Supreme Court No. 97205-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of

ENDY DOMINGO-CORNELIO,

Petitioner

MOTION FOR DISCRETIONARY REVIEW

Court of Appeals No. 50818-4-II
Pierce County Superior Court
Honorable Vicki L. Hogan
No. 13-1-02753-6

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I. IDENTITY OF PETITIONER

Endy Domingo-Cornelio, through his attorney, Emily M. Gause, hereby requests that this Court accept review of the decision designated in Part II of this motion.

II. DECISION

Mr. Cornelio urges review of an Unpublished Opinion of Division II of the Court of Appeals dated March 8, 2019. Appendix A. A timely Motion to Reconsider was filed on March 28, 2019. Appendix B. That Motion was denied on April 15, 2019. This timely Motion for Discretionary Review follows.

III. ISSUES PRESENTED FOR REVIEW

A. DID THE COURT OF APPEALS ERR IN DECLINING TO FIND INEFFECTIVE ASSISTANCE OF COUNSEL?

B. IS THE COURT OF APPEALS DECISION REGARDING PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT IN CONFLICT WITH STATE V. SMILEY IN DIVISION I?

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F. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO ARGUE FOR AN EXCEPTIONAL SENTENCE BELOW THE STANDARD SENTENCING RANGE BASED ON MR. CORNELIO'S YOUNG AGE AT THE TIME OF THE OFFENSES?

IV. STATEMENT OF THE CASE

Endy Domingo-Cornelio was convicted by a jury of one count of rape of a child in the first degree and three counts of child molestation in the first degree for acts he allegedly committed when he was between fourteen and sixteen years old. RP 717-19. Because of a delay in reporting, the case was not initiated, investigated and charged until Mr. Cornelio was twenty years old. CP 1-2. Thus, he was charged as an adult.

Mr. Cornelio received ineffective assistance of counsel when his trial attorney failed to interview key defense witnesses, obtain important records, agreed to admission of child hearsay, failed to object to improper vouching, and neglected to provide meaningful adversarial testing throughout the trial. RP 140-141; RP 450-476; RP 664. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The prosecutor committed misconduct when she repeatedly asked the jury to send a message to society about the difficulties of proving a child sex case. RP 674-75. Mr. Cornelio again received ineffective assistance of counsel when his attorney failed to object to this public policy argument.

Mr. Cornelio was sentenced on September 25, 2014. RP 726. Mr. Cornelio had no felony criminal history. RP 728-29. Nevertheless, his offender score with "other current offenses" resulted in an offender score of 9 with a standard sentencing range of 240-318 months. RP 729.

His trial attorney did not request a sentence below the standard sentencing range due to Mr. Cornelio's young age at the time of the offenses. RP 731-32. The only mention of Mr. Cornelio's age was the following statement:

> "My client has a lot of family support, Your Honor. **He was a juvenile when these incidents took place**. I would like the Court to consider the fact that my client did not take the witness stand at this trial. He sat through the trial. He heard what was testified to. **The standard range starts out at 20 years, Your Honor, 240 months**. Now, I don't know what benefit to either my client's psychological or psychosexual health or to society or to the victim and their family it would do to give him **more than the low end. 20 years**, Your Honor. **He is barely 20 himself. 20 years is a very long time in prison,** and yes, the standard range goes above that quite a bit, but I would ask the Court to consider that the victim seems to be progressing through school right on time, on course. I believe she has been able to move on with her life after these acts, and I am glad that she has, and I hope that she has a decent -- better than a decent, a good life.
>
> **I think that society, in general, does not demand acts that a teenager did, which weren't reported for four or five years, should result in *more* than 20 years in prison**, and I'm asking that the Court consider all of the facts here, the lack of information from the family of the victim in the Presentence Investigation, and consider that Endy Domingo-Cornelio **will be in prison for a minimum of 240 months**, and that is long enough, Your Honor.

RP 731-32 (emphasis added), attached hereto as Appendix C.

Trial counsel did not provide any argument for a sentence below the standard sentencing range under RCW 9.94A.535. Further, counsel did not provide the court with any analysis of what length of sentence Mr. Cornelio would receive if he was sentenced in juvenile court. Trial counsel did not provide any sentencing memorandum nor cite to any authority that would have assisted the court in its analysis.

Mr. Cornelio's sentencing hearing occurred prior to this Court's decisions in State v. O'Dell[1] and State v. Houston-Sconiers.[2] The Court did not consider Mr. Cornelio's youth or developmental maturity at the time of the offenses in its sentencing decision. There is no reference to Mr. Cornelio's age in the Court's explanation of reasons for its sentence. RP 733. The court did not address whether the fact that Mr. Cornelio was just fourteen years old at the time of the crime warranted a sentence below the standard sentencing range. RP 733-740. This was in spite of law indicating

[1] State v. O'Dell, 183 Wn.2d 680, 692, 358 P. 3d 359, 365 (2015)("youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and the sentencing court must exercise its discretion to decide when that is.")

[2] State v. Houston-Sconiers, 188 Wn.2d. 1, 391 P.3d 409 (2017) ("trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.")

juveniles should be treated differently by the criminal legal system even if sentenced as an adult.[3]

Had Mr. Cornelio been convicted of the same crimes in juvenile court, he would have faced a standard range of 148 to 237 weeks.[4] That means his maximum standard range sentence would have been just over four and a half years. Instead, the court imposed a sentence of 240 months, with 36 months community custody. RP 733. This is almost five times the sentence he would have received in juvenile court.

Mr. Cornelio's trial, sentencing hearing, direct appeal, and personal restraint petition occurred as the law regarding fair, appropriate, and constitutional sentencing of youth was rapidly evolving on a national and state level. *See* Appendix B, Relevant Case Law History, at 4-7.

Mr. Cornelio filed a timely PRP on August 30, 2017. The Court of Appeals denied his PRP on August 28, 2018. Mr. Cornelio requested reconsideration on various grounds, including intervening material changes in the law. His motion to reconsider was denied on April 15, 2019. This timely motion for discretionary review follows.

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[3] Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012) *citing* Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005), *and* Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010); J.D.B. v. North Carolina, 564 U.S. 261, 277, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011).

[4] *See* RCW 13.40.180.

V. ARGUMENT

A. THE COURT OF APPEALS ERRED IN DECLINING TO FIND INEFFECTIVE ASSISTANCE OF COUNSEL

The Court of Appeals summarily dismissed Mr. Cornelio's claims for ineffective assistance of counsel at trial. He seeks review of that decision by this Court. Specifically, Mr. Cornelio received ineffective assistance of counsel at trial when his attorney: (1) failed to conduct any meaningful pretrial investigation by failing to interview key defense witnesses and obtain important records; (2) failed to cross-examine witnesses at the child hearsay hearing or object to admission of the child hearsay statements when several State v. Ryan factors supported objection, and without the statements, there was no evidence of Rape of a Child in the First Degree; (3) failed to object to improper vouching of a state witness; and (4) failed to object to errors of constitutional magnitude in closing argument. The Decision is in conflict with decisions from the Supreme Court. RAP 13.4 (b)(1). Mr. Cornelio relies on the arguments and law set forth in his PRP, filed on August 30, 2017, and Reply Brief, filed on June 1, 2018.

B. THE COURT OF APPEALS DECISION REGARDING PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT IS IN DIRECT CONFLICT WITH DIVISION I, STATE V. SMILEY

During closing argument in Mr. Cornelio's trial, the prosecuting attorney argued that to prove the acts occurred beyond a reasonable doubt,

all that was required was A.C.'s testimony. RP 674. But she took that argument a step further when she explained:

> Can you imagine a system where we did require something else? You have heard the testimony. Also apply your common sense and experience here. Kids often don't tell about abuse that they have suffered until well after it's over and done with, or has been happening for years. It could be a period of months, but more often than not, it's years later, if they ever tell.
>
> RP 674.

The prosecutor went on to argue that: "Most of the time, 95 percent of the time, there is no physical findings. And according to the law here in Washington State, that doesn't matter. You don't need that additional evidence." RP 675. Then, the deputy prosecutor went back to her public policy argument:

> It doesn't matter that these things don't exist in this case. **In such a system, most children would have to be told, sorry we can't prosecute your case, we can't hold your abuser responsible because there is nothing to corroborate what you are telling us and no one is going to believe a child. We don't have a system like that. That's not how our system works.** A child telling you what happened to them is evidence and it's enough.
>
> **If more was required, we couldn't hold the majority of abusers responsible,** including this abuser. We couldn't hold this defendant responsible for what he did to Alejandra.

RP 675. (emphasis added).

In holding that this was not misconduct, the Decision of the Court of Appeals is in direct conflict with the decision in State v. Thierry, 190

Wn. App. 680, 360 P.3d 940 (2015), where this *same* prosecutor, in speaking about the difference between direct and circumstantial evidence, claimed that "direct evidence of the acts themselves... is not required and, if it were, the State could never prosecute any of these types of cases." She went on to say:

> if the law required more, if the law required anything, something, anything beyond the testimony of a child, the child's words, [JT's] words, those instructions would tell you that, and there is no instruction that says you need something else. And again, *if that was required, the State could rarely, if ever, prosecute these types of crimes* because people don't rape children in front of other people, and often because children wait to tell.
>
> Id. at 685 (emphasis in opinion).

The defense attorney did not object. In the State's rebuttal argument, she brought up the policy argument again, claiming "[Defense counsel wants you to basically disregard everything that [JT] has said …" because he is a child. She argued "if that argument has any merit then the State may as well just give up prosecuting these cases, and the law might as well say that 'the word of a child is not enough.'" Id. at 688 (emphasis in opinion). At that point, Thierry's defense attorney objected and stated that the prosecutor was fueling the passion and prejudice of the jury. Id.

Division II found this to be prosecutorial misconduct and reversed the conviction. It explained: any argument that exhorts the jury to send a

message to society about the general problem of child sexual abuse is improper because it inflames the passions and prejudices of the jury. Id. at 692. The Court also found there was incurable prejudice because the argument went to the key issue of the case: whether the jury should believe JT's accusations. Id. at 693. Inconsistencies among JT's statements only added to the likely prejudice of the prosecutor's closing argument. Id. The prosecutor's remarks thus "created a substantial risk that the jury decided to credit JT's testimony for improper reasons." Id. at 694.

The Decision of the Court of Appeals is also in direct conflict with the decision State v. Smiley, 195 Wn. App. 185, 379 P.3d 149 (2016), where Division I examined the same closing argument nearly verbatim to the closing arguments from State v. Thierry and Mr. Domingo-Cornelio's case. The Court agreed with Division II and held that the argument was misconduct, explaining "a proper argument stays within the bounds of the evidence and the instructions in the case at hand." Id. at 194. Further, "it is unnecessary to explain why the law is the way it is" and "such explanations tend to lead into policy-based arguments that divert the jury from its fact-finding function." Id. "Jurors should not be made to feel responsible for ensuring that the criminal justice system is effective in protecting children." Id. at 195. However, that court declined to reverse based on the misconduct because Mr. Smiley's attorney did not object.

Further, that court found that there was no prejudice because Mr. Smiley's own attorney picked up the theme in his own closing argument and made it his own. Id.

Here, Division II clearly erred in finding that the statements in closing argument were not prosecutorial misconduct. Comparing the language word-for-word in Thierry and Smiley with the closing argument in Mr. Cornelio's trial demands a different result. The prosecutor in Mr. Cornelio argued the same phrases that were found to constitute prosecutorial conduct in Thierry and Smiley:

> "*Can you imagine a system where we did require something else*? *In such a system, most children would have to be told, sorry we can't prosecute your case, we can't hold your abuser responsible because there is nothing to corroborate what you are telling us an no one is going to believe a child. We don't have a system like that. That's not how our system works*."[5]
>
> "*If more was required, we couldn't hold the majority of abusers responsible, including this abuser."*[6]

---

5 "If the system did work that way, kids would have to be told, we're sorry, we can't prosecute your case, we can't hold your abuser responsible because all we have is your word, and that's not enough. No one's going to believe a kid or a teen, and we need something else. We don't do that. That's not how the system works." Smiley, at 191.

"The prosecutor's message was that if the jury did not believe JT's testimony, and thus by implication acquitted Thierry, 'then the State may as well just give up prosecuting these cases, and the law might as well say that [t]he word of a child is not enough.' The message, in other words, was that the jury needed to convict Thierry in order to allow reliance on the testimony of victims of child sex abuse and to protect future victims of such abuse." Thierry, at 691.

6 "If the law required that additional evidence, we couldn't prosecute so many of these cases, the majority of these cases. We couldn't hold the majority of sexual abusers responsible. We couldn't hold [the victim's] abuser responsible." Smiley, at 191.

"If that argument has any merit, then the State may as well just give up prosecuting these cases, and the law might as well say that 'The word of a child is not enough.'" Thierry, at 688.

This Court should grant review, reverse the conviction, and remand for new trial because it is clear that the same offensive language contained in the closing arguments in State v. Thierry and State v. Smiley is blatant in this case. RAP 13.4(b)(2) (if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals, a petition for review will be accepted).

C. THE COURT OF APPEALS DECISION INVOLVES SIGNIFICANT QUESTIONS UNDER THE UNITED STATES AND WASHINGTON STATE CONSTITUTIONS AND WARRANTS REVIEW UNDER RAP 13.4(b)(3).

1. STATE V. HOUSTON-SCONIERS IS A SUBSTANTIAL CHANGE IN THE LAW

Juveniles are different from adults and should be treated differently by our criminal legal system.[7] A sentencing court violates the Eighth Amendment when it fails to consider the defendants' youthfulness when sentencing juveniles in adult court. State v. Houston–Sconiers, 188 Wn.2d 1, 9, 391 P.3d 409 (2017). Here, the Court did not consider or even mention Mr. Cornelio's age (14-16 years old) at the time of the offenses

[7] Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012) *citing* Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005), *and* Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010); *J.D.B. v. North Carolina*, 564 U.S. 261, 277, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011); State v. O'Dell, 183 Wn.2d 680, 692, 358 P. 3d 359, 365 (2015); State v. Ronquillo, 190 Wn. App. 765, 361 P.3d 779 (2015); and State v. Houston-Sconiers, 188 Wn.2d. 1, 391 P.3d 409 (2017).

before sentencing him to twenty years of incarceration in adult court. The result is a miscarriage of justice.

Light-Roth II held that "trial courts have always had this discretion to impose an exceptional sentence based on the youth of the defendant." In the Matter of the Pers. Restraint of Kevin Light-Roth, 191 Wn.2d 328, 422 P3d 444 (2018). However, Light-Roth II did not resolve the question of whether State v. Houston-Sconiers is a substantial change in the law that is retroactive and whether the *requirement* to consider the characteristics of youth significantly changes prior law.

