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NO. 30279-2 -III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JOEL RODRIGUEZ RAMOS,

Appellant.

APPELLANT'S OPENING BRIEF

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Seattle, WA 98104-1925
(206) 224-8777
Attorney for Appellant
Joel Rodriguez Ramos

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ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Ramos' request for a full resentencing.
2. The trial court erred in denying Mr. Ramos' CrR 7.8 motion.
3. The trial court erred in ruling that *Mulholland* could not be applied to Mr. Ramos via either a full resentencing or a CrR 7.8 motion.
4. The trial court erred in ruling that the logic of *Roper v. Simmons*¹ and *Graham v. Florida*,² and RCW 9.94A.540, holding that adolescent brain development is a relevant mitigating factor for trial courts to consider at sentencing even in the most heinous murder case, could not be applied to Joel Ramos via either a full resentencing or a CrR 7.8 motion.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in denying the CrR 7.8 motion to vacate Joel Ramos' 80-year sentence and for a complete resentencing, where the 1993 sentencing judge believed he lacked discretion to impose a lower sentence but new, retroactively applicable, controlling authority – *In re Mulholland*, 161 Wn.2d 322, 327-28, 166 P.3d 677 (2007) – holds that

¹ *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

² *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

there is such discretion to run serious violent offenses (like those of which Joel Ramos was convicted) concurrently?

2. Did the trial court err in denying the CrR 7.8 motion to vacate and for a full resentencing, despite the newly discovered, relevant, and mitigating evidence about adolescent brain development in general and Joel Ramos' adolescent brain development in particular, especially in light of the Supreme Court's holdings in *Roper* and *Graham* that such evidence is new, relevant to sentencing, and mitigating?

3. Did the trial court err in denying the CrR 7.8 motion to vacate and for a full resentencing, despite the newly discovered, relevant, and mitigating evidence about adolescent brain development in general and Joel Ramos' adolescent brain development in particular, especially in light of new legislation – RCW 9.94A.540 – recognizing that such evidence is new, relevant to sentencing, and mitigating?

4. Did the trial court's ruling that it could not revisit the length of Joel's 80-year sentence following appeal and remand conflict with the holding of *State v. Kilgore*³ and the language of RAP 2.5(c)(1)?

³ *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

STATEMENT OF THE CASE

I. INTRODUCTION

In 1993, Joel Ramos was charged in Juvenile Court with four counts of aggravated first-degree murder for the deaths of the four members of the Skelton family: the mother, the father, a 12-year old son and a 6-year old son. After several weeks of pretrial motions, discovery, and investigation, Joel Ramos – through counsel – waived a hearing on whether the Juvenile Court should decline jurisdiction; the case was transferred to Superior Court. 8/23/93 VRP:2.⁴

The Superior Court Information (CP:1-4⁵) listed the four murders as four separate crimes, but it contained only one count of premeditated first-degree murder along with three counts of first-degree felony murder. Information, CP:1-4. Joel then pled guilty, as charged. 8/23/93 VRP:20. On August 23, 1993, the court imposed a sentence of 20 years on each count, to run consecutively, for a total of 80 years, on the then 14-year old Mr. Ramos. 8/23/93 VRP:34. A summary of this case, bringing us to the 2011 resentencing proceeding, appears immediately below in Section II.

⁴ “DATE VRP:XX” refers to the specified page of the transcript or “verbatim report of proceedings” from the noted date.

⁵ “CP:XX” refers to the location of the cited document in the Clerk’s Papers.

Several things were missing from the first sentencing hearing, but those missing facts were supplied at the September 16, 2011, resentencing hearing. The main thing that was missing was a summary of Joel's neglect, immaturity, drug use, follower status, and personal losses, which predated this crime and help explain Joel's susceptibility to the influence of the older child who instigated this massacre. We summarize those pre-crime facts, presented at the resentencing, in this Statement of the Case at Section III.

At the time of the first sentencing, the Superior Court could not have predicted how Joel would fare in prison. But his exceptional history of positive prison behavior, learning, and emotional development are relevant to proving his earlier immaturity and hence his capacity to change and achieve rehabilitation. These factors were presented at the 2011 resentencing and supported by counsel's unrebutted declaration; those facts are therefore undisputed in this Court. Those facts about Joel's post-crime rehabilitation appear in Statement of the Case Section IV.

II. THE ORIGINAL TRIAL COURT PROCEEDINGS, THE APPEALS, AND THE REMAND ORDER

A. The Crime and the Charges

Joel Ramos pled guilty but supplied only a brief factual statement. A more detailed summary of the crime appears in the decision in his co-defendant's appeal, *State v. Gaitan*, 1996 Wash. App. LEXIS 1159 (1996).

According to that decision, and consistent with Joel's statement, Joel Ramos and his friend, Miguel Gaitan, both 14, broke into the Skelton family home on March 24, 1993. They were armed with knives. Mr. Michael Skelton, who was disabled, confronted the burglars and was stabbed and beaten to death by the two young men. Mr. Gaitan then attacked and killed Mrs. Lynn Skelton in the bathroom shower. He stabbed her 51 times and also beat her with a baseball bat. Twelve-year-old Jason Skelton went to his mother's aid. Gaitan killed him as well; Jason's body was found near his mother's. *Gaitan*, 1996 Wash. App. LEXIS 1159 at *2.

According to that decision, and consistent with Joel's statement, the two boys searched the house for items to steal. They found six-year-old Bryan Skelton in his bedroom and told him to go to sleep. They pulled the bedcovers over his head and then, according to both of them, Joel hit Bryan over the head with a piece of wood. *Gaitan*, at *8; Defendant's Statement on Plea of Guilty, CP:6-12.

Another inmate, Daniel Miralez, testified that Gaitan admitted that he was the one who had committed the murders. The two boys then loaded the cars with items from the residence, but abandoned that plan when they discovered the cars had manual transmissions. *Gaitan*, at *7.

An acquaintance of both Miguel Gaitan and Joel Ramos also testified that Gaitan told him he had kicked in the Skeltons' door, beaten and stabbed Mr. Skelton, and taken some jewelry and a boom box. *Id.*, at *6.

B. The Guilty Plea

Joel was originally charged in Juvenile Court with four counts of aggravated first degree murder. He waived his right to a decline hearing. 8/23/93 VRP:2-7. Joel then pled guilty. 8/23/93 VRP:20. His Statement on Plea of Guilty reads as follows:

March 24, 1993, in Yakima County, Miguel Gaitan and I walked across a field to the Skelton residence in Outlook, Washington. It was about 10:00 or 11:00 P.M. We had knives and a plan to break in and rob. When we broke into the mobile home, Miguel went in first and I went in second. We were confronted by Mr. Skelton and a struggle took place and Mr. Skelton was killed. Mrs. Skelton was killed in the bathroom and Jason Skelton was killed nearby. During this time and at one point, I ran outside. But then I ran back in. Later while inside I picked up a piece of firewood and hit Brian Skelton in the head with it so he could not identify us later. The medical reports say that the blow killed him. We then took some personal property from the home and ran away.

CP:10-11. The state recommended the low end of the sentencing range, that is, 80 years. 8/23/93 VRP:26. Defense counsel made the same recommendation, though the guilty plea (CP:6-12) did *not* require them to

do so. 8/23/93 VRP:27. The court accepted that recommendation and imposed a total sentence of 80 years. 8/23/93 VRP:34.

C. Post-Conviction Proceedings

Joel Ramos' right to appeal was reinstated by the Washington Supreme Court on March 7, 2008. On the direct appeal that followed, the Court of Appeals affirmed. *State v. Ramos*, 152 Wn. App. 684, 217 P.3d 384 (2009).

