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Division III
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SAWNAY TAW, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT’S ASSIGNMENT OF ERROR

“Sawnay [Taw] was deprived of his due process rights under the United States and Washington Constitutions when juvenile court jurisdiction was automatically declined and no hearing was held to determine whether the juvenile court should retain jurisdiction.”

II. ISSUES PRESENTED

1. Whether *State v. Watkins*, ___ Wn.2d ___, 423 P.3d 830 (2018), is binding on this Court and is dispositive of all of defendant’s due process claims?

2. Whether *Watkins* is also dispositive of defendant’s claims that the 2018 amendments to RCW 13.04.030 apply retroactively to his case, and whether, even if it is not dispositive, the amendments apply retroactively?

III. STATEMENT OF THE CASE

Sawnay Taw, who was born in November 1999, was charged in the Spokane County Superior Court on October 10, 2016 with first degree assault with a deadly weapon enhancement. CP 1. Taw’s attorney moved to remand the matter to juvenile court for a decline hearing. CP 4-10. The State opposed the motion, noting that the defendant conceded that “automatic decline” was, at the time, “the current state of the law.” CP 12. By letter

opinion, Judge Greg Sypolt denied the motion to remand to juvenile court for a decline hearing. CP 16-17.

The State then moved to amend the information to charge the defendant and others with first degree assault, first degree robbery, and conspiracy to commit first degree robbery; each charge included a firearm enhancement. CP 33-34. On July 7, 2017, the defendant pled guilty to first degree robbery, including its firearm enhancement, and to conspiracy to commit first degree robbery. CP 52-64.

IV. ARGUMENT

A. THIS COURT IS BOUND BY THE DECISION IN *STATE v. WATKINS* WHICH HELD THAT A JUVENILE DEFENDANT'S PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS ARE NOT VIOLATED BY AUTOMATIC ADULT JURISDICTION.

The defendant agreed that the issues presented by his appeal were also pending before the State Supreme Court in *Watkins*. Br. at 4. This Court is bound by majority decisions of our Supreme Court. *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). *Watkins* was decided on August 16, 2018, and rejected identical due process claims under nearly identical circumstances.¹

¹ *Watkins* had been charged with first degree burglary and had a prior felony offense, triggering the automatic adult jurisdiction provisions of former RCW 13.04.030(1)(e)(v)(D) (2009); Sawney Taw was charged with first degree assault with a deadly weapon, a serious violent offense under RCW 9.94A.030(46) and with first degree robbery with a deadly weapon, offenses that triggered the

The claims presented in *Watkins* are identical to those claimed by the defendant in his appeal. The Supreme Court rejected *Watkins*' claim that due process requires a *Kent*² hearing before a juvenile court may decline jurisdiction over a juvenile charged with one of the offenses enumerated in former RCW 13.04.030(1) (2009).³ *Watkins*, 423 P.3d at 834. The Supreme Court rejected this argument because "there is no constitutional right to be tried in a juvenile court." *Id.* (citing *In re Boot*, 130 Wn.2d 553, 571, 925 P.2d 964 (1996)). The right to a *Kent* hearing "attaches only if a court is given statutory discretion to assign juvenile or adult court jurisdiction." *Id.* (citing *State v. Salavea*, 151 Wn.2d 133, 140, 86 P.2d 125 (2004), and *Boot*, 130 Wn.2d at 570). In other words, "careful consideration of the statutory framework underlying the *Kent* decision suggests that *Kent*'s holding is limited to circumstances where a juvenile court has statutory discretion to retain or to transfer jurisdiction." *Id.* at 835.

Additionally, the Supreme Court analyzed the procedural due process claim, weighed the *Mathews v. Eldridge* factors,⁴ and concluded

automatic adult jurisdiction provisions of former RCW 13.04.030(1)(e)(v)(A) (2009) and RCW 13.04.030(1)(e)(v)(C) (2009), respectively.

² *Kent v. United States*, 383 U.S. 541, 557, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

³ Compare this argument with Sawney Taw's argument. Br. at 4-5.

⁴ 424 U.S. 319, 335-36, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (factors to consider in resolving procedural due process issue are (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such

that “automatic decline comports with procedural due process.” *Watkins*, 423 P.3d at 836-37.

Our Supreme Court also reviewed *Watkins*’ substantive due process claim, that automatic adult jurisdiction deprived him of his right to be sentenced in accordance with his reduced culpability, and his claim that *Boot* has been abrogated by subsequent decisions of both the United States Supreme Court and the Washington State Supreme Court.⁵ *Id.* at 837-39. The Court found these arguments “unconvincing” because “put simply, automatic decline does not violate a juvenile defendant’s substantive due process right to be punished in accordance with his or her culpability because adult courts can take into account the ‘mitigating qualities of youth at sentencing.’” *Id.* at 837, 838 (citing *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017)).

