FILED
SUPREME COURT
STATE OF WASHINGTON
10/10/2018 11:25 AM
BY SUSAN L. CARLSON
CLERK

No. 95394-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Personal Restraint Petition of

TIME RIKAT MEIPPEN,

Petitioner.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Eric R. Nusser
eric@terrellmarshall.com
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Cooperating Attorney for
ACLU-WA Foundation

Nancy Talner
talner@aclu-wa.org
Vanessa Hernandez
vhernandez@aclu-wa.org
ACLU OF WASHINGTON FOUNDATION
901 5th Avenue, Suite 360
Seattle, Washington 98164
Telephone: 206-624-2184

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

I. IDENTITY AND INTEREST OF *AMICUS* 1

II. ISSUE TO BE ADDRESSED BY *AMICUS* 1

III. STATEMENT OF THE CASE 1

IV. SUMMARY OF ARGUMENT 2

V. ARGUMENT 3

A. *Houston-Sconiers* was a significant and material change in the law 3

1. This Court's holding in *Houston-Sconiers* constitutes a significant change in the law 4

2. *Houston-Sconiers* was a material change in the law that affected Mr. Meippen's sentence 9

B. This Court's holding in *Houston-Sconiers* should apply retroactively 12

VI. CONCLUSION 14

TABLE OF AUTHORITIES

Page

STATE CASES

In re Pers. Restraint of Greening,
141 Wn.2d 687, 9 P.3d 206 (2000) ..... *passim*

In re Pers. Restraint of Hinton,
152 Wn.2d 853, 100 P.3d 801 (2004) 13, 14

In re Pers. Restraint of Johnson,
131 Wn.2d 558, 933 P.2d 1019 (1997) 12, 13

In re Pers. Restraint of Lavery,
154 Wn.2d 249, 111 P.3d 837 (2005) 4, 8

In re Pers. Restraint of Runyan,
121 Wn.2d 432, 853 P.2d 424 (1993) 4

In re Pers. Restraint of Vandervlugt,
120 Wn.2d 427, 842 P.2d 950 (1992) 12, 13

In re Pers. Restraint of Yung-Cheng Tsai,
183 Wn.2d 91, 351 P.3d 138 (2015) 3

State v. Furman,
122 Wn.2d 440, 858 P.2d 1092 (1993) 12

State v. Brown,
139 Wn.2d 20, 983 P.2d 608 (1999) 2, 4, 8, 14

State v. Houston-Sconiers,
188 Wn.2d 1, 391 P.3d 409 (2017) ..... *passim*

State v. Manussier,
129 Wn.2d 652, 921 P.2d 473 (1996) 5

State v. McFarland,
189 Wn.2d 47, 399 P.3d 1106 (2017) 11

State v. Moen,
129 Wn.2d 535, 919 P.2d 69 (1996) 12

FEDERAL CASES

Miller v. Alabama,
567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) 7

STATE STATUES

RCW 9.94A.310(4) 5

RCW 10.73.090(1) 3

RCW 10.73.100(6) ..... *passim*

I. IDENTITY AND INTEREST OF *AMICUS*

The identity and interest of *Amicus* are set forth in the Motion for Leave to File Brief of *Amicus Curiae* filed on September 18, 2018, and granted by the Chief Justice on October 3, 2018.

II. ISSUE TO BE ADDRESSED BY *AMICUS*

This Court in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), interpreted the Sentencing Reform Act ("SRA") to give trial courts absolute discretion to depart from sentencing guidelines and any mandatory sentence enhancements when sentencing juveniles in the adult criminal justice system, even though case law in effect at the time Mr. Meippen was sentenced for a crime he committed at 16 years old explicitly prohibited courts from exercising such discretion.

Does *Houston-Sconiers* constitute a significant, material, and retroactive change in the law satisfying the exception to the one-year time limit under RCW 10.73.100(6)? Yes.

III. STATEMENT OF THE CASE

Amicus rely on the facts set forth in Mr. Meippen's briefs filed below and in this Court. In 2008, Time Meippen was sentenced in adult court to a total of 19 years for a robbery and assault he committed when he was just 16 years old. *See* Judgment and Sentence Felony (Feb. 11, 2008), King Cnty. Super. Ct. Case No. 06-1-05905-7 SEA. At the sentencing

hearing, the court imposed a mandatory firearm enhancement, which accounted for five years of Mr. Meippen's 19-year sentence. At that time, according to this Court, trial courts did not have any discretion to depart from the SRA's sentencing guidelines on firearm enhancements when sentencing juveniles in adult court. *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), *overruled by Houston-Sconiers*, 188 Wn.2d at 21.

