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~~No. 96051-8~~

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

ANTHONY WALLER,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENT

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A. INTRODUCTION.

In 2000, Anthony Waller received an exceptional sentence above the standard range when the judge decided his actions as a 21-year-old merited further punishment under the aggravating factor of deliberate cruelty. In 2018, the trial court agreed to hold a hearing on Mr. Waller's sentence and the prosecution appeals from this order. The court has not altered Mr. Waller's judgment; he remains confined and his sentence unchanged. The Rules of Appellate Procedure do not authorize the State's appeal from an order setting a hearing. This Court should deny the prosecution's request for direct review of a ruling that simply permits an opportunity to present arguments.

The prosecution mentions only in passing the substantive issue that prompted Mr. Waller to ask that the court reevaluate his sentence. The case law permitting a sentence above the standard range based on assumptions about a young person's culpability has radically changed. Mr. Waller is entitled to have the court consider his request for sentencing relief.

B. ISSUES PRESENTED.

1. The prosecution asks this Court to disregard the Rules of Appellate Procedure that govern when a court order is appealable of right. RAP 2.2(b) unambiguously specifies the limited instances when the prosecution is entitled to direct review of a court order. These limited instances do not include a preliminary ruling where a trial court sets a briefing schedule and agrees to consider whether a defendant is entitled to resentencing. Should this Court reject the prosecution's claim it has the right to appeal under RAP 2.2(b)(3)?

2. The prosecution asks this Court to prematurely rule Mr. Waller is barred from challenging his sentence even though there has been a fundamental substantive shift in the law governing the punishment that may be imposed on young people. There are available procedural vehicles for considering whether Mr. Waller should be allowed to seek a reduced sentence, including the significant material change in constitutional law, newly discovered evidence that was not previously available based on the change in law and science, and his actual innocence of the aggravating factor used to justify

increased punishment beyond the standard range. If this Court reaches the merits of the State's appeal even though the State has no right to appeal, is Mr. Waller permitted to respond to the changes in the law by asking the trial court to revisit his sentence?

C. STATEMENT OF THE CASE.

In 2000, a sentencing judge deemed 21-year-old Anthony Waller acted with more purposeful cruelty than a mature adult and imposed a sentence greater than the maximum allowed under the standard range for first degree murder. 4/7/00RP 22-23. At the sentencing hearing, no one told the court Mr. Waller was still struggling to complete high school and suffered from severe attention deficit disorder (ADHD). *See* CP 45, 80-81.

At the original sentencing hearing, defense counsel declined the judge's invitation to offer "any facts about Mr. Waller himself," because counsel had been too busy with other trials to gather this information, but he contended the record showed Mr. Waller's actions stemmed from having panicked, acting in fear when unexpectedly confronted. 4/7/00RP 7-8, 12-13. The underlying incident occurred when Mr. Waller was

drinking with three friends, looking for someone to buy them alcohol, and then breaking into cars. CP 65; 12/14/99RP 843, 854; 12/15/99RP 973. These three friends were each younger than Mr. Waller and each testified for the prosecution, against him. 12/14/99RP 834; 12/15/99RP 1026; 12/16/99RP 1161. They described Mr. Waller as panicking when a man approached because he was afraid the man would report them for breaking into cars. CP 65 (summarizing testimony). In exchange for avoiding their own criminal liability, these friends claimed Mr. Waller acted alone when he fought and stabbed the man with a screwdriver, killing him. *See* 12/22/99RP 1782-85 (summarizing credibility questions surrounding other participants in incident).

The trial prosecutor agreed there was no advance plan or premeditation before the fight occurred, but claimed Mr. Waller could have stopped his assault earlier, thus showing he acted deliberately, even if drunk at the time. 12/22/99RP 1689, 1762.

Mr. Waller did not receive notice the prosecution would seek an exceptional sentence before sentencing. 4/7/00RP 2, 8, 16; Supp. CP __, sub. no. 77. Without any jury finding or proof beyond a reasonable doubt of the aggravating factor, the judge

ruled Mr. Waller acted with more purposeful cruelty than a typical adult and imposed a sentence greater than the maximum available under the standard range. 4/7/00RP 2, 16, 22-23.

