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STATE OF WASHINGTON
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NO. 95394-5

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF:

TIME MEIPPAN,

Petitioner,

SUPPLEMENTAL BRIEF OF PETITIONER

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WASHINGTON APPELLATE PROJECT
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A. ARGUMENT

Time Meippan immigrated to the United States in his early teens, living with extended family before moving to Seattle. A few years later, Time was sentenced to prison for a robbery and assault he committed when only 16. The 231-month sentence resulted from consecutive sentences for the assault and robbery and a five-year firearm enhancement.

Because the court could not and did not consider whether the attributes of youth or other personal characteristics mitigated Time's culpability he filed the present Personal Restraint Petition.

RCW10.73.090 permits this Court to grant a personal restraint petition beyond the one-year limit if the petition is based on a significant change in law that is retroactive and material to the petitioner. RCW 10.73.100(6); *In re Personal Restraint of Colbert*, 186 Wn.2d 614, 619, 380 P.3d 504 (2016). This Court's decision in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017) is a significant and retroactive change in the law material to Time. Time is entitled to relief.

1. *Houston-Sconiers* interpreted the provisions of the Sentencing Reform Act as permitting courts complete discretion to consider the personal attributes of youth when sentencing children as adults. That opinion is retroactive.

Houston-Sconiers interpreted the provisions of the Sentencing Reform Act (SRA) as permitting sentencing courts complete discretion

when sentencing children in adult court. The Court found there would be nothing "illegal" in a sentence of zero months based upon the mitigating circumstances of youth for either a base sentence or even a firearm enhancements. 188 Wn.2d at 21. The Court expressly overturned prior cases interpreting the SRA differently. *Id.*

Decisions based on statutory interpretation always apply retroactively because "[o]nce the Court has determined the meaning of a statute that is what the statute has meant since its enactment." *In re the Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1993).

This Court has long recognized a judge's sentencing authority is derived strictly from statutes subject to constitutional requirements. *In re the Personal Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (addressing pre-SRA sentence); *In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 869, 50 P.3d 618 (2002) (addressing SRA sentence). "This court has consistently held that fixing penalties for criminal offenses is a legislative, and not a judicial, function." *State v. Manussier*, 129 Wn.2d 652, 667, 921 P.2d 473 (1996). From its inception, courts have interpreted the SRA to mandate sentencing courts comply with its provisions and substantially limited courts' ability to act.

The Court previously interpreted the SRA to require a court to determine a person's offender score and resulting standard range and to sentence within that range unless an exceptional sentence is permissible under the provisions of the SRA. *See, e.g.*, *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). If a reviewing court determines the bases for an exceptional sentence are improper, the case is remanded for imposition of a standard range sentence.

This Court interpreted RCW 9.94A.340 to prohibit exceptional sentences based on factors personal to a particular defendant.[1] *Law*, 154 Wn.2d at 97. *Law* provided a brief survey of the Court's cases interpreting this statute. First, *Law* noted that in *State v. Freitag*, 127 Wn.2d 141, 145, 896 P.2d 1254 (1995), the Court found RCW 9.94A.340 barred reliance on a defendant's altruistic past and concern for others. *Law*, 154 Wn.2d at 98. Next, *Law* noted the Court had found youthfulness and lack of prior police contacts were personal factors not related to the crime and thus improper factors under the statute. *Id*. (citing *State v. Ha'mim*, 132 Wn.2d 834, 940 P.3d 633 (1997), *abrogated by State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015)). Finally, *Law* explained *State v. Fowler*, 145 Wn.2d

[1] RCW 9.94A.340 provides: "The sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant."

400, 38 P.3d 335 (2002), rejected the defendant's strong family support as a mitigating factor because it related solely to the defendant and not the crime. *Law*, 154 Wn.2d at 98. Relying on the rule that mitigating factors must relate to the crime and not the defendant, *Law* reversed a mitigated sentence based upon a defendant's post-crime response to treatment and strengthening family connections. *Id*. at 104.

Interpreting the SRA to permit complete discretion is a fundamentally different interpretation of the SRA. Complete discretion frees courts from the requirement that they must impose a standard range sentence absent permissible crime-related mitigating facts. Complete discretion permits a court to consider as mitigation a range of personal characteristics such as the qualities of youth. That discretion frees courts from the previously construed as mandatory procedures of the SRA.

Too, the Court interpreted the SRA enhancement provisions to require mandatory confinement not subject to a mitigated sentence. *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608, 613 (1999). *Houston-Sconiers* expressly overturned *Brown. Houston-Sconiers,* 188 Wn.2d at 21 n.5.

Because *Houston-Sconiers* interpreted the statues that make up the SRA as permitting complete discretion, that is what those statutes have always meant. Thus, it is not true that a presumptive range sentence is mandatory absent sufficient proof of a permissible mitigating factor when

sentencing children as adults. In those cases, RCW 9.94A.340 does not prevent consideration of personal characteristics as a basis for a mitigated sentence. RCW 9.94A.533 does not prohibit courts from imposing zero confinement even when an enhancement is found by a jury or admitted in a guilty plea. *Houston-Sconiers* interpreted the provisions of the SRA as they apply to the sentencing of children in adult court. That interpretation applies to people like Time who were sentenced as children in adult court. *Johnson*, 131 Wn.2d at 568.

2. Time's petition is timely under RCW 10.73.100

A "significant change in the law" occurs "when an intervening appellate decision overturns a prior appellate decision that was determinative of a material issue." *State v. Miller*, 185 Wn.2d 111, 114, 371 P.3d 528 (2016).

