COA No. 50818-4-II

NO. 97205-2

SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

ENDY DOMINGO CORNELIO, Petitioner.

MOTION FOR DISCRETIONARY REVIEW

RESPONDENT'S ANSWER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Page No.

United States Supreme Court Cases

Page No.

Statutes and Rules

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Pierce County Prosecutor, is the Respondent herein.

II. INTRODUCTION

The Defendant Cornelio has been convicted of the repeated sexual abuse of AC. His attorney requested the court impose a sentence at the low end of the 20 to 26-year standard range in consideration of the Defendant's youth. The Defendant was sentenced to 20 years on four class A felonies. Because he was under 18 at the time of his offenses, his sentence is determinate and not subject to extension by the ISRB. RCW 9.94A.507(2).

In this Motion for Discretionary Review, the Defendant argues that the open question of the retroactivity of *State v. Houston-Sconiers* has some relation to his case. *Houston-Sconiers* "question[ed] *any* statute that acts to limit consideration of the mitigating factors of youth during sentencing." *State v. Gilbert*, -- Wn.2d --, 438 P.3d 133, 136 (2019).

The Defendant is not subject to any sentencing enhancements. His sentence is not a mandatory life sentence or even a life sentence.

With earned early release, he may begin serving his 36-month community custody term when he is in his 30's.

Because no statute limited the court's consideration of the mitigating factors of youth during the Defendant's sentencing, the question of the retroactivity of *Houston-Sconiers* is not material to his sentence.

III. RELIEF REQUESTED

Respondent asserts no error occurred in the trial, conviction, and sentencing of the Petitioner and requests this Court deny discretionary review.

IV. ISSUES

1. Where the Defendant fails to cite any case law in his ineffective assistance claim, has he demonstrated a conflict with a decision of the Supreme Court under RAP 13.4(b)(1)?

2. *State v. Thierry* found reversible error where the defendant had preserved error with a timely objection and where the prosecutor had exhorted the jury to send a message. Has the Defendant demonstrated a conflict with *Thierry* where there was no exhortation to the jury to send any message in the instant case and no timely

objection?

3. *State v. Smiley* held error was waived where the defendant failed to timely object to allow the court an opportunity to cure prejudice with an instruction. Has the Defendant demonstrated a conflict with *Smiley* where he failed to object and failed to raise the claim even on direct appeal?

4. In *State v. Houston-Sconiers*, this Court questioned a statute which would limit consideration of the mitigating factors of youth during sentencing. Has the Defendant demonstrated that his case is affected by *Houston-Sconiers* where there were no sentencing enhancements, where he is not subject to a life sentence (mandatory or otherwise), where the sentencing court did not express that its hands were tied, where the court considered his youth at sentencing, and where he could have requested a downward departure from the standard range under *Matter of Light-Roth* but failed to do so?

V. STATEMENT OF THE CASE

The Defendant/Petitioner Endy Domingo Cornelio has been convicted by a jury of child rape in the first degree and three counts of child molestation in the first degree. Unpublished Opinion at 8. He

was 20 when he was charged with the offenses and 22 when sentenced. *See* Respondent's Objection to Motion to Permit the Filing of Amicus Brief.

When AC was between the ages of four and six and her parents were separated, her cousin the Defendant would spend the night at her father's house while going to work with her father at RDP Construction. RP 57-58, 73-74, 87-91, 495-97, 502, 547-48, 553-54, 577, 580. There in the house while everyone else was asleep, the Defendant woke AC on multiple occasions and sexually abused her. RP 57, 498-506. She would tell him to stop and she would try to move away. RP 514. But he would pull her closer and tell her not to tell her parents. RP 83, 99-100, 507-08, 519. AC consistently has named only the Defendant as her abuser. RP 98, 556, 623-24.

The Defendant was sentenced on September 25, 2014. RP 726. Because the Defendant was under 18 at the time of his offenses, he received a determinate sentence. RCW 9.94A.507(2). His standard sentencing range was 240-318 months (or 20-26 years). RP 729. The prosecutor recommended the high end. RP 730. Defense counsel requested the low end, making repeated references to his client's age. RP 731-32. "He was a juvenile when these

incidents took place." RP 731. "The standard range starts out at 20 years [...] He is barely 20 himself." RP 731-32. "I think that society, in general, does not demand acts that a teenager did [...] should result in more than 20 years in prison." RP 732. The court imposed the low end of the range, i.e. 240 months, and 36 months of community custody. RP 733.

