IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: ENDY DOMINGO-CORNELIO, Petitioner.	No. 97205-2 EN BANC Filed September 17, 2020

MONTOYA-LEWIS, J.—"Children are different.'" *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017) (quoting *Miller v. Alabama*, 567 U.S. 460, 480, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). The differences between children's and adults' culpability matter on a constitutional level in criminal sentencing. *State v. Ramos*, 187 Wn.2d 420, 428, 387 P.3d 650 (2017). In *Houston-Sconiers*, we held that the Eighth Amendment to the United States Constitution requires courts to consider the mitigating circumstances of youth when sentencing juveniles adjudicated as adults and must have absolute discretion to impose anything less than the standard adult sentence based on youth. 188 Wn.2d at 19. In this case and its companion case, *In re Personal Restraint of Ali*, No. 97205-2, slip op. (Wash. Sept. 17, 2020), https:/www.courts.wa.gov/opinions/, we consider whether *Houston-Sconiers* constitutes a significant and material change in the law that requires retroactive application on collateral review. As in *Ali*, we hold that it does.

I. FACTS AND PROCEDURAL HISTORY

A. Factual Background

In 2014, Endy Domingo-Cornelio was convicted by a jury of one count of first degree rape of a child and three counts of child molestation. The crimes took place over a two-year span when Domingo-Cornelio was between 15-17 years old,[1] but because of delayed reporting, he was not investigated or charged until several years later, when he was 20 years old. Domingo-Cornelio was convicted and sentenced as an adult.

Under the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, Domingo-Cornelio faced a sentence between 240 and 318 months. At sentencing, the State recommended the maximum adult standard range of 318 months, followed by 36 months of community custody. In its recommendation, the State acknowledged that Domingo-Cornelio was under 18 at the time of the crimes to explain why an indeterminate sentence would not apply and why it was seeking 36 months of community custody instead of lifetime community custody.

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[1] The Court of Appeals erroneously indicated that Domingo-Cornelio was between 14-16 years old at the time of the offenses. *In re Pers. Restraint of Domingo-Cornelio*, No. 50818-4-II, slip op. at 2 (Wash. Ct. App. Mar. 8, 2019) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2050818-4-II%20Unpublished%20Opinion.pdf. The offenses occurred between November 2007 and November 2009, when Domingo-Cornelio was between 15-17 years old. Clerk's Papers at 1-2.

Domingo-Cornelio's defense counsel requested 240 months, the low end of the standard range. Defense counsel also mentioned that Domingo-Cornelio was under 18 at the time of the crimes but did not argue that there were any mitigating factors due to his youth and did not request an exceptional sentence:

> 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 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 for 240 months, and that is long enough, Your Honor.

7 Verbatim Report of Proceedings (Sept. 25, 2014) (VRP) at 731-32. In addition to the presentence investigation report mentioned in the excerpt above, the sentencing judge considered several letters written in support of Domingo-Cornelio.

The court sentenced Domingo-Cornelio to the low end of 240 months of incarceration and 36 months of community custody supervision upon release. The sentencing judge said that she had read the letters from friends and family and imposed this sentence "considering all of the information before the Court," but she made no mention of Domingo-Cornelio's youth in her ruling. 7 VRP at 733.

B. Procedural History

Domingo-Cornelio appealed unsuccessfully, and we denied discretionary review on August 31, 2016. We decided *Houston-Sconiers* on March 2, 2017, after Domingo-Cornelio's judgment and sentence became final. Domingo-Cornelio filed his personal restraint petition (PRP) in the Court of Appeals on August 30, 2017.

In his PRP, Domingo-Cornelio argued ineffective assistance of counsel and significant changes in the law relating to juvenile sentencing. The Court of Appeals retained the PRP for consideration on the merits

but ultimately denied relief. *Domingo-Cornelio*, No. 50818-4-II, slip op. at 1. Relevant here, the Court of Appeals held that *Houston-Sconiers* did not constitute a significant change in the law because it did not overturn a prior appellate decision that was determinative of a material issue. *Id.* at 34. The court did not address materiality or retroactivity.

We granted review only on the issue of the applicability and effect of *Houston-Sconiers*. We also set a companion case, *Ali*, slip op. at 6, for consideration.

II. ANALYSIS

Domingo-Cornelio filed his PRP within one year after his judgment and sentence became final, so his PRP is timely. RCW 10.73.090. The court will grant appropriate relief if his restraint is unlawful for one or more reasons specified under RAP 16.4(c). RAP 16.4(a). Under RAP 16.4(c)(4), continued restraint is unlawful if "[t]here has been a significant change in the law, whether substantive or procedural, which is material to the . . . sentence, . . . and sufficient reasons exist to require retroactive application of the changed legal standard."