The Washington Supreme Court reversed in part and remanded to the Court of Appeals for further consideration of a community supervision issue. *State v. Ramos*, 168 Wn.2d 1025, 230 P.3d 576 (2010). The Court of Appeals in turn remanded to the Superior Court to amend the Judgment to specify the length of community supervision – not for a resentencing hearing. *State v. Ramos*, 2010 Wash. App. LEXIS 1338 (June 22, 2010).

Joel Ramos again petitioned for review, this time asserting that the remedy was remand for resentencing, not for the ministerial “clarif[ication of] the term of community placement” that this Court had ordered. The Washington Supreme Court agreed. It explained that “The Court of Appeals indicated in its opinion that resentencing was not required and that the trial court need only enter an order clarifying or amending the judgment and sentence.” *State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011). The Supreme Court then ruled that the resentencing was not a ministerial

matter, but required the exercise of discretion, and, hence, a real resentencing hearing was required. *Id.*

Prior to the resentencing hearing, defense counsel filed a CrR 7.8 motion to obtain a full resentencing and a sentence below the standard range citing new state Supreme Court law (*Mulholland*), new U.S. Supreme Court law (*Roper* and *Graham*), and new state law (RCW 9.94A.540), and based upon newly discovered evidence about adolescent brain development. The defense also filed a resentencing memo and statement regarding the scope of the resentencing hearing citing the same authority and the same newly discovered evidence. Both the CrR 7.8 motion and the resentencing memo presented information concerning Joel Ramos's immaturity as a 14-year-old, the difficulties he faced as a young teen, his exceptional rehabilitation during his incarceration at the juvenile facility, and his excellent prison performance as an adult. This information was not challenged by the state, and remains unrebutted. CP:18-260 (CrR 7.8 Motion); CP:266-508 (Resentencing Memo).

III. AT RESENTENCING, THE DEFENSE PRESENTED UNDISPUTED EVIDENCE THAT THE 14-YEAR-OLD JOEL RAMOS WAS A NEGLECTED, IMMATURE, FOLLOWER WITH A DISASTROUS HOME LIFE

The unrebutted evidence before the resentencing court showed that before this crime, Joel Ramos had an unstable home life with little

parental involvement. He felt that the person who understood him best was his sister Betty – but she died unexpectedly when Joel was 12. At about the same time, Joel underwent a significant personality change, began hanging around with gang members, and began smoking marijuana.

A. The Undisputed Evidence Shows That Joel had an Unstable Home Life with Little Parental Involvement

Before Joel waived his right to a decline hearing, the probation counselor completed an investigation and report. It documented a disruptive home life and unstable living situation.⁶ Joel's father had left home when Joel was 3 years old, and Joel never knew him.⁷ Joel lived primarily with his mother, who spoke no English.⁸ The counselor called their home run-down and ill-kept: "It has few of the amenities found in even the more modest homes. Under the most generous terms it could best be described as a hovel."⁹

⁶ CP:87-94, Probation Counselor's Report, 5/25/93.

⁷ CP:88, Probation Counselor's Report, 5/25/93; *see also* CP:106-07, Chrono Report 4/12/00 ("He reports his father left at age 3 and he has no memory of him.").

⁸ CP:106-07, Chrono Report 4/12/00 ("He [Joel] said ... she had no schooling, spoke only Spanish in the home, and had a hard time connecting with a young boy in today's society.").

⁹ CP:91, Probation Counselor's Report, 5/25/93.

Joel had five adult siblings; the next-youngest was 13 years older than Joel.¹⁰ Mrs. Rodriguez would return to Mexico periodically for visits for 3-4 months. Joel did not go with her, but would stay with his brothers and sisters in Chelan, Toppenish, and Wenatchee. He would attend school in those districts for brief periods of time.¹¹

During his early elementary years, Joel was kept back in second grade, partly because of difficulties with speaking English.¹² His summer school teacher also observed: “Student comes from a background that offers almost no opportunity for social or cultural stimulation.”¹³

B. The Undisputed Evidence Shows that the Death of Joel’s Sister was a Traumatic Event

In 1993, Joel told the probation counselor that his sister Betty was the person who understood him best.¹⁴ He described Betty to DOC staff as “the only one in his family who liked him.”¹⁵

¹⁰ CP:88, Probation Counselor’s Report, 5/25/93. *See also* DOC Psychological Evaluation, 11/6/97 (“Mr. Ramos ... was the youngest of seven siblings, but may not have had much contact with his older brothers and sisters.”) (This record was not filed in the Superior Court for privacy reasons, but will be provided to this Court upon request).

¹¹ CP:89, Probation Counselor’s Report, 5/25/93.

¹² CP:113, Light’s Retention Scale, 5/19/87 (“Student has little or no knowledge of the English language and is not acquiring new skills.”).

¹³ CP:114, Light’s Retention Scale, 5/19/87.

¹⁴ CP:92, Probation Counselor’s Report, 5/25/93.

¹⁵ CP:106, Chrono Report, 4/12/00.

But Betty died after a brief, surprising, illness in 1991. She was 25 and had three children. The probation counselor noted the unresolved trauma this caused for Joel: "This appeared to bother Joel very much but upon questioning it appears her death was not talked about or the grief ever resolved."¹⁶ DOC staff noted the same thing: "It appears it was very traumatic for him but there was no counseling."¹⁷

C. The Undisputed Evidence Shows that Joel Suffered a Significant Personality Change After his Sister's Death, Between 6th and 7th Grades

After Betty's death, reports from school and home reflect that Joel's personality changed swiftly, and for the worse. Early elementary school reports reflect "no history of antisocial behavior."¹⁸ Joel's mother reported that through his last year in elementary school, he still played with GI Joes, cars, and Ninja Turtles.¹⁹ One of his sixth grade teachers described him as "A wonderful kid, who created no disciplinary problems, showed no signs of temper or violence, aggression or drug abuse."²⁰

¹⁶ CP:88, Probation Counselor's Report, 5/25/93. *See also* CP:128, Letter from Department of Assigned Counsel to Division of Juvenile Rehabilitation, 8/26/93 ("Oftentimes Joel was incredibly lonely, particularly after his beloved sister Betty died.")

¹⁷ CP:106, Chrono Report, 4/12/00.

¹⁸ CP:116, Light's Retention Scale, 5/19/87.

¹⁹ CP:88, Probation Counselor's Report, 5/25/93.

²⁰ CP:127, Letter from Department of Assigned Counsel to Division of Juvenile Rehabilitation, 8/26/93.

Another sixth grade teacher described him as “quiet in class, but friendly, with a ready smile and a good personality.”²¹

Yet, while attending Toppenish Middle School from 2/3/92 to 4/27/92, he was referred 6 times for abusive language, disruptive behavior, tardiness, and refusing to change for P.E. class.²² Joel then withdrew to return to Granger Middle School.

The Granger Middle School counselor, Mrs. Schenk, provided details about Joel’s change to the probation counselor; she stated: “Joel did not share much of his life ... this was a significant change from 6th to 7th grade. In 6th grade Joel was always friendly and smiled. In 7th grade Joel started to affect the posture and attitude of gang members. He appeared very cocky and would affect the exaggerated walk.”²³ His grades also deteriorated: “Joel’s schooling has gone from adequate in the 6th grade to nonexistent in the 7th grade.”²⁴

The probation counselor noted that communication between Joel and his mother also deteriorated in this time period: “It appears there was

²¹ CP:128, Letter from Department of Assigned Counsel to Division of Juvenile Rehabilitation, 8/26/93.