The Defendant's convictions were affirmed on appeal. *State v. Cornelio*, No. 46733-0-II, 193 Wn. App. 1014 (Apr. 5, 2016) (unpublished).

> Among the issues discussed in the direct appeal were Cornelio's argument 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.

Unpub. Op. at 9. The court considered the child hearsay challenge over several pages.[1] *State v. Cornelio*, slip op.[2] at 8-12, 22-27, 29.

In his personal restraint petition, the Defendant focused almost entirely on claims of ineffective assistance of counsel. Personal Restraint Petition (PRP) at 18-43 (Arguments A, B, C, and D). The

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[1] The Defendant informed the Court of Appeals that its review had been cursory. Unpub. Op. at 22 (citing Reply Br. of Pet'r at 12).
[2] http://www.courts.wa.gov/opinions/pdf/D2%2046733-0-II%20Unpublished%20Opinion.pdf

Court of Appeals addressed each argument in depth,[3] ultimately finding they lacked merit. Unpub. Op. at 11-30.

The final ground in the PRP requested resentencing in order to present argument in support of a downward departure based on his youth as a mitigating factor. PRP at 43-49 (Argument E). The Defendant argued that *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), *review denied* 189 Wn.2d 1007 (2017) and *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017) presented a significant change in law such that the opinions require retroactive application. Unpub. Op. at 30-31. The Court of Appeals disagreed.[4] Unpub. Op. at 30-35. It noted that these opinions rely on much older United States Supreme Court case law and cited the recently decided *Matter of Light-Roth*, 191 Wn.2d 328, 422 P.3d 444 (2018) (holding *O'Dell* was not a significant change in law). Unpub. Op. at 32-33.

VI. ARGUMENT

A. THE MOTION FOR DISCRETIONARY REVIEW VIOLATES RAP 10.3(a)(5).

The Statement of the Case in the Motion for Discretionary

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[3] The Defendant describes this 20-page treatment as a summary dismissal. Motion for Discretionary Review (MDR) at 6.

[4] The Defendant again denigrates the ruling against him as cursory. MDR at 12.

Review (MDR) makes conclusory arguments citing portions of the transcript which do not demonstrate the allegations made. This violates the court rule which requires the Statement of the Case to be a "fair statement of the facts" and to provide a reference to the record for every factual statement. RAP 10.3(a)(5).

The Statement of the Case argues that the prosecutor committed misconduct by "repeatedly ask[ing] the jury to send a message to society about the difficulties of proving a child sex case." MDR at 2, citing RP 674-75. The record cited does not show the prosecutor asking the jury to send any message. It shows the prosecutor explaining the state's burden can be met if the jury is satisfied beyond a reasonable doubt as to the elements based on the testimony of a credible witness.

The Defendant argues his trial counsel's performance was prejudicially deficient for not interviewing witnesses, not objecting to vouching, and not testing the state's witnesses. MDR at 2, citing RP 140-41 (defense acknowledging the State had met its burden under the child hearsay statute), 450-76 (child forensic interviewer describing that she followed her standard procedures in the instant case and providing child hearsay statements which the court had held

admissible after a pre-trial hearing), 664 (defense rests). The cited record does not demonstrate that this occurred.

B. NO CONSIDERATION GOVERNING ACCEPTANCE OF REVIEW IS PRESENT IN THE MOTION.

The Supreme Court will only accept discretionary review when the petitioner can demonstrate a conflict with Washington case law, a significant constitutional question, or an issue of substantial public interest. RAP 13.4(b). None of these elements are present in the MDR.

1. The Defendant cites no conflict of case law in regard to his ineffective assistance of counsel claim.

The Defendant argues that the Court of Appeals' decision regarding his ineffective assistance claims conflicts with a decision of the Washington Supreme Court. MDR at 6 (citing RAP 13.4(b)(1)). However, no case is cited in support of this proposition. The Unpublished Opinion manifestly demonstrates applications of established legal standards.

