COA No. 50818-4-II
Pierce County Superior Court
Honorable Vicki L. Hogan (retired)
No. 13-1-02753-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NO. 97205-2

In re the Personal Restraint of

ENDY DOMINGO-CORNELIO,

Petitioner

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington State Supreme Court

Washington State Court of Appeals

Statutes

Rules

I. INTRODUCTION

Endy Domingo-Cornelio received ineffective assistance of counsel in all stages of his case. The prosecutor's closing argument caused incurable prejudice that was so flagrant it could not be remedied. Due to these errors, Domingo should receive a new trial.

Domingo suffered actual and substantial prejudice when his attorney did not present mitigating qualities of youthfulness at his sentencing hearing and referred to the bottom of the SRA range as the "minimum" amount of time the court could impose. In response, the court sentenced Domingo to the low end, 20 years, for acts he allegedly committed when he was between 14 and 16 years old. Because Houston-Sconiers is retroactive and material to his case, the court should grant him a new sentencing hearing.

II. ARGUMENT IN REPLY

A. MR. DOMINGO'S MOTION FOR DISCRETIONARY REVIEW CONTAINED A FAIR STATEMENT OF THE FACTS AND PROVIDED REFERENCES TO THE RECORD

Mr. Domingo's brief statement of the case, contained in four pages in his motion for discretionary review, was a fair statement of the case with references to the record. The state complains that counsel's characterizations in the "Statement of the Case" violated RAP 10.3(a)(5). RAP 10.3(a)(5), however, applies to appellate briefs, not motions for discretionary appeal. *See* RAP 17.3(b)(5).

RAP 10.3(a)(5) reads:

> (5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

RAP 17.3(b)(5), which govern motions for discretionary appeal, is different:

> (5) Statement of the Case. A statement of the facts and procedure below relevant to the issues presented for review, with appropriate reference to the record.

Therefore, counsel's statement of the case for a motion for discretionary review need not contain references in the record for every factual statement. It need only contain a "statement of facts and procedure relevant for review, with appropriate references to the record."

B. MR. DOMINGO'S INEFFECTIVE ASSISTANCE CLAIM INVOLVES SIGNIFICANT CONSTITUTIONAL QUESTIONS THAT SHOULD BE ADDRESSED BY THIS COURT AND THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS FROM THIS COURT

Mr. Domingo's ineffective assistance claims require review by this Court because the Court of Appeals decision is in direct conflict with decisions of the Washington Supreme Court, and because they involve significant constitutional questions. U.S. Const. amend. VI; WA Const. art. I, § 22; RAP 13.4(b)(1), (2), and (3).

Mr. Domingo cited to numerous Washington Supreme Court cases in his PRP arguments for why he received ineffective assistance of counsel at

trial.[1] Cornelio cited to State v. Jones, in support of his argument that his trial counsel was ineffective for failing to investigate or interview key witnesses and make an *informed* decision against calling a particular witness. 352 P.3d 776, 183 Wn.2d 327 (2015) (courts will not defer to trial counsel's uninformed or unreasonable failure to interview a witness). He relied on In re Pers. Restraint of Davis in support of the argument that his attorney's conceding of the State v. Ryan factors allowing child hearsay to be admitted at trial constituted "counsel entirely fail[ing] to subject the prosecution's case to meaningful adversarial testing." 152 Wn.2d 647, 673-75 (2004). This was especially true because many Ryan factors supported exclusion of the child hearsay. *See* PRP at 28-34. Mr. Domingo cited to State v. Foster when arguing his attorney failed to conduct a meaningful cross-examination of adverse witnesses, which this Court has considered the "primary and most important component" to the right to an effective attorney. 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998). Mr. Domingo pointed to State v. Kirkman when arguing that a state witness improperly vouched for the credibility of the complaining child witness when she implied that Mr. Cornelio was guilty because there was no coaching or

[1] In Domingo's PRP, he cited to thirteen total Washington Supreme Court cases in support of his ineffective assistance arguments. Rather than repeat the law relied on in his PRP, Mr. Domingo simply noted the Decision was in conflict with that case law, and explained "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." MDR at 6.

suggestibility that would raise concern that this was a false allegation. 159 Wn.2d 918, 927, 155 P.3d 125, 130 (2007).