²² CP:91, Probation Counselor’s Report, 5/25/93.

²³ CP:90, Probation Counselor’s Report, 5/25/93.

²⁴ CP:92, Probation Counselor’s Report, 5/25/93.

a lessening of communication between Joel and his mother over the last 2 years. Joel did not talk to Mrs. Rodriguez about school or teachers.”²⁵

Then, after Betty died, Joel began hanging around with gang members and smoking marijuana. In 6th grade, Joel began a friendship with Miguel Gaitan, his codefendant in these crimes.²⁶ Joel’s mother did not like Miguel, but occasionally allowed him to stay overnight in their home.²⁷ Miguel and Joel joined the Bell Garden Locos gang around the same time.²⁸ The probation counselor reported that Joel’s association with the “Bell Garden Locos” gang appeared to be recent, within the last 6 months to a year.²⁹ As a new member, Joel had little status in the gang.

While in pre-trial detention, Joel voluntarily entered the Exodus chemical dependency program. He then admitted that he had started smoking marijuana at age 12 and that his marijuana use had contributed to his truancy, decrease in grades, and trouble with the principal.³⁰ Joel reported to one police officer that he was stoned on the night of the crimes.³¹

²⁵ CP:89, Probation Counselor’s Report, 5/25/93.

²⁶ CP:92, Probation Counselor’s Report, 5/25/93.

²⁷ CP:89, Probation Counselor’s Report, 5/25/93.

²⁸ CP:92, Probation Counselor’s Report, 5/25/93.

²⁹ CP:91, Probation Counselor’s Report, 5/25/93.

³⁰ CP:123-24, Substance Abuse Evaluation, 5/20/93 F.

³¹ CP:126, Incident Report, 5/3/93.

The probation counselor noted the probable connection between his disastrous home life and other events: "Joel's usage of drugs/alcohol has no doubt contributed to the low functioning in both school and at home. Joel's association with gangs also seems to stem from his dissociation from the family and school."³² Upon his arrival at Maple Lane School, Joel himself acknowledged the connection: "Joel said that he was an A/B student in the 6th grade. He believes his grades began to decline when he began to associate with gang peers."³³

D. The Majority of Evidence – All Undisputed – Shows that Joel was a Follower

Joel has consistently stated that he did not have a plan to kill anybody that night. His Statement of Defendant on Plea of Guilty admits that there was a plan to "break in and rob." CP:10. Joel followed his co-defendant into the mobile home. *Id.* He was so shocked and scared that night that he ran out of the house twice during the events. CP:11.

This is consistent with all the available data about Joel's personality at that time. School records, school teacher and counselor reports, and the substance abuse counselor's reports all indicate that Joel was a follower, not a leader, and generally took the path of least resistance. For example, Joel was disciplined at Granger Middle School

³² CP:92, Probation Counselor's Report, 5/25/93.

³³ CP:130, DJR Initial Treatment Report, 12/1/93.

for vandalism – although the spray painting was done by another student, Joel was present and following the other student.³⁴

Similarly, one of Joel's teachers, Mr. Whittley, knew him fairly well because he had him in three classes.³⁵ Mr. Whittley felt that Joel would follow the lines of least resistance and agree to do "whatever" but only to the extent to get himself out of an uncomfortable situation.³⁶ The school counselor also felt that Joel always took the easy way out.³⁷

Chemical dependency professionals provided the same analysis of the pre-14 and 14-year-old Joel. They reported that he was easily influenced by others.³⁸

Even DOC records and the records of Joel's behavior at the Maple Lane School confirm Joel's role as a follower. The Washington Corrections Center (WCC) intake questionnaire notes "He is a follower – not a leader."³⁹ His Maple Lane counselor wrote: "Joel came to us as an unsophisticated, immature, 14 year old, who was easily influenced by negative peers."⁴⁰

³⁴ CP:119, Discipline Record, 3/12/93.

³⁵ CP:90, Probation Counselor's Report, 5/25/93.

³⁶ CP:90, Probation Counselor's Report, 5/25/93.

³⁷ CP:90, Probation Counselor's Report, 5/25/93.

³⁸ CP:124, Substance Abuse Evaluation, 5/20/93.

³⁹ CP:97, WCC Intake Questionnaire.

⁴⁰ CP:141-42, JRA Treatment Report, 9/26/96.

E. The Undisputed Evidence Shows that Joel's Reading and Comprehension Ability were Poor at Age Fourteen

There is also evidence that Joel's reading and comprehension ability were poor at age 14. Joel began elementary school behind in his English language skills, and he was slow to improve. As noted above, in Section III (A), he was held back in second grade for this reason. A standardized test given in 1991, two years before the crime, indicated that his reading skills were at the early third grade level (3.1), almost three years behind his actual grade level at the time (5.8).⁴¹

Even in 7th grade, Granger Middle School teacher Mr. Whittley felt that Joel had poor reading skills.⁴² Mr. Whittley had good reason to be familiar with Joel's reading ability – not only did he have Joel for three classes, but on 2/11/93, Mr. Whittley referred Joel for discipline for “refus[ing] to read during SSR.”⁴³ Mr. Whittley suggested that Joel be assigned to read after school with him. It appears his recommendation was followed – the “action taken” section of the record indicates that “Joel read an article in a YM magazine and is doing a report on it.”⁴⁴

⁴¹ CP:120, CTBS Comprehensive Test of Basic Skills, 6/17/91.

⁴² CP:90, Probation Counselor's Report, 5/25/93.

⁴³ CP:118, Discipline Record, 2/11/93.

⁴⁴ *Id.*

At age 18, DOC records indicate that Joel still had some language challenges – he had difficulty interpreting simple proverbs.⁴⁵

F. The Undisputed Evidence Shows that Maple Lane School Staff Considered Joel Immature for His Age During His Entire Stay There

Maple Lane School records indicate that the professional staff who worked closely with Joel considered him immature and dependent for his age.⁴⁶ After his first year at Maple Lane his counselor, Ms. Schouviller, wrote: “Joel is an immature and dependent 15-year-old youth who thrives on the attention and positive reinforcement from JRA staff.”⁴⁷ Two years after the crime, his counselor continued to feel that Joel was immature for his age. In the six-month review dated June 30, 1995, Ms. Schouviller wrote: “Joel turned 16 years old on 2-27-95, his maturity is of an adolescent, much younger.”⁴⁸

⁴⁵ DOC Psychological Evaluation, 11/6/97. *See also* CP:107, Chrono Report, 4/12/00 (“R made it to the 7th grade but was doing poorly. He said he couldn’t read and write and really had no idea or comprehension of the proceedings against him for this crime. ... It is apparent in questioning him about some of the things in his file, that he is uninformed about what went on during the time of conviction; i.e. who told who what and how his name got in the mix.”).

⁴⁶ CP:134, 6/27/94 Six Month Classification Referral (“Joel has presented himself as a very immature and dependent youth.”).

⁴⁷ CP:136, 12/21/94 Classification Referral.

⁴⁸ CP:138, 6/30/95 Treatment Report.

