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and subject matter.

II.

All relevant events or at least one element of each crime occurred in Cowlitz County, Washington.

III.

ANDREW STEVEN KENNEDY is guilty beyond a reasonable doubt of the crime of Murder in the Second Degree as charged in Count I. Defendant is guilty beyond a reasonable doubt in that, on August 1, 2004, in the State of Washington, the defendant intentionally assaulted Kieryn Severson and recklessly inflicted substantial bodily harm, and caused the death of Kieryn Severson during the course of and in furtherance of the crime of assault in the second degree.

IV.

ANDREW STEVEN KENNEDY is guilty beyond a reasonable doubt of the crime of Homicide by Abuse as charged in Count II. Defendant is guilty beyond a reasonable doubt in that, on August 1, 2004, in the State of Washington, the defendant caused the death of Kieryn Severson by engaging in conduct manifesting an extreme indifference to Kieryn's life, and the defendant had previously engaged in a practice or pattern of physical abuse and/or torture of Kieryn Severson.

V.

The aggravating circumstance that defendant knew or should have known that Kieryn Severson was particularly vulnerable and incapable of resisting the crime due to extreme youth was proved beyond a reasonable doubt in that Kieryn Severson was 362 days old, weighed 23 lbs., and could not walk at the time of her death.

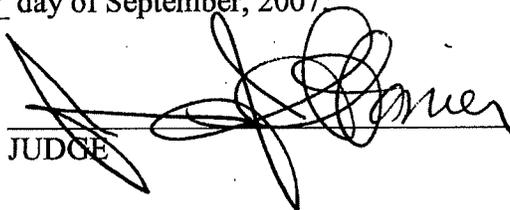
VI.

The aggravating circumstance that the defendant abused a position of trust to facilitate the commission of the crime was proved beyond a reasonable doubt in that the defendant was Kieryn's godfather and primary caregiver at the time he abused and killed her.

VII.

Defendant's crimes were incidents of domestic violence as that term is defined in RCW 10.99.020 because the defendant and Kieryn Severson resided together in the same home.

DONE IN OPEN COURT this 13th day of September, 2007



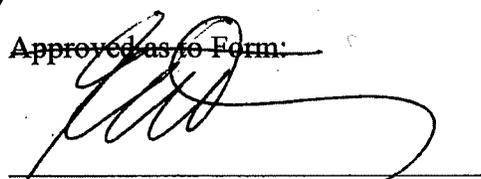
JUDGE

Presented by:



JOHN HILLMAN
Assistant Attorney General
WSB # 25071

Approved as to Form:



ELEANOR COUTO
Attorney for Defendant
WSB # 19544

APPENDIX C (MANDATE)

FILED
SUPERIOR COURT

2009 SEP -8 A 11: 43

COWLITZ COUNTY
RONI A. BOOTH, CLERK

BY _____



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

ANDREW S. KENNEDY,
Appellant,

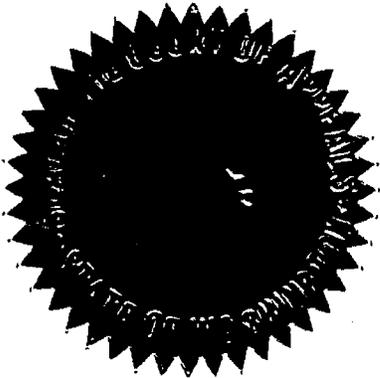
No. 36740-8-II

MANDATE

Cowlitz County Cause No.
04-1-01203-9

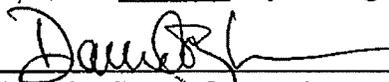
The State of Washington to: The Superior Court of the State of Washington
in and for Cowlitz County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on June 10, 2009 became the decision terminating review of this court of the above entitled case on July 13, 2009. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



Lisa Elizabeth Tabbut
Attorney at Law
PO Box 1396
Longview, WA, 98632-7822

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 31st day of August, 2009.


Clerk of the Court of Appeals,
State of Washington, Div. II

John Christopher Hillman
Atty General's Office, Criminal Justice
800 5th Ave Ste 2000
Seattle, WA, 98104-3188

160

Scanned

PA

MANDATE

Page Two

Hon. James J. Stonier
Cowlitz Co Superior Court Judge
Hall of Justice
312 SW First Ave.
Kelso, WA 98626

Indeterminate Sentence Review Board

APPENDIX D (CRR 7.8 MOTION)

8

04-1-01203-9
MT 164
Motion
2886257



FILED *SE*
SUPERIOR COURT

2018 APR 6 PM 1 49

COWLITZ COUNTY
STACI L. MYKLEBUST, CLERK

BY *hb*

**IN THE COWLITZ COUNTY SUPERIOR COURT
FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Plaintiff,

v.

