

FILED
SUPREME COURT
STATE OF WASHINGTON
5/12/2025 9:50 AM
BY SARAH R. PENDLETON
CLERK

No.

Case #: 1041659

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

JACOB SLOAN-HERB,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Jacob Sloan-Herb, Respondent/Petitioner, asks this court to accept review of the Court of Appeals decision designated in Part II of this petition.

II. COURT OF APPEALS DECISION

The Court of Appeals reversed the decision granting Mr. Sloan-Herb's motion to vacate for resentencing in an opinion dated March 25, 2025. Reconsideration was denied on April 28, 2025.

Copies are attached.

III. ISSUES PRESENTED FOR REVIEW

1.a. When a judge grants a motion to vacate a pre-*Houston-Sconiers*¹ sentence imposed on a juvenile prosecuted in adult court and finds that a lesser sentence could have been imposed if the judge had

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

considered the mitigating qualities of youth, specifically the child's capacity for rehabilitation which was demonstrated at the time of the motion, does a reviewing court err when it concludes that the motion should have been denied as untimely?

1.b. When a judge concludes that there is a reasonable likelihood of a lesser sentence from the consideration and weighing of the potential for and actual rehabilitation since the crime does that showing satisfy the retroactive substantive holding of *Houston-Sconiers*?

IV. STATEMENT OF THE CASE

In 2017, Sloan-Herb pleaded guilty to first degree child molestation. Sloan-Herb was 17 years old at the time of the crime. At sentencing, the parties jointly recommended a sentence of 98 months, the low end of the standard sentencing range. Rather than accepting

the joint recommendation, the court stated that it would sentence Sloan-Herb to 130 months, the high end of the standard range. *Opinion* at 1.

Years later, Sloan-Herb brought a motion to vacate. Defense counsel first argued that Sloan-Herb “was harmed because the mitigating factors were not addressed.” RP 11. Then, counsel summarized the voluminous evidence of Sloan-Herb’s rehabilitation since the time of the crime. *Id.* See also CP 152; 162-168.

When the trial judge granted Sloan-Herb’s motion to vacate, she prefaced that ruling with the understanding that “merely establishing the trial court did not follow *Houston-Sconiers* to the T is not itself sufficient to show prejudice.” RP at 21.

Then, she made two findings:

[I]t would not have been possible at the time of Sloan-Herb's sentencing for the sentencing court

to fully consider the mitigating qualities of youth had such an argument been made.

[Sloan-Herb] has shown that the mitigating qualities of youth could have impacted Sloan-Herb's sentence.

CP at 181. Accordingly, the trial court entered an order granting the CrR 7.8 motion, vacating Sloan-Herb's judgment, and sentence, and ordering a new sentencing hearing.

V. REASONS TO GRANT REVIEW

Introduction

This Court should accept review because, as this case demonstrates, a course correction is needed. again. Children's "differences" have become irrelevant for purposes of resentencing, even where the trial judge a reasonable likelihood of a different outcome based on the presentation of those differences, including rehabilitation.

*The Trial Judge Found that Presentation and
Consideration of the Mitigating Qualities of Youth
Could Have Resulted in a Lesser Sentence*

Whether a child sentenced in adult court prior to *Houston-Sconiers* is entitled to be resentenced is not as simple as: “not anymore.” However, there is a growing body of decisions that can be read to reach that conclusion. See e.g., *State v. Fisher*, 31 Wash. App. 2d 1036 (2024) (Fearing, J. dissenting) (“The recent Washington decisions complete the annihilation of the *Miller* promise by erecting a time bar, imposing a sophistic distinction between procedural and substantive challenges, and narrowly viewing prejudice.”). *State v. Boone*, No. 59116-2-II, 2025 WL 1304579, at *2 fn. 6 (May 6, 2025) (upholding prior grant of relief, but adding “we recognize that if Boone filed his personal restraint petitions today, it is unlikely that we would grant his petitions and order

resentencing.”). More precisely, this Court should grant review because the lower court decision conflicts with this Court’s precedent. RAP 13.4(b)(2). And, if it does not, then this case poses a significant constitutional question. RAP 13.4(b)(3).