In 2017, this Court reversed its position and held that adult courts sentencing juveniles must have "absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements . . ." *Houston-Sconiers*, 188 Wn.2d at 9 (emphasis added). Shortly thereafter, Mr. Meippen filed this *pro se* personal restraint petition ("PRP"), requesting a new sentencing hearing under *Houston-Sconiers* and citing RCW 10.73.100(6), which provides an exception to the one-year time bar for such petitions.

IV. SUMMARY OF ARGUMENT

Mr. Meippen's PRP satisfies the exception to the one-year time limit for collateral attacks under RCW 10.73.100(6) because this Court's holding in *Houston-Sconiers* was a significant, material, and retroactive change in the law. First, a significant change in the law occurred when this Court held for the first time in *Houston-Sconiers* that trial courts have discretion to depart from SRA sentencing guidelines and any mandatory

sentence enhancements when sentencing juveniles in the adult criminal justice system. Second, *Houston-Sconiers* is material to Mr. Meippen's sentence because the trial court did not meaningfully consider his youth at the time of sentencing, nor did it exercise proper discretion to consider an exceptional downward sentence for the firearm enhancement. Finally, this Court's prior precedent instructs that *Houston-Sconiers* applies retroactively back to the enactment of the SRA.

V. ARGUMENT

A. *Houston-Sconiers* was a significant and material change in the law.

Generally, a defendant has one year from the time a judgment becomes final to file a collateral attack against the judgment or sentence imposed. RCW 10.73.090(1). However, under RCW 10.73.100(6), an exception may be made to the time bar where there has been (1) a significant change in the law, (2) that is material, and (3) that applies retroactively. *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 103, 351 P.3d 138 (2015).

This Court has emphasized the importance of the "[b]road exceptions" to the time bar, stating that the Legislature has specifically "expand[ed] the scope of collateral relief beyond that which is constitutionally required" to include "*situations which affect the continued*

validity and fairness of the petitioner's incarceration." *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 695, 9 P.3d 206 (2000) (quoting *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 440, 444–45, 853 P.2d 424 (1993)) (emphasis in original). This case presents one of those situations.

1. This Court's holding in *Houston-Sconiers* constitutes a significant change in the law.

"A significant change in state law occurs 'where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue.'" *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d at 104 (quoting *In re Pers. Restraint of Greening*, 141 Wn.2d at 697). "One test to determine whether an intervening case represents a significant change in the law is whether the defendant could have argued this issue before publication of the decision." *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258–59, 111 P.3d 837 (2005) (internal citation and other marks omitted).

The "significant change" test is met here. In 1999, this Court held in *Brown* that sentencing courts do not have judicial discretion to impose an exceptional sentence downward below the SRA's guidelines for mandatory sentencing enhancements. 139 Wn.2d at 29. In that case, the defendant was convicted of second degree assault with a deadly weapon—a folding knife used to cut the victim on his nose. *Id.* at 22. Under the

SRA, the standard presumptive sentence for the assault conviction was three to nine months. *Id.* at 23. The sentencing court then added a 12-month deadly weapon enhancement pursuant to an SRA provision, arriving at a total standard range of 15 to 21 months. *Id.* The sentencing court, however, granted the jury's unanimous request for leniency and imposed an exceptional downward sentence of only seven months. *Id.*

On appeal, this Court examined the plain language of the SRA provision, which stated that "deadly weapon enhancements 'shall be added to the presumptive sentence.'" *Id.* at 28 (citing RCW 9.94A.310(4)). The SRA specified that all deadly weapon enhancements were "mandatory, [and] shall be served in total confinement." *Id.* (citing RCW 9.94A.310(4)(e)). Based on this plain reading, the Court concluded "[t]his language clearly dictates . . . that deadly weapon enhancements are mandatory and must be served." *Id.* It further noted that "[t]his court has consistently held that fixing penalties for criminal offenses is a legislative, and not a judicial, function." *Id.* at 29 (quoting *State v. Manussier*, 129 Wn.2d 652, 667, 921 P.2d 473 (1996)). The Court ultimately concluded that the sentencing court abused its discretion by imposing an exceptional downward sentence and held that the SRA "deprives a sentencing court of discretion to impose an exceptional sentence downward below the time specified for a mandatory deadly weapon enhancement." *Id.* at 22.

