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Attached pls find Mr. Wheeler's reply, which has been served on opposing counsel through this email.

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No. 44141-1-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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**STATE OF WASHINGTON,**
Plaintiff/Respondent,

v.

**ROBERT T. WHEELER**,
Defendant/Appellant.

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# APPELLANT'S REPLY BRIEF IN SUPPORT OF DIRECT APPEAL AND PRP

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## I. INTRODUCTION

This is a combined reply in support of both Mr. Wheeler's appeal and his PRP.

The State urges this Court to "dismiss" Robert Wheeler's appeal, not because his guilty plea was valid—the State does not contest the involuntariness of Wheeler's plea—but, simply because Wheeler could have raised this issue at an earlier date. However, this Court has already held that Wheeler's appeal is timely. This Court should either exercise its discretion and reach the issue or remand to the trial court with instructions that the court can, if it wishes, consider the issue. In making its argument, the State studiously ignores RAP 2.5 and the cases that say this Court has the discretion to consider an issue that could have been, but was not raised previously. In fact, the State fails to even acknowledge this Court's discretion. Instead, the State plays a game of misdirection—claiming that this Court's employment of the time bar in an earlier PRP was instead a decision on the merits—and promoting defense counsel's silence to attempt to correct the obvious error as a virtue, not a deficiency.

Likewise, the State's responds to Wheeler's PRP by implicitly acknowledging that the State intentionally delayed filing charges against Wheeler in order to avoid juvenile jurisdiction, but by arguing that this argument should be time barred by this Court. In doing so, the State argues that its due process violation was plain at the time charges were filed. Of course, if that were the case, the State should have conceded the violation and dismissed charges. While the delay was apparent at the time of filing, the reason for the delay was not.

Now, aided by internal documents that the prosecutor did not previously reveal, Wheeler has assembled a compelling case of intentional delay.

This Court should grant Wheeler's PRP or remand for an evidentiary hearing. Additionally, this Court should reverse and remand to the trial court and permit Wheeler to raise the claim that his guilty plea was invalid.

## II. ARGUMENT

### A. WHEELER'S GUILTY PLEA WAS INVALID

Wheeler begins with his direct appeal claim of error.

RAP 2.5(a) provides that a party "may raise" a "(3) manifest error affecting a constitutional right." An involuntary plea constitutes such an error. *State v. Ross,* 129 Wash.2d 279, 283, 916 P.2d 405 (1996)

RAP 2.5 (a) further provides that "(a) party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." The involuntariness of Wheeler's guilty plea is obvious from both the guilty plea form and the colloquy. The issue does not need further factual development.

This Court has the discretion to reach this issue despite the failure of counsel to contest the guilty plea in the trial court.

This Court also possesses the discretion to revisit this issue despite the fact that Wheeler appeals from a resentencing hearing.

Washington courts have interpreted RAP 2.5(c)(1) to allow trial courts, as well as appellate courts, discretion to revisit an issue on remand that was not the subject of the earlier appeal. *State v. Barberio,* 121 Wash.2d 48, 51, 846 P.2d 519 (1993). As Wheeler explained in his opening brief, this discretion is consistent with RAP 12.2, which allows trial courts to entertain post-judgment motions authorized by statute or court rules, as long as the motions do not challenge issues already decided on appeal. If the trial court elects to exercise this discretion, its decision may be the subject of a later appeal, thereby restoring the pendency of the case. *Id.* at 50, 846 P.2d 519 ; *accord* RAP 2.2(9), (10), (13) (providing right to appeal from post-judgment orders).

The State also does not respond to Wheeler's argument that the United States Supreme Court has recognized the ability of state courts to restore the pendency of a case in *Jimenez v. Quarterman,* __ U.S. __, 129 S.Ct. 681(2009), a case where the Texas Court of Criminal Appeals granted Jimenez an otherwise out-of-time appeal. *Id.* at 683-84.

Instead, the State argues that because Wheeler's prior PRP was untimely, this Court should refuse to correct a manifest injustice in this timely appeal.

Mr. Wheeler fully acknowledges that this Court's authority is discretionary. In doing so, this Court should consider: (1) Wheeler was never told that he could appeal the voluntariness of his appeal (he was told

that he waived the right to appeal by pleading guilty); (2) Wheeler promptly sought review after his suspended prison sentence was imposed: (3) Wheeler's guilty plea is obviously invalid; (4) the error in the guilty plea was compounded when the SSOSA was revoked.

This Court should either reverse and remand or remand with directions to the trial court that it can exercise its discretion to consider the invalidity of Wheeler's guilty plea.

B. THE STATE INTENTIONALLY DELAYED FILING

The State's response to Wheeler's PRP is curious. The State essentially argues that it should have been obvious when charges were filed that the State had violated due process by intentionally delaying the filing in order to deprive Wheeler of juvenile court jurisdiction. The State makes this argument in order to attempt to render the documents Wheeler first uncovered through a recent public disclosure request (not previously provided by the State) irrelevant.

Despite this position, the State does not offer to correct its constitutional violation. Instead, it argues that its intentional violation of the constitution should now be insulated as beyond review.

Wheeler certainly does not quarrel with the State's implicit concession that it intentionally delayed filing charges against Wheeler in order to deprive him of juvenile court jurisdiction. He also does not disagree that some evidence of that delay was previously available.

However, the simple fact of delay—standing alone—has never been sufficient to merit dismissal of charges. Instead, the defense must show that the State had no valid reason for delay and the delay was not attributable to the normal course of business. The State has broad discretion to decide when to prosecute and may delay prosecution until it feels it has adequately investigated and can establish guilt beyond a reasonable doubt. *State v. Warner,* 125 Wash.2d 876, 883, 889 P.2d 479 (1995); *State v. Lidge,* 111 Wash.2d 845, 850, 765 P.2d 1292 (1989).

Until the State recently disclosed internal documents (attached to the PRP) which showed no investigatory reason for delay, Wheeler could not surmount that burden. Now, armed with both of those documents and the State's implicit concession, he can. In fact, additional evidence of the State's intentional delay may be found in the numerous documents withheld as privileged, but which may become discoverable if an evidentiary hearing is ordered.

The State's investigatory log shows that no investigation was conducted after the initial charge was prepared and when it was eventually filed. In other words, the proof now defeats any possible lawful inference for the delay.

This Court should either reverse and remand for dismissal or for an evidentiary hearing.

## IV. CONCLUSION

Based on the above, this Court should vacate Wheeler's convictions and/or remand this case to Pierce County Superior Court to permit him to move to withdraw his guilty pleas. On the PRP, this Court should either reverse and remand for dismissal or for an evidentiary hearing.

DATED this 14th day of October, 2013.

Respectfully Submitted:
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