Because our Supreme Court decided and rejected the very same due process claims in *Watkins*, now presented in Sawnay Taw’s appeal, this Court must affirm the trial court’s order denying transfer of Taw’s case to juvenile court for a decline hearing.

interest through the procedures used and the probable value, if any, of additional safeguards; and (3) the government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail).

⁵ Compare this argument with Sawnay Taw’s argument. Br. at 6-14.

B. OUR SUPREME COURT STATED IN WATKINS THAT THE 2018 LEGISLATIVE CHANGES TO THE JUVENILE DECLINE STATUTE DO NOT APPLY RETROACTIVELY.

Effective June 7, 2018, the Legislature omitted certain offenses from the ambit of RCW 13.04.030(e)(v), requiring automatic adult jurisdiction. Those offenses include: first degree robbery, drive-by shooting, first degree burglary (with a prior felony offense) and other violent offenses committed while armed with a firearm. *Compare* 2009 Laws of Washington ch. 526, § 1, and 2018 Laws of Washington ch. 162, § 1.

In *Watkins*, our Supreme Court stated:

The 2018 amendment to RCW 13.04.030(1)(e)(v)(D) removed first degree burglary and several other crimes from the list of enumerated offenses that would automatically subject a juvenile offender to adult court jurisdiction. The amendment did not moot the constitutional issue presented in this case because *this amendment does not apply retroactively...*

Watkins, 423 P.3d at 832 n.1 (emphasis added).

Generally, statutes and statutory amendments apply only prospectively.⁶ *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). An amendment to a statute will be applied retroactively *only* if (1) the Legislature so intended; (2) it is curative; or

⁶ Courts disfavor retroactivity. *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997).

(3) it is remedial. *Id.* None of these criteria exist with regard to the 2018 Legislative amendments to RCW 13.04.030.

To determine whether the Legislature intended a statute to apply retroactively, courts look to the plain language of the statute as well as to legislative history. *See In re F.D. Processing, Inc.*, 119 Wn.2d at 460 (“[a]nalysis of legislative intent regarding retroactivity is not restricted to the statute’s express language ... [but] may be gleaned from other sources, including from legislative history”); *but see, Miebach v. Colasurdo*, 102 Wn.2d 170, 180, 685 P.2d 1074 (1984) (retroactivity generally must be expressed). There is nothing in the plain language of the statute or in its legislative history that would indicate the Legislature’s intent that the amendments should apply retroactively.

An amendment is curative only if it clarifies or technically corrects an ambiguous statute. Such an amendment must be “clearly curative” for it to be retroactively applied. *In re F.D. Processing, Inc.*, 119 Wn.2d at 461-62 (citing *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990)). In *State v. Ramirez*, Division Two of this Court rejected a claim that a 2005 amendment to RCW 13.04.030(1)(e) applied retroactively to the defendant because it was not properly characterized as “clarifying.” 140 Wn. App. 278, 288, 140 P.3d 61 (2007).

Apparently conceding that there is no clear express or implied indication of the Legislature's intent that its 2018 amendments to RCW 13.04.030 should apply retroactively, and seemingly conceding that the amendments are not "curative" of an ambiguity in the statute, Sawney Taw claim focuses, instead, on an argument that the amendments are "remedial" in nature. Br. at 14-17.

An amendment is remedial in nature if it "relates to practice, procedures or remedies, and does not effect a substantive or vested right." *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997). The reason for this rule is that a "party does not have a vested right in any particular form of procedure." *White v. Powers*, 89 Wash. 502, 507, 154 P. 820 (1916). In *State v. Bennett*, for example, Division One of this Court held that the 1994 amendment to the juvenile code by which the Legislature authorized extension of juvenile jurisdiction for purposes of enforcing *restitution only*, was remedial, and applied retroactively. 92 Wn. App. 637, 963 P.2d 212 (1998). The "remedial feature of juvenile restitution favor[ed] retroactive application of the amendments and jurisdictional extension." *Id.* at 641.

Contrarily, there is nothing remedial⁷ about the 2018 amendments to the juvenile code by which certain crimes were omitted from automatic adult jurisdiction. The amendment has nothing to do with providing a remedy, correcting a wrong, or enforcing a substantive right.⁸ A defendant has no substantive right to adjudication in juvenile court. *Watkins*, 423 P.3d at 838.

