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No. 96709-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

CRISTIAN DELBOSQUE,

Respondent.

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

SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ARGUMENT

Article I, section 22 guarantees Cristian the right to appeal the sentence imposed by the trial court in this case.

Because his sentence violated the Eighth Amendment and Article I, §section 14, the trial court was required to resentence Cristian. *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018); RCW 10.95.035. Cristian appealed the sentence imposed contending it remains unconstitutional.

The Court has requested the parties submit supplemental briefing addressing whether RCW 10.95.035(3) violates the right to appeal guaranteed in Article I, section 22. As addressed in Cristian's answer and his supplemental brief, the statute plainly violates his constitutional right to appeal. Relying on that statute, the Court of Appeals wrongly treated Cristian's properly filed appeal as a Personal Restraint Petition.

1. Article I, section 22 guarantees the right to appeal the sentence imposed.

Sentencing proceedings, like that required by RCW 10.95.030, are subject to the accused's constitutional rights

under the Washington Constitution. Article I, section 22 "grants not a mere privilege but a 'right to appeal in all cases'. . . it is to be accorded the highest respect by" our courts. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

RCW 10.95.035(3) provides: "The court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986." The Court of Appeals has interpreted this subsection to mean there is no right to direct appeal from a sentencing under RCW 10.95.035. *State v. Bassett*, 198 Wn. App. 714, 721-22, 394 P.3d 430 (2017), *affirmed on other grounds*, 192 Wn.2d 67.[1] The court reasoned this was so because parole board decisions setting a minimum term could be reviewed only through a personal restraint petition. *Id*. at 721.

In Cristian's case, the Court of Appeals, relying on its decision in *Bassett*, concluded Cristian could not appeal the sentence imposed. Instead the court reasoned his only avenue was via a Personal Restraint Petition (PRP).

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[1] While this Court affirmed the conclusion in *Bassett* that a child may never be sentenced to life without parole, the Court did not address the appealability question.

2. RCW 10.95.035(3) cannot prohibit Cristian's exercise of his right to appeal.

This court has previously addressed a statute which sought to limit the ability to appeal. The Sentencing Reform Act (SRA) provides in part "[a] sentence within the standard range . . . shall not be appealed." RCW 9.94A.585(1)(formerly RCW 9.94A.210). In response to the argument that this limitation violated Article I, section 22, this Court first narrowly read the statute as only precluding appellate review of the length of a standard range sentence. *State v. Ammons*, 105 Wn.2d 175, 182, 713 P.2d 719 (1986). An appellant, of course, is not precluded from challenging on appeal the procedure by which a sentence within the standard range was imposed. *Id*. at 183, *see also State v. Williams*, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003) ("underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision" are appealable); *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (same).

Addressing the same statute a few years later, the Court reiterated that a defendant may always challenge the procedure

which a sentence is imposed. *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). This Court has never strayed from this view. *See Williams*, 149 Wn.2d at 146-47 ("underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision" are appealable); *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (same). *Herzog* went further recognizing that if the statute was read "to prohibit any appeal, it would likely violate the guarantee of 'the right to appeal in all cases'" contained in article 1, section 22." *Herzog*, 112 Wn.2d at 423. Moreover, "even were the statutory prohibition absolute, a challenge based upon constitutional grounds should defeat the statute." *Id.*

Because it seeks to prohibit any appeal, RCW 10.95.035(3) violates Article I, section 22. *Herzog*, 112 Wn.2d at 423. Too, because Cristian challenges the constitutionality of his sentence, that his sentence and the procedure the court employed to impose violates the Eighth Amendment, such a challenge must defeat any prohibition on his right to appeal. *Herzog*, 122 Wn.2d at 423.

The right to appeal "in all cases" as provided in Article I, section 22 is not satisfied where review is limited to a personal restraint petition. By including an express right to appeal in Article I, section 22, the framers intended to break from the common law which provided review of criminal cases only by way of writs and other collateral attacks. James E. Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Convictions*; 8 University of Puget Sound Law Review 375, 380 (1984). In place of these collateral measures, the framers intended an absolute right to appeal. *Id.*

The framers also separately guaranteed the right to a writ of habeas corpus in Article I, §section 13. A personal restraint petition is a type of habeas proceeding. *Tolliver v. Olsen*, 109 Wn.2d 607, 610-11, 746 P.2d 607 (1987). By separately guaranteeing the express and absolute right to appeal collateral review as well as a right to a writ of habeas corpus, it is clear the framers did not intend the exercise of one right to supplant the other. That is particularly true in light to their desire to provide an absolute right to appeal "in all cases." A statute limiting the

ability to challenge a sentence to a personal restrain petition alone cannot satisfy the right to appeal.

