No. 102,628-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

Clinton Larry,

Respondent.

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

ANSWER TO STATE'S PETITON FOR REVIEW

KATE L. BENWARD
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
katebenward@washapp.org

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A. ANSWER

1. The State's appeal of the court's sentence is moot.

The State's claims raised in its petition for review are moot and this Court should deny review.

An appeal is moot when the reviewing court "can no longer provide effective relief." *In re Marriage of Horner,* 151 Wn.2d 884, 891, 93 P.3d 124 (2004) (quoting *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)).

During Mr. Larry's appeal he was released by the ISRB. The State's appeal of the court's sentence has no bearing on his release date, even if Mr. Larry were resentenced and the court removed the clause the State objects to about the firearm enhancements being subject to good time credit. The State's claims are mere academic disagreement with the Court of

Appeals about rulings that have no broader application.

Further, as discussed in section 3 below, the State's quibble with the Court of Appeals' denial of the State's motion to preclude the resentencing it had agreed to arose because the State agreed the superior court should resentence Mr. Larry under CrR 7.8, and the court granted his motion. The Court of Appeals decision does not concern any broader application of the laws governing collateral relief and is not an issue of continuing and substantial public interest meriting review. Because this Court can grant no effective relief to the State, it should deny review.

The issues Mr. Larry raises in his petition for review, by contrast, are not moot. If this Court granted review and relief to Mr. Larry, he would be entitled to a resentencing that complied with article I,

section 14, and was not tainted by prosecutorial misconduct. *See State v. Larry, Petition for Review,* no. 102628-5 (designating Mr. Larry as respondent), *filed* 12/07/23.

2. Making firearm enhancements subject to good time credit complies with *Houston-Sconiers'* mandate and does not infringe on the legislature's chosen punishment.

The State's petition for review confuses a court's authority to remove the mandatory requirements for the SRA enhancements and the DOC's ultimate decision about whether an individual in their custody is in fact eligible for good time. The court's order here concerns the former, not the latter, and is an entirely permissible exercise of the court's discretion to remove the "[t]he mandatory nature of these enhancements," which otherwise violate "Eighth Amendment protections." *State v. Houston-Sconiers*, 188 Wn.2d 1, 25-26, 391 P.3d 409 (2017).

The court's sentence that made the firearm enhancements *subject* to good time credit, is a departure below the standard range for firearm enhancements as explicitly provided for by *Houston-Sconiers*. *Id.* RCW 9.94A.533(3) contains several mandatory provisions: (1) the length of the confinement—five or three years; (2) that they "shall run consecutively to all other sentencing provisions;" and (3) this time shall be "served in total confinement." *Houston-Sconiers,* 188 Wn.2d at 18 (the SRA's sentence enhancements require mandatory, consecutive, flat time).

When applied to juveniles, "[t]he mandatory nature of these enhancements violates the Eighth Amendment protections." *Id.* at 25-26. Accordingly, sentencing courts "must have discretion to impose

any sentence below the otherwise applicable SRA range and/or sentence enhancements." *Id.* at 21.

This must necessarily include the statute's otherwise mandatory requirement that the enhancements be served in "total confinement." RCW 9.94A.533(3). "Total confinement"' means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day." RCW 9.94A.030(52).

Here, the sentencing court exercised its discretion to remove the statute's mandatory requirement that the firearm enhancements must be served "in total confinement," instead making them "subject to reduction for earned early release time" (good time) at the same percentage as counts I and II. CP 372, 374.

Making the firearm enhancements subject to earned early release time potentially reduces the time Mr. Larry would serve in total confinement, depending on whether the DOC finds him eligible for good time. This is well within the sentencing court's discretion to impose any sentence below the otherwise mandatory time required for sentence enhancements. *Houston-Sconiers,* 188 Wn.2d at 21.