When juveniles turned 17, it was customary to transfer them to adult supervision. But Joel's counselor, Paul Luttrell, felt that his lack of maturity made Maple Lane the more appropriate institution for him:

Joel's emotional level is still behind his chronological age and he fits in well with out [sic] current population. It is my recommendation that he remain in Maple Lane School's custody even though he is currently 17 years old. I feel Joel is still too open to be abused or used by more sophisticated inmates in a DOC institution.⁴⁹

Once Joel reached age 18, he could no longer remain at Maple Lane, regardless of his maturity level. However, DOC felt it was more appropriate to send him to the Youth Offender Program for 8 months, even though he was already 18 and been incarcerated for four years.⁵⁰

IV. AT RESENTENCING, THE DEFENSE ALSO PRESENTED UNDISPUTED EVIDENCE OF JOEL'S POST-CRIME POSITIVE BEHAVIOR, LEARNING, AND EMOTIONAL DEVELOPMENT – THUS CONFIRMING HIS PRIOR IMMATURITY

At the combined resentencing/CrR 7.8 hearing, the defense also presented undisputed evidence that Joel worked hard to rehabilitate himself, despite his lengthy sentence and little hope of seeing release. Beginning at the Maple Lane School and continuing through his present incarceration at Airway Heights Correctional Center, he has taken

⁴⁹ CP:140, 3/18/96 Treatment Report.

⁵⁰ CP:108, Chrono Report, 6/23/97.

advantage of every educational opportunity available to him, and he has consistently maintained employment, and he has undertaken significant volunteer work. Joel is recognized for his positive attitude, and serves as an inspiration to other inmates.

A. The Undisputed Evidence Shows Joel Turned His Life Around at the Maple Lane School

The juvenile rehabilitation program at Maple Lane School gave Joel the tools and ability to turn his life around. But it could not have been successful without Joel's desire to become a better person. The initial treatment report memorializes Joel's positive attitude, even as he began his life of incarceration:

At this time he is accepting of his situation at Maple Lane. It appears that he is open to treatment. Joel has a very lengthy sentence and states that he would like to complete his education and develop a better relationship with his mother and God. It would be very beneficial for him to develop a good and strong counseling relationship as he has many issues to work through and he displays a positive attitude in resolving some of them.⁵¹

At his first 6-month review, Joel's counselor observed that he was on the highest privilege level for his custody and maintaining a high daily performance.⁵² She also remarked on Joel's positive response to treatment

⁵¹ CP:132, DJR Initial Treatment Report, 12/1/93.

⁵² CP:134, Classification Referral, 6/27/94.

– “Joel has presented himself as a very immature and dependent youth. He has been responsive to treatment as of this writing.”⁵³

After a year at Maple Lane, Ms. Schouviller described Joel as “always exhibit[ing] a polite and respectful demeanor.”⁵⁴ She also praised his work ethic: “Joel continues to maintain high performance. ... Joel has shown responsibility and does a good job. The money he earns is all sent home to his mother.”⁵⁵ The counselor commented on how Joel seemed to be responding to the treatment he received at Maple Lane: “Joel is an immature and dependent 15-year-old youth who thrives on the attention and positive reinforcement from JRA staff. He is invested in treatment. Joel appears to need the understanding and treatment that JRA can provide.”⁵⁶

As Joel grew and matured, reports continued to be positive. That counselor reported that his grades were above average, and felt that this was a reflection of his interest in working towards his goal of completing high school.⁵⁷ Joel continued to attend all mandatory groups, and although the information was repetitive, he maintained interest and was

⁵³ *Id.*

⁵⁴ CP:135, DSHS Classification Referral, 12/21/94.

⁵⁵ CP:136, DSHS Classification Referral, 12/21/94. *See also* CP:111, DOC Records, Chrono Report 10/15/96 (“His counselor states in his month review that he has a great work ethic and always keeps a goal.”).

⁵⁶ CP:136, DSHS Classification Referral, 12/21/94.

⁵⁷ CP:137, DJR Six Month Review, 6/30/95.

receptive to treatment.⁵⁸ Her comments gave some specifics about his high performance:

Joel continues to be on Laurel Cottage IMU's highest level of achievement. He is an enjoyable youth, who had maintained good relationships with staff and his peers. He has made accomplishments in the academic setting. He also continues to meet all program expectations. Recently, Joel was given an award for his contribution to the Maple Lane School Cultural Fair held in May 1995.⁵⁹

Joel's second counselor, Paul Luttrell, made similar comments about Joel's performance, and also described how Joel dealt appropriately with negative feelings: "Joel maintained our highest level in the Maximum Security DOC program. ... Joel lost a lot of privileges due to the new program regulations. He has expressed his disappointment in these losses, but has done so in an appropriate manner."⁶⁰ In his final Maple Lane review, Counselor Luttrell describes how Joel had improved during his stay at the school and had begun to resist peer manipulation:

Joel came to us as an unsophisticated, immature, 14 year old, who was easily influenced by negative peers. We have seen a slow but steady rate of maturity take place illustrated by greater impulse control, anger management, and he is not as easily manipulated by negative peers.

⁵⁸ *Id.*; See also CP:139, DJR Treatment Report, 3/18/96 ("Joel is displaying some boredom with many of the groups as the material is repetitive, however, he is not disruptive and still participates when asked to directly.").

⁵⁹ CP:138, DJR Six Month Review, 6/30/95.

⁶⁰ CP:140, DJR Treatment Report, 3/18/96.

Joel has maintained our highest level in the cottage even when the rest of his peers have lost theirs. I have even seen Joel resist peers who are trying to set him up. Joel has asked the pastor for Catholic services when they are available. Joel has recently asked to have his tattoos removed, which are mostly gang-related.⁶¹

While at Maple Lane, Joel attended every available program, such as school, victim awareness and anger management programs, and recreational activities. He interacted positively with staff members and other juveniles. He earned all possible privileges, including extended family visits (EFVs) with his mother, and began the foundation of a healthy relationship with his mother. By the time he turned 18, Joel graduated high school with a 3.46 GPA⁶² and successfully completed his DOC case management plan.⁶³ He was described as a “model inmate.”⁶⁴

Before his incarceration at the Washington State Penitentiary (WSP), Joel took part in the Youth Offender Program offered at that time by the DOC. The instructor commended Joel for his contributions to other students, stating Joel “is a positive influence on his peers and volunteers to

⁶¹ CP:141-43, JRA Treatment Report, 9/26/96.

⁶² CP:144-45, Transcript.

⁶³ CP:108, DOC Records, Chrono Report 3/4/97.

⁶⁴ *Id.*

assist his peers in any manner possible.”⁶⁵ At the end of the program, staff noted that Joel was “an asset to the program and big help to the staff.”⁶⁶

B. The Undisputed Evidence Shows Joel Pursued Any Available Educational Opportunity

Transferred into DOC custody at age 18, Joel continued to take advantage of any educational opportunity available. He completed courses in vocational skills, self-improvement, stress and anger management, and relationship skills. Certificates of completion for numerous programs were presented to the Superior Court and are contained in CP:147-60 as Appendix H. They cover his years in prison, and topics as varied as anger management and anxiety management to furniture upholstery.

C. The Undisputed Evidence Shows That Joel’s Positive Attitude is Recognized by DOC Staff and Other Offenders

Upon his transfer to DOC custody, Joel’s positive adjustment was noted by DOC classification staff. He was recommended for medium custody due to “several years of positive adjustment and his age.”⁶⁷ After two months in DOC custody, prison staff described him as “respectful.”⁶⁸

⁶⁵ CP:98, DOC Records, Observation Report 5/21/97.

⁶⁶ CP:108, DOC Records, Chronos Report 6/23/97.

⁶⁷ CP:108, DOC Records, Chrono Report 6/23/97.

⁶⁸ DOC Records, Psychological Evaluation 11/6/97.

