Supreme Court No. _____
Court of Appeals No. 58688-6-II

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

SOPHIA NATASHA NELSON, fka AUSTIN MOORES-NELSON,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Natasha Nelson,[1] the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review.

B. SUMMARY OF ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

Ms. Nelson filed a meritorious personal restraint petition, alleging among claims, that her sentence was unlawful. The Court of Appeals agreed and issued an opinion granting Ms. Nelson's request for "resentencing."

But at "resentencing," the trial court limited the scope of resentencing to correcting the sentencing error. Ms. Nelson appealed, arguing the trial court had violated the appellate mandate and improperly limited the scope of remand by not holding a de novo resentencing. She cited the published Court

[1] After the filing of the opening brief, Ms. Nelson changed her name and now uses feminine pronouns. Even before this Ms. Nelson preferred the to go by the last name of Nelson rather than Moores-Nelson. This petition uses her preferred name and pronouns.

of Appeals in *State v. Dunbar*, 27 Wn. App. 2d 238, 244, 532 P.3d 652 (2023) holding remand for "resentencing" means a "de novo" resentencing unless the opinion says otherwise.

Notwithstanding this and other precedent, the Court of Appeals held there was no error in an unpublished decision issued on August 13, 2024. The Court distinguished Ms. Nelson's case from *Dunbar* on the grounds that Ms. Nelson's case arose from a collateral attack rather than a direct appeal. Slip op. at 5.

Ms. Nelson timely filed a motion to reconsider pointing out that this was false. *Dunbar* also arose in the context of a collateral attack. Ms. Nelson later submitted a statement of additional authorities citing this Court's decision in *State v. Vasquez*, __ Wn.3d __, 560 P.3d 853 (2024), a case that also arose on collateral attack and holds that "resentencing" means a full sentencing anew.

Without calling for an answer and without explanation, the Court of Appeals denied the motion on February 7, 2025.

Because the Court of Appeals' decision conflicts with precedent, including this Court's recent decision in *Vasquez* clarifying that "resentencing" means *de novo* resentencing, this Court should grant review.

C. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Whether an unqualified remand for resentencing by the Court of Appeals means a de novo resentencing under the law of the case and precedent?

2. Whether a defendant is deprived of their right to the effective assistance of counsel where counsel fails to recognize that an appellate court's remand for resentencing means resentencing anew and consequently fails to argue that her client should receive a lesser sentence where there were grounds ripe for a lesser sentence and mitigation, including youthfulness and evidence of rehabilitation?

3. Whether a person is deprived of their right to confer with counsel where their attorney is in the courtroom and the

record shows there was no means for the defendant to privately confer with their attorney?

4. Whether a violation of the right to confer with counsel is structural error?

5. Whether a violation of the right to confer with counsel has been proved harmless beyond a reasonable doubt where counsel misunderstood the scope of the remand and failed to advance the defendant's position that she should receive a lesser sentence?

6. Whether in sentencing a defendant for offenses committed when the person is 19, the state or federal constitutions require the trial court to meaningfully consider whether the defendant's youth is mitigating?

7. Whether the appellate court should order a new sentencing judge on remand where a reasonable observer might reasonably question the judge's impartiality on remand?

D. STATEMENT OF THE CASE

Our society failed Ms. Nelson. She had a terribly abusive and neglectful childhood. 9/9/16 RP 22, 24; CP 104-05. Her father was abusive and violent. 9/9/16 RP 24. Child protective services took her out of the home, but she was in and out of foster care for much of her life. 9/9/16 RP 24. Unsurprisingly, Ms. Nelson suffered from mental health issues and developmental disabilities. RP 22.

As a result of our society's failure, when Ms. Nelson was 19 years old, she committed acts resulting in death and tragedy. After her girlfriend broke up with her, she vandalized her car. Days later, when she went to her ex-girlfriend's house, she encountered the ex-girlfriend's mother outside, shot her, broke into the home, and shot the family dog. CP 38, 85-86; *In Re Pers. Restraint of Nelson*, noted at 18 Wn. App. 2d 1067, 2021 WL 3674336 (2021).

Based on these events, Ms. Nelson pleaded guilty in 2016 to first degree murder with a firearm enhancement, first degree

burglary with a firearm enhancement, first degree animal cruelty with a firearm enhancement, and second degree malicious mischief. CP 9-19; 9/9/16 RP 5-11.

Notwithstanding Ms. Nelson's guilty plea, personal apology, youth, and other mitigating factors, the trial court imposed a high-end total sentence of 512 months of confinement, nearly 43 years. 9/9/16 RP 20-28; CP 84-105. In rejecting Ms. Nelson's argument that her youth and background was mitigating, the court remarked that other youths with similar backgrounds did not commit similar acts:

> I see people everyday that have had childhood experiences as bad or worse than yours who are able to pull themselves up out of that and become productive members of society, don't engage in this kind of behavior, or anything close to this kind of behavior.

9/9/16 RP 28.

Ms. Nelson timely filed a personal restraint petition. Holding that the firearm enhancement on the animal cruelty conviction was unlawful because it was an unranked offense,

the Court of Appeals granted the petition and remanded for "resentencing." CP 38, 42-45, 56; *In Re Pers. Restraint of Nelson*, noted at 18 Wn. App. 2d 1067, 2021 WL 3674336 (2021). Although the case would have ordinarily been decided by Division Two, the opinion was issued by a panel on Division Three because Division Two had transferred the case.