In his personal restraint petition, Mr. Cornelio pointed to Houston-Sconiers as a recent expansion of principles espoused in O'Dell justifying resentencing. Houston-Sconiers differed from O'Dell in that it *requires* trial courts to consider a defendant's youthfulness sentencing. As articulated by this Court: "Houston-Sconiers held that trial courts ***must*** consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable sentencing range." Houston-Sconiers, 188 Wn.2d at 21 (emphasis added).

The court of appeals decision cursorily dismissed the notion that Houston-Sconiers was a substantial change in the law. It pointed to State v. Miller, 185 Wn.2d 111, 114–15, 371 P.3d 528, 529–30 (2016) which summarizes the law as follows:

> We have consistently recognized that the "significant change in the law" exemption in RCW 10.73.100(6) applies when an intervening appellate decision overturns a prior appellate decision that was determinative of a material issue. Conversely, an intervening appellate decision that "settles a point of law without overturning prior precedent" or "simply applies settled law to new facts" does not constitute a significant change in the law. "**One test to determine whether an [intervening case] represents a significant change in the law is whether the defendant could have argued this issue before publication of the decision.**"

State v. Miller, 185 Wn.2d 111, 114–15, 371 P.3d 528, 529–30 (2016) (internal citations omitted) (emphasis added).

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, 933 P.2d 1019 (1993). Houston-Sconiers interpreted and clarified RCW 9.94A.353. Previously courts were required 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 SRA. State v. Law, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). Interpreting the SRA to allow complete discretion in sentencing youthful offenders is a fundamentally different interpretation of the law.

Prior to Houston Sconiers, Mr. Cornelio **could not** have argued that the trial court was *required* to consider his age at the time of his offense in

fashioning a sentencing under the Eighth Amendment. In this case, the court clearly did not consider Mr. Cornelio's age of 14 at the time of his offenses. RP 733. Houston-Sconiers is a substantial change in the law that should be applied retroactively, and Mr. Cornelio was substantially prejudiced by the sentencing's court failure to consider his age and youthful characteristics in determining whether an exceptional sentence below the standard range was warranted.

2. STATE V. BASSETT CHANGED THE LEGAL LANDSCAPE WHEN IT HELD THAT ARTICLE I, SECTION 14 PROVIDES GREATER PROTECTIONS THAN THE EIGHTH AMENDMENT

The United States Supreme Court changed the landscape for considering a defendant's age at sentencing in Roper v. Simmons, Graham v. Florida, and Miller v. Alabama. These cases were all analyzed under the Eighth Amendment of the United States Constitution. In Washington's juvenile sentencing jurisprudence, it appears O'Dell, Ramos, and Houston-Sconiers were all analyzed under the Eighth Amendment too.

State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018) was decided October 12, 2018, four months *after* Mr. Domingo-Cornelio's personal restraint petition reply brief was filed. Bassett held "in the context of juvenile sentencings, article I, section 14 provides greater protection than the Eighth Amendment." Bassett at 82.

Bassett held "established bodies of state law, both statutory and case-based, recognize that children warrant special protections in sentencing. This weighs in favor of interpreting article I, section 14 more broadly than the Eighth Amendment." State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018).

In a footnote in the Houston-Sconiers' opinion, the Court acknowledged that it was not addressing an Article I, Section 14 argument at this time:

> Petitioners also argue, in supplemental briefing, that imposing a lengthy term of years sentence on a juvenile without possibility of discretion violates article I, section 14, of our state constitution. **This is a question of first impression before this court. However, because this issue was not raised or decided in the courts below, we decline to address it at this time.**

Houston-Sconiers, at 40, footnote 6. Now is the time to address an Article I, Section 14 analysis as it pertains to Houston-Sconiers and juvenile sentencing issues.

3. LIGHT-ROTH ONLY APPLIED TO TIME-BARRED PETITIONS; MR. DOMINGO-CORNELIO FILED A TIMELY PRP UNDER RCW 10.73.090(1)

In the decision denying Mr. Cornelio's personal restraint petition, the court of appeals explains: "After both parties filed their briefs, our Supreme Court held that O'Dell did not constitute a 'significant change in the law.'" Appendix A at 33. The Decision noted that Light-Roth II only

addressed the concept of a "significant change in the law for the purposes of the exception to the one-year PRP time bar under RCW 10.73.090(1)" but believed "its reasoning applies equally to that phrase's usage in RAP 16.4(4)." Id. at 33, footnote 20.

Light-Roth did not address whether petitions that are *not* time-barred are precluded from relief. There are no citations to RAP 16.4(c)(4) in Light-Roth. Light-Roth solely analyzed whether there had been a substantial change in the law under RCW 10.73.100(6), which articulates when the one-year time limit is not applicable.

However, Mr. Cornelio does not need to show that O'Dell and Houston-Sconiers applies retroactively for purposes of RCW 10.73.100(6) because *he is not time-barred.* Under the analysis set forth under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), if an appellate decision did not announce a "new rule" that is retroactive, it still applies to all timely cases on collateral review. The Washington Supreme Court follows Teague analysis. In re Pers. Restraint of Tsai, 183 Wn.2d 91, 100, 351 P.3d 138 (2015). Under Teague, new constitutional rules of criminal procedure usually apply only to matters on direct review, but old rules apply to matters on both direct and collateral review. Id. The question of whether an appellate decision announced a "new" rule for purposes of Teague retroactivity is distinct from the question of whether the decision constitutes

a "significant change in the law" for purposes of exemption from the time limit. Id. at 103-07.

Thus, this Court should accept review and evaluate whether Light-Roth II simply prohibited relief of time-barred petitions under RCW 10.73.100(g) and whether Mr. Cornelio's timely petition is affected by Light-Roth II.

D. THE COURT OF APPEALS DECISION INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT

This Could should accept review because this case involves an issue of substantial public interest. This Court has now made it abundantly clear that judges are not to sentence young people convicted of crimes without first examining and considering characteristics of youthfulness. This is required because we now know there are constitutionally significant distinctions between teenagers and adults. These distinctions are supported by a significant body of developmental research and neuroscience demonstrating clear psychological and physiological differences between youth and adults. This rule prevents children from facing disproportionate sentencing ranges in violation of the Eighth Amendment.

What happened to Endy Cornelio is a grave injustice. Although he was only fourteen to sixteen years old when he committed this offense, the Court did not consider his young age as a basis to depart from sentencing

guidelines. Because of his current convictions, even without any criminal history, Mr. Cornelio faced a 240-318 months sentencing range. The Court gave him the lowest amount of time it believed it could, after Mr. Cornelio's attorney repeatedly argued that 240 months was the "minimum" amount of time that the court could impose. However, the court was *not* advised or encouraged to give Mr. Cornelio a sentence below that adult standard sentencing range, one that would have been proportionate to a juvenile sentence or reflected his immaturity and age at the time of the offense.

Mr. Cornelio's sentencing hearing occurred on September, 25, 2014, before O'Dell,[8] Houston-Sconiers,[9] Bassett,[10] Gilbert,[11] or Meippen.[12] This Court changed the law when it held "the Eighth Amendment *requires* sentencing courts to consider the mitigating qualities of youth at sentencing, even in adult court."[13]

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[8] On August 13, 2015, this Court held that a sentencing court *may* consider a defendant's youth as a mitigating factor justifying an exceptional sentence below the sentencing guidelines under the SRA in State v. O'Dell, 183 Wn.2d 680, 692, 358 P. 3d 359, 365 (2015)("Adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into consideration, when sentencing juveniles tried as adults.").

[9] On August 31, 2017, this Court held that sentencing courts have full discretion to impose sentences below SRA guidelines and statutory enhancements for any juvenile defendant. State v. Houston Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017).

[10] State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018).

[11] State v. Gilbert, 438 P.3d 133 (Wash. April 4, 2019).

[12] In the Matter of the Pers. Restraint of: TIME RIKAT MEIPPEN, Petitioner., 95394-5, 2019 WL 2050270 (Wash. May 9, 2019).

[13] Houston-Sconiers at 18. (emphasis added).

This Court recently declined to address retroactivity of Houston-Sconiers finding that the petitioner could not show actual and substantial prejudice in Matter of Meippen. Mr. Cornelio's case is different. He can show actual and substantial prejudice because his youthful characteristics were never considered, and the court imposed the minimum amount of time it believed it could. This Court should grant review to answer the questions it declined to address in Meippen, and decide whether Houston-Sconiers is a substantial change in the law that must be applied retroactively.

We now know that the younger a juvenile, the less developed his brain.[14] Younger adolescents are significantly less likely than older adolescents to recognize the consequences of their decisions. Id. Further, "research on the neurophysiology of the brain and the neurofunctional developmental changes in the brain suggest a qualitatively different basis for much of the behavior that falls under sexual offense if the behavior is that of an adolescent rather than an adult."[15] Mr. Cornelio was substantially prejudiced by the sentencing court's failure to consider his age at all at

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[14] Roger Przbylski and Christopher Lobanov-Rostovsky (March 2017). *Unique Considerations Regarding Juveniles Who Commit Sexual Offenses*, Sex Offender Management Assessment and Planning Initiative, *citing to* Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N.D., & Schwartz, R. (2003). *Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. Law and Human Behavior, 27(4),* 333–363.

[15] Tolan, P.H., Walker, T., & Reppucci, N.D. (2012). Applying developmental criminology to law: Reconsidering juvenile sex offenses. Justice Research and Policy, 14(1), 117–146.

sentencing. This is especially true given that he was fourteen at the time of the offense and was not declined to adult court, but merely there because of a delay in reporting.[16] He would have faced four and a half years in juvenile court. With what we know now about adolescent brain development, there is a high probability that the sentencing court today would impose a sentence lower than twenty years for a first-time offender who was fourteen at the time of his offenses.

For these reasons, Mr. Domingo-Cornelio urges this Court to accept review and remedy this incredible injustice.

VI. CONCLUSION

Endy Domingo-Cornelio is clearly entitled to relief and review should be granted to resolve conflicts with other cases and address an issue of substantial public importance.

DATED this May 14, 2019, in Seattle, WA.

Respectfully submitted,

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GAUSE LAW OFFICES, PLLC
Attorney for Mr. Domingo-Cornelio

[16] This issue is of paramount importance in light of the 2019 legislation regarding statute of limitations for sex cases. We are now likely to see many more cases in which adults are convicted of crimes they committed when they were juveniles.

APPENDIX A

Decision

Filed
Washington State
Court of Appeals
Division Two

March 8, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of: ENDY DOMINGO-CORNELIO, Petitioner.	No. 50818-4-II UNPUBLISHED OPINION

BJORGEN, J.P.T.[*] — Endy Domingo-Cornelio petitions for relief from restraint stemming from his convictions for first degree child rape and first degree child molestation.

Cornelio argues that he received ineffective assistance of counsel because his trial counsel failed to (1) conduct an adequate pretrial investigation, (2) object to child hearsay statements and cross-examine witnesses at the child hearsay hearing, and (3) adequately cross-examine witnesses, object to impermissible opinion testimony, and object to prosecutorial misconduct at trial. He also argues that a significant change in the law relating to juvenile offenses requires remand for resentencing.

We deny his petition.

[*] Judge Bjorgen is serving as a judge pro tempore for the Court of Appeals, pursuant to RCW 2.06.150.

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FACTS

On October 13, 2012, A.C.[1] disclosed to her mother, T.C.,[2] that Cornelio had sexually abused her. At the time of disclosure, A.C. was 8 years old. The abuse occurred when she was four or five. Cornelio is A.C.'s cousin and would have been between 14 and 16 years old at the time of the alleged abuse.

A.C.'s parents, T.C. and Jose Cornelio,[3] finalized their divorce on October 12, 2012, the day before A.C.'s disclosure. The day of the disclosure, T.C. was on the phone with her sister asking why she had not testified on T.C.'s behalf at a child custody hearing. T.C. explained to her sister that she had wanted her to testify because T.C. believed Jose had had sexual contact with her sister while her sister was underage and T.C. suspected Jose had done the same or would do the same to A.C. or other underage family members. It was at that time that A.C., thinking that T.C. was talking about her, said that "it wasn't [Jose], it was [Cornelio]." Personal Restraint Petition (PRP), Ex. A, at 9. T.C. then called the police and met with an officer later that night to report the alleged abuse.

The State charged Cornelio with first degree child rape and three counts of first degree child molestation. The information alleged that each count occurred between November 2007 and November 2009.

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[1] *See* Gen. Order 2011-1 of Division II, *In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases*, http://www.courts.wa.gov/appellate_trial_courts.

[2] To protect A.C.'s privacy, we refer to her mother by initials.

[3] For the sake of clarity, we refer to him as Jose. We intend no disrespect.

I. PRE-TRIAL INVESTIGATION

Cornelio's trial counsel interviewed four witnesses: A.C., T.C., Jose, and Maria Perez (Jose's girlfriend). In his interview with T.C., counsel learned that A.C. had been acting out sexually with other children and adults and that AC had seen a counselor at age 4. There is no indication that counsel attempted to obtain records of A.C.'s counseling sessions.

In his interview with Jose, counsel learned that Cornelio's brother, Edgar Domingo-Cornelio,[4] typically stayed with Jose whenever Cornelio did. Counsel did not attempt to interview Edgar.

In his interview with A.C., counsel learned that A.C. disclosed her alleged abuse to her best friend three months before disclosing it to her mother. According to A.C., her friend is also a relative of Cornelio's and "told [A.C.] that it happened to her too." PRP, Ex. E, at 6. Counsel did not interview the friend. Counsel also learned that A.C. was concerned that T.C. was going to have Jose sent to jail and that A.C. "always tell[s] people" that she does not want Jose to go to jail. PRP, Ex. E, at 20, 22. A.C. also confirmed during this interview that she disclosed the abuse to her mother because she "kept asking" whether Jose had done something to her and she "got tired of her asking." PRP, Ex. E, at 13.

Counsel never interviewed several of Cornelio's family members whom Cornelio claims would have testified on his behalf. Among these is his mother, Margarita Cornelio,[5] who babysat A.C. for years prior to and after the alleged abuse. Cornelio asserts that Margarita would have testified that A.C. was never nervous or upset around him and that A.C. continued to enjoy coming over to their house even after the allegations surfaced. Cornelio also claims that other,

[4] For the sake of clarity, we will refer to him as Edgar. We intend no disrespect.