Our Supreme Court has noted that the statute is punitive in nature, (rather than remedial) as it evidences a legislative intent to punish with certainty and more severity those juvenile offenders who commit violent crimes rather than those youthful offenders who commit other crimes. *State v. Posey*, 161 Wn.2d 638, 167 P.3d 560 (2007).

The amendment simply changes which court is to hear future cases in which juvenile offenders are charged, transferring jurisdiction from juvenile court to adult superior court for those charges the Legislature considers to be the most egregious offenses. Even jurisdictional statutes are as much subject to the presumption against retroactivity as any other statute.

⁷ Remedial means: “(1) Affording or providing a remedy; providing the means of redress”; “(2) Intended to correct, remove, or lessen a wrong, fault or defect”; or “(3) Of or relating to a means of enforcing an existing substantive right.” Black’s Law Dictionary 1038 (Abridged 7th Ed. 2000).

⁸ “A remedial statute is one which relates to practice, procedures and remedies and is applied retroactively when it does not affect a substantive or vested right. A ‘right’ is a legal consequence deriving from certain facts, while a remedy is a procedure prescribed by law to enforce a right.” *McClendon*, 131 Wn.2d at 861.

Hughes Aircraft Co. v. U.S. ex. rel. Schumer, 520 U.S. 939, 951, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997); *see also*, *State v. Hoffman*, 116 Wn.2d 51, 65, 804 P.2d 577 (1991) (“[s]ubsequent retrocession [of jurisdiction] did not affect this case which was filed before the effective date of retrocession”); *State v. Pink*, 144 Wn. App. 945, 185 P.3d 634 (2008) (jurisdictional limitation of federal statute was not retroactive; “jurisdiction state assumed before the 1968 act was not displaced,” citing *Hoffman*, *supra*).

“[T]his presumption [against retroactivity] is only strengthened by the Legislature’s use of only present and future tenses in the wording” of the statute.⁹ *McClendon*, 131 Wn.2d at 861. The 2018 amendment to RCW 13.04.030 was not effective until June 7, 2018, which would mean that the amendments apply only to juveniles “alleged or found to have committed offenses” after the amendment’s effective date.

⁹ RCW 13.04.030 provides, in pertinent part:

- (1) Except as provided in this section, the juvenile courts in this state shall have exclusion original jurisdiction over all proceedings: ... (e) Relating to juveniles alleged or found to have committed offenses, traffic or civil infractions, or violations ..., unless: ... (v) the juvenile *is* sixteen or seventeen years old on the date the alleged offense *is* committed and the alleged offense *is*: (A) A serious violent offense...; (B) A violent offense [and the defendant has certain prior criminal history]; or (C) Rape of a child in the first degree.

(Emphasis added.)

Furthermore, under RCW 13.40.300, the juvenile court loses jurisdiction of a juvenile once the individual reaches the age of 18 years, unless, prior to the juvenile's 18th birthday, the court enters a written order extending juvenile jurisdiction. No such order was entered in this case, and therefore, if this Court were to hold the 2018 amendments apply retroactively to the defendant, the juvenile court would still lack jurisdiction to hear his case because he is now over the age of 18 years.¹⁰

The Supreme Court noted in *Watkins* that the 2018 amendment is not to be retroactively applied; the Legislature did not expressly, or implicitly, indicate its intent for the amendment to apply retroactively; and the amendment is neither curative nor remedial. The defendant is, therefore, not entitled to any retroactive relief under the amendment.

V. CONCLUSION

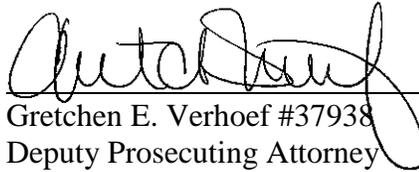
This Court is bound by the Washington State Supreme Court's holding in *Watkins*, which dispensed with the defendant's due process claims. Likewise, the Supreme Court observed that the 2018 amendments to the automatic adult jurisdiction provisions of RCW 13.04.030 are not retroactive. The Legislature did not intend its amendment to apply retroactively and the amendment is not curative or remedial. The State

¹⁰ The defendant turned 18 years of age on November 19, 2017, three months after he entered his guilty pleas to the current charges. CP 143.

respectfully requests that this Court affirm the trial court and the defendant's judgment and sentence.

Dated this 8 day of October, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney



A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", is written over a solid horizontal line. The signature is fluid and cursive.

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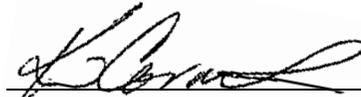
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on October 8, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Thomas Kummerow
Wapofficemail@washapp.org

10/8/18
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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