In January 2023, the trial court entered a scheduling order for a "sentencing date" of April 7, 2023. CP 106. The court held a hearing on that date. Before the hearing, neither party filed any memorandum or brief. See docket.

At the hearing, the prosecutor announced that Ms. Nelson was "in custody at the Department of Corrections, appearing via Zoom." 4/7/23 RP 4. Ms. Nelson's counsel, however, was not with her, and was instead in the courtroom. 4/7/23 RP 4-5. The court did not offer Ms. Nelson the opportunity to confer with her attorney in private during the hearing. 4/7/23 RP 4-5. Instead, the court, with the same judge that had sentenced Ms. Nelson before, invited the prosecutor to start without discussing

how Ms. Nelson could communicate with her attorney. 4/7/23 RP 5.

The prosecutor represented to the court that under this Court's opinion in Ms. Nelson's case, the firearm enhancement on the unranked felony "is to be struck today." 4/7/23 RP 5. But that this was all that was required because "the scope of the mandate does not appear to affect anything else in the original Judgment and Sentence." 4/7/23 RP 5. The court agreed, stating "my understanding is that the sentencing ranges aren't affected. It's just the question of the enhancement on Count III." 4/7/23 RP 6.

The prosecutor also asked the court to hear from a friend and co-worker of the decedent. 4/7/23 RP 5-6. Defense counsel opposed the request because any statement was not relevant given "the mandate" and that the defense counsel was "just going to be arguing law on the LFOs" (legal financial obligations). 4/7/23 RP 7.

The court permitted the friend to speak. 4/7/23 RP 7. She pleaded with the court to "keep [Ms. Nelson] in prison for as long as you possibly can" and personally told Ms. Nelson that her "final judgment is when the gates of hell open up for you." 4/7/23 RP 8-11.

Following this diatribe, the prosecutor asked the court "to impose exactly the same sentence," except for the unlawful 18-month firearm enhancement on the unranked felony offense. 4/7/23 RP 11.

Defense counsel agreed the firearm enhancement should not be imposed. But other than making an argument regarding legal financial obligations, defense counsel made no argument on behalf of her client for sentencing relief. 4/7/23 RP 6-7, 11-15.

The court invited Ms. Nelson to speak if she wanted to. 4/7/23 RP 15-16. Ms. Nelson again apologized personally to the decedent's family and friends for her actions, and hoped that they would forgive her one day. 4/7/23 RP 15-16. She

explained that when she was 19, "I was a very selfish kid that did not care about the repercussions of my actions." 4/7/23 RP 15. She acknowledged that her incarceration had helped better herself. 4/7/23 RP 16. She recounted her engagement in programing during her incarceration with the goal of ultimately becoming a productive member of society. 4/7/23 RP 16.

Stating that the hearing concerned "a correction of the sentence," the court struck the firearm enhancement on the unranked felony, resulting in a sentence reduction of 18 months. 4/7/23 RP 17-18; CP 62. The court otherwise "reinstated" the same sentences, for a total sentence of 494 months of confinement, or a little over 41 years. 4/7/23 RP 17-18; CP 64.

In doing so, the judge recounted that he was the judge who sentenced Ms. Nelson in 2016 and repeated his observation that while Ms. Nelson had gone through a difficult and challenging childhood, "there are many people that have gone through similar experiences and backgrounds that have

not engaged in anything close to what [Ms. Nelson] did." 4/7/23 RP 17.

At the end of the hearing, Ms. Nelson's attorney asked her client in open court if she would approve signing the judgment and sentence. 4/7/23 RP 20. A Department of Corrections official then collected Ms. Nelson's fingerprints and held a copy up to the camera. 4/7/23 RP 21. At the end of the hearing, Ms. Nelson's lawyer stated to Ms. Nelson that she was going to be in her office all day Monday if Ms. Nelson wanted to call.[2] 4/7/23 RP 23. Ms. Nelson stated that sounded good. 4/7/23 RP 23.

Ms. Nelson appealed. The central argument on appeal was that the mandate and opinion from the Court of Appeals ordering resentencing required de novo resentencing, not a mere ministerial correction of the sentence. To that end, not only had the trial court erred, but Ms. Nelson had been deprived

[2] The hearing on April 7, 2023 was a Friday.

of her right to effective assistance of counsel by her counsel's failure to advocate for a lesser sentence. And that a violation of Ms. Nelson's right to confer with counsel was prejudicial. Ms. Nelson sought a new judge on remand and instruction that this judge must consider whether Ms. Nelson's youth at the time of the offenses was mitigating. Br. of App. at 13-37; Reply Br. at 1-16.

The Court of Appeals, this time a panel on Division Two, rejected Ms. Nelson's arguments. Notwithstanding that its previous opinion repeatedly stated it was ordering "resentencing," the Division Two judges determined that Division Three judges had not meant what they said and that a full resentencing was not what was ordered. Based on this ruling, the Court rejected Ms. Nelson's other arguments on why she should receive a new sentencing hearing, reasoning nothing would have changed given the "limited" nature of the remand. Slip op. at 5-8. This included a determination by the Court of

Appeals that a violation of Ms. Nelson's right to confer with counsel was harmless beyond a reasonable. Slip. op at 8.