Here, the lower court opinion reversed a trial judge’s decision vacating a judgment after finding that Sloan-Herb had presented evidence of the mitigating qualities of youth, primarily the potential for an actual rehabilitation, by concluding that Sloan-Herb had only shown a violation of the procedural rule of *Houston-Sconiers*, making additional analysis unnecessary. In fact, the opinion states that Sloan-Herb “failed to even argue in his CrR 7.8 motion that his sentence constituted disproportionate punishment.” *Opinion* at 2. To the contrary, the *second sentence* of Sloan-Herb’s CrR 7.8 motion states:

Mr. Sloan-Herb contends that his current sentence of 130 months, imposed for a Child Molestation committed when he was 17 years old, is *substantively disproportionate* because it was imposed without the consideration of the “mitigating qualities of youth.”

CP 60 (emphasis supplied).

The *Opinion* then concludes that Sloan-Herb failed to show any mitigating qualities of youth to justify the trial court’s decision to grant relief by imposing the following burden: “Sloan-Herb had to show that he possessed such diminished culpability at the time of his offense that the trial court's failure to consider his youth or exercise its discretion of imposing a lower sentence resulted in a standard range sentence that constituted disproportionate punishment.”

Opinion at 3.

Sloan-Herb's Mitigating Potential for and Actual Rehabilitation

The mitigating qualities of youth are not so narrowly confined to “diminished culpability” as demonstrated in the crime of conviction. There is an additional, indispensable way in which children are different.

When sentencing a juvenile in adult court, the constitution requires sentencing courts to meaningfully consider “mitigating factors that account for the diminished culpability of youth,” which specifically includes “the youth's chances of becoming rehabilitated.” *State v. Delbosque*, 195 Wash. 2d 106, 120, 456 P.3d 806, 814 (2020).

Not only did Sloan-Herb argue that the original sentencing judge failed to consider the full panoply of the mitigating qualities of youth, he presented evidence of not only his capacity for change, but his

successful rehabilitative efforts. The lower court does not explain why it applied a test that reads out this factor, critical to assessing disproportionality.

In contrast, trial counsel summarized:

So -- and in Jacob's own situation one can see how he has, over the last eight years at Green Hill, attained that development that he had not attained at, you know, the age of 16 when he -- when this, you know, crime occurred. You know, at that time he was on track to be a complete failure. He was...doing miserable in school. He was not on track to graduate. But over the last eight years, he has been involved in every single possible program he could be after obtaining his GED, and he's completed program after program. He went to bat for himself when they weren't going to let him, you know, start sexual deviancy treatment. He went to bat for himself and got into treatment and has been doing well. You know, he's just -- he's really matured into, you know, a very good, you know, kind, good human and who's received recommendation after recommendation at Green Hill because of how well he's been doing. And, you know, that's something that has come with age, and so we can see that clearly.

RP 11-12.

For reasons not explained, the lower court's opinion overlooks or reads out a juvenile's capacity for change as relevant to an assessment of culpability and the substantive disproportionality of the prior sentence.

Finally, because the lower court's *Opinion* fails to consider the evidence of Sloan-Herb's rehabilitative potential and accomplishments, it fails to give the proper deference to the trial judge's ruling. A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

"A petitioner must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the constitutional error in order to obtain relief on collateral review." *In re Pers.*

Restraint of Domingo-Cornelio, 196 Wn.2d 255, 267, 474 P.3d 524 (2020). Prejudice may be established if the petitioner can show by a preponderance of the evidence that the sentence they received would have been shorter if the sentencing judge had complied with *Houston-Sconiers*. One factor used to determine the existence of prejudice is whether there is evidence that the sentencing judge was willing to consider mitigating factors that justify a lower sentence.

The lower court concluded that Sloan-Herb met this requirement, but then correctly noted that such a procedural *Houston-Sconiers* violation does not establish prejudice. Rather, a procedural *Houston-Sconiers* error must be accompanied by other evidence showing the sentencing judge would have imposed a lesser sentence.