> *3. The imposition of a sentence by the superior court pursuant to RCW 10.95.035 is fundamentally different from the administrative setting of a minimum term by the parole board.*

Prior to the SRA, the superior court did not set the minimum term, but instead only imposed the maximum term provided by statute. Following the defendant's transfer to the Department of Corrections, the parole board "fixed" the minimum term. Laws 1986, ch 224, §9 (former RCW 9.95.040). The administrative setting of a minimum term was not appealable as a matter of right, or even subject to discretionary review. *In re the Personal Restraint of Rolston,* 46 Wn. App. 622, 623, 732 P.2d 166 (1987). However, even before the SRA, the **court's** imposition of its sentence and the procedure for doing so have always been subject to direct appeal. *See In re the Personal Restraint of Sinka*, 92 Wn.2d 555, 565-66, 599 P.2d 1275 (1979) (noting setting of minimum term is unlike the other parts of a criminal prosecution in terms of due process).

Unlike the sentencing court in Cristian's case, the parole board was an administrative agency. D. Boerner, *Sentencing in Washington*, 1-1 (1985). The setting of a minimum term was not a part of the criminal proceeding and the State was not a party. *Sinka*, 92 Wn.2d at 566; *In re Matter of Bonds*, 26 Wn. App. 526, 529-30, 613 P.2d 1196 (1980). "The actual setting of a minimum term occur[ed] at a meeting between the inmate and a two-person panel of the Parole Board; that meeting average[ed] 15-20 minutes in length. . . . counsel, family and friends [were] not allowed to attend." *Sinka*, 92 Wn.2d at 561.

The limits on the procedural and substantive rights of an inmate in a parole hearing rested on the idea that under a parole system a person had no expectation in anything other than maximum term. *Lindsey v. Superior Court,* 33 Wn.2d 94, 104, 204 P.2d 482 (1949). The law required the trial court to impose the maximum term. A minimum term, set by a parole board, was merely an act of administrative grace. *January v. Porter*, 75 Wn.2d 768, 774, 453, P.2d 876 (1969). That is no longer the case.

A child previously sentenced as an adult to life without parole has a constitutional right to be resentenced. In fact, this

Court has concluded Article I, section 14 prohibits imposing the maximum term in any case. *Bassett*, 192 Wn.2d at 90. Instead, a sentencing court must exercise discretion whenever sentencing children as adults. *State v. Gilbert*, 193 Wn.2d 169, 175-76, 438 P.3d 133 (2019); *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). Unlike pre-1986 sentencing hearings where only one sentence was permissible, sentencing under RCW 10.95.035 requires a court to exercise a substantial amount of discretion.

Sentencing under RCW 10.95.030 is an adversarial proceeding and not merely an administrative act. Unlike parole proceedings, a sentencing hearing under RCW 10.95.035, as well as the resulting sentence, implicates several substantive and procedural constitutional rights. A sentence imposed under RCW 10.95.030 and RCW 10.95.035 does not exist merely as an exercise of administrative grace but rather by constitutional mandate.

4. To the extent it denies Cristian the right to appeal his sentence, RCW 10.95.035(3) is unconstitutional.

This Court has already recognized a statutory prohibition on the right to appeal a sentence violates Article I, section 22.

Herzog, 112 Wn.2d at 423; *Williams*, 149 Wn.2d at 147. RCW 10.95.035(3) purports to do exactly that. Under the statute, children previously convicted of aggravated first degree murder and resentenced in order to ensure their sentence is constitutional are the only individuals in Washington who do not have a right to appeal the sentence imposed or even the manner in which that sentence is imposed. Not only does that provision deny them their right to appeal under Article I, section 22, it casts substantial constitutional uncertainty under the Equal Protection Clauses of the State and Federal constitutions. As every other criminal defendant, Cristian has an unqualified right to appeal the sentence imposed in his case. To the extent RCW 10.95.035(3) purports to limit the right, it is unconstitutional.[2]

[2] As Article I, section 22 applies only to defendants in criminal cases, its guarantee of the "right to appeal in all cases" does not extend to the State. Instead, the State's ability to appeal is limited to that provided by court rule and statute. *State v. A.M.R.*, 147 Wash. 2d 91, 95, 51 P.3d 790, 792 (2002). Thus, the legislature can properly limit the State's ability to appeal to that which existed prior to 1986.

B. CONCLUSION

Cristian is entitled to appeal the unconstitutional sentence imposed on him.

Respectfully submitted this 30th day of August, 2019.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CRISTIAN DELBOSQUE, Respondent.	)))))))))	NO. 96709-1

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