Ms. Nelson filed a motion to reconsider, explaining that the Court had misread the precedent and this Court was adjudicating a similar issue in *Vasquez* on what "resentencing" means. After this Court decided *Vasquez*, which held that resentencing means a full de novo resentencing, Ms. Nelson filed a statement of additional authorities citing *Vasquez* and explaining how it applied. Still, without explanation, the Court of Appeals denied Ms. Nelson's motion for reconsideration. She seeks this Court's review.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review should be granted because the Court of Appeals' decision holding that a mandate for "resentencing" does not require a new sentencing hearing is in direct conflict with this Court's recent decision in *Vasquez* and the Court of Appeals' decision in *Dunbar*.

An appellate court's mandate is the law of the case. *Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 183, 311 P.3d 594

(2013). "The law of the case doctrine binds the parties, the trial court, and subsequent appellate courts to the holdings of an appellate court in a prior appeal until such holdings are authoritatively overruled." *Id. at* 190; *accord* RAP 12.2.

In the Court of Appeals' disposition of Ms. Nelson's personal restraint petition, the Court remanded for resentencing due to the error in the firearm enhancement on the unranked offense. CP 38 ("We agree that the firearm enhancement was incorrectly added to the animal cruelty conviction and *remand for resentencing* while rejecting the remainder of [Ms.] Nelson's issues.") (emphasis added); CP 54 ("*Since we have already granted [Ms.] Nelson's request for resentencing*, we decline to consider whether counsel's failure to spot this issue amounts to ineffective assistance of counsel.") (emphasis added); CP 56 ("We grant [Ms.] Nelson's petition and *remand for resentencing* in light of the erroneous application of the firearm's [sic] enhancement.") (emphasis added).

Under the law of the case doctrine and precedent, this required a de novo resentencing. *State v. Vasquez*, __ Wn.3d __, 560 P.3d 853, 857-59 (2024); *State v. Dunbar*, __ Wn. App. 3d __, 532 P.3d 652, 656-58 (2023); *accord State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009) (resentencing is de novo unless court remands for ministerial correction of judgment and sentence).

The Court of Appeals refused to abide by the mandate and the law of the case, which had ordered "resentencing." The Court reasoned the error identified in the earlier review logically only justified remand to strike the enhancement, not resentencing. Slip op. at 4-5. Setting aside whether this is true, the plain mandate in the opinion was "resentencing" without any limitation. Moreover, the decision on Ms. Nelson's personal restraint petition declined to address one of Ms. Nelson's claims of ineffective assistance of counsel on the grounds that the Court was ordering "resentencing," CP 54; 2021 WL 3674336 at *7. ("Since we have already granted [Ms.]

Nelson's request for resentencing, we decline to consider whether counsel's failure to spot this issue amounts to ineffective assistance of counsel."). It was unfair for the Court to interpret "resentencing" to mean mere correction of the judgment and sentence. *Cf. State v. Recuenco*, 163 Wn.2d 428, 442, 180 P.3d 1276 (2008) ("we vacate the firearm sentence *and remand for correction of the sentence*.") (emphasis added); *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009) ("The mandate . . . did not explicitly authorize the trial court to resentence Kilgore."); *State v. McFarland*, 18 Wn. App. 2d 528, 536, 492 P.3d 829 (2021) ("we remanded Ms. McFarland's case for resentencing. Yet no resentencing took place.").

Moreover, the decision is plainly contrary to this Court's decision in *Vasquez* and the Court of Appeals decision in *Dunbar*. *Dunbar* "hold[s] that, unless the reviewing court restricts resentencing to narrow issues, any resentencing should be de novo." 27 Wn. App. 2d 238, 244. The Court distinguished

Dunbar on the basis that "Dunbar did not arise in the PRP context." Slip op. at 5. As pointed out by Ms. Nelson her motion to reconsider, *this is false*. It began as a collateral attack filed in the trial court based on *State v. Blake*,[3] resulting in a "resentencing." *State v. Dunbar*, 27 Wn. App. 2d 238, 239-41, 532 P.3d 652 (2023); *see State v. Dunbar*, 194 Wn.2d 1006, 451 P.3d 335 (2019) (denying review in Dunbar's direct appeal in November 2019).

Ms. Nelson also filed a statement of additional authorities citing this Court decision in *Vasquez*. There, on collateral attack, the defendant was resentenced. But like in this case, the trial court limited the scope of the hearing and evidence to be considered. Citing *Dunbar*, the Court of Appeals vacated that sentencing and remanded for a new one, holding that the trial

[3] *State v. Blake*, 197 Wn.2d 170, 195, 481 P.3d 521 (2021).

court erred in not holding a de novo sentencing hearing. This Court affirmed. *Vasquez*, 506 P.3d at 854.

This Court held the trial court erred "in treating a resentencing hearing as 'limited' in scope." *Id.* at 858. The Court reasoned, "[i]t is a sentencing hearing, which is not limited in scope." *Id.* The Court held "that at a resentencing hearing, the court has *the same discretion* as an original sentencing judge." *Id.* at 859 (emphasis added). This is consistent with the Sentencing Reform Act, under which "a judge is free to consider any and all issues related to sentencing and to decide which factors to consider and apply in reaching a final decision." *Id.*

The Supreme Court acknowledged that "a trial court's discretion to resentence can be limited by an appellate court's mandate," but that in Mr. Vasquez's "case, there was no appellate court limitation, *so the resentencing court's discretion was at its broadest.*" (emphasis added). *Id.* 857.