ANDREW KENNEDY,
Defendant.

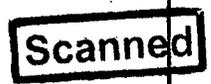
NO. 04-1-01203-9

MOTION FOR RELIEF FROM
JUDGMENT AND TO SET SHOW
CAUSE HEARING

MOTION FOR RELIEF FROM JUDGMENT

Andrew W. Kennedy (hereinafter "Kennedy"), by and through undersigned counsel moves this Court pursuant to CrR 7.8 for relief from judgment and for resentencing. Mr. Kennedy was convicted by bench trial of murder by abuse. He was sentenced to 31 ½ years in prison. Mr. Kennedy was 19 at the time of his charged crime. He was sentenced at a time when youthfulness was considered a "personal" and not a "mitigating" factor asserts. The law has changed. The change in the law applies retroactively. In short, this case is on "all fours" with *Matter of Light-Roth*, 200 Wash. App. 149, 401 P.3d 459, 461, review granted sub nom. *In re Light-Roth*, 189 Wash. 2d 1030, 408 P.3d 1094 (2017), which granted sentencing relief. As a result, Kennedy's

164



1 current sentence is unjust and this motion is timely.

2 Because *Light-Roth* makes this motion timely and consistent with the court rule,
3 Kennedy respectfully requests that this Court set a show cause hearing. CrR 7.8(c)(3);
4 *State v. Robinson*, 193 Wash. App. 215, 218, 374 P.3d 175, 177 (2016).
5

6 ARGUMENT

7
8 This case is controlled by *Light-Roth*. This Court should grant Kennedy's
9 motion, vacate the judgment, and set a resentencing date. Kennedy satisfies the elements
10 of CrR 7.8 because the motion is not barred by RCW 10.73.090 and the defendant has
11 made a substantial showing that he is entitled to relief.
12

13 *This Court Should Decide and Not Transfer this Motion*

14
15 The State may ask this Court to transfer this motion to the Court of Appeals for
16 consideration as a PRP. If it does, this Court should deny that request.
17

18 CrR 7.8(c)(2) provides that a trial court should transfer a defendant's motion to
19 vacate to the Court of Appeals for consideration as a personal restraint petition unless the
20 court determines the motion is not barred by RCW 10.73.090 and either (i) the defendant
21 has made a substantial showing that he or she is entitled to relief or (ii) resolution of the
22 motion will require a factual hearing. Here, Kennedy can show that his motion is timely
23 and that he is entitled to relief.
24

25
26 This motion is not "barred" as untimely. RCW 10.73.090 imposes a time limit on
27 collateral attacks. But, a significant, material, retroactive change in the law exempts a
28 CrR7.8 motion (and a PRP) from the time limit found in RCW 10.73.090. *In re Yung-*
29 *Cheng Tsai*, 183 Wash. 2d 91, 107, 351 P.3d 138, 146 (2015). CrR7.8 does not exempt
30

1 this Court from deciding the timeliness issue, especially where there is caselaw
2 establishing that the “retroactive change in the law” exception applies. Instead, CrR 7.8
3 only prevents a trial court from denying a motion to vacate on timeliness grounds. In
4 other words, if this Court finds that the motion is timely, then the Court can proceed and
5 consider the merits. If, on the other hand, the Court finds the motion as untimely, it must
6 then transfer to the Court of Appeals.
7

8
9 *There Has Been a Change in the Sentencing Law that Applies Retroactively*

10
11 The Washington Court of Appeals recognized in *Light-Roth* that the law regarding
12 the sentencing of youth has changed and held that “*O'Dell* expanded youthful defendants'
13 ability to argue for an exceptional sentence and was a significant change in the law.”
14 “We conclude that *Light-Roth* deserves an opportunity to have a sentencing court
15 meaningfully consider whether his youthfulness justifies an exceptional sentence below
16 the standard range.” The same rule applies to Mr. Kennedy.
17

18
19 *Light-Roth* explained that caselaw (existing at both the time of *Light-Roth*'s and
20 Kennedy 's conviction and sentencing) effectively prevented trial courts from considering
21 whether a Kennedy adult defendant's age diminished his or her culpability. Under *O'Dell*,
22 trial courts are now allowed to consider the defendant's youth and immaturity.
23

24
25 *Light-Roth* also established that the change in the law brought about by *O'Dell*
26 applies retroactively. *O'Dell* announced a change in the interpretation of the SRA.
27