His counsel's performance was not deficient or prejudicial because he failed to obtain inadmissible hearsay or testimony which conflicted with a better theory of the case. Unpub. Op. at 13-21. His attorney's concession to the admission of child hearsay statements

was not prejudicial error where admissibility was amply supported at the *Ryan* hearing. *Id.* at 22-23. His counsel's performance was within the range of reasonable trial representation. *Id.* at 24 ("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"). And counsel was not required to object to statements by the prosecutor and witnesses which were not error. *Id.* at 27.

The MDR establishes no conflict of laws or other factor which would permit review of this claim.

2. The Unpublished Opinion's discussion of the prosecutorial error claim is not in conflict with *Smiley* or *Thierry*.

The Court of Appeals recast one of the Defendant's ineffective assistance claims as a claim of prosecutorial error. Unpub. Op. at 27-30. The Defendant claims the Unpublished Opinion's discussion of the prosecutorial error claim conflicts with *State v. Smiley*, 195 Wn. App. 185, 379 P.3d 149 (2016) and *State v. Thierry*, 190 Wn. App. 680, 360 P.3d 940 (2015). MDR at 7-10. There is no conflict.

In *State v. Thierry*, the prosecutor stated that if the jury found the child was not credible "then the State may as well give up

prosecuting these cases, and the law might as well say that the 'The word of a child is not enough.'" *State v. Thierry*, 190 Wn. App. at 688. The defendant Thierry objected that this argument "fuel[ed] the passion and prejudice of the jury." *Id.* The court of appeals held the prosecutor's remark was "improper in the context presented." *Id.* at 692. The implication was that "were the jury to agree with defense counsel [that the victim was not credible], they would put other children in danger." *Id.* The message was that the jury needed to convict "in order to allow reliance on the testimony of victims of child sex abuse and to protect future victims of such abuse." *Id.* 691.

The instant case is distinguishable from *Thierry* on two counts. First, Cornelio did not make a timely objection to the prosecutor's remarks. MDR at 13 ("the defense attorney did not object"). And, second, there was no suggestion to the jury that its verdict would send a message or affect other prosecutions. Judge Bjorgen, who authored *Thierry*, found the prosecutor in the Defendant Cornelio's case did not ask the jury to send a message with its verdict. Unpub. Op. at 30. "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." Unpub. Op. at 30. This was a proper statement of the law. *Id.* There is no conflict with *Thierry.*

In *State v. Smiley*, the court of appeals found that the prosecutor's argument was error, diverting the jurors from its fact-finding function by asking them to align themselves with the system. *State v. Smiley*, 195 Wn. App. at 194. However, the court affirmed the conviction, because Smiley did not make a timely objection which would have given the trial judge an opportunity to cure the prejudice. *Id.* at 196-97.

In the instant case, the Defendant not only failed to object, he failed to raise the claim on direct appeal. The Unpublished Opinion upholding the conviction is consistent with *Smiley.* The Defendant's failure to object waives the claim.

There is no conflict under RAP 13.4(b)(2).

3. The retroactivity of *Houston-Sconiers* does not raise a significant constitutional question in the Defendant's case where no statute limited the court's consideration of youth and where the court considered his youth in determining his sentence.

Recently this Court declined to address the question of the retroactivity of *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), saving that question for another day. *Matter of Meippen*, --

Wn.2d --, -- P.3d -- , 2019 WL 2050270 (May 9, 2019). Days later, the Defendant filed this motion, all but abandoning his ineffective assistance claims and seeking out amici to buttress his argument that his case is that other day. He argues that his case presents a significant constitutional question. In fact, that question cannot be reached at all in the Defendant's case, because he was not sentenced under "*any* statute that acts to limit consideration of the mitigating factors of youth during sentencing." *State v. Gilbert*, -- Wn.2d --, 438 P.2d 133, 136 (2019) (emphasis in the original).

The Defendant's sentence does not include any enhancements. It does not include a mandatory maximum sentence of life. RCW 9.94A.507(2). And the Defendant was fully able to request a downward departure at the time of sentencing. *Matter of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018) ("RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward").