Likewise, here there was no limitation in the mandate,

which remanded for "resentencing." Under the law of the case and the Sentencing Reform Act, a de novo resentencing hearing was required.

There is no material basis to distinguish this case from *Vasquez* or *Dunbar*. Review should be granted because the decision is in conflict with precedent. RAP 13.4(b)(1), (2). Indeed, the Court of Appeals was not free to ignore this Court's decision in *Vasquez*, which is binding. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) ("When the Court of Appeals fails to follow directly controlling authority by this court, it errs.").

Additionally, regardless of whether the resentencing occurs well after a direct appeal is final, there is a constitutional right to appeal under article I, section 22 of the Washington Constitution. *State v. Delbosque*, 195 Wn.2d 106, 125-26, 130, 456 P.3d 806 (2020). So the legal distinction drawn between direct appeals and personal restraint petitions in the context of what "resentencing" requires in an mandate is not well

grounded. Review is warranted as matter of substantial public interest and because the issue involves the constitutional right to appeal under article I, section 22. RAP 13.4(b)(3), (4).

Ms. Nelson also emphasizes that as a result of the misreading of the original Court of Appeals decision in her personal restraint petition, Ms. Nelson did not receive consideration by the sentencing court on whether she should receive a lower sentence in light of her youth or rehabilitative efforts. Nearly seven years elapsed between the original sentencing in 2016 and the hearing in 2023. Our understanding of brain science and culpability for young adults has changed significantly during this time. *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 321-25, 482 P.3d 276 (2021) (deeming the "scientific differences between 18- to 20-year-olds (covering the ages of the two petitioners in this case) on the one hand, and persons with fully developed brains on the other hand, to be constitutionally significant under article I, section 14.") (plurality op.). Ms. Nelson has changed and

rehabilitated herself during incarceration, which also warrants consideration because a sentencing court must sentence the person before it. *Dunbar****Error! Bookmark not defined.***, 532 P.3d at 657. Justice is served by giving Ms. Nelson a new sentencing hearing.

Although this case presents additional issues, the Court may properly resolve it by summarily granting review on this issue, vacating the Court of Appeals decision under *Vasquez*, and remanding with instruction that Ms. Nelson receive a new sentencing hearing. This will remedy the identified errors in the earlier remand related to ineffective assistance of counsel and violation of the right to confer with counsel. As for the issues concerning (1) a new sentencing judge and (2) whether youth was mitigating for Ms. Nelson, these matters can all be addressed in the trial court on remand.

2. If the Court does not summarily grant, vacate, and remand, the Court should also grant review on the related issues of (1) whether Ms. Nelson was deprived of effective assistance of counsel, (2) whether the deprivation of the right to confer with counsel was harmful, and (3) whether Ms. Nelson was entitled to have the trial court consider the mitigating factors of youth because she was 19 at the time of the offenses.

a. Trial counsel was ineffective in failing to recognize the appellate mandate required resentencing.

At the resentencing, Ms. Nelson's attorney failed to recognize that the scope of the mandate required de novo resentencing. This required Ms. Nelson's attorney to advocate for resentencing, which would include advocacy for a reduction in Ms. Nelson's base sentence. There was no risk of a higher sentence given that the previous sentence was at the high-end of the standard range and there were no lawful bases for an exceptional sentence upward.

Instead, trial counsel believed that the mandate permitted only the striking of the firearm enhancement and (incoherently) reconsideration of legal financial obligations. The prosecution's

arguments went largely unchallenged. Unsurprisingly, the trial court adhered to its previous high-end sentence.

This was a complete deprivation of the right to counsel. Br. of App. at 19-22; *United States v. Cronic*, 466 U.S. 648, 654-57, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). And if not a complete deprivation of counsel, counsel's misunderstanding was plainly deficient performance. Br. of App. at 21; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The Court of Appeals ignored Ms. Nelson's *Cronic* based right to counsel violation claim. As for the *Strickland* based ineffective assistance claim, the Court of Appeals concluded there was no deficient performance based on its conclusion that "the mandate did not require de novo resentencing." Slip op. at 5. As explained, this is plainly incorrect.

While the Court of Appeals did not address prejudice, Ms. Nelson was prejudiced by the deficient performance because she was deprived of a *de novo* resentencing, which she

was entitled to under the mandate and precedent. Prejudice is established through the denial of resentencing. Sentencing is a critical stage. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987). "[N]o showing of prejudice is necessary if the accused is denied counsel at a critical stage of his trial." *Garza v. Idaho*, 586 U.S __, 139 S. Ct. 738, 744, 203 L. Ed. 2d 77 (2019). Thus, where ineffective assistance deprives a defendant of their right to an appeal, prejudice is established. *Id.* at 747-48. The same is true when ineffective assistance deprives a defendant of a resentencing, which is a critical stage.

For the same reasons as earlier, the Court should grant review of this related issue. RAP 13.4(b)(1), (2). This is also an issue of constitutional dimension and substantial public interest. RAP 13.4(b)(3), (4).

b. Ms. Nelson was deprived of her right to privately confer with counsel at sentencing.