In 2018, Mr. Waller filed a pro se motion for relief from judgment under CrR 7.8(b). CP 39-47. He argued the law had fundamentally changed governing the culpability accorded to young people based on advances in the science of brain development and there was newly discovered evidence. *Id.*

The trial court eventually agreed to “schedule[]” a hearing on Mr. Waller’s request for resentencing after hearing from counsel about what information may be offered at a hearing. CP 116-17. The court noted it was bound by the Court of Appeals decision in *Light-Roth*, which ruled the change in the law construing the availability of exceptional sentences below the standard range entitled a young adult to a new sentencing hearing. CP 116; *In re Pers. Restraint of Light-Roth*, 200 Wn. App. 149, 401 P.3d 459 (2017), *reversed by*, 191 Wn.2d 328, 422 P.3d 444 (2018).

Mr. Waller said he would provide the court at the future hearing with information about his youth and rehabilitation,

including school, medical, and prison records to document his brain development. 6/1/18RP 6, 16-17, 19. He has since filed a detailed assessment of his personal circumstances leading to the incident and afterward. Supp. CP __, sub. no. 197. The trial court did not issue other rulings because it stayed the proceedings at the prosecution's request for this appeal. CP 146.

D. ARGUMENT.

1. The prosecution seeks direct review of a preliminary ruling that is not appealable.

The prosecution may not appeal a court order unless expressly authorized. *State v. Smith*, 117 Wn.2d 263, 270, 814 P.2d 652 (1991) (“As this court has stated many times, unless authorized by statute, the State may not appeal an order that does not abate or determine an action.”).

RAP 2.2(b) exclusively lists the “only” instances where the prosecution may appeal a court decision in a criminal case. This list is far more limited than the decisions a defendant in a criminal case may appeal. *Compare* RAP 2.2(a) *with* RAP 2.2(b). Under RAP 2.2(b), the prosecution may only appeal from a narrow set of final decisions, such as an order granting a new

trial, or an order vacating a judgment. RAP 2.2(b)(3), (4). It may appeal a sentence in a criminal case only if it is outside the standard range or contains a provision that is unauthorized by law. RAP 2.2(b)(6).

RAP 2.2(b)(3), (4), or (6) do not apply because the court has not altered Mr. Waller's sentence. It has not vacated his judgment. The order the State appeals is an order "granting" only a request for a hearing on Mr. Waller's motion for relief from judgment filed under CrR 7.8.

CrR 7.8(b) states that a motion for relief from judgment "does not affect the finality of the judgment or suspend its operation." Under the plain terms of this court rule, the court's consideration of a CrR 7.8(b) has no effect on the finality of a judgement and it does not qualify as an appealable order.

Mr. Waller remains in custody pursuant to the original judgment and sentence. The court has not even decided what sentencing arguments it will consider. After it asked for briefing on the scope of the resentencing hearing, the prosecution requested a stay of proceedings and appealed. CP 116-17.

The cases the prosecution cites do not support its right to appeal. In *State v. Hardesty*, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996), the trial court increased the defendant's sentence after holding a hearing at the State's request under CrR 7.8. The defendant appealed the new harsher sentence, not the preliminary order allowing the State to seek resentencing. This Court affirmed the trial court's authority to change Hardesty's sentence under CrR 7.8. *Id. Hardesty* shows a court may amend a judgment under CrR 7.8, and once a new sentence is imposed, a party may appeal.

The prosecution also misleadingly cites *State v. Larranaga*, 126 Wn. App. 505, 108 P.3d 833 (2005), because *Larranaga* involves the *defendant's* appeal. The defendant appealed after the court denied his request for resentencing under CrR 7.8. *Id.* at 507. The court noted he had the right to appeal under either RAP 2.2(a)(9), which say a defendant may appeal an "order granting or denying a motion for . . . amendment of judgment," and RAP 2.2(a)(10), similarly giving a defendant the right to appeal an "order granting or denying a motion to vacate a judgment." *Id.* at 509.

The provisions of RAP 2.2(a) at issue in *Larranga* do not apply to the prosecution in a criminal case, instead RAP 2.2(b) controls. RAP 2.2(b) does not permit the prosecution to appeal an order granting or denying a motion to amend a judgment, unless the judgment is actually and affirmatively altered.