28 “Because the SRA is a statute, courts should apply this new interpretation retroactively.”
29

30 *The Change in the Law Applies Retroactively*

Finally, *Light-Roth* held that the “materiality” element does not require that a

1 defendant have previously sought an exceptionally lenient sentence based on youth. "It is
2 unreasonable to hold that a case announced a significant change because it made a new
3 argument available to a defendant, and then hold that the change is not material because
4 the defendant did not make that argument. We conclude that the change in the
5 law *O'Dell* announced was material to Light-Roth's sentence because, under *O'Dell*,
6 Light-Roth can now argue that his youth justified an exceptional sentence below the
7 standard range." The Court of Appeals added:

8
9
10
11 When describing how the defendant might be able "to establish that youth
12 diminished his capacities for purposes of sentencing," the court explained that the
13 defendant would not need to present expert testimony. *O'Dell*, 183 Wn.2d at 697.
14 The court cited examples from the record of the type of "lay testimony that a trial
15 court should consider," including family member depictions of the defendant as an
16 "immature kid," descriptions of the defendant's hobbies, including hiking and
17 playing video games, and the way he interacted with his family. *O'Dell*, 183
18 Wn.2d at 697-98. All of the examples related to the defendant's immaturity, rather
19 than the specific circumstances of his crime or criminal record. *O'Dell*, 183 Wn.2d
20 at 697-98.

21 *Light-Roth, supra*. Mr. Kennedy can satisfy that standard.

22 The Court of Appeals summarized the facts as follows:

23 In 2004, Kennedy assumed custody of his cousin's 10-month-old daughter,
24 Kieryn Severson. Two months later, Kieryn died when Kennedy took her into his
25 bedroom and intentionally swung her head into a stationary object with violent
26 force. Kennedy had also intentionally hurt Kieryn several times before her death,
27 leaving large bruises on her arms and head, breaking her arm, and intentionally
28 stopping her breathing for short periods.

29 These facts are undeniably horrific and deserving of stern punishment. However,
30 at the time when Kennedy was sentenced the court had the discretion to consider and
weigh the aggravating facts but did not possess the same discretion with respect to the
mitigating qualities of Kennedy's youthfulness.

1 Scientific research has developed to explain the effects of brain maturation, or the
2 lack thereof, on the behavioral and decision-making abilities of late adolescents in their
3 late teens and early twenties. Recent scientific studies about human brain development
4 show that the behavioral and decision-making abilities of juveniles and adolescents are
5 affected in three main areas relevant to criminal sentencing: (1) immaturity and a lack of
6 responsibility leading to greater impetuosity and ill-considered decisions; (2) increased
7 susceptibility to negative influences and peer pressure and a lesser ability to control their
8 environment; and (3) transitory personality traits making the character of a juvenile less
9 fixed.
10

11
12
13
14 What was once surmised is now a matter of scientific consensus: the development
15 of the human brain in critical ways is not complete in the teenage years but continues into
16 the mid-twenties. Additionally, we are now aware that childhood and adolescent
17 exposure to repetitive trauma; physical, emotional or sexual abuse; neglect and alcohol or
18 other substance abuse creates further delays in brain development.
19
20

21 Medical science now understands that the primary reason late adolescents
22 resemble juveniles when it comes to decision-making and behavior is that the frontal
23 lobes, “home to key components of the neural circuitry underlying ‘executive functions’
24 such as planning, working memory, and impulse control, are among the last areas of the
25 brain to mature; they may not be fully developed until halfway through the third decade
26 of life.” Sara Johnson, *Adolescent Maturity and the Brain: The Promise and Pitfalls of*
27 *Neuroscience Research in Adolescent Health Policy*, 45 J. Adolesc. Health 216, 216
28 (2009). The prefrontal lobe and the cerebellum, the regions “involved in emotional
29
30

1 control and higher-order cognitive function,” are also still developing during late
2 adolescence. Robin Martantz Henig, *Why Are So Many People in their 20s Taking so*
3 *Long to Grow Up?*, N. Y. Times (Aug. 18, 2010).

4
5 Late adolescents are still immature and impulsive. This is because the prefrontal
6 cortex is one of the last areas of the brain to mature. This part of the brain is “responsible
7 for the complex processing of information, ranging from making judgments, to
8 controlling impulses, foreseeing consequences, and setting goals and plans. An immature
9 prefrontal cortex is thought to be the neurobiological explanation for why [young people]
10 show poor judgment and too often act before they think.” Ken C. Winter, *Adolescent*
11 *Brain Development and Drug Use*, Treatment Research Inst., at 2 (2004) (hereinafter
12 “Adolescent Brain Development”).