Reducing the period of total confinement for firearm enhancements by making them subject to good time credit is no different than reducing the mandatory minimums otherwise required under RCW 9.94A.540. These mandatory minimums are addressed in RCW 9.94A.728(1)(j), which instructs the DOC not to release a person before service of these mandatory minimums. But there is no question that RCW 9.94A.728(1)(j) is inapplicable if the court

exercised its discretion under *Houston-Sconiers* to reduce RCW 9.94A.540's otherwise mandatory minimums. *See, e.g., Matter of Durham*, 20 Wn. App. 2d 1001, 2021 WL 5296317 at *3 (2021) (unpub.) (trial court has discretion to depart from RCW 9.94A.540's mandatory minimums when requested based on mitigating qualities of youth) (GR 14.1).

This Court's interpretation of the Eighth Amendment demands that sentencing rules not be read in isolation, but rather in a way that ensures fair and proportionate sentences for children, even when a sentencing provision appears to be mandatory. *See, e.g., State v. Gilbert*, 193 Wn.2d 169, 175, 438 P.3d 133 (2019). Sentencing courts have the obligation to treat all otherwise mandatory provisions of the SRA as discretionary when considering youth, and the requirement of "total confinement" under RCW

9.94A.533(3) is no different than the otherwise mandatory length and requirement they be served consecutively, regardless of RCW 9.94A.729.

The Court of Appeals' decision does not conflict with this Court's decision in *Matter of Forcha-Williams*, 200 Wn.2d 581, 589, 520 P.3d 939 (2022). This Court clarified: "any application of *Houston-Sconiers*' procedural elements to an indeterminate sentence must be tied to the substantive rule that prohibits imposing an adult standard range that would be disproportionate punishment for a juvenile who possesses diminished culpability." 200 Wn.2d at 595-96 (citing *In re Pers. Rest. of Ali*, 196 Wn.2d 220, 237, 474 P.3d 507 (2020)).

In other words, sentencing courts do not have "carte blanche to impose any sentence." *Id.* Rather, they have "absolute discretion to impose any sentence

below the SRA range or enhancements in order to protect juveniles who lack adult culpability from disproportionate punishment." *Id.* at 596 (citing *Matter of Domingo-Cornelio,* 196 Wn.2d 255, 265, 474 P.3d 524 (2020)).

Here, *Ali* and *Houston-Sconiers* control, not *Forcha-Williams,* because the court's sentence addresses the length of confinement, and seeks to ensure the minimum term Mr. Larry will serve in prison is proportionate to his diminished culpability. This potential reduction in the length of the enhancement based on good behavior is consistent with *Houston-Sconiers'* substantive rule addressing disproportionate punishment by reducing the child's sentence when they demonstrate good behavior. This reduces the length of confinement based on evidence

the child is amendable to change and rehabilitation consistent with *Houston-Sconiers*.

The State mischaracterizes the court's sentence in claiming there is a separation of powers issue. The State claims the Court of Appeals allowed the sentencing court to "order the Department of Corrections to award good time on the enhancements." Pet. for Rev. at 12. The court made Mr. Larry's enhancements *subject to reduction for earned early release time*. CP 373. This is not a *grant* of good time, and does not contravene the statutes that give DOC and the county jails authority to "grant good-time." *Matter of Williams*, 121 Wn.2d 655, 660, 853 P.2d 444 (1993); RCW 9.94A.729(1)(a) (the correctional agency establishes procedures for earned release time).

The sentencing court did not determine whether Mr. Larry in fact earned the good time credit, but rather, correctly reduced the otherwise mandatory requirement of "total confinement" by making it subject to good time credit as authorized by *Houston-Sconiers*.

The State's hypothetical of a court choosing not to apply the applicable statutory scheme bears no resemblance to the sentencing court's reduction of the total period of confinement for firearm enhancements in Mr. Larry's case. Pet. for Rev. at 12. Such cases would be governed by this Court's decision in *Forcha-Williams,* not *Houston-Sconiers*, at issue here.

The sentencing court exercised its discretion to reduce the mandatory length of total confinement if Mr. Larry demonstrated good behavior that would qualify him for earned early release credits. This

Court should deny review because trial courts' discretionary authority to reduce the otherwise mandatory term of total confinement follows *Houston-Sconiers*' requirements and meets no criteria for review.

