Supreme Court No. 102125-9
(COA No. 56885-3-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES GRANTHAM,

Appellant.

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

PETITION FOR REVIEW

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A. INTRODUCTION

Nearly 30 years ago, James Grantham was sentenced with an incorrect offender score. He was 20 years old at the time of the offense. At resentencing with a correct offender score, he asked the court to consider his youth and requested a lower sentence. Although Mr. Grantham was entitled to a plenary sentencing hearing, the court refused to consider his youthfulness arguments and imposed virtually the same sentence.

On review, the Court of Appeals ruled this Court's well-settled jurisprudence on the particular vulnerabilities of a youthful offender do not apply to Mr. Grantham because he is not serving a life without parole sentence and did not specifically ask for an exceptional sentence below the standard range. This Court should accept review to correct the Court of Appeals' superficial limitation of this Court's case law regarding youthful offenders.

B. IDENTITY OF PETITIONER AND DECISION BELOW

James Grantham, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision in *State v. Grantham*, No. 56885-3-II, issued on May 23, 2023. A copy of the opinion is attached in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

State v. O'Dell[1] and *In re Pers. Restraint of Monschke*[2] recognize the right of young adults to present evidence and argument that their youth, personal characteristics, and background mitigated their crimes and that the court should consider those factors to impose a lower standard range or exceptional sentence. The court must meaningfully consider these arguments before imposing a sentence. Nevertheless, the Court of Appeals determined this Court's guidance on the particular vulnerabilities of youthful adult offenders does not apply to persons not serving a life without parole sentence, or

[1] 183 Wn.2d 680, 358 P.3d 359 (2015).
[2] 197 Wn.2d 305, 482 P.3d 276 (2021).

those who did not request an exceptional sentence below the standard range. This Court should accept review to correct the Court of Appeals' cursory effort to distinguish and limit the application of *O'Dell* and *Monschke*. RAP 13.4(b)(1), (4).

D. STATEMENT OF THE CASE

In 1994, when he was 20 years old, James Grantham got into a fight at a party. CP 56. At the time, Mr. Grantham was a member of a "ruthless, violent" gang, which he joined seeking acceptance and an outlet for his trauma-induced anger. CP 54. Deeply indoctrinated into gang policies, Mr. Grantham knew the gang would violently reprimand him if he lost the fight—he had once been shot in the hand by another member for violating the rules. CP 55, 56. Reacting "instantly and impulsively," Mr. Grantham shot his opponent once, killing him. CP 56.

After he was found guilty at trial, the court sentenced Mr. Grantham to nearly 35 years for one count of murder in the first degree. CP 31. He was 21 years old. *Id.* Mr. Grantham's criminal history included a juvenile conviction for possession

of a controlled substance conviction. CP 32. The standard range was 312-416 months, and he received the high end. CP 32, 36.

He has spent the last 28 years attempting to atone for his actions and rehabilitate himself.

1. **Mr. Grantham's adolescence and early adult years were marred by continuous violence both at home and in his peer groups.**

Mr. Grantham came from a home overshadowed by his stepfather's violence. CP 53-54. Beginning when Mr. Grantham was seven years old, his stepfather routinely slapped him, grabbed him hard enough to leave marks, and yanked him by his hair and clothing. *Id*. Mr. Grantham's stepfather punched him in the chest, beat him with a belt buckle, and called him a "half-breed" because of his mixed ethnic heritage. *Id*. The violence extended to Mr. Grantham's mother and brother and caused him to "shake uncontrollably in fits of anger/rage." *Id*.

By middle school, Mr. Grantham began avoiding home, skipping school and spending time with kids "in the streets." CP 54. He began using drugs and alcohol and eventually joined

a gang. *Id*. For his initiation he was forced to fight multiple other members to be accepted. *Id*. He frequently got in fights, channeling his uncontrollable anger and garnering praise from fellow gang members. *Id*. From ages 10 to 17, he was repeatedly placed in juvenile detention. CP 55. Although Mr. Grantham was detained, the gang encouraged him to continue fighting rival gang members in the facility whenever staff members failed to keep rivals separated. *Id*. By the time he was 18, Mr. Grantham had been shot a second time by a rival gang member during a fight. *Id*.

Throughout his teenage and early adult years, Mr. Grantham's overwhelming need for acceptance and protection from the gang, his fear of violent repercussions, and his impulsive anger took precedence over everything, including his duties to his own children. CP 55. The circumstances of his youth and childhood impaired his ability to consider the wrongfulness of his actions and the consequences of shooting someone. CP 56.