The right to counsel includes the right of defendants to be able to confer privately and continually with counsel. *State v. Hartzog*, 96 Wn.2d 383, 402, 635 P.2d 694 (1981); *State v. Anderson*, 19 Wn. App. 2d 556, 562, 497 P.3d 880 (2021).

Ms. Nelson was unable to tell her attorney what she wanted during the hearing because she was not afforded the ability or opportunity to privately confer with her attorney. This was a violation of the right to counsel. Br. of App. at 22-26.

The prosecution conceded error. The Court of Appeals accepted the concession, but held the error harmless beyond a reasonable doubt. Slip op. at 6. In a footnote, the Court rejected Ms. Nelson's argument that the violation of the right to confer with counsel is structural error. Slip op. at 7 n.3. As for constitutional harmless error, the Court reasoned the error was harmless because Ms. "Nelson obtained the relief identified by the mandate, striking the erroneous enhancement." Slip op. at 8.

Again, this is a clear misreading of the mandate and is contrary to precedent. Due to the conflict in precedent, review is warranted on this related issue RAP 13.4(b)(1), (2). And whether a violation of the right to confer with counsel is structural error, and if not, when it can be deemed harmless beyond a reasonable doubt, present significant constitutional questions and are matters of substantial public interest that should be decided by this Court. RAP 13.4(b)(3), (4).

c. The trial court failed to consider the mitigating factors of youth when sentencing Ms. Nelson, who was 19 at the time of the offenses.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. U.S. Const. amend. VIII. Article I, section 14 of the Washington Constitution likewise prohibits cruel punishment, but is often more protective, including in juvenile sentencing. Const. art. I, § 14; *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 311 n.6, 482 P.3d 276 (2021) (plurality) *State v. Bassett*, 192 Wn.2d 67, 78, 82, 428 P.3d 343 (2018).

Youth makes a person categorically different from a mature adult. For this reason, both the United States Supreme Court and this Court "have concluded that children are less criminally culpable than adults." *Bassett*, 192 Wn.2d at 82. "As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." *Id.* (internal quotation marks omitted). These "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

The foundation for these truths is brain science. The brains of juveniles and mature adults are different, including "parts of the brain involved in behavior control." *Id.* at 471-72 (cleaned up). A person with an immature brain is less culpable

and more likely to change due to time and brain development. *Id.* at n.5.

This brain development, including the parts of the brain involved in behavior control, continues "well into a person's 20s" and maturity is not reached until around 25. *State v. O'Dell*, 183 Wn.2d 680, 692 & n.5, 358 P.3d 359 (2015); *Monschke*, 197 Wn.2d at 321-22.

To ensure that a person's punishment is proportionate and not unconstitutionally cruel, a sentencing court must consider mitigating qualities of youth at sentencing. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017); *Monschke*, 197 Wn.2d at 326 (plurality); Br. of App. at 30-31.

This is currently the rule for people sentenced in adult court for crimes committed as children. *Houston-Sconiers*, 188 Wn.2d at 21. This rule should be extended to 18 and 19 year olds. As the leading opinion in *Monschke* recognizes, there is no meaningful distinction between 17-year-olds and 18 or 19-year-olds regarding brain development. This compels the

conclusion that if a trial court is required to consider the mitigating qualities of youth when sentencing a 17-year-old offender, a trial court must be required to consider the offender's youth when sentencing an 18 or 19-year-old. *State v. Nevarez*, 24 Wn. App. 2d 56, 65, 519 P.3d 252 (2022) (Maxa, J., dissenting); *see also State v. Zwede*, 21 Wn. App. 2d 843, 867-68, 508 P.3d 1042 (2022) (Hazelrigg, J., dissenting) (recognizing that constitutional jurisprudence applied to juveniles must also be applied to youthful adults, specifically a 19-year-old).

In neither 2016 nor 2023 did the trial court did consider the mitigating factors of youth and whether they mitigated Ms. Nelson's culpability. All the judge did was note that not everyone who has a terrible and abusive childhood goes on to commit serious crimes. The court did not consider the mitigating qualities of youth set out in *Houston-Sconiers*, a decision that post-dates the original sentencing in 2016. This Court should reverse and remand for resentencing where the

trial court must meaningfully consider the mitigating factors of youth in sentencing Ms. Nelson. *Nevarez*, 24 Wn. App. 2d at 65 (Maxa, J., dissenting).

The Court of Appeals held there was no error given the "limited" mandate and procedural postures. As explained, this was error. This Court should grant review of this related issue, which is a significant constitutional issue and matter of substantial public interest. RAP 13.4(b)(3), (4).

F. CONCLUSION

Applying *Vasquez* and the law of the case, the Court should summarily grant review, vacate the Court of Appeals decision, and remand for a new sentencing hearing. Alternatively, the Court should grant the petition for review on all the issues and issue an opinion following supplemental briefing and argument.

This document 4,810 words and complies with RAP 18.17.

Respectfully submitted this 7th day of March, 2025.