The lower court erred because it either ended its analysis too soon or misread this Court's decisions to make rehabilitation irrelevant. Either way, the decision is contrary to the state and federal constitutions and the caselaw applying the prohibition against curule punishment.

VI. CONCLUSION

This Court should reverse the Court of Appeals, affirm the order vacating, and remand for a new sentencing.

WORD COUNT

This Petition for Review has 8269 words.

DATED this 12th day of May 2025

RESPECTFULLY SUBMITTED:

s/Jeffrey Erwin Ellis
Jeffrey E. Ellis #17139
Attorney for Mr. Sloan-Herb

March 25, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

JACOB ALEXANDER SLOAN-HERB,

Respondent.

No. 59226-6-II

UNPUBLISHED OPINION

MAXA, P.J. – The State appeals the trial court’s order granting Jacob Sloan-Herb’s CrR 7.8 motion for a new sentence for his 2017 first degree child molestation conviction, which occurred when he was a juvenile. In 2023, Sloan-Herb filed a CrR 7.8 motion, arguing that in 2017 the trial court failed to consider the mitigating characteristics of his youth when sentencing him as now required by *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). He further argued that *Houston-Sconiers* was a retroactive change in the law that provided an exception to the one year time bar on his collateral attack. The trial court granted his motion and ordered that he be resentenced.

We hold that Sloan-Herb’s CrR 7.8 motion is time barred because he established only a violation of *Houston-Sconiers*’s procedural rule in his case, which does not apply retroactively

on collateral review, and not a violation of *Houston-Sconiers*'s substantive rule prohibiting disproportionate sentences for juveniles due to diminished culpability.¹

Accordingly, we reverse the trial court's order granting Sloan-Herb's CrR 7.8 motion and vacating his 2017 judgment and sentence.

FACTS

In 2017, Sloan-Herb pleaded guilty to first degree child molestation.² Sloan-Herb was 17 years old at the time. As part of his plea, Sloan-Herb acknowledged two prior convictions for first degree child molestation and first degree child rape. The parties jointly recommended a sentence of 98 months, the low end of the standard sentencing range.

At sentencing, the trial court did not consider any mitigating factors related to Sloan-Herb's youth. And rather than accept the joint recommendation, the court stated that it would sentence Sloan-Herb to 130 months, the high end of the standard range. The court stated:

I believe it's appropriate for many, many reasons. . . . You are clearly at risk and a danger to our children. . . .

[T]he only way I can see to fix it, is for you to get some serious, serious in prison treatment to find out what's going on and why this is happening. . . . [B]ecause it's clear, if I let you walk out the door today, there'd be another couple victims tomorrow, and then my real worry is that nobody would tell those families you got a problem. . . . [I]n my estimation, right now as you sit here today, you are a serial child molester and if I let you out this door today, it would happen again.

Clerk's Papers (CP) at 135-36.

The trial court entered a judgment and sentence imposing 130 months in confinement for child rape. Sloan-Herb did not file a direct appeal of his judgment and sentence.

¹ Because of this holding, we do not address the State's other argument that Sloan-Herb failed to show actual and substantial prejudice.

² Sloan-Herb also pleaded guilty to communication with a minor for immoral purposes, a misdemeanor. He did not challenge his sentence for that conviction.

In December 2023, Sloan-Herb filed a motion under CrR 7.8 to vacate his judgment and to seek resentencing. He argued that he was entitled to resentencing under *Houston-Sconiers* because the trial court did not consider the mitigating qualities of youth at his 2017 sentencing hearing. He also argued that the one year time bar did not apply to his motion because *Houston-Sconiers* was a significant change in the law that applied retroactively.

On the merits, Sloan-Herb's only argument was as follows:

Here, the sentencing court did not consider the mitigating qualities of youth because none was presented. As an offer of proof, if granted a new sentencing Mr. Sloan-Herb will not only present evidence that this crime was the product of judgment impaired, at least in part, due to his still immature brain. Perhaps more importantly, he will show that he has made significant rehabilitative strides. He will demonstrate positive change.