2. For nearly 30 years, Mr. Grantham has worked to help himself and others break the cycle of learned violence and incarceration.

While in custody, Mr. Grantham has made every effort to rehabilitate himself. He has logged thousands of hours in programming, allowing him to complete his GED, obtain an associate's degree, and become a licensed barber.[3] CP 41-43. He has helped the King County Prosecuting Attorney's Office develop their Restorative Community Pathways program[4], sharing his own experiences and gained insight about his life to help the program address harm in a way that produces better outcomes and safer communities. CP 49. The KCPAO recognizes Mr. Grantham "has not only transformed his life but

[3] The Department of Corrections's offender program history for Mr. Grantham only dates back to 2013 and does not include programing hours Mr. Grantham accrued prior to that date.

[4] "Restorative Community Pathways (RCP) is a comprehensive community diversion program that seeks to divest funds and services from the current juvenile legal system, that is racially disproportionate and often harmful, and invest in a community-driven support system that lead with racial equity and care for the young people, their families, the harmed parties, and the community." CP 49.

he also helps all those around him transform their lives," demonstrating "a commitment to accountability and transformation in our communities." *Id*.

Most importantly, Mr. Grantham has dedicated the last three decades to maintaining relationships with his two sons, working to end the cycle of violence that he was unable to escape himself. CP 45-46; RP 18-19. Mr. Grantham has stayed in touch through emails, visits, and phone calls for over 27 years. CP 45-46. His son, Lorenzo, commended Mr. Grantham's growth over the years, made possible by his proactive efforts to "accomplish tasks [Lorenzo] didn't think [were] possible to do in prison," such as learning another language and becoming a barber. *Id*. Mr. Grantham fully recognizes that his incarceration has been "the best thing to happen" to him and his children, because it saved his life and prevented his sons from following in his footsteps. RP 18-19.

3. Mr. Grantham received a new sentencing hearing, but the court failed to consider whether his youth and other mitigating factors warranted a lesser sentence.

In 2022, Mr. Grantham moved the court to vacate the judgment and sentence because his original sentence was based on an incorrect offender score. CP 18-56. The score as originally calculated included a juvenile conviction for possession of a controlled substance. However, under *State v. Blake*, that conviction was void and could not contribute to Mr. Grantham's offender score. 197 Wn.2d 170, 481 P.3d 521 (2021).

At the new sentencing hearing, the original sentencing judge, was no longer on the bench. Judge Philip Sorensen conducted the resentencing. Because the juvenile possession conviction only counted as a half point, Mr. Grantham's offender score remained a six, and his standard range remained 312-416 months. Mr. Grantham requested a sentence of 320 months rather than the low end, with the expectation that a

transitional period, such a work release program, would be to his benefit. RP 9, 21.

Additionally, Mr. Grantham presented evidence and argument that his youth, background, and individual characteristics at the time of the offense warranted a lower-end sentence. CP 45-56; RP 9-14, 17-22. He told the court about his difficult childhood and his overriding desire for approval from—and his fear of—his fellow gang members. *Id*. He demonstrated how his youth, with its attenuating immaturity, impulsivity, and poor judgment, and his difficult upbringing informed his actions the day of the offense. *Id*.

The court did not meaningfully consider any of these arguments. The court acknowledged "there wasn't any formalized way of accounting for" youth at the original sentencing, but stated, "However, what there was at the time that you were sentenced was a way of looking at past behavior beyond just the event that led to, in this case, a death." RP 22.

The court went on to list Mr. Grantham's criminal history, noting it must have "scared [the former judge] to death." *Id.*

Without further addressing any of Mr. Grantham's sentencing arguments regarding youth or other mitigating circumstances, the court imposed 404 months, reducing Mr. Grantham's sentence by 12 months solely "for the efforts that [he has] put in" to improve his life while in custody. RP 23.

On review, the Court of Appeals held the trial court did not abuse its discretion by refusing to consider Mr. Grantham's sentencing arguments. Slip Op. at 4. In a two-page analysis, the Court summarily distinguished *O'Dell* and *Monschke*, finding those cases irrelevant to Mr. Grantham because he is not serving a mandatory life without parole (LWOP) sentence, and because he did not request an exception sentence below the standard range. Slip Op. at 3-4.

E. ARGUMENT

The Court of Appeals' opinion incorrectly distinguishes *O'Dell* and *Monschke*, and superficially limits the discretion of sentencing courts to consider the traits of a youthful offender, warranting this Court's review.