3. The Court of Appeals found RAP 16.4(d) did not apply to Mr. Larry because the State conceded Mr. Larry was entitled to resentencing and the court granted his CrR 7.8 motion. This case does not involve any broader application about the scope of relief on collateral review as the State claims.

The State's concession to Mr. Larry's CrR 7.8 motion for resentencing resulted in the Court of Appeals' decision to not apply *In re Pers. Restraint of Hinton*, 1 Wn.3d 317, 525 P.3d 156 (2023) and *In re Pers. Restraint of Carrasco*, 1 Wn.3d 224, 525 P.3d 196 (2023) to deprive him of the sentencing hearing the State previously agreed he was entitled to. There is no broader concern about the uniformity of habeas

relief as the State contends in its petition for review. Pet. for Rev. at 5, 13. This Court should deny the State's petition.

After agreeing to Mr. Larry's resentencing, the State later claimed he was not entitled to the resentencing it had agreed to because RCW 9.94A.730 provided him an adequate remedy based on *Hinton* and *Carrasco*. The State waived this claim and invited any potential error by agreeing to Mr. Larry's resentencing and not raising this as an issue on appeal.

The State never argued Mr. Larry's CrR 7.8 motion seeking relief from the court's unlawful sentence after *Houston-Sconiers* should have been transferred as a PRP and never argued that RCW 9.94A.730 provided Mr. Larry an adequate remedy in the trial court.

Instead, "[t]he State conceded that [Mr. Larry] was entitled to a full resentencing." 7/16/21 RP 4. At this time, the State was also fully aware that Mr. Larry was subject to the ISRB, as the prosecutor had been involved in the process. 7/16/23 RP 5-6. The trial court is presumed to know the relief available under CrR 7.8. It accepted the State's concession and resentenced Mr. Larry.

Even if the State had a change of heart, it did not raise the issue in its cross appeal or challenge the court's resolution of the CrR 7.8 motion. The State did not assign error or argue the propriety of the CrR 7.8 motion in its cross-appeal. By its explicit agreement and failure to appeal the issue the State conceded the point that Mr. Larry was entitled to a resentencing pursuant to his CrR 7.8 motion.

Any claim the State now makes should be dismissed as invited error. A "party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal." *Ames v. Ames*, 184 Wn. App. 826, 849, 340 P.3d 232 (2014). A party invites the error when they affirmatively assented, materially contributed, or benefited from it. *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). Here the State affirmatively assented to the court's grant of Mr. Larry's CrR 7.8 motion, and therefore invited any error it now claims in its reply brief. Nor does the State claim RAP 2.5(a)(3) applies.

Hinton demonstrates the State invited the error here. In *Hinton,* the trial court transferred his CrR 7.8 motion to the Court of Appeals for consideration as a personal restraint petition. 525 P.3d at 158. The State argued to the Court of Appeals in 2017 that

"because Hinton has a meaningful opportunity for release pursuant to RCW 9.94A.730, a new sentencing hearing is not constitutionally required." *State's response* at 8, *Hinton,* No. 75194-8-I (Wash. App. Div. 1, 2019).

RCW 9.94A.730 was the same in 2017, when the prosecutor raised this issue in *Hinton*, as in 2021, when the prosecutor in Mr. Larry's case agreed he should be resentenced. CP 247; Laws of 2015 ch. 134. This was a live issue that the prosecutor in Mr. Larry's case could have argued in the trial court but did not.

This Court in *Hinton* held RCW 9.94A.730 provided Hinton an adequate remedy to a *Houston-Sconiers* violation because the State finally showed this Court how to correctly interpret the statute:

> But now, the State has brought to our attention the full effect of the remedy the

> legislature has provided in RCW 9.94A.730. Beyond providing an opportunity for parole, RCW 9.94A.730 has effectively reformed the sentences of juvenile offenders like Hinton by providing them with indeterminate sentences with a minimum term of 20 years and a presumption of release at each parole.

