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STATE OF WASHINGTON
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IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

ROBERT WHEELER,
Defendant/Appellant.

Consolidated with

IN RE PERSONAL RESTRAINT PETITION OF:

ROBERT T. WHEELER,

PETITIONER.

SUPPLEMENTAL BRIEF OF ROBERT WHEELER

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ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTS	1
III.	ARGUMENT	4
	A. The New Evidence that the State Intentionally Delayed Filing Charges Resulting in the Prejudicial Loss of Juvenile Court Jurisdiction.	4
	B. Both the Trial and Appellate Court Had the Discretion to Consider Defendant's Challenge to the Validity of his Guilty Plea.	9
IV.	CONCLUSION	11

TABLE OF AUTHORITIES

Federal Cases

<i>Banks v. Dretke</i> , 540 U.S. 668(2004)	4
<i>State v. Barberio</i> , 121 Wash.2d 48, 846 P.2d 519 (1993)	10, 11
<i>Holland v. Florida</i> 560 U.S. 631 (2010)	4
<i>Jimenez v. Quarterman</i> , ___ U.S. ___, 129 S.Ct. 681(2009)	9, 10

State Cases

<i>PRP of Stenson</i> , 174 Wash.2d 474, 276 P.3d 286 (2012)	7, 8
<i>State v. Barberio</i> , 121 Wash.2d 48, 846 P.2d 519 (1993)	10, 11
<i>State v. Calderon</i> , 102 Wash.2d 348, 684 P.2d 1293 (1984)	5
<i>State v. Dixon</i> , 114 Wash.2d 857, 792 P.2d 137 (1990)	5, 6
<i>State v. Scott</i> , 150 Wn.App. 281, 207 P.3d 439 (2009)	8

Statutes and Court Rules

RAP 2.5(c)(1)	10
RAP 12.1(b)	11
RAP 12.2	10
RAP 2.2(9)(10)(13)	11
RAP 12.7	10
RCW 10.73.090 (1)	4

I. INTRODUCTION

Robert Wheeler, Appellant/Petitioner, challenges his Pierce County convictions for Rape of a Child and Child Molestation. This Court accepted review of two issues:

Whether a personal restraint petition is exempt from the one-year time limit on collateral review on the basis of newly discovered evidence where the petitioner has provided evidence that the State delayed filing criminal charges until after the petitioner's 18th birthday, and if so, whether the petitioner is entitled to relief.

Whether on appeal from a corrected judgment and sentence that was entered as a result of a personal restraint petition filed more than one year after the original judgment and sentence became final, the Court of Appeals had discretion under RAP 2.5(c)(1) to entertain a claim that the guilty plea underlying the judgment and sentence was involuntary.

Wheeler addresses the issues in that order.

II. FACTS

Robert Wheeler was born on March 29, 1987. Between December 6, 2000, and December 5, 2001, when he was between 13 and 14 years old, he committed the crimes of Rape of a Child and Child Molestation. Those crimes were reported on November 1, 2004, when he was 17 years old. On January 3, 2005, the victims were formally interviewed. See *Prosecutor's Log* attached to PRP. On January 23, 2005, Mr. Wheeler confessed. At the time of Mr. Wheeler's confession, more than 2 months remained before he turned 18. The case was referred to a prosecutor for review days later--on February 8, 2005.

According to documents the State chose to disclose (in a recent public disclosure request and not previously revealed to Wheeler), no investigation took place after Wheeler's confession. On March 7, 2005, the State drafted an *Information* charging the aforementioned offenses in juvenile court. However, for reasons the State chose not to disclose, charges were not filed at that time.

On March 26, 2005, three days before Wheeler's 18th birthday, the State prepared an information and probable cause statement (which contained less information than the probable cause statement prepared for the unfiled juvenile court charge). Once again, the charges were not filed on that date. Instead, the State waited until May 4, 2005 (after Wheeler turned 18), when it simply crossed out the earlier date and hand-wrote in the new date.