In *O'Dell*, this Court recognized a fundamental truth about the psychological and neurological development of youthful adult offenders: the parts of the brain responsible for behavior control "continue to develop well into a person's 20s." 183 Wn.2d at 691-96. This Court acknowledged "a clear connection between youth and decreased moral culpability for criminal conduct" that "may persist well past an individual's 18th birthday." *Id*. at 695 (citing *Roper v. Simmons*, 543 U.S. 551, 574, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)).

Six years later, this Court further recognized that "no meaningful neurological bright line exists. . . between age 17 on the one hand, and ages 19 and 20 on the other hand." *Monscke*, 197 Wn.2d at 326. The *Monschke* court clearly stated that "sentencing courts must have discretion to take the mitigating

qualities of youth. . . into account for defendant younger and older than 18." *Id.*

The Court of Appeals' decision here conflicts with both *O'Dell* and *Monschke*, warranting this Court's review under RAP 13.4(b)(1) and (4). Additionally, the Court of Appeals' opinion further presents a matter of substantial public interest because it wrongly requires youthful offenders to request an exceptional sentence or face a mandatory LWOP sentence before a court must consider their youthfulness arguments, contravening RCW 9.94A.500(1). RAP 13.4(b)(4).

a. Courts must meaningfully consider youth as a mitigating factor before imposing a sentence on a youthful offender.

"When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2021). A court's outright refusal to consider a sentencing argument is error. *State v. Mutch*, 171 Wn.2d 646, 654, 654 n.1, 254 P.3d

803 (2011) (rejecting defendant's sentencing arguments without any analysis on the record may be error where record is not sufficient to sustain trial court's findings). Indeed, RCW 9.94A.500(1) requires the trial court to hear arguments from defense counsel and the offender prior to imposing its sentence. "This section of the statute forms a baseline—a minimum amount of information which, if available and offered, *must* be considered in sentencing." *State v. Mail*, 121 Wn.2d 707, 711, 854 P.2d 1042 (1993) (discussing RCW 9.94A.110, recodified as RCW 9.94A.500) (emphasis in original).

As the State conceded at resentencing, courts must consider youth and personal factors as mitigation when imposing a sentence on youthful offenders. *O'Dell*, 183 Wn.2d at 694-96; *Monschke*, 197 Wn.2d at 326; RP 16.

As discussed above, this Court has recognized the neuroscience demonstrating the parts of the brain responsible for behavior control continue to develop into a person's 20s, and prior to full maturity, youthful offenders' brains may suffer

from fundamental deficiencies "in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." *O'Dell*, 183 Wn.2d at 692. *O'Dell* makes clear that while the legislature has determined persons 18 and older may generally be equally culpable, sentencing courts must meaningfully consider the "particular vulnerabilities" of a youthful offender, such as impulsivity, poor judgment, and susceptibility to outside influences. *Id.* at 691, 696.

Where information about a young adult's youthfulness is "available and offered" at sentencing, the sentencing court must consider this information. *Mail*, 121 Wn.2d at 711. The failure to meaningfully consider youth as a mitigating circumstance requires reversal. *Id.* at 696-97; *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333-34, 166 P.3d 677 (2007); *State v. Grayson*, 154 Wn.2d 333, 342-43, 111 P.3d 1183 (2005).

b. The sentencing court failed to meaningfully consider Mr. Grantham's youthfulness prior to imposing its sentence.

Here, the court failed to meaningfully consider whether Mr. Grantham's youth, troubled upbringing, and individual characteristics at the time of the incident reduced his culpability and justified a lower sentence.

Mr. Grantham told the court he was only 20 years old when he shot the decedent and expressed his unequivocal remorse: "Today, my remorse and responsibility for that senseless act is something I could not admit to then because who I was then was someone living in denial in more ways than one." RP 17, 19.

He told the court about his volatile home life, which left him with uncontrollable anger and led him to seek acceptance and belonging with a gang. He addressed the hold the gang had on him and how he shot the victim "instantly and impulsively" because he feared the gang would punish him violently if he lost a fight. In short, Mr. Grantham identified the very

hallmarks of the young adult brain: impulsivity, poor judgment, and susceptibility to outside influences. *O'Dell*, 183 Wn.2d at 691.