Domingo claims now that the Court of Appeals erred when denying him relief because his attorney's conduct is consistent with other cases this Court has reversed for similar conduct. Thus, the Decision is in conflict with decisions from the Supreme Court. RAP 13.4 (b)(1).

C. THE FACTS HERE ARE IDENTICAL TO THE PROSECUTORIAL MISCONDUCT IN THIERRY AND SMILEY, AND THIS COURT SHOULD RESOLVE WHETHER SUCH CONDUCT RESULTS IN INCURABLE PREJUDICE

The comments made by the prosecutor in closing argument during Mr. Domingo's trial are nearly identical to the same statements made in State v. Thierry, 190 Wn. App. 680, 360 P.3d 940 (2015) and State v. Smiley, 195 Wn. App. 185 (2016). In Thierry, defense counsel did not object during the prosecutor's closing remarks. Defense counsel, however, did object during the prosecutors' rebuttal argument. In Smiley, defense counsel failed to object, and used the same theme in his own closing argument. Domingo's attorney did not object during closing argument. Therefore, he must show 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). An objection is unnecessary in cases of incurable prejudice only because there is, in effect,

a mistrial and a new trial is the mandatory remedy. Id. at 762. Thierry already held that this language in closing results in "incurable prejudice."

The Court of Appeals Decision compared the language used in Thierry with the statements made by the prosecutor in Domingo's case and found "the prosecutor's comments in this appeal do not share the flaws present in Thierry." Decision at 30. Specifically, the court decided the prosecutor's statement "merely reflected the law and did not have the inflammatory effect of the statement in Thierry." Id. The court ignored Domingo's arguments based on State v. Smiley. As described in detail in Domingo's motion for discretionary review, the inflammatory statements from closing argument in his case are identical to the arguments made in Thierry and Smiley. In fact, the *same prosecutor* who caused reversal in Thierry was the one prosecuting Domingo's case.

In Theirry, Division II held that any argument which extorts the jury to send a message about the general problem of child sexual abuse is improper because it inflames the passions and prejudices of the jury. Thierry at 693. There, the prosecutor argued that the state would have to give up prosecuting child sexual abuse cases if the word of a child was not enough. This argument was held to be "clearly improper" resulting in "incurable prejudice." Id. at 693. Specifically, the misconduct was in the argument "that the state would have to stop prosecuting sexual abuse cases

involving children if defense counsel's argument had merit." Id. at 680. Division II reversed and remanded for new trial. Id. Thierry was decided on direct appeal, and defense counsel preserved the issue with an objection.

In State v. Smiley, 195 Wn. App. 185 (2016), a split decision[2] decided the year after Thierry, Division I reviewed a similar argument and explained that "a proper argument stays within the bounds of the evidence" and "it is unnecessary to explain why the law is the way that it is." Smiley at 194. The prosecutor made several statements calling the jurors to imagine a legal system in which corroborating evidence was required and to consider how difficult it would be to hold abusers responsible. Id. The court found "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.

But the prosecutor did exactly that in Domingo's case, using identical language found to be misconduct in Thierry and Smiley. MDR at 10. This misconduct deprived Domingo of his constitutional right to a fair

[2] Judge Schindler wrote a dissenting opinion finding this language in closing results in incurable prejudice that cannot be neutralized by a curative instruction.

trial.[3] The state was not simply "highlighting the standard of evidence"[4] when she argued about *why* the law doesn't require more than the word of a child. She made policy-based arguments identical to those in Thierry and Smiley and threatened that the state would have to stop prosecuting sexual abuse cases in involving children if the law required more.[5]

In Smiley, like here, defense counsel did not object during closing argument. Division I declined to reverse, however, because it found Smiley's own attorney picked up the public policy theme in closing argument and "made it his own." Smiley at 197. The court paid attention to the defense attorney's own closing "asserting the jury *should* demand corroborating evidence in order to convict." Id. In *that specific context,* Division I declined to reverse, finding the prejudice was not incurable.