In *Houston-Sconiers*, the co-defendants were 16 and 17 when they were charged with multiple armed robberies, resulting in mandatory automatic adult jurisdiction. *State v. Houston-Sconiers*, 188 Wn.2d at 12. Based on the firearm enhancements alone, they

faced decades of incarceration. *Houston-Sconiers*, 188 Wn.2d at 12-13. The sentencing court was mandated to impose the enhancements under the Hard Time for Armed Crime initiative. *State v. Brown*, 139 Wn.2d 20, 26-27, 29, 983 P.2d 608 (1999). "[A]ll parties balked at this result. But they felt their hands were tied by our state statutes." *Houston-Sconiers*, 188 Wn.2d at 9. So the judge imposed zero months on the substantive crimes and imposed the firearm enhancements only. *Id.* at 13.

The Washington Supreme Court held that because "children are different" under the Eighth Amendment, "when sentencing juveniles in adult court," the courts have discretion to depart "as far as they want" from standard ranges, inclusive of enhancements. *Houston-Sconiers*, 188 Wn.2d at 9. This decision overruled *Brown* with respect to juveniles. *Houston-Sconiers*, 188 Wn.2d at 21 n. 5. *See also State v. Gilbert*, 438 P.2d at 136 ("In *Houston-Sconiers*, we recognized the discretion a judge possesses during juvenile sentencing when, similar to Gilbert's case, mandatory firearm enhancements were required by statute to be served consecutively."); *Matter of Smith*, 200 Wn. App. 1033 (2017) (unpublished but citable under GR 14.1(a) for its persuasive value) (finding *Houston-Sconiers*

to be a significant change in the law that was material to Smith's case insofar as it overruled *Brown* and allowed sentencing courts to depart from firearm enhancements imposed on juvenile offenders in adult court).

The Defendant mischaracterizes the lesson of *Houston-Sconiers*. MDR at 17-18 (interpreting a requirement that judges have a duty in every case involving offenses committed when offenders were under the age of 18 to engage in a *Miller* investigation independent of any invitation or information provided by the attorneys). The Defendant did not receive a mandatory sentence. He did not receive a life sentence. He received a 20-year sentence at the low end of the standard range and 36 months of community custody.

That portion of the *Houston-Sconiers* opinion, which explains that courts may depart from sentencing ranges for youth, was already well-established in Washington law. *Matter of Light-Roth*, 191 Wn.2d at 336 (explaining that the court's have always had this discretion under RCW 9.94A.535(1)(e)). Nor did *Houston-Sconiers* create an obligation on courts to make individualized sentencing decisions for youths. That was a United States Supreme Court case that came out two years before the Defendant was sentenced. *Miller v. Alabama*,

567 U.S. 460, 477, 132 S. Ct. 2455, 2457-58, 2468, 183 L. Ed. 2d 407 (2012) (the Eighth Amendment forbids *mandatory* life imprisonment without parole (LWOP) sentence for persons who were under 18 at the time of their crimes, requiring individualized consideration of youth). *See also State v. Ramos*, 187 Wn.2d 420, 428, 687 P.3d 650 (2017) ("where a convicted juvenile offender faces a possible life-without-parole sentence, the sentencing court must conduct an individualized hearing and 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'") (quoting *Miller*, 132 S.Ct. at 2469).

United States Supreme Court cases which preceded the Defendant's sentencing held that the Eighth Amendment requires that judges have discretion when sentencing offenders for acts which occurred before they reached the age of 18. *Houston-Sconiers* , 188 Wn.2d at 18, n.4. The Defendant's sentencing judge had this discretion thanks to RCW 9.94A.535(1)(e). *Matter of Light-Roth*, 191 Wn.2d at 336.

The lesson of *Houston-Sconiers* regards the ability of courts to depart from otherwise mandatory statutory provisions. In the instant

case, there were no enhancements or any other mandatory provision which the defense questioned. Therefore, the question of *Houston-Sconiers* is not material to the Defendant's case.

In the absence of any challenged mandatory statutory sentencing provision, this case is not an appropriate vehicle for this Court to address the retroactivity of *Houston-Sconiers*.

VII. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the Petition for Discretionary Review.

DATED: June 13, 2019.

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The undersigned certifies that on this day she delivered by U.S. mail and/or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o of his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6.13.19
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

June 13, 2019 - 11:09 AM

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