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Appendix

Filed
Washington State
Court of Appeals
Division Two

February 7, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SOPHIA NATASHA NELSON, fka AUSTIN MOORES-NELSON, Appellant.	No. 58688-6-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Sophia Nelson, filed a motion for reconsideration of the court's August 13, 2024, unpublished opinion. After consideration, the court denies the motion for reconsideration. Accordingly, it is

SO ORDERED

PANEL: Jj. Glasgow, Veljacic, Che

FOR THE COURT:

Che, J.

Filed
Washington State
Court of Appeals
Division Two

August 13, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SOPHIA NATASHA NELSON, fka AUSTIN MOORES-NELSON, Appellant.	No. 58688-6-II UNPUBLISHED OPINION

CHE, J. — Nelson appeals the resentencing for her first degree animal cruelty conviction. Nelson filed a personal restraint petition (PRP) seeking relief from an unlawful firearm enhancement on her animal cruelty conviction, among other claims. Division Three agreed that the firearm sentencing enhancement was improper and remanded for "resentencing in light of the erroneous application of the firearm's enhancement."[1]

At the resentencing hearing, the State and the trial court believed that the remand was limited to correcting the erroneous firearm enhancement. Defense counsel requested the enhancement be struck and raised arguments regarding legal financial obligations (LFOs). The court imposed the same sentence absent the firearm enhancement.

Nelson appeals, arguing that (1) the appellate court's opinion and mandate entitled her to de novo resentencing where she could present argument based on rehabilitation and the mitigating qualities of youth, (2) the trial court erred in not considering her mitigating qualities

[1] *In re Pers. Restraint of Nelson*, No. 37983-3-III, slip op. at 20 (Wash. Ct. App. Aug. 19, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/379833_unp.pdf.

of youth, (3) she received ineffective assistance of counsel, (4) her right to counsel was violated because she could not exercise her right to confer privately with her attorney, and (5) certain discretionary LFOs should be eliminated.

We hold that (1) our scope of appeal is limited to the issue raised in the PRP and error identified in the Division Three opinion—the striking of the erroneous firearm enhancement, (2) Nelson's counsel did not provide ineffective assistance, and (3) any error related to Nelson's right to confer with counsel was harmless beyond a reasonable doubt. We accept the State's concession that we should strike the victim penalty assessment (VPA) and the DNA collection fee but otherwise affirm the sentence. The remainder of Nelson's arguments fail.

FACTS

In 2016, the State charged Nelson, a 19 year old, with first degree murder, first degree burglary, first degree animal cruelty, and second degree malicious mischief. Nelson pleaded guilty to the crimes charged.

The trial court sentenced Nelson to 512 months total, a high-end standard range sentence. The trial court imposed firearm sentencing enhancements on the murder, burglary, and animal cruelty convictions. The trial court also imposed the VPA and the DNA collection fee. Subsequently, the trial court entered a restitution order. In 2017, Nelson filed a PRP arguing:

> (1) that the application of the firearms enhancement to [her] animal cruelty conviction was error, (2) the victim statements by persons employed in the court system created bias and violated [her] due process rights, (3) the court imposed an exceptional sentence without sufficient findings of fact or conclusions of law, (4) [] Nelson's sentencing range was miscalculated because several convictions should have been counted as "same criminal conduct," (5) [her] attorney's failure to object to these errors constitutes ineffective assistance of counsel, and (6) [her] plea was involuntary.

In re Pers. Restraint of Nelson, No. 37983-3-III, slip op. at 1.

Division Three agreed that a firearm enhancement was unlawfully added to Nelson's animal cruelty conviction, and that error entitled her to "resentencing in light of the erroneous application of the firearm's enhancement" and it rejected the remaining claims. Clerk's Papers (CP) at 56. The opinion stated at several points that Nelson was entitled to resentencing, without including the "in light of . . ." qualifier. In May 2022, Division Three entered its mandate requiring "further proceedings in accordance with the attached . . . Opinion." CP at 36.

At the resentencing hearing, Nelson appeared in custody via video conferencing. The trial court did not establish a communication procedure between Nelson and defense counsel who appeared in the courtroom. The State argued that the scope of the mandate implicated only the erroneous firearm enhancement, and so, the trial court should impose the same sentence absent the erroneous firearm enhancement. The trial court agreed with the State.

Nelson requested that the trial court remove the erroneous firearm enhancement, waive the interest on the restitution, and strike the DNA fee. Defense counsel did not address Nelson's incarceration time beyond the request to remove the erroneous firearm enhancement. The court heard Nelson's allocution.

The trial court judge stated that he was the original trial court judge and he recalled Nelson's hard childhood, arduous background, youth at the time of the crimes, and the heinousness of the crimes. The court then struck the erroneous firearm enhancement and imposed the original sentence less the erroneous firearm enhancement for a total of 494 months. Finally, the court found Nelson to be "indigent as defined in RCW 10.101.010(3)(a)-(d)," but imposed the VPA, the DNA fee, and restitution interest, noting that the restitution interest issue may be addressed upon release. CP at 61.

Nelson appeals.

ANALYSIS

I. SCOPE OF RESENTENCING

Nelson argues that she was entitled to a de novo resentencing hearing. The State argues that Nelson is precluded from appealing the resentencing because, among other reasons, the scope of remand was limited to a ministerial correction—vacating the erroneous firearm enhancement.[2] We agree with the State.