A. Unlawful Restraint

In *Houston-Sconiers*, we held that when sentencing juveniles in adult count, "courts must consider mitigating qualities of youth" and "must have discretion to impose any sentence below the otherwise applicable

SRA range and/or sentence enhancements."[2] 188 Wn.2d at 21. Although there are several factual and procedural differences between Domingo-Cornelio's case and the companion case, *Ali*, we conclude that *Houston-Sconiers* constitutes a significant change in the law material to both cases and that it requires retroactive application.[3]

1. *Significant Change in the Law*

Houston-Sconiers represents a significant change in the law. *Ali*, slip op. at 11-13. " '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, 115, 371 P.3d 528 (2016) (alteration in original) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Lavery*, 154

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[2] We rely on the summary of *Houston-Sconiers* in the companion case, *Ali*, slip op. at 710, for the animating principles of *Houston-Sconiers*.

[3] Because the requirements for a significant, material, and retroactive change in the law under RCW 10.73.100(6) are echoed in RAP 16.4(c)(4), we rely on our analysis of those requirements in *Ali*, slip op. at 11-23. However, since Domingo-Cornelio's petition is timely, he does not need to meet the requirements of RCW 10.73.100(6) for us to consider his petition; he needs only to establish that his restraint is unlawful under RAP 16.4(c).

Wn.2d 249, 258-59, 111 P.3d 837 (2005)).[4] Here, even if Domingo-Cornelio's sentencing court had discretion to impose a lower sentence prior to *Houston-Sconiers*, Domingo-Cornelio could *not* have argued that it *must* consider his youth before imposing a standard range sentence. Domingo-Cornelio could have, and did, argue for a low end standard range sentence based, in part, on his youth. However, he could *not* have argued that the sentencing court *must* consider mitigating factors relating to his youth in light of its absolute discretion to impose any lesser sentence. Therefore, *Houston-Sconiers* constitutes a significant change in the law.[5]

2. *Materiality*

Houston-Sconiers is material to Domingo-Cornelio's case. Domingo-Cornelio was sentenced to a standard adult range under the SRA for crimes he committed as a child, one of the types of sentences that required the

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[4] *See also In re Pers. Restraint of Greening*, 141 Wn.2d 687, 697 & n.9, 9 P.3d 206 (2000) ("While litigants have a duty to raise *available* arguments in a timely fashion and may later be procedurally penalized for failing to do so, . . . they should not be faulted for having omitted arguments that were essentially *unavailable* at the time." "While the State correctly notes that 'Washington case law is replete with examples of defendants challenging standing case law and succeeding in reversing that law,' we do not believe procedural restrictions should penalize litigants who fail to do so." (citation omitted)).

[5] Unlike in *Ali, State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), would not have applied to Domingo-Cornelio because he was not sentenced to any weapon enhancements. However, *Houston-Sconiers* nevertheless meets the test for a significant change in the law under the above test.

consideration of youth in *Houston-Sconiers.* 188 Wn.2d at 21. The sentencing court imposed a low end standard adult sentence—which defense counsel characterized as the "minimum" sentence—for crimes Domingo-Cornelio committed as a child. 7 VRP at 732. Under *Houston-Sconiers*, the sentencing court had discretion to impose an exceptional downward sentence and it was required to consider mitigating circumstances of youth at sentencing, which it appears it did not do.

The State argues that *Houston-Sconiers* is a significant change in the law only because it permits sentencing cowls to depart from mandatory firearm enhancements that would deny a juvenile offender meaningful opportunity for release in their lifetime, and that the significant change is not material to Domingo-Cornelio because he was not sentenced to any weapon enhancements and did not receive a de facto life sentence. As we stated in *Ali*, slip op. at 13, this is wrong. We stated explicitly in *Houston-Sconiers* that "[t]rial courts must consider the mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the *otherwise applicable SRA range and/or sentence enhancements.*" 188 Wn.2d at 21 (emphasis added). In that case, the State recommended a sentence below the SRA range—zero months on the substantive crimes that otherwise would have carried SRA ranges but the full time for mandatory weapon enhancements—which it believed to be "just" but "technically illegal." *Id.* We disagreed with the State's and sentencing judge's belief that it was illegal

to impose zero months for the substantive crimes instead of a sentence within the SRA range and held that sentencing courts must have discretion to impose any sentence below the otherwise applicable SRA range in light of the mitigating circumstances of the defendant's youth. *Id.* Thus, the fact that the defendants in *Houston-Sconiers* were sentenced to time only for the weapon enhancements does not mean that the case was limited to such enhancements. We made clear that our holdings applied equally to any otherwise applicable SRA range or enhancement. *Id.*[6]

Domingo-Cornelio received the kind of sentence that implicates *Houston-Sconiers*; thus, that case is material. The change in the law is material to adult standard range sentences imposed for crimes the defendant committed as a child. Prior to *Houston-Sconiers*, Domingo-Cornelio could not have argued that the court was required to consider his youth at sentencing or that it had to consider whether his youth justified any exceptional sentence downward in light of its absolute discretion.