In 2017, this Court published its opinion in *Houston-Sconiers*, which explicitly overruled *Brown* when it held that adult courts sentencing juveniles must have "absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements . . ." *Houston-Sconiers*, 188 Wn.2d at 9. In that case, two juvenile defendants—Zyion Houston-Sconiers and Treson Roberts—were convicted in adult court on numerous charges related to a series of robberies carried out at gunpoint. *Id.* at 12. On top of their sentences for the underlying crimes, both teenagers received additional firearm enhancements. *Id.* Houston-Sconiers, who was 17 years old at the time of the robberies, faced a sentencing range of 501–543 months (41.75–45.25 years) in prison. *Id.* Roberts, who was 16 years old at the time of the robberies, faced a sentencing range of 441–483 months (36.75–40.25 years). *Id.* at 12–13.

Despite obtaining a guilty verdict on nearly all counts, the State recommended an exceptional sentence <u>below</u> the standard range—zero months—on each of the underlying crimes. *Id.* at 13. The State conceded that its recommendation was technically unlawful under the statutory scheme and controlling law at the time. *Id*. Nevertheless, the State argued that the teenagers' sentences—42 to 45 years for Houston-Sconiers and 37 to 40 years for Roberts—were "perhaps excessive." *Id*. The State did not

recommend a similar departure from the SRA's sentencing guidelines for any of the firearm enhancements. *Id.*

The sentencing court accepted the State's recommendation and imposed no time on the underlying crimes but imposed all the time associated with the firearm enhancements: 372 months (31 years) for Houston-Sconiers and 312 months (26 years) for Roberts. *Id.* After hearing mitigating testimony related to both teenagers' difficult childhood circumstances and potential for rehabilitation, the sentencing judge expressed his frustration that he was unable to exercise greater discretion over the sentences he was required to impose. *Id.* The defendants' sentences were affirmed at the Court of Appeals, and this Court granted review. *Id.* at 13–14.

Embracing the fundamental maxim that "children are different," *Id.* at 18 (citing *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)), this Court held that "sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system." *Id.* at 21. The Court further held that trial courts "must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." *Id.* This Court then explicitly overruled *Brown*, writing, "[t]o the extent our state statutes have been

interpreted to bar such discretion with regard to juveniles, they are overruled." *Id*. (footnote omitted). Of critical importance is the Court's citation of *Brown* as the case that *Houston-Sconiers* overruled. *Id.* n.5.

Before this Court's decision in *Houston-Sconiers*, *Brown*'s interpretation of the mandatory nature of the SRA's sentencing guidelines was controlling law—even for juveniles. The State acknowledged this fact in its sentencing recommendation for Houston-Sconiers and Roberts, writing, "[w]hat is clear in this case is there are no statutorily legitimate reasons for imposition of an exceptional sentence downward." *Id.* at 13. Affirming the veracity of the State's assessment, the sentencing judge similarly acknowledged that he was unable to exercise greater discretion on the mandatory sentences he was required to impose for the firearm enhancements. *Id.* Of greatest importance is that this Court acknowledged this same fact in *Houston-Sconiers* when it affirmed the teenagers' convictions but reversed their sentences and remanded to the trial court for resentencing. *Id.* at 34.

Here, Meippen was sentenced in 2008, nine years after *Brown* was decided and nine years before it was overruled by this Court in *Houston-Sconiers*. Therefore, at the time Mr. Meippen was sentenced, he could not have argued that the trial court had the discretion to depart from the sentencing guidelines for firearm enhancements that were set out in the

SRA. Because Mr. Meippen could not have made such an argument before publication of *Houston-Sconiers* in 2017, *Houston-Sconiers* represents a significant change in the law.

2. *Houston-Sconiers* was a material change in the law that affected Mr. Meippen's sentence.

To satisfy the exception to the one-year time bar, the significant change in the law must also be material to the conviction, sentence, or other order entered in a criminal proceeding. RCW 10.73.100(6); *In re Pers. Restraint of Greening*, 141 Wn.2d at 695. This Court has held that a significant change in the law is material where a petitioner "may not have been properly sentenced" under a prior appellate decision that was later overturned. *See In re Pers. Restraint of Lavery*, 154 Wn.2d at 260–61 (sentence vacated where controlling appellate decision interpreting statute at time of petitioner's sentence was later overturned).