According to the information obtained by Wheeler's recent public disclosure request and which was not previously disclosed, there was no on-going investigation justifying the delay from March 7 to May 4, 2005. As a result of the State's delay, juvenile court jurisdiction lapsed.

Robert Wheeler eventually pleaded guilty to one count of Rape of a Child in the First Degree and one count of Child Molestation in the First Degree. The maximum penalty for the both charges was "life" and a \$50,000 fine.

However, Wheeler's guilty plea form indicates that the maximum sentence for the Rape of a Child count is "life" and \$20,000 (in paragraph 4) and later states that maximum as 20 years and \$50,000 (in paragraph 6). For the Child Molestation count the plea form lists the maximums as "life" and \$20,000 (¶ 4), as well as 20 years and a \$50,000 fine (¶ 6). When Wheeler was sentenced the same day, the *Judgment* listed the maximum punishment as "20 yrs/\$50,000" and "10 yrs/\$20,000" respectively. CP 60-81.

On March 24, 2010, Mr. Wheeler filed a *Personal Restraint Petition* challenging the validity of his judgment and the voluntariness of his guilty plea. On July 3, 2012, the Court of Appeals remanded for correction of the judgment.

At the remand hearing, Mr. Wheeler appeared (with different counsel) in Pierce County Superior Court. The Court corrected the judgment to reflect the correct maximum sentences for each crime of conviction: Resent RP 3. Neither counsel for Wheeler nor Wheeler himself requested that the sentencing court exercise its discretion and consider the voluntariness of Wheeler's guilty plea. *Id.*

IV. ARGUMENT

A. The New Evidence that the State Intentionally Delayed Filing Charges Resulting in the Prejudicial Loss of Juvenile Court Jurisdiction.

Introduction

A PRP can be filed more than one year after finality if it is based on newly discovered evidence, provided the defendant acted with reasonable diligence in discovering the evidence. RCW 10.73.090 (1). While a petitioner is required to pursue his rights diligently, the appropriate standard should be “reasonable diligence,” not “maximum feasible diligence.” See *Holland v. Florida* 560 U.S. 631 (2010). When the new evidence is information that the prosecution was obliged, but failed to disclose this Court should not fault the defendant for assuming that the State fulfilled its constitutional duty. “A rule thus declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.” *Banks v. Dretke*, 540 U.S. 668, 696 (2004).¹

The State Intentionally Delayed Filing Charges to Deprive Wheeler of Juvenile Court Jurisdiction

The State does not appear to contest Wheeler’s contentions (1) that it delayed filing charges against Mr. Wheeler, not because it was

¹ *Brady* applies to all exculpatory information, not just the evidence presented at trial. See *United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993); *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990), *vacated on other grounds*, 503 U.S. 930 (1992) (both applying *Brady* to information relevant to a pre-trial suppression hearing).

investigating, but in order to deprive Wheeler of juvenile court jurisdiction; and (2) that it failed to disclose documentary proof of the unlawful delay to Wheeler until his recent public disclosure request. In other words, the merits of Wheeler's claim or the fact that the public disclosure request revealed information new to Wheeler do not seem to be in dispute.

Certainly, the law on this point is clear. Where a defendant commits a crime before he is 18 but is not charged until after he is 18, there is a violation of due process if the delay was intentional or negligent. *State v. Dixon*, 114 Wash.2d 857, 858–59, 792 P.2d 137 (1990); *State v. Calderon*, 102 Wash.2d 348, 349, 684 P.2d 1293 (1984). Petitioners fulfill their burden of proof when prosecutorial delay causes a loss of juvenile court jurisdiction because the loss results in a decrease of benefits available to a defendant. *Dixon*, 114 Wash.2d at 860–61 (stating that two benefits lost to the defendant are the avoidance of the stigma attached to an adult conviction and the possibility for less harsh penalties); *Calderon*, 102 Wash.2d at 352–53 (stating that loss of juvenile court jurisdiction results in the loss of juvenile adjudication or the opportunity to argue against a decline from juvenile court jurisdiction).