A PRP is the procedural mechanism for defendants to raise collateral attacks on their convictions in appellate courts. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011). In the context of a collateral attack, an error in the judgment and sentence does not permit a petitioner "to circumvent other carefully crafted time limits on collateral review." *Id.* at 134. "The trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate." *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

The error identified on appeal determines the remedy ordered by this court; thus, the scope of the trial court's discretion on remand is determined by the aforementioned error. *See, e.g.*, *State v. Collicott*, 118 Wn.2d 649, 660, 827 P.2d 263 (1992); *State v. Collicott*, 112 Wn.2d 399, 412, 771 P.2d 1137 (1989) (plurality opinion) (scope of resentencing limited to redetermining the petitioner's offender score as error on appeal related to same criminal

[2] The State also argues that Nelson cannot appeal her sentence because (1) Nelson received a standard range sentence, (2) Nelson failed to object and does not meet the RAP 2.5(a) hurdle, (3) Nelson did not challenge the trial court's denial of her request for an exceptional sentence in her PRP, and (4) the trial court did not exercise independent judgment on remand. Because we agree with the State on the scope of appeal issue, we do not address the State's various other arguments for affirming.

conduct). And here, the only error in Nelson's case is the erroneous firearm enhancement on the animal cruelty charge. Therefore, there is no reason to order any remedy other than remand to strike that enhancement, and the superior court's discretion was limited to resentencing only on that basis.

Nelson argues that, "'unless the reviewing court restricts resentencing to narrow issues, any resentencing should be de novo,'" so the trial court may consider any matters relevant to sentencing, including those not previously raised. Br. of Appellant at 13 (quoting *State v. Dunbar*, 27 Wn. App. 2d 238, 244, 532 P.3d 652 (2023) (holding that the trial court erred in not considering evidence of Dunbar's rehabilitation)).

But *Dunbar* did not arise in the PRP context, and so, that case is not applicable here. Nelson's case began as a timely PRP. The scope of the remand and the current appeal is necessarily limited to the issues that were within the scope of the PRP and mandate.

Nelson argues that the trial court erred at resentencing by not considering her mitigating qualities of youth. But this issue is not part of Nelson's PRP nor is it addressed in the prior PRP opinion. Thus, consideration of the mitigating qualities of youth was not within the scope of the remand.

Nelson also argues that her counsel was ineffective because defense counsel failed to recognize that the mandate required de novo resentencing, and thus, failed to advocate for a reduction in Nelson's sentence based on Nelson's mitigating qualities of youth and rehabilitation during incarceration. Because we conclude that the mandate did not require de novo resentencing, Nelson fails to show that counsel's performance was deficient.

II. RIGHT TO CONFER WITH COUNSEL

Nelson also argues for the first time on appeal that the trial court violated her right to counsel due to her inability to communicate privately with her attorney. The State concedes the violation but argues that it was harmless beyond a reasonable doubt. Because this argument is about the underlying process of the hearing on remand based on an issue raised within the scope of the PRP, this argument may be raised despite not being mentioned in the underlying PRP. We hold that any error relating to the right to confer was harmless.

The deprivation of the right to counsel is a fundamental constitutional claim that may be raised for the first time on appeal so long as the claim is manifest, which is required by RAP 2.5(a)(3). *State v. Anderson*, 19 Wn. App. 3d 556, 562, 497 P.3d 880 (2021).

"Under both the Sixth Amendment and article I, section 22 of the Washington Constitution, a criminal defendant is entitled to the assistance of counsel at 'critical stages' in the litigation." *Bragg v. State*, 28 Wn. App. 2d 497, 503, 536 P.3d 1176 (2023). "A 'critical stage' is one 'in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.'" *Id.* at 503-04 (internal quotation marks omitted) (quoting *State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009)). Resentencing is a critical stage of the proceedings. *Anderson*, 19 Wn. App. 2d at 562.

"The constitutional right to the assistance of counsel 'carries with it a reasonable time for consultation and preparation,' which includes the 'opportunity for a private and continual discussions between [the] defendant and his attorney during the trial.'" *Bragg*, 28 Wn. App. 2d at 504 (quoting *State v. Hartzog*, 96 Wn.2d 383, 402, 635 P.2d 694 (1981)). The consultation with counsel must be meaningful, not seamless. *Id.*

We apply the constitutional harmless error analysis when a defendant is provided with counsel and there is a deprivation of the right to meaningfully and privately confer with that counsel. *State v. Dimas*, __ Wn. App. 3d __, 544 P.3d 597, 600-01 (2024).[3] Under this analysis, prejudice is presumed and the State must prove harmlessness beyond a reasonable doubt. *Anderson*, 19 Wn. App. 2d at 564. "If a court commits constitutional error, but the error would not have changed the outcome of the proceeding, such error is harmless." *Bragg*, 28 Wn. App. 2d at 512.

Here, while Nelson did not object to the infringement on her right to confer with counsel, the State concedes the error meets the exception to the error preservation rule under RAP 2.5(a)(3) because "it is not apparent how private attorney-client communication could have taken place during the hearing." Br. of Resp't at 44. The remaining question is whether the State proved that the error is harmless beyond a reasonable doubt.