This Court's decision in *Houston-Sconiers* is material to Mr. Meippen's sentence because the trial court did not meaningfully consider his youth at the time of sentencing, nor did it exercise proper discretion to consider an exceptional downward sentence for the firearm enhancement. In *Houston-Sconiers*, the Court held that a sentencing judge "must consider mitigating qualities of youth at sentencing" and "must have complete discretion" to depart from the SRA when sentencing juveniles in

adult court. 188 Wn.2d at 21 (emphases added). Here, there is no indication in the record that the trial court meaningfully considered the circumstances of Mr. Meippen's youth when it imposed the firearm enhancement. *See* Verbatim Report of Proceedings (Jan. 23, 2008) at 17:10–21. In fact, the trial court did not even mention Mr. Meippen's age or discuss any of the circumstances surrounding his youth when imposing its sentence. *Id.*

While it is true that Mr. Meippen did not request exceptional relief from the firearm enhancement, that fact does not affect the materiality of *Houston-Sconiers* to his sentence. First, until this Court's decision in *Houston-Sconiers*, the argument that the trial court could depart from the mandatory enhancement language in the SRA was not meaningfully available to Mr. Meippen because of this Court's prior decision in *Brown*. *See In re Pers. Restraint of Greening*, 141 Wn.2d at 697 ("While litigants have a duty to raise *available* arguments in a timely fashion and may later be procedurally penalized for failing to do so . . . they should not be faulted for having omitted arguments that were essentially *unavailable* at the time, as occurred here." (emphases in original)). Therefore, any argument Mr. Meippen could have made to obtain exceptional downward relief from the firearm enhancement would have been futile.

Second, this Court has held that "every defendant is entitled to have an exceptional sentence actually considered" regardless of whether he or she has requested such relief. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). In *McFarland*, the defendant was convicted of 14 counts related to burglary and theft of multiple firearms and sentenced to nearly 20 years in prison. *Id.* at 50. At sentencing, McFarland did not request an exceptional sentence downward by running the firearm-related sentences concurrently. *Id.* Likewise, the trial court did not consider departing from the SRA guidelines because it believed it did not have discretion to do so under the body of case law at the time. *Id.* at 51. Nonetheless, McFarland argued on appeal that the trial court erred because it did not run her sentences concurrently. *Id.* The Court of Appeals rejected McFarland's argument because "the sentencing judge 'cannot have erred for failing to do something he was never asked to do.'" *Id.* at 49–50 (quoting *State v. McFarland*, No. 32873-2-III, slip op. at 16, 2016 WL 901088 (Wash. Ct. App. Mar. 8, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/328732.unp.pdf). On review, this Court reversed the Court of Appeals, vacated McFarland's sentence, and remanded for resentencing. *Id.* at 59. The Court held that under certain circumstances, a trial court does have "discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related

sentences." *Id.* at 55. Therefore, McFarland was entitled to be considered for an exceptional sentence even though she did not request one at sentencing. *Id.* at 56–59.

Because the trial court failed to meaningfully consider the "mitigating qualities" of Mr. Meippen's youth at the time of sentencing and did not exercise proper discretion when imposing the firearm enhancement, *Houston-Sconiers* is material to Mr. Meippen's sentence.

B. This Court's holding in *Houston-Sconiers* should apply retroactively.

While the thrust of the decision in *Houston-Sconiers* is the constitutional maxim that "children are different," the Court nonetheless gave this principle effect by construing the statutory sentencing scheme contained in the SRA. 188 Wn.2d at 23–26 ("[I]t is the duty of this court to construe a statute so as to uphold its constitutionality." (quoting *State v. Furman*, 122 Wn.2d 440, 457–58, 858 P.2d 1092 (1993)).

"The rule established by this court is that where a statute has been construed by the highest court of the state, the court's construction is deemed to be what the statute has meant since its enactment. In other words, there is no question of retroactivity." *State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996) (citing *In re Pers. Restraint of Vandervlugt*, 120 Wn.2d 427, 436, 842 P.2d 950 (1992)); *see also In re*

Pers. Restraint of Johnson, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997) ("Once the Court has determined the meaning of a statute, that is what the statute has meant since its enactment."); *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 859–60 and n.2, 100 P.3d 801 (2004) ("When this court construes a statute, setting out what the statute has meant since its enactment, there is no question of retroactivity; the statute must be applied as construed to conduct occurring since its enactment."); *In re Pers. Restraint of Greening*, 141 Wn.2d at 693 n.7 ("When this court construes a statute, its *original* meaning is clarified. Our ruling is thus automatically 'retroactive.'" (emphasis in original)).