The prosecution notes two cases where it appealed court orders that set new sentencing hearings, prior to actually pronouncing new sentences. Brief of Appellant at 7 (citing *State v. Miller*, 185 Wn.2d 111, 371 P.3d 528 (2016) and *State v. Scott*, 190 Wn.2d 586, 416 P.3d 1182 (2018)). But no one objected to the appeal in those cases, either because no one noticed the procedural flaw or the parties wanted appellate review and waived their objections. Neither case carves a new right for the prosecution to appeal despite the plain language of RAP 2.2(b).

The prosecution's appeal should be dismissed because the State asks this Court to interfere in a trial court's decision to set a hearing that is not appealable under RAP 2.2(b). Appellate courts do not weigh in on every hearing a trial court sets. This Court should deny the prosecution's request to appeal a non-

substantive order that simply agrees to consider an issue but does not actually alter any aspect of the judgment or sentence.

2. The merits of the case raise significant and viable claims about Mr. Waller’s sentence and the court should be permitted to hold further proceedings.

a. Mr. Waller was sentenced under a procedural scheme and substantive legal framework that is now invalid.

After Mr. Waller’s sentencing in 2000, the laws governing punishment for youths “changed dramatically.” *State v. Scott*, 190 Wn.2d 586, 589, 416 P.3d 1182 (2018). The judge decided Mr. Waller acted with “deliberate cruelty” and used this aggravating factor to impose a sentence greater than the maximum term available under the jury’s verdict and the adult-based standard range. The substantive law no longer justifies the factual basis of the increased punishment imposed.

Sentencing laws have substantively changed because biological, neurological, and psychological evidence altered the law governing criminal culpability of young people. This scientific evidence has led the country to “rapidly” modify harsh

sentencing outcomes for juveniles. *State v. Bassett*, 192 Wn.2d 67, 90, 428 P.3d 343 (2018).

This Court recently granted review in three cases that challenge the constitutionality of using an offense committed when a person was 19, 20, or 21 as a predicate offense for a life sentence under the three-strikes sentencing law, premised on the reduced blameworthiness that accompanies youth and its application to young adults. *State v. Del Orr*, 3 Wash.App.2d 1039 (2018) (unpublished), *rev. granted*, _Wn.2d _, S.Ct. No. 96061-5 (Feb. 6, 2019); *State v. Nguyen*, 2 Wash.App.2d 1001 (208) (unpublished), *rev. granted*, _Wn.2d _, S.Ct. No. 95510-7 (Feb. 6, 2019); *State v. Moretti*, 1 Wash.App. 1007 (2017) (unpublished), *rev. granted*, _Wn.2d _, S.Ct. No. 95263-9 (Feb. 6, 2019). These cases demonstrate the shift in constitutionally permissible punishments for young adults predicated on their neurological and psychological development and the reduced blameworthiness that attaches categorically.

b. Juveniles are fundamentally different from mature adults for purposes of constitutionally permissible punishment.

Starting in 2005, the United States Supreme Court established, through a series of decisions, that young people's neurological and psychological development renders them different from adults and these differences require individualized consideration of their youthful characteristics prior to imposition of the harsh punishments given to adults. *Roper v. Simmons*, 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding that imposing the death penalty on people under 18 violates the Eighth Amendment's prohibition against cruel and unusual punishment); *Graham v. Florida*, 560 U.S. 48, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (holding that imposing life without parole sentences on juveniles convicted of non-homicide offenses is unconstitutional); and *Miller v. Alabama*, 567 U.S. 460, 465, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (holding that mandatory life without parole sentences for juveniles convicted of homicide are unconstitutional).

The Court predicated its rulings on scientific research identifying essential developmental differences between youth and adults: youth's lack of maturity and impetuosity; youth's susceptibility to outside influences; and youth's capacity for change. See *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 733, 193 L. Ed. 2d 718 (2016) (quoting *Miller*, 567 U.S. at 471). These developmental characteristics establish the diminished culpability of young people convicted of crimes; their "conduct is not as morally reprehensible as that of an adult." *Roper*, 543 U.S. at 570.