Joel has successfully maintained employment while incarcerated. Supervisors have noted his positive work ethic, reliability and promptness.⁶⁹ His most recent performance evaluation is no exception; in fact, his supervisor considers him a valued employee.⁷⁰

Although Joel was granted the privilege of EFVs at Maple Lane, WSP originally denied them because of his lengthy sentence. But the Superintendent reviewed Joel's programming and record and approved EFVs⁷¹ with unit team support: "[Ramos] has been programming positively. He has had 48 hour EFV's with his mother in 2009 and 2010 without incident ... Ramos has not received any serious infractions and has not been a problem in the unit. I recommend approval"⁷²

D. The Undisputed Evidence Shows That Joel's Change for the Better is Recognized by Family and Friends

Friends and family wrote numerous letters of support for Joel. CP:161-254, Appendix I. These letters all describe Joel's positive attitude

⁶⁹ DOC Records, Chrono Report 8/31/98, Appendix E ("Successfully completed: Will be prepared for work and show up on time; ... Continue with positive work ethic skills learned at Maple Lane; ... Will obtain work referral from counselor and check in to designated work program; ... Will show up on time for in the proper attire and ready to work.; ... Will participate in work program with no unexcused absences; ... Complete all group and home work on time and be prepared for group sessions; ... Turn in all homework assignments as requested.").

⁷⁰ CP:101, DOC Records, Offender Performance Evaluation 1/18/11.

⁷¹ CP:99, DOC Records, Memo re Appeal of Denial of EFVs 7/18/00.

⁷² CP:102, DOC Records, Memo re: Extended Family Visits 3/7/11.

and caring nature. Some letter writers describe his sincere motivation to better himself, and/or the change in him that they have personally witnessed.

Joel has also served as a role model and inspiration for positive change for other inmates. CP:161-254, Appendix I.

E. The Undisputed Evidence Shows That Joel has Tried to Disassociate from Gangs and Helps Young Offenders Avoid the Gang Lifestyle

Joel's former association with a gang has followed him relentlessly throughout his incarceration, despite his attempts to dissociate himself. In January, 1997, Joel asked to have his tattoos removed.⁷³ Upon his transfer to DOC custody, Maple Lane staff described him as a "model inmate"; his records show that he acted as a Spanish interpreter, he received his high school diploma, and there were no medical or mental health concerns.⁷⁴ No mention is made of Joel having any gang association.⁷⁵

After Maple Lane, Joel was in the Youthful Offender Program. He graduated in June, 1997, and returned to DOC. At his initial classification hearing, his records from the Youth Offender Program and Maple Lane were reviewed. The Unit Team noted his successful completion of that program and singled out the fact that, "He has been an asset to the

⁷³ CP:109, Chronos Report, 1/13/97.

⁷⁴ CP:108, Chronos Report, 3/4/97.

⁷⁵ *See id.*

program and big help to the staff interpreting for Spanish speaking youth.” The also listed his other educational and rehabilitative accomplishments: “completed his case plan at JR and has completed his high school education and received his diploma. He has completed anger stress management, victim awareness, and chemical dependency to name a few. ... Even though his crime would keep him at close custody for his first five years he has spent most of that in a close custody unit at Maple Lane – Medium is recommended due to several years of positive adjustment and his age.⁷⁶ This report did not reference any gang affiliation.

F. The Undisputed Evidence Shows That Joel Helps DOC Staff and Offenders by Serving as a Volunteer Translator

Beginning at Maple Lane School, Joel helped DOC staff and other juveniles by acting as a Spanish interpreter.⁷⁷ In the Youth Offender Program, Joel continued to act as a translator, and also helped other youths.⁷⁸ Joel continued to act as a translator for DOC staff thereafter.⁷⁹

G. The Undisputed Evidence Shows That Joel Helped Create a Juvenile Offender Support Group for Juveniles Sentenced as Adults

⁷⁶ CP:108, Chronos Report, 6/23/97.

⁷⁷ CP:108, Chrono Report, 3/4/97.

⁷⁸ CP:98, Observation Report, 5/21/97.

⁷⁹ See, e.g., CP:106, Chrono report, 7/12/00.

The undisputed evidence even shows that Joel took the initiative to obtain the help of the mental services staff at Airway Heights to start a weekly support group for juveniles serving adult time. The group inspires each other to maintain positive growth, and explores ways of “stopping the cycle” outside of prison with youth at risk.⁸⁰ The group started with 3 members, and is now up to 10.⁸¹ Juvenile offenders who are familiar with the support group credit Joel with starting it and imbuing it with a positive feeling and goal.⁸²

Although all of the information summarized in this Section IV and Section III above was fully supported in both the sentencing memo and the CrR 7.8 motion, and totally undisputed, none of it was considered at Joel’s 2011 resentencing hearing, and none of it was considered when deciding his CrR 7.8 motion.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE CrR 7.8 MOTION ON THE GROUND THAT IT LACKED AUTHORITY TO APPLY *IN RE MULHOLLAND* “RETROACTIVELY”; THAT RULING CONFLICTS WITH *MULLHOLLAND* AND *IN RE JOHNSON*⁸³

⁸⁰ See CP:188-89, Jerry Boot letter.

⁸¹ CP:169-70, Brian Ronquillo letter.

⁸² *Id.*

⁸³ *In re the Personal Restraint of Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1997).

A. **The Trial Court's Ruling That It Lacked Authority to Apply *Mulholland*, Even in the Context of the CrR 7.8 Motion**

At Joel's first sentencing, the court imposed a sentence of 20 years, consecutive, on each of the four murder counts – the premeditated murder charged in Count 1, and the felony murders charged in Counts 2, 3, and 4 – for a total of 80 years. The sentencing court in 1993 stated that it had no discretion about this – it treated 80 years as a mandatory minimum that left it no discretion:

THE COURT: You understand that, in your instance, as to each count, the standard range that may be imposed against you by the court upon a plea of guilty or a conviction, either one, is 240 months to 320 months on each count, and each count is required by law to be served consecutively, that is, one after another?

THE DEFENDANT: Yes.

THE COURT: So the minimum sentence in years upon pleas of guilty to four counts is 80 to 106 and some months. Do you understand that?

THE DEFENDANT: Yes.

8/23/93 VRP:18-19.

The court likely said that because in 1993, the rule was that RCW 9.94A.589(1)(b) mandated that sentences for “serious violent” felonies had to run consecutively, and first-degree murder is a “serious violent” felony (per former RCW 9.94A.030(37)). (His earliest possible release date with

that sentence is May 11, 2061.⁸⁴ If Joel lives to see that day, he will be 82.⁸⁵)

In 2011, the resentencing court was presented with both a CrR 7.8 motion and a resentencing memorandum challenging the 1993 court's ruling that the lowest possible sentence it could impose was 80 years. The 2011 resentencing court denied the CrR 7.8 motion. 9/16/11 VRP:41-42. It rejected the request for a full resentencing (this is discussed more fully below in Argument Section III). The 2011 sentencing judge specifically stated that Joel did not have the right to what it called "retroactive" application of *Mulholland*. 9/16/11 VRP:35. It appears to have come to the same conclusion about *Roper*, *Graham*, and RCW 9.94A.540 – that they could not be considered by the resentencing court because that would be impermissibly "retroactive."

B. This Ruling Conflicts With CrR 7.8, In re Mulholland, and In re Johnson

In 2011, in the Superior Court, Joel moved, in the alternative, for an order vacating sentence and for full resentencing pursuant to CrR 7.8. He made several arguments about why the judge actually did have discretion to impose a sentence less than 80 years.

⁸⁴ CP:103, Chrono Report.