Mr. Grantham requested a lower sentence of 320 months, citing his rehabilitation efforts in custody. RP 19-20; CP 45-56. While he believed he was ready for release, Mr. Grantham felt he would benefit from a transitional period prior to reentry, such as through a work release program. RP 9, 19. He explicitly did not request the low end of 312 months, demonstrating a hard-earned awareness that an abrupt transition out of incarceration would be difficult for him. RP 21.

The court did not meaningfully take into account Mr. Grantham's particular vulnerabilities. Although the court agreed "there wasn't any formalized way of accounting for that youth [at the original sentencing] like perhaps there is now," it did not provide any additional analysis or actually account for youth or other mitigating factors in its own sentencing decision. RP 22-23. Instead, the court noted, "what there was at the time

that you were sentenced was a way of looking at past behavior beyond just the event that led to, in this case, a death,"—that is, criminal history—and claimed that Mr. Grantham's history must have "scared Judge Sebring to death," justifying the high end sentence. RP 22-23. The court did not address how Mr. Grantham's criminal history, which his offender score already accounted for, could substitute for a meaningful analysis of youth, background, and personal characteristics as mitigators.

The court denied Mr. Grantham's request for 320 months but reduced his original sentence by 12 months, not because of his youthfulness, but for taking responsibility and for the efforts he had made towards rehabilitation. RP 23. This minimal reduction was entirely unrelated to any of Mr. Grantham's youthfulness arguments. *Id*. Indeed, other than acknowledging youth had not been considered at the original sentencing, the court did not mention youth or Mr. Grantham's background again.

Despite the sentencing court's refusal to consider Mr. Grantham's youthfulness argument, the Court of Appeals found no abuse of discretion. Slip Op. at 4. This Court should accept review and hold that sentencing courts must meaningfully consider the sentencing arguments presented by both the defendant and defense counsel. *Mail*, 121 Wn.2d at 711; RAP 13.4(b)(4).

c. The Court of Appeals opinion conflicts with, and artificially limits the application of, O'Dell and Monschke.

Contrary to the Court of Appeals' conclusion, *O'Dell* and *Monschke* are not irrelevant to Mr. Grantham simply because he is not serving a mandatory LWOP sentence and did not request an exceptional sentence. Slip Op. at 3-4. Ignoring Mr. Grantham's demonstrated growth and maturity in requesting a lower-end sentence to account for what will surely be a difficult transition back to the community, the Court of Appeals simply faults him for not requesting the right sentence. This reasoning is flawed.

In both *O'Dell* and *Monschke*, this Court adopted the findings of the neuroscientific community and recognized that "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." *O'Dell*, 183 Wn.2d at 695; *Monschke*, 197 Wn.2d at 321-25 ("Neuroscientists now know that all three of the 'general differences between juveniles under 18 and adults' recognized by *Roper* are present in people older than 18.").

Although *O'Dell* and *Monschke* considered youthfulness as it related to a request for an exceptional sentence and a mandatory LWOP sentence respectively, nothing in those cases limits the application of the available science to those scenarios alone. This Court's understanding of youthfulness and its impact on the culpability of a young adult applies generally to all youthful adult offenders.

In *Monschke*, this Court held that mandatory LWOP sentences for all persons 18 and older convicted of aggravated

murder were unconstitutional because such sentences prevent courts from exercising discretion to consider an individual defendant's characteristics. 197 Wn.2d at 326. This Court did not hold that youthfulness as a characteristic was relevant only because Monschke faced a mandatory LWOP sentence. Instead, it noted that "the variability in individual attributes of youthfulness are exactly why courts must have discretion to consider those attributes as they apply to each individual youthful offender." *Id.* at 323. That is to say, the individual attributes of youthfulness are always relevant to a sentencing court's consideration, contrary to the Court of Appeals' conclusion in this case.

The Court of Appeals' reasoning here is further belied by its own opinion in *State v. Mallis*, 15 Wn. App. 2d 1057, 2020 WL 7624769 (2020) (unreported, cited pursuant to GR 14.1). In *Mallis*, the defendant committed his offenses at 20 years old. *Id.* at *1. At sentencing, he requested a low-end sentence, emphasizing his own childishness at the time. *Id.* at *2. The

Court of Appeals found Mallis' attorney was ineffective for failing to cite *O'Dell* in support of his request for a low-end sentence. *Id*.

As the Court of Appeals itself recognized in *Mallis*, *O'Dell* and sentencing arguments about youthfulness are relevant to a sentencing court's consideration even where a defendant does not request an exceptional sentence or face a mandatory LWOP sentence. *Mallis*, at *2. If *O'Dell* and *Monschke* truly did not apply outside of those circumstances, an attorney could not be ineffective for failing to cite those cases under the circumstances presented in *Mallis*.