The filing delay in this case can only be described as intentional. The charges were ready to be filed before Wheeler turned 18. In fact, charging documents were prepared for both juvenile and adult court before Wheeler turned 18—after the investigation was complete. The only

possible reason for the delay was so that juvenile court jurisdiction could lapse and Wheeler be prosecuted in adult court. Prejudice is obvious.

Due Diligence and the State's Failure to Disclose Exculpatory Information

Instead, Mr. Wheeler's claim turns on the evaluation of his diligence in light of the State's constitutional violation. Requiring Wheeler to exercise continuous "due diligence" places a burden of assuming that the State failed to comply with its constitutional obligation on the defendant and forgives the prosecution from its duty of disclosure.

Both the United States Supreme Court and this Court have previously evaluated a defendant's due diligence requirement in light of the State's failure to disclose exculpatory information in its possession. For example, the United States Supreme Court rebuked the Fifth Circuit Court of Appeals for relying on a harsh due diligence requirement undermining the *Brady* rule in *Banks v. Dretke*, 540 U.S. 668 (2004). In *Banks*, the Court considered the Fifth Circuit's use of a due diligence requirement to dismiss the defendant's *Brady* claim. Similar to this case, the diligence question in *Banks* was whether the defendant "should have asked to interview" a witness who could have furnished the exculpatory evidence the prosecutor did not disclose. *Banks*, 540 U.S. at 688. The Supreme Court rejected this requirement in no uncertain terms. *Id.* at 696.

The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to ... discover the

evidence,” so long as the “potential existence” of a prosecutorial misconduct claim might have been detected. *A rule thus declaring “prosecutor may hide, defendant must seek,” is not tenable in a system constitutionally bound to accord defendants due process.* Ordinarily, we presume that public officials have properly discharged their official duties. We have several times underscored the “special role played by the American prosecutor in the search for truth in criminal trials. Courts, litigants, and juries properly anticipate that “obligations [to refrain from improper methods to secure a conviction] ... plainly rest[ing] upon the prosecuting attorney, will be faithfully observed.” Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.

(Emphasis added, internal citations omitted).

This Court took the same approach in *PRP of Stenson*, 174 Wash.2d 474, 276 P.3d 286 (2012), when it concluded that because the State did not properly disclose certain exculpatory information, it was reasonable for the defense to assume that nothing in a witness's possession would have any relevance to the case. *Stenson* involved the defendant's sixth and otherwise-time barred PRP. Stenson claimed that state had suppressed a FBI file that contained bench notes relating to gunshot residue testing on defendant's jeans. Despite the fact that defense counsel could probably have discovered the notes by requesting them at trial, because the State had a duty to disclose the trial judge found that there was no lack of due diligence by defense trial counsel or defense counsel on the previous PRPs

in failing to discover the full FBI file material. This Court affirmed that decision. *In re Stenson*, 174 Wash.2d at 490-91.²

Wheeler's diligence here should be measured in light of both *Banks* and *Stenson*. Pre-filing delay is justified when the State's investigation is on-going, but is not when the State negligently or intentionally deprives a defendant of juvenile court jurisdiction. Obviously, the State possess all of the facts on this issue. Where the State fails to disclose any facts suggesting intentional or negligent delay, a defendant should not be penalized. The remedy against delay is entirely in the State's control. If the State timely fulfils its constitutional obligation, then a defendant would not be able to show due diligence if he brought an untimely PRP. On the other hand, where the State fails in the first instance, it should not be heard to complain that the defendant was not diligent because he failed to assume the State was acting in bad faith and contrary to the law.

This Court should either find that Wheeler has satisfied the due diligence requirement or, if any of the material facts are disputed, should remand for an evidentiary hearing.

² See also *State v. Scott*, 150 Wn.App. 281, 207 P.3d 439 (2009) (Defendant acted with reasonable diligence in discovering new evidence in form of recantations by alleged victim and two witnesses on which motion to withdraw *Alford* plea to third-degree child degree was based, and therefore motion was not barred by one-year time limit; defendant was imprisoned and was barred by a no-contact order from contacting alleged victim, and it was also unlikely that the witnesses would have changed their stories earlier or that defendant could have done anything to cause those changes.).