⁸⁵ The average life expectancy in 2009 for a 30-year-old white male is 77.6. National Vital Statistics Reports, Vol. 59, No. 4, March 16, 2011, p. 26.

As this Court is aware, 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). Joel Ramos sought an order vacating his sentence and permitting him to be resentenced under that rule for both of those reasons.

First, relief from judgment is justified because of the new, controlling, decision in *In re Mulholland*, 161 Wn.2d 322, 327-28. The *Mulholland* Court ruled, for the first time, in 2007 – many years after Joel Ramos’ initial sentencing in 1993 – that despite the fact that RCW 9.94A.589(1)(b) states that sentences for separate “serious violent offenses”⁸⁶ that do not constitute “same criminal conduct”⁸⁷ (like the four murders of which he was convicted) must run consecutively, a sentencing court still has the discretion to order that they run concurrently as an exceptional sentence per RCW 9.94A.535.

Such a new Supreme Court decision interpreting a statute (here, RCW 9.94A.589(1)(b) and RCW 9.94A.535) is applicable retroactively to the time of the initial enactment of the statute. The state Supreme Court

⁸⁶ RCW 9.94A.030(40), formerly subsection (37).

⁸⁷ RCW 9.94A.589(1)(a).

made this clear in *In re the Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). In that case, as in this case, the controlling statute affected the length of the defendant's sentence. In that case, the challenge to the application of that statute was raised in an arguably procedurally-barred PRP – there, a successor PRP. The Washington Supreme Court ruled that it was not thereby barred by RAP 16.4(d)'s general bar on successor PRP's, because it relied on a significant change in the law, namely, a new interpretation of an SRA statute. The new authority was found to constitute “good cause” for filing the otherwise late, successor, PRP; and the Supreme Court specifically ruled that the new interpretation of the statute applied retrospectively, because statutory interpretation in Washington merely clarifies what the statute has always meant.⁸⁸

Thus, the *Mulholland* decision applies retrospectively to Joel Ramos. It is new, controlling law warranting relief, under CrR 7.8(b)(5).⁸⁹ The Superior Court erred in ruling to the contrary.

C. The Error Mattered

⁸⁸ *Accord In re the Personal Restraint of Vandervlugt*, 120 Wn.2d 427, 842 P.2d 950 (1992) (vacating sentence improperly enhanced, due to intervening decision concerning construction of SRA); *In re the Personal Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980).

⁸⁹ *See generally In re Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) (intervening change in law provides good cause to revisit decision on collateral challenge).

The error mattered. As discussed in the Statement of the Case, above, and Sections II and III concerning adolescent brain development, below, there were numerous mitigating factors in this case, including:

- New evidence regarding adolescent brains;
- Supreme Court statements on lesser culpability of adolescents;
- Joel's unstable homelife with little parental involvement;
- The trauma to Joel associated with the death of his closest family member;
- Joel's deficient reading and comprehension abilities at the time of the crime;
- Joel's extreme youth at the time of the crime (1 month past 14th birthday);
- Documents from Maple Lane demonstrating Joel's immaturity for his age; and
- Joel's demonstrated rehabilitation.

The Superior Court ruled that it could not consider any of this, because it could not reduce Joel's sentence below the 80-year statutory mandatory minimum, either pursuant to the remand order or via the CrR 7.8 motion. Following *Mulholland*, this was error; the Superior Court did have the discretion to run as many of those serious violent offenses concurrently as it chose.

Finally, under the statute governing exceptional sentences, it certainly had the means to do so. See RCW 9.94A.535(1)(c)(d) (discussing mitigating factors of inducement by another and coercion), (e) (imperfect diminished capacity), (g) (multiple offenses and clearly

excessive sentence), RCW 9.94A.535(1) (any other reason mitigating culpability, given non-exclusive nature of list of mitigating factors).

D. The CrR 7.8 Motion Was Timely Filed

The only other possible question is whether the CrR 7.8 motion was timely filed – even though neither the state nor the court questioned its timeliness. CrR 7.8 does state that motions filed pursuant to that rule are subject to the time limits applicable to PRPs. Even though Joel’s original sentencing occurred a long time ago, the Washington Supreme Court vacated his sentence and remanded for resentencing. Thus, at the time of the 2011 resentencing, his case was not even final, so the one-year time limit for filing collateral challenges like the CrR 7.8 motion had not even started to run. *See In re the Personal Restraint of Skylstad*, 160 Wn.2d 944, 950-54, 162 P.3d 413 (2007).

The CR 7.8 motion was therefore timely filed.

II. THE TRIAL COURT ERRED IN DENYING THE CrR 7.8 MOTION ON THE GROUND THAT IT LACKED AUTHORITY TO APPLY *ROPER*, *GRAHAM*, AND RCW 9.94A.540 – WHICH HOLD THAT ADOLESCENT BRAIN DEVELOPMENT IS A MITIGATING FACTOR JUSTIFYING LESSER SENTENCES FOR EVEN THE MOST HEINOUS MURDERS – “RETROACTIVELY”

A. The Trial Court’s Ruling That It Lacked Authority to Consider *Roper*, *Graham*, and RCW 9.94A.540, Even in the Context of the CrR 7.8 Motion

As discussed above, the resentencing court denied the CrR 7.8 motion. 9/16/11 VRP:41-42. The judge specifically stated that Joel Ramos did not have the right to what it called “retroactive” application of *Mulholland*. 9/16/11 VRP:35. It appeared to come to the same conclusion about *Roper*, *Graham*, and RCW 9.94A.540 – that they could not apply to Joel because they are new decisions and statutes, so that would be impermissibly “retroactive.”

B. This Ruling Conflicts with CrR 7.8, and Conflicts in Principle with *Roper*, *Graham*, and RCW 9.94A.540

As discussed above, CrR 7.8 grants the trial court authority to vacate a sentence based on “[n]ewly discovered evidence” or “[a]ny other reason justifying relief,” a category that includes new laws. *Roper*, *Graham*, and RCW 9.94A.540 constitute just such new laws and “reason[s].” The adolescent brain development discoveries upon which *Roper*, *Graham*, and RCW 9.94A.540 are based constitute just such new “evidence.” All of it could be considered in the context of the CrR 7.8 motion.

1. *The “Newly Discovered” Adolescent Brain Development “Evidence”*

Medical and psychiatric experts' briefing in the Supreme Court case, *Roper v. Simmons*,⁹⁰ declared: "To a degree never before understood, scientists can now demonstrate that adolescents are immature not only to the observer's naked eye, but in the very fiber of their brains."⁹¹

The Supreme Court agreed. It relied on this new scientific data in *Roper v. Simmons* in 2005. The Court explained that juveniles differ from adults in several ways that – without excusing their crimes – reduce juveniles' culpability and undermine any justification for definitively ending their free lives: they lack adults' capacity for mature judgment; they are more vulnerable to negative external influences; and their characters are not yet fully formed. *Id.* at 569-70. Juveniles' vulnerability and lack of control over their surroundings "mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their environment." *Id.*, at 570. And "[t]he reality that juveniles still

⁹⁰ 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

⁹¹ Amicus Brief of the American Medical Association et al. in *Roper v. Simmons*, 543 U.S. 551. Amici included the American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association. Brief available online at: <http://www.ama-assn.org/resources/doc/legal-issues/roper-v-simmons.pdf>, last accessed 8/25/11.

struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of [an] irretrievably depraved character.” *Id.*

The Court also found that juveniles’ immaturity and vulnerability mean that “the case for retribution is not as strong with a minor as with an adult.” *Roper*, 543 U.S. at 571. Moreover, “the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.” *Id.* Finally, the imposition of life without parole for a crime committed as a juvenile – a sentence that rejects the possibility of redemption – cannot be reconciled with juveniles’ unformed characters and the likelihood that they will change as adults. “From a moral standpoint it would be misguided to equate the failing of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Id.*, at 570. The Court also found it significant that “[i]n recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.” *Id.*, at 569.