Roper acknowledged that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." 543 U.S. at 574. But at that time, there was very little published research on adolescent brain development. Steinberg, *The Influence of Neuroscience on the U.S. Supreme Court Decisions about Adolescent's Criminal Culpability*, 14 *Nature Reviews Neuroscience* 513, 513-14 (2013). After *Roper*, neurological and psychological studies now show "the parts of the brain involved in behavior control continue to develop well

into a person's 20." *State v. O'Dell*, 183 Wn.2d 680, 691-92 & n.5, 358 P.3d 359 (2015).

c. Young adults share the key hallmarks of youth that undermine the rationale of harsh, adult-based sentencing schemes.

When Mr. Waller was sentenced in 2000, developmental scientists thought 18 year-olds were biologically mature and young adult brains were fully developed. See Nat'l Res. Council, Nat'l Acads., *Adolescent Development And The Biology Of Puberty* 1-3 (Michele D. Kipke ed., 1999). At that time, society "ridiculed" the notion that older youths lacked responsibility based on their age. Elizabeth S. Scott et al., *Young Adulthood As A Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 659 (2016).

But advances in neuroimaging techniques have allowed researchers to evaluate brains in real time and document their changes as people age. J. Casey, *Imaging the Developing Brain: What Have We Learned About Cognitive Development?* 9 Trends In Cognitive Sci. 104,104-105 (2005). These advances led "to the current medical recognition that brain systems and structures are still developing into an individual's mid-

twenties.” American Bar Association (ABA) Resolution 111: Death Penalty Due Process Review Project Section of Civil Rights and Social Justice, at 4 (2018) <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf> (hereafter “ABA Resolution”). Based solely on this new scientific understanding of on-going brain development in young adults, the ABA issued a resolution that documents the scientific and legal basis to prohibit the death penalty for anyone under 22 years old. *Id.* at 6-10.

The “prefrontal cortex continues to change prominently until well into a person’s 20s.” Jay N. Giedd, *The Amazing Teen Brain*, 312 *Sci. Am.* 32, 34 (2015). For young adults, “cognitive capacity is still vulnerable to the emotional influences that affect adolescent behavior” as the “prefrontal circuitry involved in self-control” continues to develop. Alexandra Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 *Temp. L. Rev.* 769, 771 (2016).

In particular, in situations of high emotional arousal, young adults exhibit impaired impulse control similar to younger adolescents. *Id.* at 786 (noting 21 year olds “show

diminished cognitive capacity, similar to that of adolescents, under brief and prolonged negative emotional arousal”).

Research shows antisocial peer pressure in stressful situations is a highly significant predictor of reckless behavior in emerging adults 18 to 25. Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE 139, 163 (2016).

The presence of peers makes youth, including young adults, far more likely to make risky decisions, but has no effect on mature adults. Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 91 (2008).

In sum, research now confirms the brain function related to impulse control, making spontaneous decisions during stressful events, and susceptibility to peer pressure, stems from a portion of the brain that develops later than when a person is 18 years old. Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78, 83-92 (2008); *see also* U.S. Sent’g Comm’n, *Youthful Offenders in the Federal System* 1, 7 (2017) (describing scientific consensus that 25 is “the average

age at which full development has taken place,” with individual variation.¹

Due to profound neurological developmental growth continuing in a person’s 20s, “young adults have a diminished capacity to understand the consequences of their actions and control their behavior in ways similar to youth under 18.” ABA Resolution at 7. Like juveniles, they are more prone to risk-taking, act more impulsively, and do not anticipate future consequences. *Id.*

Consequently, “[d]rawing a bright line at 18 and disregarding the characteristics of older youthful defendants fails to serve any of the penological justifications that the Supreme Court has ruled imperative for harsh and irrevocable sentences.” Kelsey B. Shust, *Extending Sentencing Mitigation For Deserving Young Adults*, 104 J. Crim. L. & Criminology 667, 677 (2014).

One reason *Roper* drew a line at age 18 for purposes of cruel punishment is because this age is “where society draws the

¹ Available at:
https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf.

line for many purposes between childhood and adulthood.” 543 U.S. at 574. But since *Roper*, society increasingly treats young adults in their late teens and early 20s differently than mature adults.