[5] For the sake of clarity, we refer to her as Margarita. We intend no disrespect.

unnamed family members would have testified that T.C. accused Jose of sexually abusing A.C. prior to A.C.'s disclosure of alleged abuse by Cornelio and that T.C. had a reputation for untruthfulness.

Cornelio also asserts in his petition that Edgar was at the house with A.C. and him "on almost every occasion" of the claimed abuse, that Edgar slept on a couch with Cornelio and A.C., and that Edgar never saw any interaction between Cornelio and A.C. PRP at 24-25. Cornelio's petition contains Edgar's declaration, which states that he and Cornelio "always spent the night at Jose's house together, with the exception of only a few times when I recall [Cornelio] spending the night without me." PRP, Ex. D, at 3. Edgar claims that every night he and Cornelio were at Jose's house together they slept on the small couches in the living room, while A.C. typically would sleep in Jose's room, but occasionally would sleep on the large couch in the living room. Edgar states in his declaration that he was willing to speak to counsel and testify that he had never seen Cornelio act inappropriately toward A.C. and that he is certain that he would have been aware of any inappropriate activity between them occurring at Jose's house.

Cornelio's investigator, Karen Sanderson, states in her declaration that police reports show that A.C. was exposed to drugs, violence, and neglect and left in the care of drug users while in the custody of her mother.[6] Cornelio claims counsel never pursued this line of inquiry. Sanderson's declaration also states that the documents she obtained from Cornelio's defense counsel "did not contain any court records indicating that he had gathered or reviewed" Jose and T.C.'s publicly available divorce records.[7]

[6] Cornelio does not include these reports in his petition, but relies on Sanderson's references to them in her declaration.

[7] Cornelio does not include these records in his petition, but relies on Sanderson's references to them in her declaration.

II. CHILD HEARSAY HEARING

The trial court held a hearing the first day of trial to determine the admissibility of A.C.'s statements to T.C. and to forensic child interviewer Keri Arnold under RCW 9A.44.120. The State called T.C., Arnold, A.C., and Jose to testify. Defense counsel called no witnesses.

T.C. explained that A.C. had first disclosed to her that Cornelio had abused her after A.C. overheard T.C. on the telephone and A.C. thought that her mother was "saying that her dad had [done] something to her and she said it wasn't her dad, it was [Cornelio]." Verbatim Report of Proceedings (VRP) (Vol. I) at 100. T.C. reported asking A.C. why she had not told her something earlier because T.C. had questioned A.C. "multiple times" as a result of T.C. seeing A.C. "trying to do stuff with dolls and her brother and sister." VRP (Vol. I) at 99. T.C. denied that A.C. had ever accused anyone else of sexually abusing her.

T.C. explained that A.C. had been "a little instigator" when she was younger by lying to get her sister and brother in trouble. VRP (Vol. I) at 94. T.C. stated that A.C. had been caught lying about stealing candy from a store or items from her cousin's house. When asked whether A.C. understood that stealing was wrong, T.C. responded that A.C. was "getting there." VRP (Vol. I) at 95-96.

Arnold testified that she interviewed A.C. Arnold explained that she conducted a truth and lie exercise with A.C., which she said A.C. appeared to understand. Arnold testified that A.C. was able to promise to tell Arnold the truth without any difficulty and there was nothing during the interview that gave her any concern that A.C. had been coached. Arnold reported that A.C. had disclosed to her that Cornelio abused her.

A.C. testified that her mother had discussed with her the importance of telling the truth. A.C. affirmed that she had told the truth about Cornelio touching her and explained that she had told Arnold everything.

Jose testified that A.C. never complained about Cornelio. He also testified that he was not aware of A.C. alleging that anyone else had sexually abused her. Jose denied ever speaking with A.C. about her allegations against Cornelio and denied telling A.C. what to say when she came to court. Jose explained that A.C. had been caught lying about fighting with her sister, but also that A.C. would admit that she lied.

The State argued that A.C.'s statements to T.C. and to Arnold were admissible under RCW 9A.44.120 and under the *Ryan*[8] reliability factors. Defense counsel conceded that the factors had been met and did not object to the admission of the statements. The trial court admitted A.C.'s statements to T.C. and Arnold under RCW 9A.44.120 and the *Ryan* factors.

III. TRIAL

A.C. testified at trial. She testified that Cornelio frequently would spend the night at Jose's house. A.C. reported that she would sleep on a little couch in the front room and Cornelio would sleep on a big couch in the same room. Jose testified that A.C. would sleep in his room when Cornelio came over. A.C. claimed the abuse occurred when both she and Cornelio were sleeping on the living room couches.

A.C. testified that Cornelio would tell her not to tell her father and then would do things that she did not like. She testified that Cornelio grabbed her behind, touched the part of A.C. that she used to go to the bathroom, and made her touch his part that he used to go to the bathroom. A.C. testified that these things happened more than one time. She stated that Cornelio put his

[8] *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

mouth on her mouth, but denied that Cornelio put his mouth or tongue anywhere else on her body.

A.C. further testified that she did not tell her mother about the abuse when it was occurring because Cornelio told her not to. A.C. further explained that she did not tell any other adult because she "didn't want to tell on him," and she thought it was "none of their business." VRP (Vol. VI) at 508.

T.C. testified that A.C. had begun exhibiting sexual behaviors well before the alleged abuse. This made T.C. concerned that something had happened to A.C. and prompted T.C. to repeatedly ask A.C. if she had ever been abused. A.C. had always denied any abuse.

T.C. testified that A.C.'s disclosure occurred when A.C. overheard her talking on the phone because A.C. thought T.C. was talking about her. T.C. did not mention that at that moment she was discussing her suspicions that Jose had acted inappropriately with her sister and that she was concerned he was also acting inappropriately with A.C.

Arnold testified that delayed disclosure from children is typical, and "more often than not" disclosure occurs months or even years after the abuse occurred. VRP (Vol. VI) at 428. She explained that it is common for children to fear that their disclosure might get a family member in trouble. She also testified that children often share graphic details of abuse without "crying or appearing to have a significant emotional response." VRP (Vol. VI) at 456. She explained that "[c]oaching refers to the concern that a child is making a false allegation because they are being instructed to do so by another individual." VRP (Vol. VI) at 450-51. She then testified that nothing from her interview with A.C. "caused [her] any concern for suggestibility or coaching." VRP (Vol. VI) at 476. Defense counsel did not object to these statements, but did

cross-examine Arnold on the coaching issue and asked her whether a divorce could factor into a child's suggestibility.

During closing argument, the prosecutor stated that A.C.'s testimony was all that was required to find the abuse beyond a reasonable doubt. She then went on to say the following:

> Can you imagine a system where we did require something else? You have heard the testimony. Also, apply your common sense and experience here. Kids often don't tell about abuse that they have suffered until well after it's over and done with, or has been happening for years. It could be a period of months, but more often than not, it's years later, if they ever tell.
>
> . . . . Most of the time, 95 percent of the time, there is no physical findings. And according to the law, our law here in Washington State, that doesn't matter. You don't need that additional evidence.
>
> It doesn't matter that these things don't exist in this case. In such a system, most children would have to be told, sorry, we can't prosecute your case, we can't hold your abuser responsible because there is nothing to corroborate what you are telling us and [no one] is going to believe a child. We don't have a system like that. That's not how our system works. A child telling you what happened to them is evidence and it's enough.
>
> If more was required, we couldn't hold the majority of abusers responsible, including this abuser. We couldn't hold this defendant responsible for what he did to [A.C.].

VRP (Vol. VII) at 674-75. Defense counsel did not object.

The jury found Cornelio guilty of one count of first degree child rape and three counts of first degree child molestation.

IV. SENTENCING

At sentencing, Cornelio's offender score was calculated as 9, and his standard sentencing range was 240-318 months. Defense counsel argued for the low end of the range because Cornelio was a juvenile when the incidents occurred, but did not argue for an exceptional sentence below that range based on Cornelio's youth. The trial court sentenced Cornelio to the minimum 240 months in prison with 36 months of community custody.

V. APPEAL

Cornelio appealed, and we affirmed his convictions in an unpublished opinion. *State v. Cornelio*, No. 46733-0-II, slip op. at 193 Wn. App. 1014 (Wash. Ct. App. Apr. 5, 2016) (unpublished).[9] Among the issues discussed in the direct appeal were Cornelio's arguments that he received ineffective assistance of counsel because his trial counsel failed to object to (1) the admission of child hearsay statements and (2) prosecutorial misconduct during closing argument. We held against each of those arguments.

On August 31, 2016, Cornelio's petition for review to the Supreme Court was denied. *State v. Cornelio*, No. 93097-0, 186 Wn.2d 1006 (2016). On August 30, 2017, he filed this PRP.

ANALYSIS

I. PRP LEGAL PRINCIPLES & STANDARD OF REVIEW

We will grant appropriate relief to a petitioner who is under unlawful restraint for one or more of the reasons set out RAP 16.4(c). RAP 16.4(a). To obtain relief through a PRP, a petitioner must generally "establish that a constitutional error has resulted in actual and substantial prejudice, or that a nonconstitutional error has resulted in a fundamental defect which inherently results in a complete miscarriage of justice." *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). Among other reasons, a restraint may be unlawful when there has been a significant change in the law which is material to the petitioner's sentence and sufficient reasons exist to require retroactive application of the changed legal standard. RAP 16.4(c)(4).

"As a general rule, 'collateral attack by [PRP] on a criminal conviction and sentence should not simply be a reiteration of issues finally resolved at trial and direct review, but rather

[9] Http://www.courts.wa.gov/opinions/pdf/467330.pdf.

should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 670-71, 101 P.3d 1 (2004) (footnotes omitted) (quoting *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999)). A "new" issue is not created merely by supporting a previous ground for relief with different factual allegations or with different legal arguments. *Id.* at 671. "The petitioner in a [PRP] is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." *Id.* (footnotes omitted). The interests of justice may be served by reconsidering a ground for relief if there has been an intervening material change in the law or some other justification for having failed to raise a crucial point or argument on appeal. *Gentry*, 137 Wn.2d at 388.

The petitioner "must support the petition with facts or evidence and may not rely solely on conclusory allegations." *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010); RAP 16.7(a)(2)(i). For allegations "'based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief.'" *Id.* (quoting *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992)).

> If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify.

Rice, 118 Wn.2d at 886. The rules applicable to PRPs "do not explicitly require that the petitioner submit evidence, but rather the petition must identify the existence of evidence and where it may be found." *In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 641, 362 P.3d 758 (2015). That being said, "[h]earsay remains inadmissible under *Rice* and is not a basis for

granting a reference hearing or other relief." *In re Pers. Restraint of Moncada*, 197 Wn. App. 601, 608, 391 P.3d 493 (2017).[10]

The petitioner must also show by a preponderance of the evidence that he was prejudiced by the error. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). If the petitioner fails to meet his threshold burden of showing prejudice, the petition must be dismissed. *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). If the petitioner makes a prima facie showing of prejudice, but the merits of the contentions cannot be determined solely on the record, we will transmit the petition to the trial court for a full hearing on the merits or a reference hearing pursuant to RAP 16.11(a) and RAP 16.12. *Id.* If we are convinced the petitioner has proven actual prejudicial error, we will grant the PRP. *Id.*

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Cornelio argues that he received ineffective assistance of counsel in several respects, thereby denying him his right to a fair trial.[11]

A. Legal Principles and Standard of Review

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674

[10] *Moncada* reasoned that "*Ruiz-Sanabria* did not overrule or modify *Rice* . . . nor did *Ruiz-Sanabria* involve the question of admitting hearsay . . . *Ruiz-Sanabria* did not change the evidentiary standards for obtaining a reference hearing." 197 Wn. App. at 607.

[11] Cornelio contends that the State's brief concedes two of his ineffectiveness claims (failing to object to improper vouching and failing to object to errors of constitutional magnitude in closing argument) by failing to argue them. We disagree. Although the State does not present a detailed argument on those specific ineffectiveness issues, it does argue that those claims fail to meet the evidentiary requirements of PRPs and were previously decided on the merits in Cornelio's direct appeal.

(1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Ineffective assistance of counsel is a mixed question of law and fact and is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Washington follows the *Strickland* test: the defendant must show both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. 466 U.S. at 687; *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington has adopted the *Strickland* test).

A trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. There is a "strong presumption that counsel's performance was reasonable," *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009), and a defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant can rebut this presumption by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). That said, the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). In evaluating ineffectiveness claims, we must be highly deferential to counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011).

In the context of a PRP, a petitioner claiming ineffective assistance of trial counsel necessarily establishes actual and substantial prejudice if he meets the standard of prejudice applicable on direct appeal. *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 538, 397 P.3d 90 (2017). To show prejudice, the defendant must show that but for counsel's deficient performance there is a reasonable probability the outcome of the proceeding would have been different. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). "A reasonable probability is

a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

Even if a petitioner raised a claim of ineffective assistance of counsel on direct appeal, the petitioner may assert ineffective assistance on a different basis on collateral review. *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 688-89, 363 P.3d 577 (2015).

B. Pretrial Investigation

Cornelio first argues that his trial counsel's performance was deficient because he failed to obtain records and interview key witnesses prior to trial. Specifically, he claims that his trial counsel (1) did not seek A.C.'s counseling records which allegedly contradict her claims of abuse, (2) failed to obtain public divorce records that allegedly showed that A.C. was exposed to many men during the time of the alleged abuse and that identified the exact date of the divorce as the day before A.C. accused Cornelio, and (3) failed to interview family members who had daily interactions with A.C. during the time of the alleged abuse, including Cornelio's brother Edgar, who Cornelio alleges stayed with him nearly every time he spent the night at Jose's house.[12]

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 691. *Strickland* elaborated:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. For example, when the facts that support a certain potential line of defense are generally known to counsel

[12] Cornelio also claims his counsel failed to interview key prosecution witnesses, including those who provided the most damaging child hearsay evidence at trial, but does not provide any further argument. He does not specify which witnesses he is referring to, and he does not give evidence that counsel failed to interview them or explain how he was prejudiced. Furthermore, as evidenced from Cornelio's own petition, counsel did interview T.C., Jose, and A.C. before trial. The trial transcript also reveals that counsel cross-examined other witnesses for the State, and there is no indication that having not interviewed them beforehand harmed counsel's preparation or performance with respect to those witnesses. We accordingly reject this claim.

> because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.

Id.

Effective assistance of counsel requires that trial counsel investigate the case, which includes witness interviews. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). "Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest." *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). Courts will not defer to trial counsel's uninformed or unreasonable failure to interview a witness. *Jones*, 183 Wn.2d at 340. However, "there is no absolute requirement that defense counsel interview witnesses before trial." *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 488, 965 P.2d 593 (1998).