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[3] In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703–04, 286 P.3d 673 (2012). The prosecutor does not represent the victims in a criminal trial. RPC 3.8, cmt. 1. A prosecutor is a quasi-judicial officer who has a duty "to act impartially in the interest only of justice." State v. Monday, 171 Wn.2d 667, 676 n.2, 257 P.3d 551 (2011).

[4] The Decision denying Mr. Domingo relief devotes only one paragraph to analyzing whether his case is similar to the misconduct in Thierry. In finding it was not, the Court of Appeals explained "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." Decision at 30.

[5] "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." VRP at 674-75, MDR at 7.

Here, by contrast, Domingo's attorney did not argue that A.C.'s word alone was insufficient proof. He did not demand the jurors look for additional corroboration. He did not invite the state's argument that the word of a child alone is enough.[6] He did not pick up the state's public policy theme in his own argument. And, like Thierry and Smiley, the key issue was whether to believe A.C.'s testimony.

Thierry held that this conduct is "especially flagrant" when "the outcome of a case depends entirely on whether the jury chose to believe [alleged victim's] accusations or [the defendant's] denial." Thierry at 694. "The bell once rung cannot be unrung" with a curative instruction.[7] In State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), Division III held that this same argument is misconduct, the resulting prejudice incurable and reversed, even though Powell had not requested a remedial instruction in the trial court.

The case against Domingo turned on witness credibility. A.C. had motive and reason to point the finger on someone other than her father. The allegation came out the day after a contentious divorce trial and in the midst

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[6] Even plainly improper remarks from a prosecutor do not merit reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements…" State v. Thierry, 190 Wn. App. 680, 690, 360 P.3d 940, 946 (2015).

[7] State v. Powell, 62 Wn. App. 914, 919, 916 P.2d 86 (1991), review denied 118 Wn.2d 1013, 824 P.2d 491 (1992).

of A.C.'s mother continuing to accuse A.C.'s father of molesting her. A.C.'s testimony and credibility were the state's only evidence. Thus, the prosecutor's argument was a blatant attempt to appeal to fear and persuade jurors to convict to hold all sexual abusers accountable. In the context of the facts of this case, there is a substantial likelihood that the prosecutor's flagrant and ill-intentioned statements affected the verdict and could not have been cured by an instruction.

This Court should accept review because Division I's decision in Smiley, Division II's decision in Thierry, and Division II's decision in Powell are in conflict. RAP 13.4(b)(2).

D. THIS COURT SHOULD GRANT REVIEW AND CLARIFY STATE V. HOUSTON-SCONIERS

Three years after Mr. Domingo's sentencing, in 2017, Houston Sconiers changed the law when it held that sentencing judges *must* consider and weigh mitigating factors of youthfulness in every case involving a juvenile. State v. Houston Sconiers, 188 Wn.2d 1, 9, 391 P.3d 409 (2017). Specifically, this Court articulated that judges "must have discretion to impose any sentence *below the otherwise applicable range* and enhancements." Id. at Holding 3 (emphasis added). In *every* case where a trial court sentences a juvenile in adult court, the Eighth Amendment

requires a sentencing court "to treat children differently, with discretion, and with consideration of mitigating factors." Id. at 20.

The state believes that Houston-Sconiers is irrelevant to Domingo's case. It argues Houston-Sconiers *only* applies to cases where there are mandatory sentencing enhancements, or the court imposes a juvenile life sentence. State's Response, at 14; Response to Amici, at 5. The state's confused interpretation of Houston-Sconiers only supports why this Court should accept review. Contrary to the state's misguided belief, Houston Sconiers *did* create a requirement on the trial court to make individualized sentencing decisions for youth, relying on the sound analysis regarding diminished juvenile culpability as described in Miller.