For example, an increasing number of states and local governments set 21 as the legal age for purchasing cigarettes, because “their brains are still developing,” making them more susceptible to the addictive effect of nicotine. *Raising the Tobacco Age to 21*, Campaign for Tobacco Free Kids, <https://www.tobaccofreekids.org/what-we-do/us/sale-age-21> (last visited Mar. 7, 2019). People under 24 are dependents for tax purposes, and at 25 or younger they may remain on their parents’ health insurance. 26 U.S.C. § 152; 42 U.S.C. § 300gg-14 (2017). Washington, and many other states, extend foster-care services to people who are 18-21. RCW 74.13.031(11); *Extending Foster Care Beyond 18*, Nat’l Conference of State Legislatures (July 28, 2017).² The Individuals with Disabilities Education Act extends high school services to people through age 21 if they

² Available at: <http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx>.

have a disability and have not earned a diploma. 20 U.S.C.A. § 1412 (a)(1)(A) (2016). Juvenile jurisdiction in Washington now may extend until 21 years old and a person may be held in a juvenile rehabilitation center until 25 years old in some circumstances. RCW 13.40.300(1), (3)(a)(i), (3)(b)(ii).

Society no longer draws the line between childhood and adulthood at 18, and instead increasingly treats young adults differently from mature adults. This societal change underscores the legal principle that youth are categorically different from mature adults for purposes of the penological goals of punishment and their moral culpability.

d. Changes in the law undermine the justification for increasing a young adult's punishment based on guesswork about his mental state without considering his youth

In *Light-Roth*, this Court rejected a claim that prior to *O'Dell*, case law expressly prohibited a judge from reducing a young adult's sentence below the standard range based on qualities associated with youth. 191 Wn.2d at 337. But Mr. Light-Roth received a standard range sentence, which was within the range the prosecution and defense asked the judge to

impose. *Id.* at 331-32. This Court found that even though the defendant had not asked for a mitigated sentence, the standard range sentence the court imposed did not rest on unlawful or unconstitutional considerations about his age or culpability. *Id.*

Unlike *Light-Roth*, Mr. Waller was sentenced to an exceptional sentence above the standard range. He received this aggravated sentence based on the judge's finding that Mr. Waller acted with deliberate cruelty. The judge's basis for increasing Mr. Waller's punishment was entered before both science and the law fundamentally shifted to require courts to acknowledge the reduced blameworthiness of young people whose brain development undermines their abilities to control their behavior.

The judge's sentencing decision was made before the development of a scientific consensus establishing the decision-making weaknesses of a young adult's brain, which are exacerbated by presence of peers and by stressful events, the spontaneity of the incident, the risk-taking and recklessness of an incident that began with breaking into cars and rapidly escalated in an unplanned burst of aggression, and Mr. Waller's

own severe ADHD and struggle to even complete high school. See, e.g., ABA Resolution, *infra*, at 3, 6-8; Scott, 85 Fordham L. Rev. at 659; CP 43.

The “brain regions important for control and attention” develop later for young people with ADHD. *Brain development delayed in ADHD, study shows*, Science Daily, <https://www.sciencedaily.com/releases/2012/07/120730094822.htm> (last visited Mar. 7, 2019), citing Shaw, et al, *Development of Cortical Surface Area and Gyrification in Attention-Deficit/Hyperactivity Disorder*, Biological Psychiatry, Vol. 72, Issue 3 (Aug 1, 2012). Recent brain imaging studies document “delayed brain maturation” in people with ADHD. Amy Ellis Nutt, “Attention-deficit/hyperactivity disorder is linked to delayed brain development,” Wash. Post, (Feb. 15, 2017).³ As Mr. Waller noted in his CrR 7.8 motion, his severe ADHD “has been scientifically proven to hinder brain development.” CP 43.

The law has materially and significantly changed in regard to the judge’s determination that Mr. Waller was more

³ https://www.washingtonpost.com/news/to-your-health/wp/2017/02/15/attention-deficithyperactivity-is-a-brain-disorder-scientists-confirm/?noredirect=on&utm_term=.119f3df25a44

blameworthy than a typical mature adult. The judge imposed an exceptional sentence at a time when 18 year old brains were treated as fully mature. *See* Scott, 85 Fordham L. Rev. at 659. It is no longer constitutionally permissible to impose a lengthy term of imprisonment upon a young person solely because of the terrible nature of the crime, because the crime alone is not evidence of irretrievably depraved character for a young person. *Roper*, 543 U.S. at 50; *Miller*, 567 U.S. at 473.