CP at 64. Sloan-Herb did not argue that his sentence constituted disproportionate punishment.

The State opposed the motion. The State argued that Sloan-Herb's motion was time barred because *Houston-Sconiers*'s procedural rule requiring courts sentencing juveniles to consider the mitigating qualities of youth did not apply retroactively. The State also argued that Sloan-Herb could not show actual and substantial prejudice.

The trial court ruled that Sloan-Herb's motion was not time barred because "the procedural rule of *Houston-Sconiers*, . . . which requires courts to meaningfully consider the mitigating qualities of youth at the time of sentencing, is a retroactive change in the law." CP at 180. Regarding prejudice, the court's order stated,

[I]t would not have been possible at the time of Sloan-Herb's sentencing for the sentencing court to fully consider the mitigating qualities of youth had such an argument been made. [Sloan-Herb] has shown that the mitigating qualities of youth *could* have impacted Sloan-Herb's sentence.

CP at 181 (emphasis added). Accordingly, the trial court entered an order granting the CrR 7.8 motion, vacating Sloan-Herb's judgment and sentence, and ordering a new sentencing hearing.

The State appeals the trial court's order granting Sloan-Herb's CrR 7.8 motion.

ANALYSIS

A. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision on a CrR 7.8 motion. *State v. Frohs*, 22 Wn. App. 2d 88, 92, 511 P.3d 1288 (2022). Application of the wrong legal standard is an abuse of discretion. *State v. Valencia*, 2 Wn. App. 2d 121, 126, 416 P.3d 1275 (2018).

B. CrR 7.8 PRINCIPLES

CrR 7.8 permits a criminal defendant to seek relief from a judgment or order. CrR 7.8 is a form of collateral attack on a judgment and sentence because it is a form of postconviction relief other than a direct appeal. RCW 10.73.090(2).

CrR 7.8 has specific procedures for vacating a judgment. CrR 7.8(c)(2) states that a trial court must transfer a CrR 7.8 motion to the Court of Appeals to be considered as a personal restraint petition unless the trial court determines that “the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that they are entitled to relief or (ii) resolution of the motion will require a factual hearing.”

RCW 10.73.090(1) states that a defendant may not collaterally attack a facially valid judgment and sentence “more than one year after the judgment becomes final” unless one of the exceptions in RCW 10.73.100 applies. Under RCW 10.73.100(7),³ the one year time bar does not apply if the collateral attack is based on (1) a significant change in the law, (2) that is material to the conviction or sentence, and (3) that has been determined to apply retroactively either by the legislature or courts. *See State v. Willyard*, 3 Wn.3d 703, 710, 555 P.3d 876 (2024).

³ Before 2024, this exception was located in RCW 10.73.100(6). We cite to the current version.

C. TIME BAR FOR *HOUSTON-SCONIERS* VIOLATIONS

The State argues that the trial court erred in granting Sloan-Herb’s CrR 7.8 motion because it was time barred. We agree.

1. Legal Principles

The Supreme Court has clarified that *Houston-Sconiers* announced both substantive and procedural rules. *In re Pers. Restraint of Hinton*, 1 Wn.3d 317, 328-29, 525 P.3d 156 (2023); *In re Pers. Restraint of Williams*, 200 Wn.2d 622, 630-31, 520 P.3d 933 (2022). The substantive rule is that “courts may not impose ‘certain adult sentences . . . on juveniles who possess such diminished culpability that the adult standard SRA⁴ ranges and enhancements would be disproportionate punishment.’ ” *Hinton*, 1 Wn.3d at 328-29 (quoting *In re Pers. Restraint of Ali*, 196 Wn.2d 220, 239, 474 P.3d 507 (2020)). This substantive rule is retroactive on collateral review. *Williams*, 200 Wn.2d at 630.