Whether a failure to interview a particular witness constitutes deficient performance depends on the reason for the trial lawyer's failure to interview. *Jones*, 183 Wn.2d at 340. In addition, a defendant raising a "failure to investigate" claim must show "a reasonable likelihood that the investigation would have produced useful information not already known to defendant's trial counsel." *Davis*, 152 Wn.2d at 739. Even if a defendant can show such information would have been uncovered, the potential resulting prejudice "'must be considered in light of the strength of the government's case.'" *Id.* (quoting *Rios v. Rocha*, 299 F.3d 796, 808-09 (9th Cir. 2002)).

1. Counseling and Divorce Records

Cornelio claims that A.C.'s counseling records "capture both the lack of allegations of abuse during the relevant time periods that A.C. now claims she was abused, but also detail the alleged abuse after she made her initial allegations." PRP at 23. He also claims that Jose's and T.C.'s divorce records show that A.C. was exposed to many men and inappropriate situations

during the years when the abuse allegedly took place and confirmed that A.C.'s disclosure occurred the day after the divorce was finalized. These records also purportedly show that Jose had concerns that T.C. was influencing what A.C. was saying during the custody battle.

Cornelio argues that counsel's failure to obtain these records and bring out their content at trial was deficient performance, particularly because the timing of the divorce was critical to the defense's case that A.C.'s disclosure was related to her parents' separation and custody battle.

There is nothing in the record to suggest why defense counsel declined to pursue A.C.'s counseling records or the divorce records. Cornelio claims that counsel knew of these records' existence but clearly did not know their content. Cornelio does not provide us with these records. With respect to the counseling records, Cornelio does not present any direct evidence of their content, but claims that T.C. took A.C. in for counseling "to explore her sexual abuse history." PRP at 2-3. In support, Cornelio cites Exhibit A of his petition and VRP (Vol. VII) at 561-564. These sources do not state that A.C. was in counseling to explore sexual abuse history, but do suggest that A.C. was referred for therapy at least in part due to inappropriate boyfriend-girlfriend play with other children and straddling the legs of adult male visitors. See PRP, Exhibit A, at 18-20, 28-30; VRP (Vol. VII) at 564. As for the divorce records, Cornelio relies on Sanderson's declaration to show that they contain evidence to support his claims.[13]

The State argues that none of the evidence that Cornelio relies on in his PRP is admissible. Because Sanderson's declaration relies on matters outside the existing record, Cornelio must demonstrate that he has "competent, admissible evidence to establish the facts that

[13] Cornelio also cites Sanderson's declaration to support his claim that trial counsel never sought A.C.'s counseling records, but that declaration does not mention counseling records.

entitle him to relief." *Monschke*, 160 Wn. App. at 488. Contrary to the State's claim, Sanderson's declaration need not be admissible itself, but must merely establish that Cornelio possesses competent, admissible evidence. *Id.*

Cornelio makes no argument that A.C.'s counseling records would be admissible, and they are likely protected by privilege. Moreover, even considering the partial purposes of the counseling described above, he does not show a reasonable likelihood that investigation of the counseling records would have produced useful information not already known to counsel. *Davis*, 152 Wn.2d at 739. In the absence of any argument or authority that the counseling records would be admissible, we cannot assume that they would be. In addition, Cornelio has not shown under the standards above that trial counsel was deficient in not pursuing the counseling records or that counsel's failure to pursue them resulted in prejudice to him. We therefore hold against Cornelio's claims based on A.C.'s counseling records.

However, it is likely that her parents' publicly available divorce records would be admissible. Hence, with respect to the divorce records, Cornelio has met his burden to show that he possesses competent, admissible evidence. *Id.*

To show his counsel was deficient, Cornelio must demonstrate a reasonable likelihood that investigation of the divorce records would have produced useful information not already known to counsel. *Davis*, 152 Wn.2d at 739. There is some support in the record for Cornelio's contention that defense counsel did not know the exact date the divorce was finalized, as he could not refresh Jose's memory when Jose struggled to provide that date on cross-examination. However, counsel established in his cross-examination of T.C. that the divorce was finalized on October 12 and that she contacted the police about A.C.'s disclosure "the day after." VRP (Vol. VII) at 565. Furthermore, in his closing argument counsel argued that the disclosure occurred

"right around that time when Jose got custody of the children after a court battle." VRP (Vol. VII) at 696. In addition, counsel highlighted the concerns regarding A.C.'s suggestibility and coaching that were echoed in the divorce proceedings.

It does not appear that investigation of the divorce records would have produced any useful information not already known to counsel. *Davis*, 152 Wn.2d at 739. The record shows that counsel knew, and established for the jury, that the divorce occurred the day before A.C.'s disclosure and that there were concerns that she was being influenced by her mother. Because Cornelio has not shown that further investigation would have produced new information, he cannot demonstrate deficient performance on this basis.

2. Potential Witnesses

Cornelio also argues counsel was deficient in failing to interview A.C.'s friend and several of Cornelio's family members, including his brother. We examine each of these potential witnesses in turn.

i. A.C.'s friend

First, we conclude it was not deficient performance for counsel not to interview A.C.'s friend, to whom A.C. disclosed her alleged abuse by Cornelio several months before her disclosure to T.C. According to A.C., her friend is also a relative of Cornelio's and "told [A.C.] that it happened to her too." PRP, Ex. E, at 6. In fact, the friend separately reported to police that her male cousin exposed his penis to her, but could not remember any more details or identify the man by name. This suggests that it was a strategic choice not to interview A.C.'s friend, since counsel would have had reason to believe that the friend would only corroborate A.C.'s allegation. Under the circumstances, it was reasonable for counsel not to pursue this line of inquiry.

ii. Family Members

Sanderson states in her declaration that unnamed family members reported that T.C. had accused Jose of abusing her sister and A.C. for years and that T.C. was not trustworthy. Additionally, according to Sanderson's declaration, those family members reported that A.C. never appeared nervous or uncomfortable around Cornelio and never complained about coming over to Cornelio's house, where Margarita would babysit her. Sanderson's declaration also states that Margarita reported that she had almost daily contact with A.C. during the years the abuse took place, and she continued to babysit A.C. even after the allegations were made.

Cornelio has not provided us with statements by these family members, nor has he suggested that they would have been willing and able to testify at trial. The State argues that the family members' statements referenced in the declaration are inadmissible hearsay and should not be considered.

With respect to the statements of Cornelio's family members, Sanderson's declaration does not meet the evidentiary standard of *Rice.* Sanderson cannot competently testify to the hearsay statements contained within her declaration, and Cornelio has made no argument that they fall under any hearsay exception. *See Rice,* 118 Wn.2d at 886. Instead he argues that these statements serve as "other corroborative evidence," and that such evidence can include hearsay. Reply Br. of Pet'r at 8. However, "[h]earsay remains inadmissible under *Rice* and is not a basis for granting a reference hearing or other relief." *Moncada,* 197 Wn. App. at 608.

Because Cornelio has not shown that he has competent, admissible evidence of what his family members would testify to, we reject his claim of ineffective assistance counsel based on his counsel's failure to interview them. *Monschke*, 160 Wn. App. at 488.

iii. Edgar

Finally, Cornelio claims that his brother Edgar would have testified that he was with Cornelio at Jose's house on almost every occasion and never saw Cornelio act inappropriately with A.C.

Unlike Cornelio's other family members, Edgar submitted his own declaration outlining what he would have testified to. He claims that he and Cornelio "always spent the night at Jose's house together, with the exception of only a few times when [he] recalls [Cornelio] spending the night without [him]." PRP, Ex. D, at ¶6. Edgar claims that every night he and Cornelio were at Jose's house together they slept on the small couches in the living room, while A.C. typically would sleep in Jose's room but occasionally would sleep on the large couch in the living room. Edgar would have testified that he had never seen Cornelio act inappropriately toward A.C. and that he is certain that he would have been aware of any inappropriate activity between them occurring at Jose's house. As Edgar has firsthand knowledge of the facts he would testify to, his declaration does "contain matters to which [he] may competently testify." *Rice,* 118 Wn.2d at 886. His declaration therefore satisfies the evidentiary standards of *Rice.*

Even if we assume without deciding that Cornelio's trial counsel was deficient for failing to interview Edgar, Cornelio must still demonstrate prejudice. We hold he was not prejudiced.

Cornelio argues he was prejudiced because Edgar's testimony would have directly contradicted much of what A.C. claimed at trial. Specifically, Cornelio claims that Edgar's statement that he always slept on the living room couches with Cornelio, yet never saw Cornelio act inappropriately with A.C., would have created a "reasonable chance that some jurors, or even one juror, would have found [Cornelio] not guilty." PRP at 25.

Cornelio relies on *Jones*, which involved a "credibility contest" between the State's witnesses and the defendant's witnesses. 183 Wn.2d at 344. *Jones* concluded that the defendant was prejudiced because defense counsel did not interview a witness who (1) would have directly contradicted the alleged victim's version of events, (2) would have corroborated similar testimony of another witness, (3) would have provided "very defense-favorable testimony" that the defendant was in fact the victim, and (4) was a neutral observer with no relationship to either the defendant or the alleged victim. *Id.* at 341-43.

This case is distinguishable from *Jones*. First, although Edgar would have contradicted A.C.'s description of the sleeping arrangements, he would not be able to directly contradict her claims of abuse because he could not have provided an alibi for the nights when he did not join Cornelio at Jose's house. Second, although Edgar's testimony that he never saw Cornelio act inappropriately would have supported Jose's testimony to that point, he also would have contradicted Jose's favorable testimony that A.C. always slept in Jose's room when Cornelio was there.

For these reasons, we hold that Cornelio was not prejudiced because there is not a reasonable probability the outcome of the trial would have been different had defense counsel interviewed Edgar.

3. Cumulative Effect

To the extent Cornelio argues cumulative error, he does not demonstrate ineffective assistance of counsel taking each of these alleged failures to investigate cumulatively. As discussed above, much of the evidence Cornelio identifies does not meet PRP evidentiary standards. The remaining evidence either does not provide new information previously unknown to counsel or lacks the exculpatory strength, even taken together, to suggest that but for its

exclusion there is a reasonable probability that Cornelio would have been acquitted. We reject Cornelio's argument of ineffective assistance counsel for failure to investigate the case.

C. Child Hearsay Hearing

Cornelio's second ineffective assistance claim is that his trial counsel failed to cross-examine witnesses at the child hearsay hearing or object to admission of child hearsay statements.[14] Cornelio presents several bases for objecting to A.C.'s statements based on the factors espoused in *Ryan*: (1) there was evidence that A.C. had a reputation for untruthfulness, as articulated by her mother at the hearsay hearing, (2) the disclosure was not spontaneous, but was in response to her mother's continued assertions that A.C. was being abused by Jose, and (3) the timing of the disclosure and facts surrounding the custody battle for A.C. were not discussed as an apparent motive to lie. He argues that there was no legitimate strategic or tactical reason for his trial counsel to concede the admission of A.C.'s hearsay statements.

We rejected Cornelio's claim regarding his trial counsel's failure to object to the admission of those statements in his direct appeal. *Cornelio*, slip op at 193 Wn. App. 1014. Cornelio must therefore demonstrate that the interests of justice require relitigation of that issue. *Davis*, 152 Wn.2d at 671. He argues that we should revisit this issue because he raises new facts and analysis not raised in his direct appeal and the alleged error was manifest error affecting a constitutional right. *In re Pers. Restraint of Percer*, 111 Wn. App. 843, 847, 47 P.3d 576 (2002) ("In light of the clear error involving a constitutional right, we reexamine the issue in the

[14] Although Cornelio claims ineffective assistance based on his counsel's failure to cross-examine witnesses in his grounds for relief, he does not provide any argument in support of this assertion and instead focuses exclusively on his counsel's failure to object. Hence, we decline to consider it. RAP 10.3(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

interests of justice."). Specifically, he maintains that his direct appeal did not focus on the lack of meaningful adversarial testing of the prosecution's case by his trial counsel, nor did it argue that the issue involved a manifest error affecting a constitutional right. He contends that the interests of justice will be served because this issue was only "cursorily discussed" in his direct appeal. Reply Br. of Pet'r at 12.

We hold this is insufficient justification to relitigate this issue. "[S]imply recasting" a previously rejected legal argument "'does not create a new ground for relief or constitute good cause for reconsidering the previous rejected claim.'" *Davis*, 152 Wn.2d at 671 (quoting *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001)). Moreover, there is no "clear error" involving Cornelio's constitutional right to counsel with respect to the child hearsay hearing. *Percer*, 111 Wn. App. at 847. Trial counsel's decision about whether to object is a classic example of trial tactics and only in egregious circumstances relating to evidence central to the State's case will the failure to object constitute incompetent representation that justifies reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Even assuming Cornelio meets this standard, he does not show prejudice: that the trial court would have sustained the objections if made and the result of the proceeding would likely have been different. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

As we noted in Cornelio's direct appeal, despite defense counsel's concession on the *Ryan* factors, the trial court nevertheless provided a detailed analysis of those factors and concluded that A.C.'s hearsay statements were admissible under RCW 9A.44.120. *See Cornelio*, slip op at 193 Wn. App. 1014. The trial court made specific findings that A.C. was truthful, her disclosure was spontaneous, and she had no apparent motive to lie. The fact that the court

independently found the *Ryan* factors met strongly suggests it would not have sustained an objection arguing the contrary or chosen to exclude the statements.

Moreover, even if Cornelio could show that the court may have decided differently with respect to any or each of the three *Ryan* factors he points to in his petition, he must also show that the trial court would probably have ruled differently with respect to its consideration of all the *Ryan* factors taken together. *See Kennealy*, 151 Wn. App. at 881 ("No single *Ryan* factor is decisive and the reliability assessment is based on an overall evaluation of the factors."). He has not done so. We are satisfied there was no clear error and that Cornelio has not shown a reasonable probability that the trial court would have ruled differently had he objected.

Cornelio also argues that his circumstance warrants a presumption of prejudice because by failing to object to the hearsay statements his counsel "'entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing.'" PRP at 33 (quoting *Davis*, 152 Wn.2d at 673-75). This "'presumptive prejudice rule'" is limited to circumstances comparable to "'the complete denial of counsel'" in the context of the entire representation. *Davis*, 152 Wn.2d at 674-75 (quoting *Visciotti v. Woodford*, 288 F.3d 1097, 1106 (9th Cir. 2002)). That was not the case here. Defense counsel cross-examined witnesses, raised objections to evidence, presented closing argument to the jury, and advocated for a shorter prison sentence at sentencing. *See id.* at 675.