Since the judge sentenced Mr. Waller in 2000, the law has also changed in the Supreme Court's categorical recognition that intellectual disability compromises decision-making significantly enough to render a person less than fully responsible for their conduct even if they understand right from wrong. *Atkins v. Virginia*, 536 U.S. 304, 318, 122 S Ct. 2242, 153 L. Ed. 2d 335 (2002). This disability compromises a person's ability to refrain from acting on impulse and engage in logical reasoning. *Id.* *Atkins* reversed precedent that permitted the imposition of the death penalty on a person with intellectual disability. *Id.* at 321. Given Mr. Waller's extraordinary struggles to complete a basic education and his severe ADHD, he likely

has cognitive impairments that further reduce his ability to make reasoned decisions in stressful events.

Atkins and *Roper*, both decided after Mr. Waller’s sentencing hearing, mark a significant departure in the law premised on previously unavailable scientific consensus. The science on which they relied apply to a young adult’s brain as well, impairing the ability of a 21 year old who has other cognitive limitations to refrain from acting on impulse and making reasoned decisions in the midst of stressful events.

Article I, section 14 is more protective than the Eighth Amendment in the context of juvenile punishment. *Bassett*, 192 Wn.2d at 81. Even when our courts have permitted harsh punishments for young people in the past, these cases are not “guiding lights” and instead, our courts look to the evolution in our jurisprudence involving sentences for youth. *Id.* at 81. This Court extended the psychological and neurological studies in *Roper*, *Miller*, and *Graham* to young adults. *Id.*, citing *O’Dell*, 183 Wn.2d at 691-96. It extended *Miller* to bar long sentences for juveniles, even if they are not mandatory life terms. *Id.*, citing *State v. Ramos*, 187 Wn.2d 420, 446, 387 P.3d 650 (2016).

It construed the adult sentencing scheme to require “complete discretion” notwithstanding any other laws, when sentencing a juvenile in adult court. *Id.*, citing *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). Ample authority demonstrates this Court construes article I, section 14 to more broadly protect young people who are sentenced within the adult criminal justice system from cruel punishment.

The *Gunwall* analysis conducted in *Bassett* applies to a young adult who received an exceptional sentence above the standard range based on a judicial determination of aggravated culpability, rendered prior to *Roper*. 192 Wn.2d at 80-82, 85. It constitutes cruel punishment to legally deem a 21-year-old more blameworthy than a typical adult without any individual consideration of the characteristics that diminish culpability based on youth, especially when coupled with cognitive deficits. This Court has evolved our state constitutional framework to ensure fair sentencing for young people premised on consideration of the most appropriate factors. *Id.* at 85.

Mr. Waller received a 36 year sentence, without any possibility of parole, for which he will be 57 years old when

complete. CP 54. This sentence effectively incapacitates him for most of his life. It was entered based on a judge's finding that deemed Mr. Waller more blameworthy than an adult, without any information about "Mr. Waller himself," and the law and science now categorically reject the notion that a young person's terrible acts alone render him irreparably depraved. 4/7/00RP 12; *Bassett*, 192 Wn.2d at 88, 90.

The court's imposition of an exceptional sentence based on the judicially found aggravating factor of deliberate cruelty before the fundamental shift in understanding the psychological and neurological limitations on a young adult's decision-making and blameworthiness. These significant changes in the law undermine the constitutionality of deeming a young adult more deliberately culpable than any mature adult, when this decision is made without no information about the young person's individual circumstances, and merits a further sentencing hearing for a judge to consider the lawfulness of the sentence imposed. 4/7/00RP 7-8.

e. Mr. Waller is not procedurally barred from having a judge consider whether fundamental legal changes undermine his sentence.

The State's appeal remains premature because no judge has had the opportunity to revisit Mr. Waller's sentence, assess his blameworthiness, or change his sentence. RAP 2.2(b).

However, the State's cursory assertion that he has no avenue for relief due to the time that has passed since his original sentencing should be disregarded.

CrR 7.8 provides for relief from judgment for a variety of reasons, including "Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5" and "Any other reason justifying relief from the operation of the judgment." CrR 7.8(b)(2), (5).