Further, the state fails to address Domingo's argument that Houston-Sconiers is retroactive. The state's response highlights the necessity for this Court to grant review and clarify the holding of Houston-Sconiers, whether it applies retroactively, and whether it is a substantial change in the law.

1. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT STATE V. HOUSTON-SCONIERS IS NOT LIMITED TO JUVENILE LIFE OR MANDATORY SENTENCING ENHANCEMENTS

The state argues: (1) Houston-Sconiers only applies to life sentences; and (2) Houston-Sconiers limits the application of mandatory sentencing

schemes, but does not put any obligations on courts beyond that. *See* Response to Amici, pgs. 5-11.

In arguing such, the state highlights its lack of familiarity with Houston-Sconiers' facts and analysis. The two juvenile defendants in Houston-Sconiers did ***not*** receive juvenile life equivalent sentences. Defendant Houston-Sconiers, who was 17 at the time of the offense, received a 31-year sentence. Defendant Roberts, who was 16 at the time of the offense, received 26 years of incarceration. Neither of the two sentences in Houston-Sconiers was for a *de facto* life sentence.

Houston-Sconiers' holding addressed mandatory sentencing enhancements in holding that a sentencing court must have complete discretion to waive mandatory sentencing schemes when sentencing juveniles. But, the lesson of Houston-Sconiers was not limited to mandatory sentencing statutes. This Court repeatedly stated its intent to provide complete sentencing discretion based on youthfulness for sentences without mandatory enhancements, allowing the judge to depart below the SRA standard sentencing range:

> "Sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a hearing on the transfer to adult court or not, and ***courts must have discretion to impose any sentence below the***

> ***otherwise applicable Sentencing Reform Act (SRA) range*** and sentence enhancements."

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

This Court specifically addressed the discussion during Houston-Sconiers sentencing, when both judge and prosecutor commented on the "illegality" of sentencing a juvenile offender below the *standard sentencing range*:

> "Even the State contended that its recommendation for a sentence below the SRA range, while just, was technically illegal. CPHS at 227. The judge agreed. 25 VRP (Sept. 13, 2013) at 2418."
>
> **We disagree**. In accordance with Miller, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. **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."
>
> Id. at 21 (emphasis added).

It is clear that this Court did not limit Houston-Sconiers' holding to cases where the juvenile received a *de facto* life sentence or a mandatory sentencing enhancement.

2. THIS COURT SHOULD GRANT REVIEW BECAUSE STATE V. HOUSTON-SCONIERS APPLIES RETROACTIVELY

This Court should accept review because the decision below conflicts with this Court's decisions; because this case presents a significant constitutional question; and because this case presents an issue of substantial public interest. RAP 13.5A; 13.4(b)(1), (3), and (4).

Mr. Domingo was convicted of several crimes occurring when he was 14-16 years old and was sentenced before this Court's decision in State v. Houston-Sconiers. When he was sentenced, no evidence was presented, and the trial court did not consider the mitigating qualities of Domingo's youth. Moreover, the low end of the standard range was mistakenly treated as the "minimum" sentence for the crimes.

The law has changed. That change is both material to Domingo's sentence and retroactive. RAP 16.4(c)(4). Houston-Sconiers is retroactive because it constitutes a substantive change in constitutional law. It is material to Domingo's sentence because he was sentenced without consideration of the mitigating qualities of his youth and at a time when the trial court's discretion to impose a sentence below the standard range for a juvenile sentenced in adult court was constrained. Houston-Sconiers also changed the law regarding mandatory minimum and statutorily mandated consecutive sentences. State's *Response*, at 14; *Response to Amici*, at 5. However,

Domingo does not need to show the materiality of every change in the law. In fact, because his petition is timely, in order to prevail he need only show that the constitutional rule applies retroactively, not that it changed previous law. RAP 16.4(c)(2).