525 P.3d at 164. *Hinton* does not announce a new rule, but rather corrects its previous interpretation of RCW 9.94A.730.

Hinton clarified that *Ali*, 196 Wn.2d 220 and *In re Pers. Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 474 P.3d 524 (2020) only gave *Houston-Sconiers*' substantive rule retroactive effect. Therefore, the rule announced by *Houston-Sconiers* that applied retroactively to Hinton's case is the substantive rule that courts may not impose "certain adult sentences ... on juveniles who possess such diminished culpability that the adult standard SRA ranges and enhancements would be disproportionate

punishment." *Hinton*, 525 P.3d at 162. The fact that this Court did not overrule either *Ali* or *Domingo-Cornelio* and find RCW 9.9A4.730 was not an adequate remedy in all cases means this remains a case-specific question. The State waived this challenge in Mr. Larry' case.

Just as a defendant is barred from changing course and demanding relief based on a court's later, more favorable interpretation of a statute, the State cannot change course and demand relief after waiving an argument that "has always been available" to them. *See Matter of Henriques*, 14 Wn. App. 2d 199, 205, 470 P.3d 527 (2020).

The State's failure to make this claim to the trial court means this case-specific question was not adequately developed as required for meaningful appellate review by this Court. The result of the State

conceding to Mr. Larry's resentencing is that he and the State both appealed from a judgment and sentence entered after the court resentenced him. The Court of Appeals correctly held Mr. Larry is not required to show other remedies are inadequate as is required for a personal restraint petition. RAP 16.4(d).

Regardless, *Hinton* does not categorically bar a resentencing for people eligible for release under RCW 9.94A.730 as the State believes. Rather, the *Hinton* majority stated, "RCW 9.94A.730 cannot provide an adequate remedy under all circumstances" where a child has been sentenced as an adult to an unconstitutionally disproportionate punishment. *Hinton,* 515 P.3d at 159 (citing *Ali,* 196 Wn.2d at 246). For instance, if a juvenile offender is sentenced to 20 years or fewer, RCW 9.94A.730 provides "no

relief at all." *Id.* (citing *Domingo-Cornelio*, 196 Wn.2d at 269 n.8). Likewise, it would provide inadequate relief for a juvenile offender subsequently convicted of crimes. *Id.*

Hinton is not an absolute bar to resentencing when the court's sentence does not comply with *Houston-Sconiers*. As discussed above, the State never sought to transfer Mr. Larry's CrR 7.8 motion to the Court of Appeals as a PRP and did not argue RCW 9.94A.730 provided an adequate remedy in Mr. Larry's case. The State did not challenge the trial court's grant of Mr. Larry's CrR 7.8 motion and resentencing and so there was not a question of whether RCW 9.94A.730 provided Mr. Larry an adequate remedy. The Court of Appeals' decision does not concern any broader issues about the application of RAP 16.4(b), which the Court of Appeals correctly

found did not apply to Mr. Larry's appeal from the resentencing hearing *after* the State conceded and the trial court granted his CrR 7.8 motion.

B. CONCLUSION

This Court should deny review of the State's petition for review. The State's claims it makes now after conceding Mr. Larry was entitled to the resentencing are foreclosed because the State failed to make the claim below and the trial court granted his CrR 7.8 motion and resentenced him. The court's sentence that made Mr. Larry's firearm enhancements subject to good time is moot, and fully complies with *Houston-Sconiers*. The State's petition meets no criteria for review and should be denied.

DATED this 5th day of January 2024.

In compliance with RAP 18.17, this document contains 2,705 words.

s/ Kate Benward-WSBA # 43651
Washington Appellate Project
1511 Third Ave, Suite 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
E-mail: katebenward@washapp.org

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☒ Petitioner Pamela Loginsky, DPA
[pamela.loginsky@piercecountywa.gov]
[pcpatvecf@piercecountywa.gov]
[pcpatcecf@piercecountywa.gov]
Prosecuting Attorney Pierce County

☐ Attorney for other party

TREVOR O'HARA, Legal Assistant
Washington Appellate Project

Date: January 5, 2024

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