Under RCW 10.73.100, a significant change in the law will apply retroactively. *In re Pers. Restraint of Young-Cheng Tsai*, 183 Wn.2d 91, 104, 351 P.3d 138 (2015). The purpose of this rule is "to *reduce* procedural barriers to collateral relief in the interests of fairness and justice." *Id.*, quoting *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2000) (emphasis in original). Litigants are obligated to raise available

arguments in a timely fashion and may later be procedurally penalized for failing to do so but “they should not be faulted for having omitted arguments that were essentially unavailable at the time.” *Id.*

Roper, Graham, and Miller rendered certain punishments unconstitutional for people under 18 due to their psychological and neurological development. *Bassett* construed the diminished capacity of youth to require more protection than the Eighth Amendment strictly mandates. *Houston-Sconiers* concluded the categorically reduced blameworthiness of people under 18 requires complete discretion for sentencing judges.

A young adult faces essentially the same impairments in thinking and same reduced blameworthiness underlying these precedents. In 2000, neither these legal rulings nor the science on which they are based was available. Due to the fundamental changes in the law governing punishments imposed on young people, it is unconstitutional and contrary to today’s legal precedent to impose an aggravated sentence based on a judge’s cursory determination that a 21-year old is “deliberately cruel.” This Court and the United States Supreme Courts have

implemented the substantive rule that courts may not impose the harshest adult-based sentences without regard for the reduced blameworthiness that accompanies youth. This substantive legal change undermines the justification for the penalty imposed and must be given retroactive effect. *See Montgomery*, 136 S. Ct. at 734; *Young-Cheng Tsai*, 183 Wn.2d at 104.

Mr. Waller's CrR 7.8(b) motion for relief from judgment is also timely under the plain terms of that rule. Under the final paragraph of CrR 7.8, if a motion for relief is not solely predicated on subsections (1) and (2), it is timely if "made within a reasonable time." *See Hardesty*, 129 Wn.2d at 315; *see also State v. Golden*, 112 Wn. App. 68, 79, 47 P.3d 587 (2002) (holding a CrR 7.8(b)(5) motion challenging a juvenile disposition entered without a capacity hearing not time barred because filed within a reasonable time); *State v. Zavala-Reynoso*, 127 Wn. App. 119, 122-24, 110 P.3d 827 (2005) (CrR 7.8(b)(4) and (5) motion challenging excessive community custody term was brought within a reasonable time); *State v. Klump*, 80 Wn. App. 391, 397, 909 P.2d 317 (1996) ("reasonable time" is

measured from date of intervening decision or change when motion is brought under CrR 7.8(b)(5)). Only motions made under CrR 7.8(b)(1) and (2) are further subject to the procedural rules in RCW 10.73.090, .100, .130, and .140, based on the comma that separates this phrase from the proceeding phrase, indicating it relates to the last antecedent.⁴ *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006).

Mr. Waller is entitled to relief under CrR 7.8(b)(5), because the change in science and its legal ramifications satisfies the requirement of an “other reason justifying relief” that it is not otherwise accounted for in CrR 7.8. Similarly, he may show he is actually innocent of the aggravating factor used to increase his punishment. His actual innocence is an exception to the time bar that applies to a collateral attack and renders his sentence unlawful. *In re Pers. Restraint of Carter*, 172 Wn.2d 917, 931, 263 P.3d 1241 (2011).

⁴ The pertinent portion of CrR 7.8(b) states:
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.

Mr. Waller has not yet had the chance to fully present his sentencing arguments to the court and the court has not yet ruled whether he may be entitled to relief. At the least, it is premature to deem Mr. Waller forever barred from raising a claim that his sentence was improperly imposed under an available subsection of CrR 7.8(b).

Mr. Waller should be permitted to proceed with his CrR 7.8 motion as the trial court ordered, and any necessary appeal that results from the trial court's order should proceed only after the merits of his claims are presented in the trial court. The State's premature request for direct review of a preliminary order should be denied.

E. CONCLUSION.

The State's appeal should be dismissed because it is not authorized by the Rules of Appellate Procedure.

DATED this 7th day of March 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy Collins", written over a horizontal line.

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Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

ANTHONY WALLER,

Respondent.

NO. 96051-8

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