Indeed, this Court has long applied its holdings retroactively where it has construed the meaning of a statute or statutory scheme as it did in *Houston-Sconiers*. *See, e.g.*, *In re Pers. Restraint of Greening*, 141 Wn.2d at 693–94 (decision overturning prior case law interpreting statute applied retroactively to enactment of SRA); *see also In re Pers. Restraint of Vandervlugt*, 120 Wn.2d at 436 (intervening cases decided after petitioner's sentencing applied retroactively back to enactment of SRA); *In re Pers. Restraint of Johnson*, 131 Wn.2d at 568 (decision setting out proper calculation of offender score under SRA must be applied retroactively to petitioner's 1985 sentence); *In re Pers. Restraint of*

Hinton, 152 Wn.2d at 859–60 (Supreme Court decision published in 2002 applied retroactively to 1976 enactment of statute).

In *Houston-Sconiers*, this Court construed the meaning of the statutory sentencing scheme under the SRA and for the very first time gave trial courts absolute discretion to depart downward from its guidelines when imposing firearm enhancements on juveniles in adult court. 188 Wn.2d at 21. This decision explicitly overturned the Court's previous holding in *Brown*, which interpreted the same sentencing scheme but denied trial courts such discretion. *Id.* at 21 n.5. The Court should, therefore, reaffirm its longstanding precedent on retroactive application and apply its holding in *Houston-Sconiers* retroactively.

VI. CONCLUSION

For the reasons set forth herein, this Court should hold that its decision in *Houston-Sconiers* constitutes a significant, material, and retroactive change in the law satisfying the exception to the one-year time limit under RCW 10.73.100(6).

RESPECTFULLY SUBMITTED AND DATED this 10th day of October, 2018.

ACLU OF WASHINGTON FOUNDATION

By: /s/ Eric R. Nusser, WSBA #51513

Eric R. Nusser, WSBA #51513
ACLU-WA Foundation
Cooperating Attorney
Nancy L. Talner, WSBA #11196
Vanessa T. Hernandez, WSBA #42770
ACLU-WA Foundation
901 5th Avenue, Suite 360
Seattle, Washington 98164
Telephone: (206) 624-2184
Email: talner@aclu-wa.org

CERTIFICATE OF SERVICE

I certify that on October 10, 2018, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

Gregory Charles Link, WSBA #25228 Email: greg@washapp.org Washington Appellate Project 1511 3rd Avenue, Suite 610 Seattle, Washington 98101-3647 Telephone: (206) 587-2711 Facsimile: (206) 587-2710	☐ U.S. Mail, postage prepaid ☐ Hand Delivered via ☐ Messenger Service ☐ Overnight Courier ☒ Facsimile Electronic Service

Attorneys for Time Rikat Meippen

Daniel T. Satterberg, WSBA #15400 Email: dan.satterberg@kingcounty.gov Ann Marie Summers, WSBA #21509 Email: ann.summers@kingcounty.gov Email: paoappellateunitmail@kingcounty.gov KING COUNTY PROSECUTOR'S OFFICE 516 3rd Avenue, Suite W554 Seattle, Washington 98104 Telephone: (206) 477-9497 Facsimile: (206) 296-9013	☐ U.S. Mail, postage prepaid ☐ Hand Delivered via ☐ Messenger Service ☐ Overnight Courier ☒ Facsimile Electronic Service

Attorneys for the State

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of October, 2018.

ACLU OF WASHINGTON FOUNDATION

By: /s/ Eric R. Nusser, WSBA #51513
Eric R. Nusser, WSBA #51513

TERRELL MARSHALL LAW GROUP PLLC

October 10, 2018 - 11:25 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95394-5
Appellate Court Case Title:	Personal Restraint Petition of Time Rikat Meippen
Superior Court Case Number:	06-1-05905-7

The following documents have been uploaded:

- 953945_Briefs_20181010112510SC280011_6458.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Brief of Amicus Curiae ALCU of WA.pdf

A copy of the uploaded files will be sent to:

- amy.meckling@kingcounty.gov
- ann.summers@kingcounty.gov
- bkinsey@terrellmarshall.com
- docketrequests@terrellmarshall.com
- filing@terrellmarshall.com
- greg@washapp.org
- griff1984@comcast.net
- hrota@terrellmarshall.com
- office@blacklawseattle.com
- paoappellateunitmail@kingcounty.gov
- talner@aclu-wa.org
- tim@blacklawseattle.com
- vhernandez@aclu-wa.org
- wapofficemail@washapp.org

Comments:

Sender Name: Holly Rota - Email: hrota@terrellmarshall.com
Filing on Behalf of: Eric Riley Nusser - Email: eric@terrellmarshall.com (Alternate Email:)

Address:
936 N. 34th Street
Suite 300
Seattle, WA, 98103
Phone: (206) 816-6603

Note: The Filing Id is 20181010112510SC280011