Rather, together with *Mail* and RCW 9.94A.500(1), *O'Dell* and *Monshke* clearly support the conclusion that sentencing courts must consider a defendant's youthfulness where the defendant presents such arguments. This is true regardless of whether the defendant seeks an exceptional sentence or faces a mandatory LWOP sentence. This Court should accept review to correct the Court of Appeals' mistaken

understanding of *O'Dell* and *Monschke*, and to ensure sentencing courts fully and meaningfully consider all arguments raised by defendants and their attorneys. RAP 13..4(b)(1), (4).

F. CONCLUSION

For the reasons stated above, this Court should accept review under RAP 13.4(b)(1) and (4).

Counsel certifies this document complies with RAP 18.17 and contains approximately 3377 words.

DATED this 22nd day of June 2023.

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES WILLIAM GRANTHAM, Appellant.	No. 56885-3-II UNPUBLISHED OPINION

PRICE, J. — James W. Grantham appeals from his sentence imposed following resentencing. Grantham argues the superior court erred by failing to meaningfully consider his youth as a mitigating factor. In his statement of additional grounds (SAG),[1] Grantham claims his criminal history improperly included a juvenile conviction committed before he was 15 years old. We affirm.

FACTS

In July 1994, Grantham was charged with first degree murder. Grantham was 20 years old at the time of the murder. In May 1995, a jury convicted Grantham as charged. Grantham's criminal history included two convictions for second degree rape, one conviction for second degree possession of stolen property (PSP), and one conviction for bail jumping. Grantham's criminal history also included two juvenile convictions: unlawful possession of a controlled substance (UPCS) and first degree robbery committed when Grantham was 14 years old. Grantham's

[1] RAP 10.10.

offender score was calculated as 6, resulting in a standard range of 312-416 months. Grantham was sentenced to 416 months' confinement.

In 2022, Grantham filed a motion to vacate his judgment and sentence and to be resentenced based on our Supreme Court's opinion in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Removing the juvenile UPCS conviction, the only one affected by *Blake*, from Grantham's criminal history did not change his offender score or standard range because the juvenile conviction, scored at only a half point, did not contribute to his offender score. *See* former RCW 9.94A.360 (1992) ("The offender score is the sum of points accrued under this section rounded down to the nearest whole number."). Nevertheless, the superior court held a resentencing hearing.

At the resentencing, Grantham did not seek a sentence below the standard range. Instead, Grantham asked the superior court to impose a standard range sentence of 320 months. In support of his request for a shorter sentence, Grantham pointed to his youth at the time of the crime. He also pointed to his efforts toward rehabilitation, including completing an associate's degree and getting licensed as a barber.

The superior court imposed 404 months' confinement—a 12-month reduction to the original sentence—based on Grantham's efforts toward rehabilitation.

Grantham appeals.[2]

ANALYSIS

I. CONSIDERATION OF YOUTH

Grantham argues that the superior court erred by failing to meaningfully consider his youth at his resentencing. Specifically, Grantham argues our Supreme Court's decisions in *Monschke*[3] and *O'Dell*[4] required the superior court to meaningfully consider his particular vulnerabilities as a youthful offender, "such as impulsivity, poor judgment, and susceptibility to outside influences." Br. of Appellant at 14.

However, because Grantham was not receiving a mandatory life without parole (LWOP) sentence and did not seek a mitigated sentence below the standard range, the authorities cited by Grantham did not require the superior court to undertake the type of consideration Grantham demands. Therefore, the superior court did not commit a reversible error at Grantham's resentencing hearing.

In *Monschke*, our Supreme Court held that it was unconstitutional to impose an LWOP sentence on an 18-, 19-, or 20-year-old offender without considering the mitigating qualities of

[2] The State points out that Grantham was not entitled to a resentencing hearing because his judgment and sentence was facially valid. However, the State concedes that it did not cross-appeal and this issue is not before this court. When a change in offender score does not change the standard range, the judgment and sentence is not facially invalid and a collateral attack on the judgment and sentence is not exempt from the one-year time bar pursuant to RCW 10.73.090(1). Order, *In re Pers. Restraint of Richardson*, No. 101043-5 (Wash. Sup. Ct. Nov. 14, 2022), https://www.courts.wa.gov/opinions/pdf/1010435.pdf. But because the State did not cross-appeal, we do not address the validity of Grantham's resentencing.