13
14 Older adolescents are even more prone than their juvenile counterparts to “act
15 before they think.” *Adolescent Brain Development*, at 2. The National Institute of
16 Medicine reported in 2015 that young adults (aged eighteen to twenty-four) experience
17 higher rates of morbidity and mortality than either adolescents or older adults from a
18 wide variety of preventable causes, including automobile crashes, physical assaults, gun
19 violence, sexually transmitted diseases, and substance abuse.” *Young Adulthood*, at 645-
20 46.

21
22 Personality traits are just as transient in late adolescents as they are in juveniles.
23 Put simply, the personality or character of late adolescents is not yet formed: The major
24 developmental tasks of adolescence are to create a stable and secure identity and begin
25 the process of becoming a complete and productive adult. As the understanding of the

1 complex transition from adolescence to adulthood has deepened, there continues to be
2 general consensus about these developmental tasks—coupled with an understanding that
3 they now take longer to achieve. With all these complex tasks to master, researchers
4 theorize that the consolidation of adult status likely occurs not at 18 or 21, but closer to
5 age 30. Madelyn Freundlich, *The Adolescent Brain: New Research and its Implications*
6 *for Kennedy People Transitioning from Foster Care*, Jim Casey Youth Opportunities
7 Initiative, at 17 (2011) (footnotes omitted). Because of the brain maturation process, “the
8 process for becoming an adult is an extended one” *Id.* Immature and impulsive
9 personality traits dissipate as a person lives through his or her twenties. *See, e.g., Risk*
10 *Taking in Adolescence*, at 57 (discussing that brain maturation “lead[s] to gradual
11 improvements in many aspects of cognitive controls such as response inhibition”).

12
13
14
15
16
17 There is a clear nexus between the traits associated with late adolescence and this
18 terrible crime. Put simply, Kennedy, whose brain was not fully developed, lost control.
19 Kennedy was unable to regulate his emotions and that led to impulse failure with tragic
20 results. And, as tragic as the results were, Kennedy’s immature brain was a contributing
21 factor to his emotional dysregulation, loss of impulse control, and his decreased ability to
22 stop and make a mature judgment.
23
24

25 If the State contests Kennedy’s showing, he can provide additional information.
26
27
28
29
30

1 **CONCLUSION**

2 Kennedy is entitled to a sentencing hearing where his youthfulness is considered
3
4 as a mitigating circumstance and where the Court is invested with the discretion to
5 impose a lesser sentence based on that fact.
6

7 Consistent with the court rule, this Court should call for a response and set a show
8 cause hearing.

9 DATED this 25th day of March 2018.
10

11 Respectfully Submitted:

12 /s/Jeffrey Erwin Ellis JE
13 Jeffrey E. Ellis, WSBA #17139
14 B. Renee Alsept #21004

15 *Attorneys for Mr. Kennedy*
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APPENDIX E (RULES AND STATUTES)

RCW 10.73.100**Collateral attack—When one year limit not applicable.**

The time limit specified in RCW **10.73.090** does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;
- (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- (5) The sentence imposed was in excess of the court's jurisdiction; or
- (6) 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 or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

[1989 c 395 § 2.]

Rules of Appellate Procedure

RAP RULE 16.4 PERSONAL RESTRAINT PETITION-GROUNDS FOR REMEDY

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioners restraint is unlawful for one or more of the reasons defined in section (c).

(b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

(c) 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 over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil 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 interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; 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 or civil proceeding instituted by the state or local government, 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 civil proceeding instituted by the state or local government; 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.

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, or .100. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

[Originally effective July 1, 1976; amended effective July 2, 1976; September 1, 1991; September 1, 2014.]

References

RCW 7.36, Habeas Corpus.

Superior Court Criminal Rules

RULE CrR 7.8 RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

(c) Procedure on Vacation of Judgment.

- (1) Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.
- (2) Transfer to Court of Appeals. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.
- (3) Order to Show Cause. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

[Adopted effective September 1, 1986; amended effective September 1, 1991; June 24, 2003; September 1, 2007.]

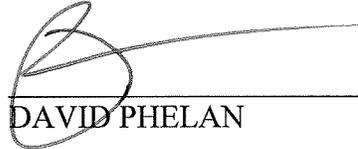
CERTIFICATE OF SERVICE

DAVID PHELAN, certifies that opposing counsel was served electronically via the Division II portal:

JEFFREY ERWIN ELLIS
Law Office of Alsept & Ellis
621 SW Morrison St. Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 18th, 2019.



DAVID PHELAN

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

September 18, 2019 - 4:46 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53360-0
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