The defendant in *Roper v. Simmons* was 17 years old at the time of his crime. *Id.*, at 566. The Court therefore ruled that imposing the death penalty on a juvenile was unconstitutional. *Id.*, at 578. Joel was only one

month past his 14th birthday at the time of the Skelton murders, and he was still in 7th grade. The State of Washington has determined that Joel was not mature enough to learn to drive, RCW 46.20.055, to buy a “violent” video game for his Nintendo, RCW 9.91.180, to need a license for fishing, RCW 77.32.470, or to consent to sex with anyone four or more years older, RCW 9A.44.079. Joel was not even old enough to go see an R-rated movie without his mother.

The Court reviewed the latest updated research on adolescent brains In *Graham v. Florida*, __ U.S. __, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010).⁹² In *Graham*, the Court held that the inadequacy of penological theory to justify life without parole sentences for juvenile nonhomicide offenders, the limited culpability of such offenders, and the severity of these sentences all lead to the conclusion that life without parole sentences for juveniles violate the Eighth Amendment ban on cruel and unusual punishment.

The Court cautioned that retribution must be directly related to the criminal culpability of the offender. *Id.*, at 2028. The case for retribution is not as strong with a minor as an adult. *Id.* Due to an even greater lack of maturity than that found in 17-year-olds, a case for retribution is even

⁹² The night that Graham committed the crime, he was 34 days short of his 18th birthday. *Graham*, 130 S.Ct. at 2019.

weaker with respect to a juvenile, like Joel, who was barely 14 years old.⁹³

The *Graham* Court found that deterrence alone was not a sufficient penological objective either, quoting *Roper*: “the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.” *Id.*, at 2028. The Court further found that incapacitation did not justify the life without parole sentence – “To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.” *Id.*, at 2029. “A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.” *Id.* Finally, the Court found that the absence of rehabilitative opportunities or treatment with a life without parole sentence makes the disproportionality of the sentence all the more evident. *Id.*, at 2030. Although *Graham* involved a non-homicide offender, the same considerations apply in a homicide case, especially with a much younger offender like Joel.

The 2011 resentencing court seemed to reject these points because they were new law, which could not be applied retroactively to Joel. This

⁹³ Correction staff uniformly observed that Joel was immature for his age, as discussed above, in section III.F.

is wrong on three counts. First, these cases memorialize new scientific discoveries – new *facts*. CrR 7.8(b)(2) explicitly says that a CrR 7.8 motion can be used to bring such newly discovered *evidence* to the courts attention.

Next, the new cases – *Roper* and *Graham* – can also be considered in a collateral attack, if they constitute significant, new, controlling authority. See *Gentry*, 137 Wn.2d 378, 388. *Roper* and *Graham* qualify on all counts.

Finally, there is no question about retroactivity here – these cases were cited to a court adjudicating a resentencing in 2011, post-*Roper* and *Graham*, not pre-*Roper* and *Graham*.

For all three reasons, the trial court erred in refusing to consider the newly discovered scientific evidence about adolescent brain development in the context of the CrR 7.8 motion.

2. *The New State Law Recognizing the Importance of this New Adolescent Brain Development Evidence*

Washington’s new juvenile sentencing statute, which was enacted after Mr. Ramos’ first sentencing hearing, also endorses the critical importance of this new scientific data on adolescent brain development and its relevance to juvenile culpability and sentencing. In 2005, the legislature amended RCW 9.94A.540 to give sentencing courts the

discretion to avoid the mandatory minimum sentence of 20 years for first-degree murder when the defendant is a juvenile. The legislative findings show that the legislature enacted this new portion of the sentencing laws precisely because of the “emerging research on brain development” upon which we are relying:

(1) The legislature finds that emerging research on brain development indicates that adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into consideration when sentencing juveniles tried as adults. The legislature further finds that applying mandatory minimum sentences for juveniles tried as adults prevents trial court judges from taking these differences into consideration in appropriate circumstances.

(2) The legislature intends to eliminate the application of mandatory minimum sentences under RCW 9.94A.540 to juveniles tried as adults, and to continue to apply all other adult sentencing provisions to juveniles tried as adults. . . .

2005 WA ALS 437, § 1.

The new amendment thus provides that the mandatory minimum sentences established by RCW 9.94A.540(1) “shall not be applied in sentencing of juveniles tried as adults pursuant to RCW 13.04.030(1)(e)(i).” RCW 9.94A.540(3)(a).

It is true that the legislature also provided that this grant of discretion to the trial courts to avoid mandatory minimum sentences for

juveniles “applies only to crimes committed on or after the effective date of this act.” RCW 9.94A.540(3)(b). Joel Ramos’ crimes occurred before the amendment was passed, but his sentencing occurred after the date of that amendment. It is therefore unclear whether this statute applied at Joel’s 2011 sentencing, since it is the current law, or not.

This is a complicated question. Division I has ruled that that amendment applies *prospectively* and, taken literally, such prospective application would include application to the Ramos resentencing which post-dates the enactment of that amendment. *In re Hegney*, 138 Wn. App. 511, 158 P.3d 1193 (2007). But the sentencing in *Hegney* occurred in 2002, before the new amendment was adopted, so it did not explicitly address whether such “prospective” application would include the situation we have here. To our knowledge, neither Division III nor the state Supreme Court has addressed the meaning of this new amendment at all.

Given the fact that Mr. Ramos is in all relevant respects “similarly situated” to juveniles whose crimes occurred more recently, there is certainly a serious question about whether applying this new statute only to some juveniles who are sentenced after its enactment, but not to all of them, would violate state and federal constitutional equal protection

guaranties and/or contravene state case law.⁹⁴ There is also a serious question about whether interpreting RCW 9.94A.540(3)(b) to apply to 14-

⁹⁴ Article I, § 12 of the Washington Constitution provides: “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” U.S. Const amend. XIV’s equal protection clause similarly provides: “... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” “Equal protection does not require that all persons be dealt with identically, but it does require that the distinction made have some relevance to the purpose for which the classification is made.” *In re Stanphill*, 134 Wn.2d 165, 174, 949 P.2d 365 (1998) (citing *Baxstrom v. Herald*, 383 U.S. 107, 111, 86 S. Ct. 760, 15 L.Ed.2d 620 (1966)). The equal protection guaranties of the state and U.S. Constitutions thus require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. *State v. Coria*, 120 Wn.2d 156, 839 P.2d 890 (1992).

Thus, this Court must ask either whether there is a “rational” or closer relationship between using the year the juvenile sentencing amendment was adopted as a dividing line between those who can benefit from it and those who can’t, and some permissible government objective – here, making just choices about sentencing options. *See Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 972, 977 P.2d 554 (1999) (applying rational basis test to age classification). There is no rational relationship between choosing that date and achieving those goals, given that new legislation is generally presumed to apply prospectively to all *judicial events* like sentencing occurring after enactment regardless of when the crime occurred. *See State v. Pillatos*, 159 Wash.2d 459, 471, 150 P.3d 1130 (2007) (“A statute is not retroactive merely because it applies to conduct that predated its effective date. Instead, ‘[a] statute operates prospectively when the *precipitating event* for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment.’ ... The act clearly contemplates that either the entry of the plea or the trial is the precipitating event. Based on its plain language, the act is not retroactive in this context.” (citation omitted)

year olds who are sentenced at the same time as Joel, but not to Joel, would violate the SRA's own nondiscrimination mandate.⁹⁵

Those serious questions need not be resolved today. In fact, under the principle of constitutional avoidance, statutes are interpreted to avoid raising constitutional questions.⁹⁶ And, following *Mulholland*, the sentencing court did not have to use RCW 9.94A.540 as a vehicle to

(emphasis in *Pillatos*).