[3] *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021).

[4] *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

youth. 197 Wn.2d at 325-36. Although Grantham was 20 years old at the time he committed his offense, he did not receive a mandatory LWOP sentence. *See In re Pers. Restraint of Kennedy*, 200 Wn.2d 1, 24, 513 P.3d 769 (2022) (holding that *Monschke* is not material to the sentences of youthful offenders who were not convicted of aggravated first degree murder or sentenced to mandatory LWOP). Therefore, *Monschke* is not relevant to Grantham and imposes no requirement on the superior court to meaningfully consider his youth.

In *O'Dell*, our Supreme Court recognized that the characteristics of an offender's youth may contribute to a defendant's crime and diminish the defendant's culpability. 183 Wn.2d at 695. Therefore, the *O'Dell* court held that an offender's youthfulness is a mitigating factor that can support a sentence below the standard range. *Id.* at 696. And the superior court "must be allowed to consider youth as a mitigating factor" when sentencing youthful offenders. *Id.* at 696. Thus, a superior court errs by failing to consider a request for a mitigated sentence or when it bases its decision on the " 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.' " *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (alteration in original) (quoting *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007)); *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Here, Grantham did not request a mitigated sentence below the standard range; he requested a sentence within the standard range. Accordingly, like *Monschke*, *O'Dell* has no relevance to Grantham. Therefore, nothing in these cases compels the conclusion that the superior court abused its discretion.

II. OFFENDER SCORE

In his SAG, Grantham claims that the superior court erred in relying on his prior juvenile conviction for first degree robbery. We disagree.

To the extent Grantham is claiming that his offender score was incorrectly calculated, this claim fails. While, under former RCW 9.94A.360(4),[5] it is true that his juvenile conviction for first degree robbery (committed at age 14) should not have contributed to Grantham's offender score, there is no evidence that it did. Each of the second degree rape convictions would have counted for two points, and the bail jumping and PSP would each count as one point for a total of six points. Former RCW 9.94A.360(10).[6] Accordingly, Grantham's offender score was correctly calculated using only his adult convictions.[7]

[5] Under former RCW 9.94A.360(4), a prior juvenile conviction for a class A felony non-sex offense may only be included in the calculation of an offender score if the offender was 15 years old or older at the time of the offense.

[6] Former RCW 9.94A.360(10) provides:

> If the present conviction is for Murder 1 or 2, Assault 1, Assault of a Child 1, Kidnapping 1, Homicide by Abuse, or Rape 1, count three points for prior adult and juvenile convictions for crimes in these categories, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

[7] The State asserts that, at his original sentencing, the trial court counted the second degree rape convictions as the same criminal conduct and, therefore, Grantham's offender score was calculated based on two points for the rape convictions, one point for the bail jumping, one point for the PSP, and two points for the juvenile robbery conviction. The record before this court belies this assertion. Grantham's judgment and sentence includes a place to designate prior convictions counted as one offense and there is nothing noted there. And the record of the original sentencing hearing is not in the record before this court. Therefore, nothing clearly establishes that the two rape convictions were counted as the same criminal conduct.

Moreover, the State's calculation would be legally incorrect given that former RCW 9.94A.360(4) clearly states that juvenile offenses for Class A felony non-sex offenses are not

To the extent that Grantham is claiming that simply including a reference to the juvenile robbery conviction in his judgment and sentence was error, this claim lacks merit. Grantham relies on *In re Personal Restraint of LaChapelle*, 153 Wn.2d 1, 100 P.3d 805 (2004), to support his assertion that including an unscored conviction in the judgment and sentence is error. However, *LaChapelle* holds only that juvenile convictions committed before the offender was 15 years old cannot be counted in an offender score if the juvenile offense was committed prior to the amendment to the Sentencing Reform Act, chapter 9.94A RCW, that allowed such convictions to be counted. 153 Wn.2d at 12-13. Further, there is nothing in the record to establish that the court based its sentencing determination on Grantham's juvenile robbery conviction.

We affirm.

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 in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:

LEE, P.J.

CHE, J.

counted if the offender was under 15 at the time of the offense and Grantham's judgment and sentence designates the juvenile robbery conviction as "(LESS 15)." Clerk's Papers (CP) at 6. Counting the rape convictions separately and not counting the juvenile robbery conviction reaches the same offender score of six and is legally correct. Accordingly, we reject the State's asserted calculation of Grantham's offender score.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 56885-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Date: June 22, 2023

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