For these reasons, we hold there was no clear error affecting a constitutional right and the interests of justice do not require us to reconsider our holding on direct appeal that Cornelio was not prejudiced by his counsel's performance at the child hearsay hearing.

D. At Trial

Cornelio's final grounds for arguing ineffective assistance of counsel rest on his counsel's performance at trial. Specifically, he argues his counsel failed to (1) cross-examine witnesses, (2) object to impermissible opinion testimony, and (3) object to prosecutorial misconduct in closing argument.

1. Cross-Examination

Cornelio argues his counsel was deficient in failing to meaningfully cross-examine key witnesses who testified against him. Specifically, Cornelio contends his counsel was deficient because he failed to highlight T.C.'s suspicions that Jose had been abusing A.C. and that A.C. had been exhibiting sexually inappropriate behaviors before the alleged abuse by Cornelio. He also argues his counsel "seemed confused at best" in failing to effectively cross-examine Jose and T.C. about the timing of A.C.'s disclosure to highlight that it occurred the day after their divorce. PRP at 35.

The extent of cross-examination is a matter of judgment and strategy. *Davis*, 152 Wn.2d at 720. We will not find ineffective assistance of counsel based on trial counsel's decisions during cross-examination if counsel's performance fell within the range of reasonable representation. *Id.*

Although counsel may not have emphasized this information as much as Cornelio would have liked, the fact remains that most of this information was established on the record for the jury to consider. Counsel did not explicitly draw out the fact that A.C. was exhibiting sexualized behaviors before the alleged abuse, but he did establish that A.C. claimed she learned those behaviors from movies and that starting when A.C. was three years old T.C. had harbored suspicions that Jose had abused A.C. Counsel's choice to highlight where A.C. learned those

behaviors, rather than when she exhibited them, fell within the range of reasonable representation.

As for the timing of the disclosure, although counsel did not clarify the timing during Jose's testimony, he did establish on cross-examination of T.C. that A.C.'s disclosure occurred the day after the divorce was finalized. Counsel's performance in drawing out this fact for the jury to consider likewise fell within the range of reasonable representation.

Cornelio's argument essentially "amounts to an assertion that trial counsel could have done a better job at cross-examination. This is not enough to demonstrate deficient performance." *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). We hold counsel was not deficient.

2. Improper Opinion Testimony[15]

Cornelio next claims that his trial counsel failed to object when the State's witness improperly commented on A.C.'s credibility.[16] Specifically, Cornelio claims that Arnold improperly stated that she had "no concern" that A.C. was coached or that suggestibility affected her disclosure, improperly discussed that delayed disclosure was "typical," and improperly

[15] In his grounds for relief, Cornelio characterizes this argument as part of his claim of ineffective assistance of counsel. However, in arguing this issue he instead presents the standard for manifest error of constitutional magnitude, which is an exception to the rule that an appellate court may refuse to review an unpreserved error on direct appeal. RAP 2.5(a). As that is the standard on direct appeal, rather than in a PRP, we instead analyze this claim under the ordinary framework for ineffective assistance of counsel for failure to object.

[16] Cornelio initially characterizes this claim as improper vouching, which occurs when a prosecutor expresses a personal belief in a witness's credibility. *See State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). However, his argument in fact is not that the State prosecutor vouched for A.C.'s credibility, but that the State's witness provided impermissible opinion testimony on A.C.'s credibility.

suggested that it was common for children not to show a significant emotional response when talking about their abuse. PRP at 36; VRP (Vol. VI) at 428-29, 455-56, 476.

No witness may state an opinion about a victim's credibility because such testimony "invades the jury's exclusive function to weigh the evidence and determine credibility." *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Impermissible opinion testimony regarding the defendant's guilt may be reversible error because it violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

Testimony on general child victim interview protocol does not improperly comment on the truthfulness of the victim. *Kirkman*, 159 Wn.2d at 934. Furthermore,

> it has long been recognized that a qualified expert is competent to express an opinion on a proper subject even though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact. The mere fact that the opinion of an expert covers an issue which the jury has to pass upon, does not call for automatic exclusion.

Id. at 929 (internal citations omitted).

Cornelio argues that Arnold's explanations of delayed disclosure and children's lack of emotional response to recounting their abuse improperly went beyond general testimony about child victim interview protocol. We disagree.

Arnold at no time linked her discussions of delayed disclosure or the common lack of emotional response from child victims to A.C. specifically; she merely described some of the psychological factors that generally bear on how children might act and present themselves after they are abused or in recounting their abuse. The jury was then left to weigh this general information in its consideration of A.C.'s credibility.

Cornelio also argues that Arnold's statement that she had no concern that A.C. had been coached amounted to an "explicit statement regarding the accuracy and truthfulness of A.C.'s accusations" and that, therefore, trial counsel's failure to object to it was a manifest constitutional error. PRP at 38. Again, we disagree.

Arnold did not say that A.C. was telling the truth or that she believed her, but rather made an inference based on her interactions with A.C. that A.C. was not exhibiting certain behaviors of coaching or suggestibility. Arnold testified that in her professional experience, these can be an issue when interviewing and counseling child victims.

We hold Arnold's statements were not improper, and defense counsel was not deficient for failing to object to them.

3. Prosecutorial Misconduct[17]

Finally, Cornelio argues his trial counsel failed to object to alleged prosecutorial misconduct during closing argument.[18]

Although prosecutors enjoy "wide latitude to argue reasonable inferences from the evidence," they "must 'seek convictions based only on probative evidence and sound reason.'" *In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (quoting *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). To prevail on a prosecutorial

[17] Cornelio classifies this argument as an ineffective assistance of counsel claim, but instead argues under the framework for analyzing prosecutorial misconduct on direct appeal. We accordingly address this argument as an ordinary claim of prosecutorial misconduct in the context of PRP requirements that Cornelio show actual and substantial prejudice.

[18] Although Cornelio made several claims of prosecutorial misconduct in his direct appeal, none of them overlap with the statements he challenges in his PRP. Hence, this argument raises new points of fact and law that were not raised in the principal action. *See Davis*, 152 Wn.2d at 670-71. If there is doubt about whether two grounds are distinct, we resolve the doubt in the petitioner's favor. *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986).

misconduct claim, a defendant must show that the conduct was both improper and prejudicial "in the context of the record and all of the circumstances of the trial." *Id.*

In establishing prejudice where the defendant did not object at trial, the defendant is deemed to have waived the error unless the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). In that case "the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Cornelio challenges the following segment of the State's closing argument, which followed its statement that A.C.'s testimony was all that was required to find the abuse beyond a reasonable doubt:

> Can you imagine a system where we did require something else? You have heard the testimony. Also, apply your common sense and experience here. Kids often don't tell about abuse that they have suffered until well after it's over and done with, or has been happening for years. It could be a period of months, but more often than not, it's years later, if they ever tell.
>
> . . . . Most of the time, 95 percent of the time, there is no physical findings. And according to the law, our law here in Washington State, that doesn't matter. You don't need that additional evidence.
>
> It doesn't matter that these things don't exist in this case. *In such a system, most children would have to be told, sorry, we can't prosecute your case, we can't hold your abuser responsible because there is nothing to corroborate what you are telling us and* [*no one*] *is going to believe a child.* We don't have a system like that. That's not how our system works. A child telling you what happened to them is evidence and it's enough.
>
> If more was required, *we couldn't hold the majority of abusers responsible, including this abuser*. We couldn't hold this defendant responsible for what he did to [A.C.].

VRP (Vol. VII) at 675 (emphasis added). Defense counsel did not object.

Cornelio compares these remarks to those in *State v. Thierry*, which we held constituted prosecutorial misconduct. In her opening argument, the prosecutor in *Thierry* stated:

> If the law required more, if the law required anything, something, anything beyond the testimony of a child, the child's words, [J.T.'s] words, those instructions would tell you that, and there is no instruction that says you need something else. And, again, *if that was required, the State could rarely, if ever, prosecute these types of crimes* because people don't rape children in front of other people and often because children wait to tell.

190 Wn. App. 680, 685, 360 P.3d 940 (2015), *review denied*, 185 Wn.2d 1015 (2016). After defense counsel's closing argument, in which counsel tried to rehabilitate Thierry's credibility and highlight inconsistencies in the child victim's statements and the victim's potential motive to lie, the prosecutor returned to her theme in rebuttal:

> [Defense counsel] says, "It's a good thing to tell kids, 'Tell someone if you've been abused. You're not going to get in trouble.'" She said, "It's a good thing to make sure that they know that they can tell when this has happened to them." That statement contradicts everything that she just stood up here and argued to you about. How is it a good thing when basically the crux of her argument is: "They aren't going to be believed. Children can't be believed. There's never any other physical evidence. We can't believe what they say because they make up stories," so *how is it a good thing to tell them that they should tell somebody because we're going to bring them in here to court to have a Defense attorney say, You can't believe them.*"
> . . . .
> [Defense counsel] wants you to basically disregard everything that [J.T.] has said between what he told [his mother], between what he told Ms. Arnold-Harms, between when he told his primary care provider Ms. Lin and what he told Amber Bradford. "Just disregard all of that because he's a child, because he was 8 when he said these things and because he was 9 when he was on the stand. Nothing he said is credible so just disregard it all." *If that argument has any merit, then the State may as well just give up prosecuting these cases, and the law might as well say that* "*the word of a child is not enough.*"

Id. at 687-88.

"It is improper for prosecutors to 'use arguments calculated to inflame the passions or prejudices of the jury.'" *Id.* at 690 (quoting *Glassman*, 175 Wn.2d at 704). *Thierry* reasoned that an argument that "'exhorts the jury to send a message to society about the general problem

of child sexual abuse' qualifies as such an improper emotional appeal." *Id.* (quoting *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989)). The court accordingly held that the comment was improper because it essentially told the jury that it needed to convict the defendant in order to allow reliance on the testimony of victims of child sex abuse and protect future victims. *Id.* at 691.

The prosecutor's comments in this appeal do not share the flaws present in *Thierry*. As noted, the prosecutor's message in Thierry was essentially that the jury needed to convict the defendant in order to allow reliance on the testimony of child victims in future cases and to protect future victims of such abuse. Here, the prosecutor instead highlighted the standard of evidence to make sure the jury understood that A.C.'s testimony alone may be sufficient to meet the State's burden of proof, should the jury find A.C. credible. The prosecutor's statement in this case merely reflected the law and did not have the inflammatory effect of the statement in *Thierry*. Because the statement was not improper, we need not consider whether Cornelio was prejudiced.[19]

III. SIGNIFICANT CHANGE IN LAW

Cornelio argues that a significant change in law applies retroactively to his case and requires remand for a new sentencing hearing. Specifically, he argues that *State v. O'Dell*, a recent Washington Supreme Court decision issued after the imposition of his sentence, holds that trial courts should consider youth as a mitigating factor and gives courts the discretion to impose an exceptional sentence below the standard range applicable to adults. 183 Wn.2d 680, 358 P.3d 359 (2015), *review denied*, 189 Wn.2d 1007 (2017). He argues similarly that *State v. Houston-*

[19] For the same reason, we likewise need not address Cornelio's conclusory argument that defense counsel was ineffective for failing to object.

Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), constituted a significant change in the law through its requirement that trial courts consider the characteristics of youth in sentencing for offenses committed while a juvenile.

A. Legal Principles and Standard of Review

A restraint may be unlawful when there has been a significant change in the law which is material to the petitioner's sentence and sufficient reasons exist to require retroactive application of the changed legal standard. RAP 16.4(c)(4). 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). An intervening decision that "'settles a point of law without overturning prior precedent'" does not constitute a significant change in the law. *Id.* at 114-15 (quoting *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 83, 74 P.3d 1194 (2003)). One test to determine whether a decision represents a significant change in the law is whether the defendant could have argued the issue in question before publication of the intervening decision. *Id.* at 115.

B. Significant Change in the Law

RCW 9.94A.535(1)(e) provides that a trial court may impose an exceptional sentence below the standard range if it finds mitigating circumstances, including impairment of the defendant's capacity to appreciate the wrongfulness of his conduct. *O'Dell* held that "a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is." 183 Wn.2d at 698-99. The court explained,

> Until full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond.

Id. at 692. In drawing these conclusions, *O'Dell* relied on the reasoning and scientific information underlying the United States Supreme Court's decisions in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), and *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

In rejecting O'Dell's argument that it should consider his age as a mitigating circumstance at sentencing, the trial court in *O'Dell* relied on *State v. Ha'mim*, which held that a defendant's age, alone, does not automatically support an exceptional sentence below the standard range applicable to an adult felony offender. *O'Dell*, 183 Wn.2d at 689; *State v. Ha'mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997). The trial court in *O'Dell* interpreted this holding as "absolutely barring any exceptional downward departure sentence below the range on the basis of youth." *O'Dell*, 183 Wn.2d at 698. *O'Dell* reversed the trial court and specified that *Ha'mim* did not bar trial courts from considering youth at sentencing. *Id*. at 689. Rather, *O'Dell* characterized *Ha'mim* as holding "only that the trial court may not impose an exceptional sentence automatically on the basis of youth, absent any evidence that youth in fact diminished a defendant's culpability." *Id*. Hence, rather than directly overturning *Ha'mim*, *O'Dell* merely "disavowed" *Ha'mim*'s reasoning to the extent that it was inconsistent with its own. *Id.* at 696.

Cornelio argues that under *O'Dell* he is entitled to a new sentencing hearing so that the trial court can be allowed to consider his youth as a mitigating factor. Although Cornelio was tried and convicted as an adult, his crimes were committed when he was between 14 and 16 years old.

After both parties filed their briefs, our Supreme Court held that *O'Dell* did not constitute a "significant change in the law."[20] *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 422 P.3d 444, *reconsideration denied* (2018). *Light-Roth* reasoned that the *O'Dell* court had "explained that *Ha'mim* did not preclude a defendant from arguing youth as a mitigating factor but, rather, it held that the defendant must show that his youthfulness relates to the commission of the crime." *Id.* at 336. Hence, "RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward, and mitigation based on youth is within the trial court's discretion." *Id.*

Because we are bound by *Light-Roth*'s holding that *O'Dell* did not constitute a significant change in the law, we reject Cornelio's argument for resentencing based on *O'Dell*.

Cornelio also points to *Houston-Sconiers* as a recent expansion of the principles espoused in *O'Dell* justifying resentencing.[21] He notes that *Houston-Sconiers* held that "[t]rial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable [sentencing range]." 188 Wn.2d at 21.