B. Both the Trial and Appellate Court Had the Discretion to Consider Defendant's Challenge to the Validity of his Guilty Plea.

Introduction

As a general matter, this Court oversees the rules of procedure in this state to ensure that such rules are fair and effective, and see that justice is done in each and every case.

It is obvious that Wheeler's guilty plea was involuntary. He was unquestionably misinformed about a direct consequence of his guilty plea. The question posed is whether the trial and/or appellate court had the discretion to consider that issue despite the fact that the case was remanded for resentencing. Wheeler does not argue that the trial and appellate court were *required* to decide that issue. Instead, Wheeler argues both courts had the *discretion* to decide the issue. Because neither court recognized that it possessed such discretion, this Court should remand with instructions in accord.

Restoring the Pendency of a Case

The United States Supreme Court recognized the ability of state courts to restore the pendency of a case in *Jimenez v. Quarterman*, ___ U.S. ___, 129 S.Ct. 681(2009). In that case, after Jimenez lost his first appeal and after the time to challenge his conviction had run, the Texas Court of Criminal Appeals granted Jimenez an out-of-time appeal. *Id.* at 683-84. In his petition for a writ of habeas corpus, Jimenez argued that the

discretionary decision to grant an otherwise out-of-time appeal restored the pendency of the case. *Id.* at 684. The Supreme Court agreed, reasoning once the Texas Court of Criminal Appeals granted the out-of-time appeal, Jimenez's case was no longer final for purposes of collateral review. *Id.* at 686. In other words, when the state court exercised its discretionary power to entertain an otherwise out-of-time appeal the conviction, which had earlier been final, was no longer.

There is no reason to conclude that Washington courts are not invested with the same discretionary authority. Court rules give the trial and appellate courts the discretion to reach the merits of an un-adjudicated, meritorious claim. The pendency of a case otherwise final under RAP 12.7 can be revived pursuant to RAP 2.5(c)(1) which provides:

Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

Washington courts have interpreted RAP 2.5(c)(1) to allow trial courts, as well as appellate courts, discretion to revisit an issue on remand that was not the subject of the earlier appeal. *State v. Barberio*, 121 Wash.2d 48, 51, 846 P.2d 519 (1993). This is consistent with RAP 12.2, which allows trial courts to entertain post-judgment motions authorized by statute or court rules, as long as the motions do not challenge issues already decided on appeal. (“After the mandate has issued, the trial

court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.”).

If the trial court elects to exercise this discretion, its decision may be the subject of a later appeal, thereby restoring the pendency of the case.

Id. at 50; *accord* RAP 2.2(9), (10), (13) (providing right to appeal from postjudgment orders). In addition, RAP 12.1(b) permits an appellate court to consider and decide an issue not raised by a party. In sum, these rules allow a court to do justice.

This Court can decide the issue in this appeal, especially in light of the fact that the facts are undisputed. Alternatively, this Court can remand this case to Pierce County Superior Court with an instruction that the court has the discretion to consider a motion by Wheeler to withdraw his guilty plea. At such a hearing, both parties would be able to present all of the equities—the most important of which is the simple fact that Wheeler was convicted and is serving life-maximum sentences based on invalid guilty pleas. In the end, the question posed here is whether the law should permit correction of a manifest error identified after its harm was realized.

IV. CONCLUSION

Based on the above, this Court should either dismiss; vacate Wheeler’s guilty plea and remand; reverse and remand for an evidentiary hearing; or reverse and remand to the trial court with the instruction that the

trial court has the discretion to consider Wheeler's motion to withdraw his guilty plea.

DATED this 20th day of December, 2014.

Respectfully Submitted:

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Attached for filing is Mr. Wheeler's supplemental brief, which has been served on opposing counsel through this email.

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