To implement the substantive rule, *Houston-Sconiers* adopted a mechanism to guide sentencing courts: “ ‘sentencing courts must consider the mitigating qualities of youth and have discretion to impose sentences below what the SRA mandates.’ ” *Hinton*, 1 Wn.3d at 329 (quoting *Ali*, 196 Wn.2d at 237); *see also Williams*, 200 Wn.2d at 630. This mechanism is a procedural rule that is not retroactive on collateral review. *Hinton*, 1 Wn.3d at 329.

In *In re Personal Restraint of Carrasco*, the Supreme Court again stated that the procedural rules of *Houston-Sconiers* are not retroactive. 1 Wn.3d 224, 233, 525 P.3d 196 (2023). The court confirmed that the procedural rules are designed only to implement the substantive rule that “the imposition of adult standard SRA ranges and/or enhancements is a disproportionate punishment for *juveniles with diminished culpability*.” *Id.* at 237. Therefore,

⁴ Sentencing Reform Act of 1981, chapter 9.94A RCW.

“[a] violation of that procedural right does not lead to the conclusion that Carrasco is serving an unconstitutional sentence under the Eighth Amendment.” *Id.* The court noted that “Carrasco does not argue that his substantive constitutional rights . . . were violated. Specifically, Carrasco does not argue that he is a ‘juvenile with diminished culpability’ serving a disproportionate adult standard SRA range sentence.” *Id.*

Here, the trial court erred when it concluded that Sloan-Herb’s CrR 7.8 motion was not time barred because *Houston-Sconiers*’s procedural rule applied retroactively. Even though the State cited *Hinton*, *Williams*, *Carrasco* and other cases to support its argument that the procedural rule was not retroactive, the court erroneously disregarded those cases.

2. Analysis

The State concedes that there was a procedural violation of *Houston-Sconiers* during Sloan-Herb’s 2017 sentencing hearing because the trial court did not consider the mitigating qualities of Sloan-Herb’s youth. But in order to avoid the one year time bar, Sloan-Herb had the burden of showing that this procedural violation led to a violation of *Houston-Sconiers*’s substantive rule. *See Williams*, 200 Wn.2d at 630-31. Accordingly, Sloan-Herb had to show that he possessed such diminished culpability at the time of his offense that the trial court’s failure to consider his youth or exercise its discretion of imposing a lower sentence resulted in a standard range sentence that constituted disproportionate punishment. *See Hinton*, 1 Wn.3d at 328-29.

Sloan-Herb did not meet this burden. He failed to even argue in his CrR 7.8 motion that his sentence constituted disproportionate punishment. As in *Carrasco*, he did not argue that “he is a ‘juvenile with diminished culpability’ serving a disproportionate adult standard SRA range sentence.” 1 Wn.3d at 237. Instead, Sloan-Herb argued only that the trial court in 2017 violated

the *Houston-Sconiers* procedural rule by failing to account for the mitigating qualities of his youth.

As discussed above, *Houston-Sconiers*'s procedural rule does not apply retroactively on collateral review. *Hinton*, 1 Wn.3d at 329. Therefore, RCW 10.73.100(7) is inapplicable and Sloan-Herb's CrR 7.8 motion was time barred.

We hold that the trial court abused its discretion when it determined that Sloan-Herb's motion was not time barred.

CONCLUSION

We reverse the trial court's order granting Sloan-Herb's CrR 7.8 motion and vacating his 2017 judgment and sentence.

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.

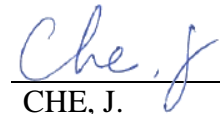


MAXA, P.J.

We concur:



GLASGOW, J.



CHE, J.

April 28, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

JACOB ALEXANDER SLOAN-HERB,

Respondent.

No. 59226-6-II

ORDER DENYING MOTION
FOR RECONSIDERATION

Respondent moves for reconsideration of the court's March 25, 2025 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Glasgow, Che

FOR THE COURT:



MAXA, P.J.

ALSEPT & ELLIS

May 12, 2025 - 9:50 AM

Filing Petition for Review

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