As *Light-Roth* held, trial courts have always had this discretion to impose an exceptional sentence based on the youth of the defendant. This, however, does not resolve whether the *requirement* to consider the characteristics of youth significantly changes prior law. To answer

[20] Although *Light-Roth* interpreted the concept of "significant change in the law" for the purposes of the exceptions to the one year PRP time bar under RCW 10.73.090(1), its reasoning applies equally to that phrase's usage in RAP 16.4(c)(4).

[21] The State argues that Cornelio cannot rely on *Houston-Sconiers* because it was decided after his case was "final" for the purposes of retroactivity analysis. Br. of Resp't at 25, 26 n.3. But in the context of RAP 16.4(c), there is no need for the petitioner's case to be ongoing for us to consider whether there has been a significant change in the law that should be applied retroactively. As Cornelio's petition is timely, it need not meet the retroactivity criteria of RCW 10.73.100(6) as an exception to the one-year time bar under RCW 10.73.090(1). Rather, it must meet the retroactivity standard of RAP 16.4(c)(4).

that question, we follow *Miller*, 185 Wn.2d at 114, and ask whether *Houston-Sconiers* overturns a prior appellate decision that was determinative of a material issue. *Houston-Sconiers* does not overturn any such decision.

First, the requirement to consider youth in *Houston-Sconiers* did not overturn *Ha'mim*. As clarified by *O'Dell* and *Light-Roth*, *Ha'mim* did not preclude a defendant from arguing youth as a mitigating factor, but held that the defendant must show that his youthfulness relates to the commission of the crime. *Light-Roth*, 191 Wn.2d at 336. *Houston-Sconiers* recognized the constitutional differences between children and adults and required courts to consider the characteristics of youth in sentencing. 188 Wn.2d at 18. These principles do not overturn the holdings of *Ha'mim*, as clarified by *O'Dell* and *Light-Roth*.

For similar reasons, *Houston-Sconiers* also did not overturn *State v. Scott*, 72 Wn. App. 207, 866 P.2d 1258 (1993). Scott deemed the argument that youth limited the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law as one that "borders on the absurd." *Scott*, 72 Wn. App. at 218. However, *Light-Roth* also clarified that *Scott* did not categorically preclude consideration of youth, but rather, like *Ha'mim*, required the defendant to explain how his youthfulness related to the commission of the crime. 191 Wn.2d at 336. Although *Houston-Sconiers* repudiates the apparent attitude of *Scott*, it cannot be said to have overturned its holdings.

Houston-Sconiers merely "'settle[d] a point of law without overturning prior precedent,'" and so does not constitute a significant change in the law under RAP 16.4(c)(4). *Miller*, 185 Wn.2d at 114-15 (quoting *Turay*, 150 Wn.2d at 83). Cornelio's argument for resentencing based on *Houston-Sconiers* therefore fails.

Neither *Houston-Sconiers* nor *O'Dell* constitute a significant change in the law material to Cornelio's sentence. Therefore, Cornelio's petition for relief under RAP 16.4(c)(4) fails.

CONCLUSION

We deny Cornelio's petition.

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.

Bjorgen, J.T.

We concur:

Worswick, P.J.

Johanson, J.

APPENDIX B

Motion for Reconsideration

No. 50818-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint of

ENDY DOMINGO-CORNELIO,

Petitioner

MOTION FOR RECONSIDERATION

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I. IDENTITY OF THE MOVING PARTY

Endy Domingo-Cornelio, the petitioner, hereby requests that this Court reconsider its decision denying personal restraint petition, as designated in part II.

II. STATEMENT OF RELIEF SOUGHT

Petitioner moves to reconsider one issue in the opinion denying personal restraint petition, Matter of Domingo-Cornelio, 50818-4-II, filed on March 8, 2019. He asks for reconsideration of the sentencing issue, specifically his request for a new sentencing hearing under Miller v. Alabama[1], State v. O'Dell,[2] State v. Houston-Sconiers[3], and In the Matter of Light-Roth (Div. I, 2017).[4]

In his opening brief for Personal Restraint Petition, Mr. Domingo-Cornelio framed the issue as follows:

> THERE HAS BEEN A SIGNIFICANT CHANGE IN THE LAW THAT APPLIES RETROACTIVELY TO PETITIONER'S CASE, AND MATERIAL FACTS EXIST WHICH HAVE NOT BEEN PREVIOUSLY PRESENTED AND HEARD, WHICH REQUIRES VACATION OF PETITIONER'S SENTENCE UNDER RAP 16.4

The Court should reconsider this issue because the Court overlooked other avenues for relief due to counsel's reliance on In the Matter of Light-

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[1] Miller v. Alabama, 567 U.S. 460 471, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

[2] State v. O'Dell, 183 Wn.2d 680, 692, 358 P.3d 359 (2015).

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

[4] In the Matter of Light-Roth, 200 Wn. App. 149, 401 P.3d 459 (2017)

Roth (Div. I, 2017) (Light-Roth I) which was reversed by the Washington Supreme Court after briefing was completed in this case, on August 28, 2018. 191 Wn.2d 328, 422 P3d 444 (2018) (Light-Roth II). Rather than require counsel to file a successive petition which argues new grounds for relief that were not sufficiently raised in this petition, there is good reason to consider these issues now at this stage. *See* RCW 10.73.140.

III. FACTS RELEVANT TO MOTION

On July 16, 2014, a jury convicted Endy Domingo-Cornelio of one count of rape in the first degree and three counts of child molestation in the first degree. RP 717-19. The sentencing hearing occurred on September 25, 2014. RP 726. Mr. Domingo-Cornelio had, before this case, absolutely no felony criminal history. RP 728-29. Nevertheless, his offender score as calculated by the trial court with "other current offenses" resulted in an offender score of 9 and a standard sentencing range of 240-318 months. RP 729.

Mr. Domingo-Cornelio was between 14 and 16 years old at the time of the offenses. Because of delayed reporting, he was not charged with these offenses until he was over eighteen. Thus, he was required to be charged in adult court. If Mr. Domingo-Cornelio been convicted of the exact same charges in juvenile court, he would have been facing a standard range of 103 to 129 weeks on Rape of a Child in the First Degree, and 15-

36 weeks on each of the Child Molestation in the First Degree charges, for a total standard range of 148 to 237 weeks. That means his maximum sentence would have been just over **four and a half years.**

During sentencing, defense counsel did not argue that Mr. Domingo-Cornelio's age at the time of the crime warranted an exceptional sentence below the standard range. RP 731-32. Counsel did not compare the sentence Mr. Domingo-Cornelio would have received under the Juvenile Justice Act with the Sentencing Reform Act (SRA). Id. Instead, counsel simply asked for the lowest sentence he believed was allowed under the law – the bottom of the range, 240 months.

The only mention of Mr. Domingo-Cornelio's age at the time of the offenses was the following statement:

> "My client has a lot of family support, Your Honor. **He was a juvenile when these incidents took place**. I would like the Court to consider the fact that my client did not take the witness stand at this trial. He sat through the trial. He heard what was testified to. **The standard range starts out at 20 years, Your Honor, 240 months**. Now, I don't know what benefit to either my client's psychological or psychosexual health or to society or to the victim and their family it would do to give him **more than the low end. 20 years**, Your Honor. **He is barely 20 himself. 20 years is a very long time in prison,** and yes, the standard range goes above that quite a bit, but I would ask the Court to consider that the victim seems to be progressing through school right on time, on course. I believe she has been able to move on with her life after these acts, and I am glad that she has, and I hope that she has a decent -- better than a decent, a good life.

> **I think that society, in general, does not demand acts that a teenager did, which weren't reported for four or five years, should result in more than 20 years in prison**, and I'm asking that the Court consider all of the facts here, the lack of information from the family of the victim in the Presentence Investigation, and consider that Endy Domingo-Cornelio **will be in prison for a minimum of 240 months**, and that is long enough, Your Honor.

RP 731-32 (emphasis added). Trial counsel did not provide any argument for a sentence below the standard sentencing range under RCW 9.94A.535. Further, counsel did not provide the court with any analysis of what length of sentence Mr. Domingo-Cornelio would receive if he was sentenced in juvenile court. Trial counsel did not provide any sentencing memorandum nor cite to any authority that would have assisted the court in its analysis.

The sentencing court did not mention Mr. Domingo-Cornelio's age *at all* in its sentencing decision. RP 733. The court did not address whether the fact that Mr. Domingo-Cornelio was just fourteen years old at the time of the crime warranted a sentence below the standard sentencing range. RP 733-740. The court imposed a sentence of 240 months, with 36 months community custody. RP 733.

IV. RELEVANT CASE LAW HISTORY

Mr. Domingo-Cornelio's sentencing hearing occurred on September, 25, 2014.

On August 13, 2015, our Supreme Court held that a sentencing court may consider a defendant's youth as a mitigating factor justifying an exceptional sentence below the sentencing guidelines under the SRA in State v. O'Dell.[5]

On August 31, 2017, the Houston-Sconiers opinion was filed. That Court held that sentencing courts have full discretion to impose sentences below SRA guidelines and statutory enhancements for any juvenile defendant.[6]

On August 14, 2017, the Court of Appeals Division One held "O'Dell expanded youthful defendants' ability to argue for an exceptional sentence and is a significant change in the law" in Light-Roth I.[7]

Two weeks later, on August 30, 2017, Mr. Domingo-Cornelio filed his opening brief in support of his Personal Restraint Petition. His reply brief was filed June 1, 2018. Both briefs relied on O'Dell, Houston-Sconiers and Light-Roth I, and argued that Light-Roth I controlled, which should provide for a new sentencing hearing for Mr. Domingo-Cornelio where youth could be considered.

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[5] State v. O'Dell, 183 Wn.2d 680, 692, 358 P. 3d 359, 365 (2015). ("Adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into consideration, when sentencing juveniles tried as adults.").

[6] State v. Houston Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017).

[7] In the Matter of Light-Roth, 200 Wn. App. 149, 401 P.3d 459 (2017).

On August 28, 2018, the Washington Supreme Court overruled the Court of Appeals decision in Light-Roth I and held that "State v. O'Dell is not a significant change in the law that provided an exception to the one-year limitation period for PRP's."[8]

On March 8, 2019, this Court filed its opinion denying Mr. Domingo-Cornelio's personal restraint petition, explaining: "After both parties filed their briefs, our Supreme Court held that O'Dell did not constitute a 'significant change in the law.'" Matter of Domingo-Cornelio, 50818-4-II, 2019 WL 1093435, (Wash. Ct. App. Mar. 8, 2019) at 33. Therefore, the Court reasoned "because we are bound by Light-Roth's holding, that O'Dell did not constitute a significant change in the law, we reject Cornelio's argument for resentencing based on O'Dell." Id. Further, the Court explained that Light-Roth made clear that "Ha'mim[9] did not preclude a defendant from arguing youth as a mitigating factor, but held that the defendant must show that his youthfulness related to the commission of the crime." Id. at 34.

This Court also analyzed whether Houston-Sconiers was a significant change in the law. The Court reasoned that Houston-Sconiers did not overrule Ha'mim but instead "recognized the constitutional

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[8] In the Matter of Light-Roth, 191 Wn.2d 328, 422 P.3d 444 (2018) (Light-Roth II).

[9] State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997).

differences between children and adults and *required* courts to consider the characteristics of youth as sentencing." Id. at 34, citing Houston-Sconiers, 188 Wn.2d at 18. The Court found Houston-Sconiers is not a significant change in the law requiring retroactivity and relief for Mr. Domingo-Cornelio's case.

V. GROUNDS FOR RELIEF AND ARGUMENT

I. THE COURT SHOULD REVISIT PETITIONER'S ARGUMENT FOR NEW SENTENCING UNDER NEW AUTHORITY GIVEN THE RECENT DECISION IN LIGHT-ROTH FILED AFTER BRIEFS WERE SUBMITTED IN THIS CASE

Mr. Domingo-Cornelio relied on In the Matter of Light-Roth, 200 Wn. App. 149, 401 P.3d 459 (Div. I 2017) (Light-Roth I).

In this Court's opinion denying Mr. Domingo-Cornelio's personal restraint petition, it explains: "After both parties filed their briefs, our Supreme Court held that O'Dell did not constitute a 'significant change in the law.'" Matter of Domingo-Cornelio, at 33.

Although Mr. Domingo-Cornelio articulated facts and made arguments supporting other grounds for relief, he did not rely on nor cite to other authority supporting ineffective assistance of counsel at sentencing. *See* PRP at 12-13, 43-49; and Reply to PRP at 20-23.

This Court should reconsider and revisit this issue because of counsel's reliance on Light-Roth I and failure to argue law supporting this

ground for relief. Because there was an intervening material change in the law, there is good reason to reconsider this issue. *See* In re Pers. Restraint of Turay, 153 Wn.2d 44, 49, 101 P.3d 854 (2004).

II. MR. DOMINGO-CORNELIO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

Mr. Domingo-Cornelio's trial counsel was ineffective at sentencing when he failed to request an exceptional sentence below the standard sentencing range, and instead explained that the low end of the range, 240 months, was "the minimum" amount of time that the Court could impose. RP 731-32.

"To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.,* it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.,* there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Here, Mr. Domingo-Cornelio's attorney was deficient for failing to articulate reasons and authority to impose a sentence below the standard sentencing range and Mr. Domingo-

Cornelio was prejudiced because there is a reasonable probability the sentencing judge would have given him a lower sentence than twenty years.

The sentencing court was not provided with any authority or argument for a sentence below the standard sentencing range under RCW 9.94A.535. A sentencing court cannot make an informed decision if it does not know the parameters of its decision-making authority. State v. McGill, 112 Wn. App. 95, 102, 47 P.3d 173, 177 (2002). Nor can it exercise its discretion if it is not told it has discretion to exercise. Id. In McGill, the court held the defendant was denied effective assistance of counsel when defense counsel failed to cite case law to the sentencing court that the court had the authority to consider and impose an exceptional sentence downward. Id.

A. UNDER LIGHT-ROTH II, COUNSEL COULD HAVE, AND SHOULD HAVE, ARGUED YOUTH AS A MITIGATING FACTOR

In the Matter of Light-Roth (2018) (Light-Roth II) clarified the law by explaining that trial courts have *always* had the discretion to impose an exceptional sentence based on youth. Matter of Domingo-Cornelio, at 33. Light-Roth specifically held that Ha'mim did not preclude a defendant from arguing youth as a mitigating factor, despite the language that "age is not alone a substantial and compelling reason to impose an exceptional sentence." Ha'mim at 847, 940 P.2d 633. Instead, Light-Roth clarified that

mitigation based on youth was always within the trial court's ability to exercise discretion and impose an exceptional sentence below the standard sentencing range. If that's true, Mr. Domingo-Cornelio's trial counsel was deficient when he failed to present any evidence or argument in support of an exceptional sentence under RCW 9.94A.535. Mr. Domingo-Cornelio was gravely prejudiced by this failure, and is now serving a sentence of twenty years in prison.