Interestingly, the State does not argue that Houston-Sconiers is not retroactive. Instead, it argues only that Houston-Sconiers did not change the law by requiring the consideration of the mitigating qualities of youth accompanied by unlimited discretion to depart below the standard range because no prohibition previously existed regarding the presentation and court's consideration of such evidence. While Domingo contends that the law has changed because what was once optional is now required and because the discretion to depart below the range for a juvenile sentenced in adult court has changed dramatically, once again he does not need to show a change in the law to prevail. In short, the state's argument is no barrier to relief for Domingo.

The constitution now imposes a responsibility on a court sentencing a juvenile to consider and weigh the mitigating qualities of the defendant's youth and increases its discretionary authority. In State v. Scott, 190 Wn.2d 586, 416 P.3d 1182 (2018), this Court reiterated that the Eighth Amendment requires sentencing courts to treat children differently, with discretion, and with consideration of mitigating factors. As the court explained in Scott:

> Applying Miller, this court 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 SRA (Sentencing Reform Act of 1981, ch. 9.94A RCW) range and/or sentence enhancements." Houston-Sconiers, 188 Wn.2d at 21. This court explained in Houston-Sconiers, "Critically, the Eighth Amendment requires trial courts to exercise this discretion at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line." Id. at 20.

190 Wn.2d at 594-95 (some alterations in original).

This Court recently reiterated the extent of consideration required:

> [T]he court must consider the mitigating circumstances related to the defendant's youth, including, but not limited to, the juvenile's immaturity, impetuosity, and failure to appreciate risks and consequences—the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, the way familial and peer pressures may have affected him or her, how youth impacted any legal defense, and any factors suggesting that the juvenile might be successfully rehabilitated.

State v. Gilbert, 193 Wn.2d 169, 176, 438 P.3d 133 (2019) (citing Houston-Sconiers, 188 Wn.2d at 23 (quoting and citing Miller). Trial courts now have "absolute discretion" to consider an exceptional downward sentence in light of such mitigating factors. Gilbert, 193 Wn.2d at 175.

Interestingly, the state does not argue that the rule announced in Houston-Sconiers is not retroactive. This implicitly admits that review is warranted because this case presents an important and reoccurring constitutional issue. As Domingo and amicus have argued previously, this Court should follow the roadmap drawn by the dissent in Meippen, which was

decided on other grounds, accept review and hold that the full breadth of the rule announced in Houston-Sconiers is retroactive.

Even a cursory review of the sentencing in this case reveals the harm resulting from the failure to present the mitigating qualities of Domingo's youth along with the failure of the court to consider those facts and to be invested with the corresponding unlimited discretion to impose a sentence below the bottom of the range.

Domingo faced a disproportionate sentencing range in violation of the Eighth Amendment. He was between 14 and 16 years old at the time of the alleged offense conduct. He had no criminal history, and no subsequent involvement with the criminal justice system. Due to a delay in reporting, Domingo was not charged until he was an adult. Due to the scoring of current offenses after conviction, Domingo faced a maxed-out offender score of 9. Thus, the judge was told she must sentence him within a standard sentencing range of 240-318 months, an equivalent of 20-26 years.

There were not particularly egregious facts associated with the alleged offense conduct. There was no alleged violence, no threats, no force, no interference with justice. Domingo's family wrote letters to the Court showing Domingo had good family support. RP 731. The victim and her mother did not. Nor did they participate in the preparation of the presentence report. Id. They did not speak at sentencing. Id.

Today, after the clarification that State v. O'Dell provided[8], Domingo's attorney would have known he could, and should, ask for less than the bottom of the sentencing range. He could have presented information about what Domingo would have faced if charged before he turned 18, and adjudicated the juvenile system. Had Domingo been convicted of the same charges in juvenile court, he would have faced a standard range of 103 to 129 weeks on Rape of a Child, and 15-36 weeks on each of the Child Molestation charges, for a total standard range of 148 to 237 weeks. The drastic difference between a juvenile sentencing range of 2.8 to 4.5 years and the 20-year minimum Domingo faced in adult court could have provided a basis warranting an exceptional sentence below the SRA range based on youthfulness. There were no aggravating factors present to otherwise justify a lengthy prison sentence. The judge gave the lowest amount of time she believed she could – the bottom of the range.