In *State v. Anderson*, Division Three held that the deprivation of Anderson's right to confer with counsel was harmless beyond a reasonable doubt. 19 Wn. App. 2d 556, 564, 497 P.3d 880 (2021). Anderson received all forms of relief requested at his resentencing hearing. *Id.* Anderson argued "he might have asked his attorney to expand the scope of the hearing beyond the issues identified on remand." *Id.* But Division Three found that argument unpersuasive because, among other things, (1) they had the opportunity to confer prior to the hearing, and (2)

[3] Nelson asserts that the alleged error was structural, requiring automatic reversal. "Failure to have counsel present at a hearing constitutes structural error requiring automatic reversal if the hearing was a critical stage of the prosecution." *Dimas*, 544 P.3d at 600. But deprivation of the right to confer with counsel meaningfully and privately when the defendant is provided an attorney—as opposed to the right to be provided with counsel—does not trigger structural error analysis. *Id*. Because Nelson was provided with counsel, structural analysis is not applicable here.

"there are no plausible topics that the court may have been willing to reconsider beyond those already addressed." *Id.*

Here, the State met its burden of proving harmless error. Nelson obtained the relief identified by the mandate, striking the erroneous enhancement. Nelson obtained additional relief regarding LFOs. And while Nelson did not receive relief regarding restitution interest despite her counsel's request, which is addressed further below, there is no indication that attorney-client consultation would have affected the court's decision.

Nelson argues that, if she could have conferred with her attorney, she could have told the attorney to advocate for a lower sentence based on youth and rehabilitative efforts. This argument fails. First, Nelson presented her allocution wherein she emphasized her rehabilitation and her youth, referring to herself as a "very selfish kid," at the time of the offenses. Rep. of Proc. (RP) (Apr. 7, 2023) at 15. Second, Nelson did not raise this issue in her PRP and it is outside the scope of the remand. And the trial court understood that the remand was for a technical correction, not a de novo resentencing.

It is unclear how attorney-client consultation would have changed the court's sentence. The trial court recalled the facts of the case, reflected on Nelson's youth, and still opined that the same high-end sentence, absent the erroneous enhancement, was appropriate. Had Nelson encouraged her counsel to address the mitigating qualities of youth in this context, it would not have likely changed the outcome of the proceeding given the court's expressed opinions. We hold that the State met its burden to show that the error was harmless beyond a reasonable doubt.

III. LFOs

Nelson argues that the VPA and the DNA should be stricken based on recent statutory changes. Because the State conceded that the VPA and the DNA fee should be stricken, we remand for the court to strike those LFOs.

Nelson also argues the trial court abused its discretion by failing to consider the RCW 10.82.090(2) factors before declining her request to waive restitution interest. Nelson requested the trial court waive restitution interest below. Because Nelson raised this issue below and the trial court addressed it, we address this contention on appeal. The State argues that the lower court only has to address the RCW 10.82.090(2) factors before waiving restitution interest, not if the court declines to waive restitution interest. We agree with the State.

In 2022, the legislature added a subsection in RCW 10.82.090 listing factors the courts must consider should it elect to waive restitution interest. LAWS OF 2022, ch. 260, § 12. Effective January 1, 2023, RCW 10.82.090(2) provides, "The court may elect not to impose interest on any restitution the court orders. *Before determining not to impose interest on restitution*, the court shall inquire into and consider the following factors." LAWS OF 2022, ch. 260, § 12 (emphasis added). Whether the RCW 10.82.090(2) factors apply when the court imposes restitution interest is a legal question, which we review de novo. *See State v. Glover*, 4 Wn. App. 2d 690, 694, 423 P.3d 290 (2018).

In *State v. Ellis*, the trial court declined to alter the interest imposed on restitution. 27 Wn. App. 2d 1, 5, 530 P.3d 1048 (2023). RCW 10.82.090(2) was amended during the pendency of Ellis's appeal. *Ellis*, 27 Wn. App. 2d at 16. Our court remanded "for the trial court to address whether to impose interest on the restitution amount under the factors identified in

RCW 10.82.090(2)" as we determined that the amendment to RCW 10.82.090(2) applies to cases on direct appeal. *Ellis*, 27 Wn. App. 2d at 16.

Unlike *Ellis*, resentencing in this case occurred after the amendment to RCW 10.82.090(2) took effect. Therefore, at the time of Nelson's resentencing, the trial court had the opportunity to apply the statutory factors should it have elected to waive the restitution interest under RCW 10.82.090(2). However, the trial court did not exercise that discretion; instead, it merely declined to waive restitution interest at that time. If the trial court had determined to waive imposition of restitution interest, the statute would have required the trial court to consider certain factors prior to doing so. RCW 10.82.090(2). Because the trial court declined to waive the restitution interest—a decision made within its discretion—the court was not required to expressly discuss and apply the RCW 10.82.090(2) factors upon resentencing. We hold that the trial court did not err by not considering those factors.[4]

CONCLUSION

We affirm the sentence but remand for the court to strike the VPA and DNA collection fee.

[4] Finally, because we remand for the limited purpose of striking the VPA and the DNA fee, we need not address Nelson's argument for a new judge on remand. *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014) ("[E]ven where a trial judge has expressed a strong opinion as to the matter appealed, reassignment is generally not available as an appellate remedy if the appellate court's decision effectively limits the trial court's discretion on remand.").

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Glasgow, J.

Veljacic, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 58688-6-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Andrew Yi, DPA
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Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: March 7, 2025
Washington Appellate Project

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