Defense counsel's failure to inform the trial court of its sentencing authority can constitute ineffective assistance of counsel.[10] In State v. McGill, defense counsel failed to appraise the court of its authority to depart from the standard range on grounds the multiple offense policy of the Sentencing Reform Act resulted in an excessive sentence.[11] Although there was case law supporting a downward departure in McGill's case, his attorney did not move for an exceptional sentence or cite the relevant authorities that would have supported it.[12]

Division One held that counsel rendered ineffective assistance. Counsel's failure to cite RCW 9.94A.535(1)(g) and certain case law in support of the exceptional sentence was deficient because that failure

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10 State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002);
11 Id. at 97.
12 Id. at 101-102.

ultimately prevented the court from exercising its authority under RCW 9.94A.535(1)(g). That failure was prejudicial, thus warranting a new sentencing hearing, because the "the reviewing court [was not] confident that the trial court would impose the same sentence" after properly exercising its discretion.[13]

Reversal is likewise required here. First, as in McGill, Mr. Domingo-Cornelio's attorney, and likely the sentencing court, erroneously believed that there was *no legal basis* to impose an exceptional sentence. This is clearly evidenced by the reference to 240 months (20 years) as the "minimum" sentence the court could impose.

> "**The standard range starts out at 20 years, Your Honor, 240 months**. Now, I don't know what benefit to either my client's psychological or psychosexual health or to society or to the victim and their family it would do to give him **more than the low end. 20 years**, Your Honor. **He is barely 20 himself. 20 years is a very long time in prison,** …
>
> **I think that society, in general, does not demand acts that a teenager did, which weren't reported for four or five years, should result in more than 20 years in prison**, and I'm asking that the Court consider all of the facts here, the lack of information from the family of the victim in the Presentence Investigation, and consider that Endy Domingo-Cornelio **will be in prison for a minimum of 240 months**, and that is long enough, Your Honor.

RP 731-32.

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[13] *McGill*, 112 Wn. App. at 100-101.

Where the appellate court "cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option," remand is proper. State v. McGill, at 100–101. And, "while no defendant is entitled to an exceptional sentence ..., every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183, 1187–88 (2005). Mr. Domingo-Cornelio has a constitutionally protected right to provide mitigating evidence, and his trial counsel either failed to discover or failed to offer this evidence. Williams v. Taylor, 529 U.S. 362, 363, 120 S. Ct. 1495, 1497, 146 L. Ed. 2d 389 (2000).

B. COUNSEL SHOULD HAVE ARGUED FOR A JUVENILE-EQUIVALENT SENTENCE UNDER STATE V. POSEY II

State v. Posey, 74 Wn.2d 131, 272 P.3d 840 (2012) (Posey II) was decided on March 22, 2012, more than two years prior to Mr. Domingo-Cornelio's sentencing hearing. In that case, Mr. Posey was sixteen when he was charged with three counts of second-degree rape and one count of first degree assault. He was automatically declined to adult court. He was later convicted of two counts of rape in the second degree, but acquitted of the third count of rape and first degree assault. He was sentenced as an adult. The court gave him two concurrent terms of life in prison with a minimum term of 119 months of confinement. The case was remanded for sentencing

because the assault charge triggering auto decline resulted in acquittal and his case should have been returned to juvenile court for resentencing. The court ultimately imposed a sentence consistent with the Juvenile Justice Act 60-80 weeks at JRA.

Posey II held that superior courts have the ability to impose juvenile justice sentences even for those who fall outside of juvenile jurisdiction due to delay in prosecution. Mr. Domingo-Cornelio's attorney was deficient when he failed to cite to Posey II and explain that the adult court has the authority to sentence Mr. Domingo-Cornelio to a juvenile-equivalent sentence. If he had done so, he would have provided the court with the drastic difference in sentencing schemes. In juvenile court, Mr. Domingo-Cornelio would be facing a high-end range sentence of four and a half years. Instead, Mr. Domingo-Cornelio's attorney simply argued for "the minimum" amount, the low-end standard range sentence under the SRA, which was twenty years. Such failure was prejudicial to Mr. Domingo-Cornelio.

C. COUNSEL SHOULD HAVE ARGUED FOR AN EXCEPTIONAL SENTENCE UNDER THE MULTIPLE OFFENSE POLICY

Mr. Domingo-Cornelio's attorney was ineffective for failing to request an exceptional sentence due to the multiple offense policy, which allows courts to grant a downward departure from the standard range if

multiple sentences result in a presumption range that is clearly excessive. RCW 9.94A.535(1)(g).

Mr. Domingo-Cornelio's attorney failed to identify this ground for an exceptional sentence. Under this mitigating factor, the analysis focuses on the difference between the effect of one of the defendant's crimes and the cumulative effect of all of them. The failure to identify a basis for an exceptional sentence was ineffective assistance. Had Mr. Domingo-Cornelio's attorney presented this argument, the trial court could have imposed a much lower sentence. For example, a conviction for just one count of first-degree rape of a child with no criminal history (like Mr. Domingo-Cornelio) yields a standard sentencing range of 93-123 months, over *half* the amount of time imposed for Mr. Domingo-Cornelio because of the multiple offense policy that multiple his offender score to 9. In hearing this vast difference in sentencing ranges, the Court could have imposed a much lower sentence.

D. THE FAILURE TO RAISE INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING IN MR. DOMINGO-CORNELIO'S PRP COULD BE INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel for Mr. Domingo-Cornelio's PRP failed to identify and argue ineffective assistance at sentencing, instead relying on Light-Roth and O'Dell in her briefing. That failure to identify other grounds for new

sentencing hearing may constitute ineffective assistance of post-conviction counsel. Counsel did not make such decision based on strategy, but instead overly-relied on the existing legal landscape at the time of the briefing. This deficiency may be raised in a successive petition. However, it is in the best interests of Mr. Domingo-Cornelio if the Court addresses this issue now, instead, rather than have him file a later petition for ineffective assistance of post-conviction counsel.

III. STATE V. HOUSTON-SCONIERS IS A SUBSTANTIAL CHANGE IN THE LAW

A sentencing court violates the Eighth Amendment when it fails to consider the defendants' youthfulness when sentencing juveniles in adult court. State v. Houston–Sconiers, 188 Wn.2d 1, 9, 391 P.3d 409 (2017). Here, the Court did not consider or even mention Mr. Domingo-Cornelio's age (14-16 years old) at the time of the offenses before sentencing him to twenty years of incarceration in adult court.

As the Court correctly summarized in its opinion, Light-Roth held that "trial courts have always had this discretion to impose an exceptional sentence based on the youth of the defendant." Pg. 33. However, Light-Roth did not resolve the question of whether State v. Houston-Sconiers is a substantial change in the law that is retroactive and whether the *requirement*

to consider the characteristics of youth significantly changes prior law. Light-Roth only analyzed whether O'Dell overturned State v. Ha'mim.

In his personal restraint petition, Mr. Domingo-Cornelio pointed to Houston-Sconiers as a recent expansion of principles espoused in O'Dell justifying resentencing. Houston-Sconiers differed from O'Dell in that it *requires* trial courts to consider a defendant's youthfulness sentencing. As articulated by this Court: "Houston-Sconiers held that trial courts must consider mitigating qualities of youth at sentencing and must have direction to impose any sentence below the otherwise applicable sentencing range." Domingo-Cornelio at 33, citing Houston-Sconiers, 188 Wn.2d at 21.

This Court cursorily dismissed the notion that Houston-Sconiers was a substantial change in the law as argued by Mr. Domingo-Cornelio. It points to State v. Miller, 185 Wn.2d 111, 114–15, 371 P.3d 528, 529–30 (2016) which summarizes the law as follows:

> We have consistently recognized that the "significant change in the law" exemption in RCW 10.73.100(6) applies when an intervening appellate decision overturns a prior appellate decision that was determinative of a material issue. *In re Pers. Restraint of Yung–Cheng Tsai,* 183 Wn.2d 91, 104, 351 P.3d 138 (2015) (citing *In re Pers. Restraint of Greening,* 141 Wn.2d 687, 697, 9 P.3d 206 (2000)). Conversely, an intervening appellate decision that "settles a point of law without overturning prior precedent" or "simply applies settled law to new facts" does not constitute a significant change in the law. *In re Pers. Restraint of Turay,* 150 Wn.2d 71, 83, 74 P.3d 1194 (2003); *accord In re Pers. Restraint of Domingo,* 155 Wn.2d 356, 368, 119 P.3d

> 816 (2005). " **'One test to determine whether an [intervening case] represents a significant change in the law is whether the defendant could have argued this issue before publication of the decision.'** " *In re Pers. Restraint of Lavery,* 154 Wn.2d 249, 258–59, 111 P.3d 837 (2005) (second alteration in original) (quoting *In re Pers. Restraint of Stoudmire,* 145 Wn.2d 258, 264, 36 P.3d 1005 (2001)).

State v. Miller, 185 Wn.2d 111, 114–15, 371 P.3d 528, 529–30 (2016) (emphasis added).

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, 933 P.2d 1019 (1993). Houston-Sconiers interpreted and clarified RCW 9.94A.353. Previously courts were required to determine a person's offender score and resulting standard range, and to sentencing within that range unless an exceptional sentence is permissible under the SRA. State v. Law, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). Interpreting the SRA to allow complete discretion in sentencing youthful offenders is a fundamentally different interpretation of the law.

Prior to Houston Sconiers, Mr. Domingo-Cornelio **could not** have argued that the trial court was *required* to consider his age at the time of his offense in fashioning a sentencing under the Eighth Amendment. In this case, the sentencing court clearly did not consider Mr. Domingo-Cornelio's

age of 14 at the time of his offenses. In the sentencing court's reasoning, it did not motion Mr. Domingo-Cornelio's age at all. RP 733

IV. THE COURT SHOULD ADDRESS WHETHER STATE V. BASSETT CHANGED THE LEGAL LANDSCAPE WHEN IT HELD THAT ARTICLE I, SECTION 14 PROVIDES GREATER PROTECTIONS THAN THE EIGHTH AMENDMENT

The United States Supreme Court changed the landscape for considering a defendant's age at sentencing in Roper v. Simmons, Graham v. Florida, and Miller v. Alabama. These cases were all analyzed under the Eighth Amendment of the United States Constitution.

In Washington's juvenile sentencing jurisprudence, it appears O'Dell, Ramos, and Houston-Sconiers were all analyzed under the Eighth Amendment too.

State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018) was decided October 12, 2018, four months after Mr. Domingo-Cornelio's personal restraint petition reply brief was filed and his petition was perfected for this Court's review. Bassett held that "in the context of juvenile sentencings, article I, section 14 provides greater protection than the Eighth Amendment." Basset at 82.

Basset held "established bodies of state law, both statutory and case-based, recognize that children warrant special protections in sentencing. This weighs in favor of interpreting article I, section 14 more broadly than

the Eighth Amendment." State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018).

In a footnote in the Houston-Sconiers' opinion, the Court acknowledged that it was not addressing an Article I, Section 14 argument at this time:

> Petitioners also argue, in supplemental briefing, that imposing a lengthy term of years sentence on a juvenile without possibility of discretion violates article I, section 14, of our state constitution. **This is a question of first impression before this court. However, because this issue was not raised or decided in the courts below, we decline to address it at this time.**

Houston-Sconiers, at 40, footnote 6.

Now is the time to address an Article I, Section 14 analysis as it pertains to Houston-Sconiers and all juvenile defendant sentencing issues.

V. LIGHT-ROTH ONLY APPLIED TO TIME-BARRED PETITIONS; MR. DOMINGO-CORNELIO IS WITHIN THE TIME FRAME ALLOWED BY RCW 10.73.090(1)

In this Court's opinion denying Mr. Domingo-Cornelio's personal restraint petition, it explains: "After both parties filed their briefs, our Supreme Court held that O'Dell did not constitute a 'significant change in the law.'" Matter of Domingo-Cornelio, at 33. The Court noted that Light-Roth only addressed the concept of a "significant change in the law for the purposes of the exception to the one-year PRP time bar under RCW

10.73.090(1)" but believed "its reasoning applies equally to that phrase's usage in RAP 16.4(4)." Id. at 33, footnote 20.

Light-Roth did not address whether petitions that are *not* time-barred are precluded from relief. There are no citations to RAP 16.4(c)(4)[14] in Light-Roth. Light-Roth solely analyzed whether there had been a substantial change in the law under RCW 10.73.100(6), which articulates when the one-year time limit is not applicable. The text is the same in RCW 10.73.100(g) and RAP 16.4(c)(4).

However, Mr. Domingo-Cornelio does not need to show that O'Dell and Houston-Sconiers applies retroactively for purposes of RCW 10.73.100(6) because *he is not time-barred.* Under the analysis set forth under Teague v. Lane, 489 US. 288, 109 S.Ct. 1060, 103 L.Ed2d 334 (1989), if an appellate decision did not announce a "new rule" that is retroactive, it still applies to all timely cases on collateral review. The Washington Supreme Court follows Teague analysis. In re Pers. Restraint of Tsai, 183 Wn.2d 91, 100, 351 P.3d 138 (2015). Under Teague, new

[14] RAP Rule 16.4 – Personal Restraint Petitions – Ground for Remedy:

(c) The restraint must be unlawful for one or more of the following reasons:

(4) "There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order …, and sufficient reasons exist to require retroactive application of the changed legal standard."

constitutional rules of criminal procedure usually apply only to matters on direct review, but old rules apply to matters on both direct and collateral review. Id. The question of whether an appellate decision announced a "new" rule for purposes of Teague retroactivity is distinct from the question of whether the decision constitutes a "significant change in the law" for purposes of exemption from the time limit. Id. at 103-07.

Thus, this Court should evaluate whether Light-Roth II simply prohibited relief of time-barred petitions under RCW 10.73.100(g) and whether Mr. Domingo-Cornelio's timely petition is affected by Light-Roth II.

VI. CONCLUSION

For the foregoing reasons, this Court should reconsider its decision denying Mr. Cornelio-Domingo a new sentencing hearing.

DATED this March 28, 2019, in Seattle, WA.

Respectfully submitted,

Emily M. Gause, WSBA #44446
Attorney for Petitioner

GAUSE LAW OFFICES PLLC

March 28, 2019 - 4:40 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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APPENDIX C

Sentencing Transcript

BE IT REMEMBERED that on Thursday, September 25, 2014, the above-captioned cause came on duly for hearing before the **HONORABLE VICKI L. HOGAN**, Judge of the Superior Court in and for the County of Pierce, State of Washington; the following proceedings were had, to wit:

<<<<<< >>>>>>

THE COURT: Good morning.