Domingo's case is similar to Houston-Sconiers, where the judge, prosecutor, and defense counsel all believed that a sentence below the SRA

[8] State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), settled a point of law without overturning prior precedent. Prior to O'Dell, many sentencing courts believed they could not consider an exceptional sentence below the SRA range based on youthfulness of the offense. State v. Ha'mim specifically held "age alone may not be used as factor to impose exceptional sentence outside of the SRA range." State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997), abrogated by State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015). In 2015, one year after Domingo's sentencing, this Court clarified that "a defendant's youthfulness can support an exceptional sentence below the standard range ... and that the sentencing court must exercise its discretion to decide when that is." O'Dell at 698-99.

range due to the defendant's age was "technically illegal."[9] Domingo's attorney explained the law as "the standard sentencing range starts out at 20 years, your honor, 240 months." RP 731. He went on to say, "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." RP 731-32. Defense counsel repeatedly referred to 20 years as the "minimum" that could be imposed. RP 732 ("consider that Endy Domingo-Cornelio will be in prison for a minimum of 240 months, and that is long enough…").

Given the circumstances of this case, and the fact that the judge imposed a sentence at the bottom of the range, it is clear that Domingo suffered actual and substantial prejudice when his attorney did not present mitigating qualities of youth in support of a sentence below the standard sentencing range. Here, unlike Mieppen, the court did not consider and then reject counsel's request for a low-end sentence. In Mieppen, the court articulated aggravating factors and imposed a high-end sentence. Here, defense counsel repeatedly told the Court that the "minimum amount" was

[9] "Even the State contended that its recommendation for a sentence below the SRA range, while just, was technically illegal. The judge agreed. We disagree. In accordance with Miller, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not." Houston-Sconiers, at 21 (internal citations omitted).

20 years, and the court in turn imposed the lowest amount she believed she could. Thus, Domingo has demonstrated a likelihood that his sentence would have been shorter if the sentencing court had been presented with mitigating factors related to youthfulness and known it had absolute discretion to depart from the SRA range.

3. THIS COURT SHOULD GRANT REVIEW AND FIND HOUSTON-SCONIERS WAS A SIGNIFICANT CHANGE IN THE LAW WHEN IT *REQUIRED* JUDGES TO CONSIDER YOUTHFULNESS AT SENTENCING

Houston-Sconiers represents a significant change in the law because Domingo could not have argued this issue before publication of the decision. State v. Miller, 185 Wn.2d 111, 115, 371 P.3d 528 (2016), quoting In re Pers. Restraint of Lavery, 154 Wn.2d 249, 258-59, 111 P.3d 837 (2005). Houston-Sconiers held the judge *must* consider the mitigating factors of youth at sentencing. 188 Wn.2d at 18.

Mr. Domingo's sentencing counsel made the only argument then feasible: that the low end of the sentencing range was "appropriate" for Domingo because "he was a juvenile when these incidents took place." RP 731-32; MDR Ex. C. He did not, because he could not, argue that the judge was *required* to take youth into account. By providing the law that a sentencing judge *must* consider youth, when this argument did not before exist, Houston-Sconiers was a significant change in the law. Matter of

Meippen, 440 P.3d 978, 984 (2019) (Justice Wiggins, dissenting). The rule in Houston-Sconiers explicitly overruled prior cases that indicated the inflexibility of the SRA. Further, it was a substantive change to constitutional law concerning the Eighth Amendment's rule on proportionate sentencing for youth. Meippen, dissenting opinion, at 325.

III. CONCLUSION

For the foregoing reasons, this Court should grant review to resolve conflicts of law, address significant constitutional questions, and clarify an issue of substantial public importance.

DATED this 15th day of July, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Emily M. Gause certifies that opposing counsel was served electronically via the Supreme Court portal via email:

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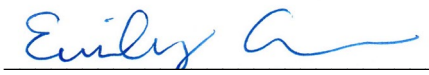
I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED this 15th day of July, 2019 in Seattle, WA.



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