Houston-Sconiers expressly overturned cases which barred the departure from the mandatory procedures of the SRA when sentencing children as adults. 188 Wn.2d at 21. That class of cases is broader than simply those addressing the mandatory nature of enhancements. Instead, that group of cases includes all cases addressing the mandatory nature of the SRA or those limiting the ability of sentencing courts to depart from presumptive ranges. Because it overturned numerous prior cases, *Houston-Sconiers* is a significant change in the law. *Miller*, 185 Wn.2d at 114.

This significant change in the law is material to Time's case. Prior to *Houston-Sconniers*, no court or party understood the breadth of discretion available to it. This Court's opinions had uniformly insisted on the mandatory nature of the SRA and the limitations on the discretion to depart from those mandatory procedures.

Houston-Sconiers not only changed the available outcomes when sentencing a child as an adult, it changed the procedures which lead to those outcomes. A focus solely on the characteristics of the crime rather than the child who committed it was required by the SRA, yet this approach failed to account for how youthfulness mattered. This Court recognized as much in *O'Dell*. 183 Wn.2d at 691–92 (acknowledging that when legislature enacted SRA "it did not have the benefit of psychological and neurological studies showing that the parts of the brain involved in behavior control continue to develop well into a person's 20s.") Too, the Court recognized its own cases interpreting the SRA had been decided without "the benefit of . . . studies that establish a clear connection between youth and decreased moral culpability for criminal conduct." *Id*. at 695.

> Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later

time. . . .

Graham v. Florida, 560 U.S. 48, 85, 130 S. Ct. 2011, 2036, 176 L. Ed. 2d 825 (2010) (Stevens, J. concurring).

Houston-Sconiers echoed that understanding when it found the Eighth Amendment requires, and the SRA permits, complete discretion when sentencing children and overturned prior cases interpreting the SRA to prohibit it. 188 Wn.2d at 28. The trial court certainly could not have anticipated that conclusion eight years earlier. At the time of Time's sentencing, neither this Court nor the United States Supreme Court had held proper consideration of the mitigating qualities in adult sentencing was constitutionally required outside the context of the death penalty. Even had the trial court, years in advance of this Court or the United States Supreme Court, properly understood how the mitigating qualities of youthfulness may affect Time's culpability, it lacked any discretion to do anything with that understanding. *Houston-Sconiers* fundamentally alters the framework of sentencing, changing what must be considered, how it may be considered, and the outcomes available.

Miller v. Alabama addressed at length the "hallmark features" of youth, "immaturity, impetuosity, and failure to appreciate risks and consequences." 567 U.S. 460, 477, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The Court noted that beyond a youth's lessened "moral

culpability," the transitional nature of adolescence means it is much more likely a young person's "deficiencies will be reformed" as his "neurological development occurs." *Id.* at 471-72. But at the time of Time's sentencing, the SRA precluded consideration of this demonstrated immaturity and capacity for rehabilitation. The court was prohibited from considering or relying on Time's recent immigration to the United States at the age of 15 and his lack of family when he arrived. The court could not afford any weight to the possibility that this unsettled home life coupled with the hallmark attributes of youth led to Time "[falling] in with a rather bad element in the neighborhood whom he determined he would impress." The trial court focused only the circumstances of the offense, as the law then required, without analysis of how Time's youthfulness mattered. The law prevented the court from doing anything different.

Houston-Sconiers requires a different approach:

> [I]n exercising full discretion in juvenile sentencing, the court must consider mitigating circumstances related to the defendant's youth—including age and its "hallmark features," such as the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences." It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and "the way familial and peer pressures may have affected him [or her]." And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.

Houston-Sconiers, 188 Wn.2d at 23 (Internal citations omitted, citing *Miller*, 567 U.S. at 477-78). Time did not receive such a hearing and the sentencing court could not have provided him such a hearing. The significant change in law in *Houston-Sconiers* is material to Time.

3. Because Time has no other remedy available he is entitled to relief under RAP 16.4(d).

Without qualification, *Houston-Sconiers* concluded the Eighth Amendment requires interpreting the SRA to permit sentencing courts complete discretion whenever sentencing a child. 188 Wn.2d at 24.

This Court has found a petitioner's eligibility for parole after 20 years afforded him a remedy such that he was not entitled to relief under RAP 16.4. *State v. Scott*, 190 Wn.2d 586, 592, 391 P.3d 990 (2018), Time has no such remedy as no statute affords him eligibility for parole.

Recasting the holding of *Scott*, the State contends that because Time's sentence does not cross the 20-year threshold for parole eligibility under RCW 9.94.730, there is no constitutional error. Response at 10. *Scott* concerned only the question of what remedy existed for the Eighth Amendment violation in that case, it did not define the boundaries of the violation nor remedies available to others. Neither *Houston-Sconiers* nor *Scott* concluded a constitutional violation occurs only if a person receives a sentence in excess of 20 years. *Houston-Sconiers* construed the SRA to

require sentencing courts "consider mitigating qualities of youth and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." 188 Wn.2d at 21. That did not happen here. *Houston-Sconiers* found this absence of discretion violated the Eighth Amendment without regard to the length of sentence imposed.

In Time's case, the sentencing court did not have complete discretion at the time of sentencing and did not have the benefit of the numerous recent cases which recognize the mitigating qualities of youthfulness. Moreover, Time has no opportunity to earn his early release based upon rehabilitation. Because there is no other remedy available, RAP 16.4 permits this Court to grant the petition.

B. CONCLUSION

Time is serving an unconstitutional sentence imposed without consideration of the mitigating qualities of youth and without the court's appreciation of its boundless discretion. The only remedy for that unconstitutionality is a new sentencing that complies with *Miller*.

Respectfully submitted this 19th day of October, 2018.

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	)	
Petitioner.	)	

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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF OCTOBER, 2018.

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WASHINGTON APPELLATE PROJECT

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