MR. SHAW: Morning, Your Honor.

THE COURT: Ms. Sanchez, Mr. Shaw. We are here on the State of Washington versus Endy Domingo Cornelio, 13-1-02753-6. Today is the day for sentencing.

We received the Presentence Investigation Report dated August 26. I think we set this matter over a short period of time for review of that late received report. Are we ready to go forward, Ms. Sanchez?

MS. SANCHEZ: We are, Your Honor, and the reason that we had set this over was actually DOC has requested more time to complete the PSI. At the last sentencing it hadn't been done yet.

THE COURT: I knew there was some reason, I just couldn't remember fully.

All right. Mr. Shaw, you and your client are ready for sentencing?

MR. SHAW: Yes, Your Honor, with one minor caveat. I have a Notice of Appeal and a motion supported for one reason or another in my scramble to get to court, I don't have the page which sets the appellate bond, or that allows you to sign it, but I suggest we go forward, we establish the oral record, and then I can bring those papers back up to the Court later today, just not to inconvenience all parties, if that's acceptable to the State and to the Court.

MS. SANCHEZ: The only question I have, I am fine with the, like, the appellate paperwork, the notice of appeal, but are you going to be asking the Court, Mr. Shaw, for an appeal bond to be set, is that what you are asking?

MR. SHAW: I will make that orally, and I will give you time to respond, and when the Judge orders it, then I can present the papers to you and to the Court. I have them unfortunately --

MS. SANCHEZ: Well, there is a statute on point that does not allow it in the charges he has been convicted of. If I had known ahead of time I would have brought it, but it is prohibited by statute.

THE COURT: Well, the only question I had was are we ready to go forward with sentencing?

MR. SHAW: I think we are, Your Honor. Was the Court able to review the numerous letters in support of my

client?

THE COURT: I got nothing, no working copies from you, Mr. Shaw. All I have is the PSI.

MR. SHAW: I'm sorry, Your Honor. I e-filed those a good week and a half ago.

THE COURT: Didn't get me working copies.

MR. SHAW: If you have not received them, then on behalf of my client and his family, I guess we are not ready.

THE COURT: Ms. Sanchez.

MS. SANCHEZ: Your Honor, I understand defense's position, but the mother of the victim, Ms. Croll, has been here twice now. Obviously, the first time we set it over it was the DOC issue that they didn't have enough time, but she is here again today. And I just know the Defendant's family is here as well. I just hate to set this over again, but I will defer to the Court.

THE COURT: All right. Well, what I will do, Mr. Shaw, despite not having received working copies, I see that were filed the 18th. I don't believe the State got copies, Ms. Sanchez?

MS. SANCHEZ: I printed them off of LINX, Your Honor.

THE COURT: All right. Then what I will do, Mr. Shaw, is I will hear from the State on their

recommendation. I will hear from you. It looks like I will just have to glance through them as the proceeding goes forward so we don't have to delay any further.

MR. SHAW: Thank you, Your Honor. Apologies to all parties.

THE COURT: Any exceptions or objections to the PSI, Mr. Shaw?

MR. SHAW: Your Honor, my client had an opportunity to read this PSI yesterday, and I believe that there were no corrections; is that correct, Mr. Cornelio?

THE DEFENDANT: Yes.

MR. SHAW: No corrections.

THE COURT: And then no exceptions or objections?

MR. SHAW: Correct, Your Honor.

THE COURT: Ms. Sanchez, what is the State recommending?

MS. SANCHEZ: Thank you, Your Honor. The Defendant's standard range on this matter based on the convictions for four counts, Count I, Rape of a Child in the First Degree, and the others, Child Molestation in the First Degree is 240 months at the low end, up to 318 months at the high end. He was under 18 at the time during the charging period, so the indeterminant sentence, it doesn't apply. It's just a standard range sentencing.

The State is asking for the high end of 318 months to be followed by 36 months of community custody. Again, because he was under 18 at the time of the commission of these offenses. It's not a lifetime community custody, it's just 36 months.

Legal financial obligations in the amount of $200 court costs, $100 DNA sample fee, $1,500 to the Department of Assigned Counsel because this went to trial. $500 crime victim penalty assessment, and there actually is a restitution amount, but I believe that defense signed already, and I handed forward the paperwork but that amount is $705.79.

THE COURT: I'm sorry. 79?

MS. SANCHEZ: Right. $705.79. It is for medical and the sexual assault exam.

We would request that the Defendant be required to get a psychosexual evaluation, complete any recommended follow-up treatment. He has to register as a sex offender as required by the statute, a no contact order for life with the victim, A.C. Also, no contact with any minors, have law abiding behavior and do any -- comply with any conditions that his CCO deems are appropriate. Complete HIV testing. And comply with the conditions that are set forth in Appendix H of the PSI, and I think that that encompasses everything. And as I indicated, the mother of

the victim, Ms. Croll is here, but the last time I knew she did not wish to speak. That is still the case, so she is just present to observe.

THE COURT: All right. Good enough.

Mr. Shaw, I will hear from you on behalf of your client.

MR. SHAW: Thank you, Your Honor.

Your Honor, we were hoping that perhaps the victim and the victim's mother would have some input in the preparation of the Presentence Investigation Report. Ms. Sally Saxon informed me she tried numerous times to get a response and never did, which is, of course, the right of at least the victim and the mother. I don't know the dynamics there. I don't know if the alleged victim was not allowed to speak to Ms. Saxon. I don't know. She is the victim now that my client was convicted.

My client has a lot of family support, Your Honor. He was a juvenile when these incidents took place. I would like the Court to consider the fact that my client did not take the witness stand at this trial. He sat through the trial. He heard what was testified to.

The standard range starts out at 20 years, Your Honor, 240 months. Now, I don't know what benefit to either my client's psychological or psychosexual health or to society or to the victim and their family it would do to give him

more than the low end. 20 years, Your Honor. He is barely 20 himself. 20 years is a very long time in prison, and yes, the standard range goes above that quite a bit, but I would ask the Court to consider that the victim seems to be progressing through school right on time, on course. I believe she has been able to move on with her life after these acts, and I am glad that she has, and I hope that she has a decent -- better than a decent, a good life.

I think that society, in general, does not demand acts that a teenager did, which weren't reported for four or five years, should result in more than 20 years in prison, and I'm asking that the Court consider all of the facts here, the lack of information from the family of the victim in the Presentence Investigation, and consider that Endy Domingo Cornelio will be in prison for a minimum of 240 months, and that is long enough, Your Honor.

THE COURT: All right. Thank you. Excuse me, Mr. Shaw. I didn't mean to interrupt.

MR. SHAW: You did not.

THE COURT: All right. I am just finishing the last letter, so let me do that before I turn to your client.

MR. SHAW: Thank you.

THE COURT: All right. It appears the last letter is from -- maybe I should have started down that

path since I can't read the handwriting. All right. It looks like the gentleman who married your client's cousin, Mr. Shaw, doesn't sound about right?

MR. SHAW: Yes, Your Honor.

THE COURT: Then I am ready to sentence you, Mr. Cornelio. You have the right to remain silent. You also have the right to make a statement if you wish before I sentence you. Is there anything that you would like to say before I sentence you on these charges?

THE DEFENDANT: I never did anything. That's all I've got to say.

THE COURT: All right. The Court understands your position. The jurors found differently.

The Court did, Mr. Shaw, have a chance to review the letters that were filed from your client's mother, his aunt and uncle, a separate letter from a different uncle, his brother, numerous friends, best friends, work, employees that your client supervised, his girlfriend.

The Court, in considering all of the information before the Court will impose 240 months in the Department of Corrections on Count I. On Counts II, III and IV, 198 months which will run concurrent, not consecutive, to Count I. 36 months of community custody supervision when you are released from prison.

The conditions of community custody supervision are

numerous, sir. You have to report regularly with the community corrections officer. You must successfully complete a psycho sexual evaluation and treatment, if indicated. You must register as a sex offender immediately upon your release from jail, or from prison. You are to have law abiding behavior. No contact with the victim, no contact with any minor children, mandatory HIV and DNA tests.

In addition, your community correction officer will have a contract of conditions that you will be required to comply with. Most of those are set out on Appendix H. They supervise your employment and approve any relationships. You are not permitted to have relationships with people that have minor children, unless approved by your community corrections officer. They will approve your job. You are not to go and work at places where children congregate or primarily frequent, such as a library, driving a school bus, video game arcades, and they will go over that list with you.

You are not to consume alcohol or controlled substance without a valid prescription from a licensed physician. You are not to peruse the internet or any pornographic materials. I think that's included in Appendix H, let me just verify. Well, the way it's phrased is you are prohibited from joining or pursuing anti public social

websites such as Facebook or MySpace. So I think I went a little too far on that, Mr. Shaw?

MR. SHAW: Yes, we have Appendix F here.

THE COURT: Is it F? I have Appendix H.

MS. SANCHEZ: Appendix H comes from the PSI, which should be attached to your copy. Also I will give you mine, but Appendix F comes with all prison sentences.

THE COURT: Your right to vote or own or possess a firearm are removed. Do you have any questions so far about any of the terms of the Court's order, sir?

THE DEFENDANT: No.

THE COURT: You will get a copy of all of these conditions in the various documents, and the Court would remind you that not only is your community corrections officer going to be supervising you once you are released from prison, your treatment provider will be reporting to the Court, and we will have periodic reviews regarding this case.

The restitution appears to be agreed, Mr. Shaw?

MR. SHAW: Well, I don't know. My client has not yet signed this restitution order.

THE COURT: Okay. Legal financial obligations can be paid over time and they will set up a payment schedule for you.

I guess, actually, Mr. Shaw, I am looking at the last

page of Appendix H, and it does include do not possess or peruse any sexually explicit materials in any medium, which includes the internet, Mr. Cornelio.

The treatment provider will help define that more specifically, and will also discuss with you the necessary blocks on the computer for you to allow other access for job search and the like.

I have signed the Appendix H that has been presented with the PSI. My copy will be filed.

MR. SHAW: Thank you, Your Honor.

THE COURT: It looks likes the PSI was filed on on September 17th, so I don't need to file my copy.

MS. SANCHEZ: I just showed Mr. Shaw that he handed me back the restitution order, which was signed by himself and his client.

THE COURT: All right.

MS. SANCHEZ: So assuming that he is in agreement and not contesting it, that the Court will order that amount.

THE COURT: Your client signed the restitution order.

MR. SHAW: Thank you, Your Honor.

THE COURT: All right. Then I will sign.

Mr. Shaw, it looks like the HIV will be done in custody. He probably won't go out on the chain until next

week, for his family that might be here.

MR. SHAW: Your Honor, I have a Notice of Appeal prepared. I can also have the complete package in front of the Court later in the day, whatever the Court would like.

THE COURT: It can't be later today. We have already interrupted --

MR. SHAW: We have 30 days from today, and my client has signed off on his part of that after we went over his financials in looking for a state funded appellate attorney. So his participation is complete.

THE COURT: I guess the question would be is, whether or not your client would waive his presence for presentation to my Judicial Assistant ex parte?

MR. SHAW: Well, since we have 30 days to do that, I believe that assumes that he would not be present.

THE COURT: Well, I can certainly put you on the docket for October 3rd to present it, and your client would be held an additional week.

MR. SHAW: That would be great, Your Honor.

THE COURT: All right. Then we will go ahead and set the presentation. Mr. Cornelio will not be waiving his presence. So October 3rd for that hearing.

MR. SHAW: Thank you, Your Honor.

Just a few more things to sign, Your Honor.

THE COURT: That's fine. Linda will put that in LINX. Thank you. Probably need a scheduling order.

MS. SANCHEZ: Since we are now setting a hearing for that, I would ask that if defense does ask for an appeal bond that I be allowed to state a position on that, because like I said, I do think it's prohibited by statute.

MR. SHAW: Of course.

THE COURT: Certainly. All right. Then I reviewed the stipulation on prior record. I signed the no contact order, prohibiting contact with the victim in this case. And the defendant will be served a copy here in open court.

MS. SANCHEZ: Thank you, Your Honor.

Your Honor, just to clarify, is the Court ordering the $1,500 to DAC?

THE COURT: Yes.

MS. SANCHEZ: Just for the record, I am serving the Defendant in open court with the order prohibiting contact with A.C. and it's non-expiring and continues for life.

MR. SHAW: We have received.

THE COURT: All right. The Judgment and Sentence does include credit for time served, Mr. Shaw, and all of the other conditions that I went over with your

client. Most importantly, Mr. Cornelio, you register immediately upon your release from prison, and that you report to the community corrections office the first business day after your release.

Finally, Ms. Sanchez, Mr. Shaw, I do not believe that we set a date for any future reviews. So I just wanted, because I don't have any -- I have given the sentence Mr. Cornelio received. There isn't any way to anticipate a date for the future. It would seem impractical to do so at this time.

MR. SHAW: I agree, Your Honor.

THE COURT: Ms. Sanchez.

MS. SANCHEZ: And he should be supervised by DOC.

MR. SHAW: Just one last thing, I beg your pardon. In order to present the Notice of Appeal we were going to come back on October 3rd. Is there a scheduling order to that effect?

THE COURT: Yes, we are preparing that now, and I am going to go ahead and hand down the Judgment and Sentence for separation so that your client can get a copy, and then hopefully we will get that printed out. Once everybody signs I will sign that order setting that hearing for October 3rd for presentment of those documents, and I will make a notation that Mr. Cornelio does not waive his

presence so he won't be transported, Mr. Shaw, on the chain.

MR. SHAW: Thank you.

THE COURT: All right. Then with that, anything further, Ms. Sanchez?

MS. SANCHEZ: No, Your Honor. Thank you.

THE COURT: Mr. Shaw?

MR. SHAW: I think not, Your Honor.

THE COURT: All right. Then we will be at recess to get the next matter ready.

(Court at recess.)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. ENDY DOMINGO-CORNELIO Defendant.	)	Superior Court No. 13-1-02753-6 Court of Appeals No. 46733-0-II

REPORTER'S CERTIFICATE

STATE OF WASHINGTON)
) ss
COUNTY OF PIERCE)

I, Raelene Semago, Official Court Reporter in the State of Washington, County of Pierce, do hereby certify that the forgoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

Dated this 16th day of January, 2015.

RAELENE SEMAGO, CCR, RPR, CMRS
Official Court Reporter

GAUSE LAW OFFICES PLLC

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