Applying the new juvenile sentencing statute to future sentencings would therefore be consistent with Washington's interpretation of what "prospective" generally means. It would also avoid treating two identical juveniles differently based on the fortuity of whether they were having a sentencing or resentencing after the new law was enacted.

⁹⁵ The SRA's statement of purpose, RCW 9.94A.010, shows that it was designed to make judges impose sentence based on permissible factors, such as making punishment commensurate with crimes; similarly, it was designed to prevent judges from imposing sentences based on arbitrary or discriminatory factors. In particular, sentences are to be imposed in accordance with RCW 9.94A.120, which requires that sentences be based upon the seriousness of the offense and the defendant's criminal history. The date on which sentencing occurs is nowhere listed as a permissible ground for imposing a higher sentence. In fact, the SRA expressly mandates that sentences must be imposed without discrimination on the basis of any element that is not relevant to the crime or the defendant's criminal history. RCW 9.94A.340; *State v. Payne*, 45 Wn. App. 528, 726 P.2d 997 (1986). Thus, the SRA itself prohibits discrimination based on the date of the sentencing hearing.

⁹⁶ *Cheek v. United States*, 498 U.S. 192, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991). See generally *Peretz v. United States*, 501 U.S. 923, 929-30, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991); *Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000), cert. denied, 532 U.S. 920 (2001).

impose a discretionary lower sentence – because *Mulholland* was a clearly available vehicle.

Instead, RCW 9.94A.540 should be considered for the light it sheds on whether the new adolescent brain development research – which formed the basis for *Roper*, *Graham*, and RCW 9.94A.540 – is really new, really scientific, and really worthy of consideration at sentencing. Clearly, it shows that the legislature thinks the answer is a resounding “yes!”

VI. THE TRIAL COURT’S RULING THAT IT LACKED AUTHORITY TO REVISIT PRIOR SENTENCING RULINGS IN THE CONTEXT OF THE NEW SENTENCING HEARING CONFLICTS WITH *KILGORE* AND RAP 2.5(c)(1)

C. The Trial Court’s Ruling That It Lacked Authority to Revisit Prior Sentencing Rulings

On April 1, 2010, the Washington Supreme Court entered an Order granting Joel’s Petition for Review “only on the community placement issue and this case is remanded to the Court of Appeals for reconsideration in light of *State v. Broadaway*, 133 Wn.2d 118 (1997).” *Ramos*, 168 Wn.2d 1025. On remand, this Court of Appeals issued an unpublished opinion stating in part, “We ... now remand for the trial court to enter an order clarifying the term of community placement.” *Ramos*, 2010 Wash. App. LEXIS 1338 at *4.

Joel again petitioned for review, this time asserting that the remedy was remand for resentencing, not merely for a ministerial “clarify[ication of] the term of community placement.” On February 10, 2011, the state Supreme Court agreed – it began, “The Court of Appeals indicated in its opinion that resentencing was not required and that the trial court need only enter an order clarifying or amending the judgment and sentence.” CP:84, *Ramos*, 171 Wn.2d at 48. It continued, however, that the resentencing was not a ministerial matter, but required the exercise of discretion and, hence, a real resentencing:

Here, the Court of Appeals, relying on *Broadaway*, remanded for correction of Ramos’s judgment and sentence to state the specific term of community placement, which was not so stated in the original judgment and sentence. If that is all the trial court will be required to do, the remand hearing would be purely ministerial, since the length of community placement is dictated by statute. ... But the Court of Appeals went further, correctly directing the trial court to specify “the ‘special terms’ of the placement,” which it had not originally done. ... In directing the trial court to specify any special terms, the Court of Appeals necessarily required the trial court to exercise discretion in amending the judgment and sentence. Since the trial court’s duty on remand is not merely ministerial, the trial court must exercise discretion. Ramos, therefore, has a right to be present and heard at resentencing.

The Court of Appeals is reversed to the extent it ruled that resentencing is not required. The matter is remanded to the trial court to specify the community placement term and the conditions of community

placement. Upon remand, Ramos shall be afforded the opportunity to be present and heard.

CP:85, *Ramos*, 171 Wn.2d at 49 (emphasis added) (citations omitted).

The Washington Supreme Court thus ruled that Joel was entitled to a real resentencing hearing, at which the trial court must exercise discretion, and not just a ministerial amendment of his J&S. On the other hand, that Court stated – in a somewhat contradictory fashion – that the hearing was to “specify the community placement term” and “conditions.” *Id.*

The resentencing court then ruled that the Court of Appeals’ remand order limited the scope of resentencing to the length of community placement, and that it barred him from addressing anything other than the length of community placement. 9/16/11 VRP:34-35 (“It is my conclusion that the Washington State Supreme Court, in saying “resentencing,” was discussing it in a ... limited fashion related only to the right to be present because it would involve the discretion of the judge [T]he court did not remand this for a complete resentencing on all issues.”).

B. This Ruling that the Superior Court Lacked Discretion to Reach Sentencing Issues That Had Not Been Addressed by the Appellate Court Conflicts With *Kilgore* and RAP 2.5(c)(1)

The Superior Court’s ruling that it could not consider the substantial new brain development research about youths in general, and

about the teenage Joel in particular, in the context of the resentencing hearing, conflicts with controlling authority. It is true that the scope of a remand for a resentencing is determined by the scope of the appellate court's mandate. *See State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009)

But it is also true that the Washington Supreme Court clarified, in *Kilgore*, 167 Wn.2d 28, that RAP 2.5(c)(1)'s "law of the case" doctrine allows the Superior Court, at any resentencing, to revisit any issues that the appellate court has not explicitly rejected. *Kilgore*, 167 Wn.2d at 38-39. *Kilgore* held that there was no abuse of discretion in the Superior Court's decision to decline to hold a full resentencing hearing in a case where two of five concurrent sentences were vacated because the presumptive sentence range and sentence remained the same, the sentences imposed before the appeal remained the same, there was no change in the length of the sentence, and hence there was no need to exercise independent judgment. *Kilgore*, 167 Wn.2d at 40, 42-43.

The corollary of the *Kilgore* holding, for purposes of Joel's case, is that the trial court does not abuse its discretion, either, when it elects to hold a full resentencing hearing in a case where the length and conditions of the sentence are once again up for grabs. *See also State v. Larson*, 56 Wn. App. 323, 329, 783 P.2d 1093 (1989) (legal sentence on multiple

count charge may be increased to effectuate original sentencing court's scheme).

The Superior Court thus had the discretion to consider the new evidence, and new grounds for a lower sentence, even in the context of the resentencing hearing itself, and even if no CrR 7.8 motion had been filed. The resentencing court's decision to the contrary conflicted with *Kilgore* and RAP 2.5(c)(1).

CONCLUSION

For the foregoing reasons, this case should be remanded for a resentencing hearing at which the court must consider both *Mulholland* and the new evidence about adolescent brain development in general, and Joel's own adolescent brain development in particular.

DATED THIS 21st day of December, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of December, 2011, a copy of the OPENING BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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