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[6] *See also State v. Gilbert*, 193 Wn.2d 169, 175-76, 438 P.3d 133 (2019) ("We held [in *Houston-Sconiers*] that sentencing courts possess this discretion to consider downward sentences for juvenile offenders regardless of *any sentencing provision to the contrary*. . . . Our opinion in that case cannot be read as confined to the firearm enhancement statutes as it went so far as to question *any* statute that acts to limit consideration of the mitigating factors of youth during sentencing.") (first emphasis added).

3. *Retroactivity*

A new rule applies retroactively on collateral review only if it is a new substantive rule of constitutional law or a watershed rule of criminal procedure. *See Montgomery v. Louisiana*, ___ U.S., ___, 136 S. Ct. 718, 728, 193 L. Ed. 2d 599 (2016) (citing *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)). As we held in *Ali*, "*Houston-Sconiers* applies retroactively because it announced (1) a new rule (2) of constitutional magnitude (3) that is substantive." *Ali*, slip op. at 15.

First, *Houston-Sconiers* announced a new rule, holding that the Eighth Amendment requires sentencing courts to consider mitigating circumstances of youth and to have absolute discretion to impose any sentence below the SRA range or enhancements in order to protect juveniles who lack adult culpability from disproportionate punishment. 188 Wn.2d at 19-21; *Ali*, slip op. at 15. The requirement that sentencing courts *must* consider youth and *must* have discretion to impose any exceptional sentence downward based on youth were not dictated by existing precedent at the time Domingo-Cornelio's sentence became final, so *Houston-Sconiers* announced a new rule. *Ali*, slip op. at 15; *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 104, 351 P.3d 138 (2015).

Second, we decided *Houston-Sconiers* on constitutional grounds. 188 Wn.2d at 18-19; *Ali*, slip op. at 16. *Houston-Sconiers* followed a line of United States Supreme Court cases holding "that the Eighth

Amendment to the United States Constitution compels us to recognize that children are different." 188 Wn.2d at 18 (citing *Miller*, 567 U.S. at 480; *Graham v. Florida*, 560 U.S. 48, 68-70, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)); *see also Ali*, slip op. at 8, 16.

Third, *Houston-Sconiers* announced a substantive constitutional rule. *Ali*, slip op. at 16-23. Substantive rules include " 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Montgomery*, 136 S. Ct. at 729 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)). *Houston-Sconiers* identified a category of punishments that are beyond courts' authority to impose: adult standard SRA ranges and enhancements for juveniles who possess such diminished culpability that those sentences would be disproportionate punishment. *Ali*, slip op. at 17; *Houston-Sconiers*, 188 Wn.2d at 19-21. It also established the mechanism necessary to effectuate that substantive rule. The Eighth Amendment requires trial courts to exercise discretion to consider the mitigating qualities of youth at sentencing in order to protect the substantive constitutional guaranty of punishment proportionate to culpability. *Ali*, slip op. at 17; *Houston-Sconiers*, 188 Wn.2d at 19-20; *see also Montgomery*, 136 S. Ct. at 732-33.

Houston-Sconiers constitutes a significant change in the law that is material to Domingo-Cornelio's sentence and requires retroactive application. *Ali*, slip op. at 23. Domingo-Cornelio is entitled to resentencing if he demonstrates actual and substantial prejudice and there are no other adequate remedies available. RAP 16.4.

B. Prejudice

A petitioner must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the constitutional error in order to obtain relief on collateral review. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004). In *Houston-Sconiers*, we explained that *Miller* requires discretion to impose any sentence below the SRA range or enhancements based on youth, and "provides the guidance on how to use it." 188 Wn.2d at 23 (listing mitigating circumstances of youth that courts must consider). Here, there is no evidence to suggest that the sentencing court considered any mitigating circumstances relating to Domingo-Cornelio's youth. Instead, the only relevant information presented to the sentencing court was Domingo-Cornelio's age at the time of the crimes. Moreover, defense counsel erroneously characterized the low end of the adult standard range as the "minimum" sentence for Domingo-Cornelio. 7 VRP at 732.

In *Ali*, we found that the petitioner had established actual and substantial prejudice by a preponderance of the evidence when the sentencing court was presented with significant evidence of mitigating circumstances of the petitioner's youth, defense counsel requested an exceptional sentence based on youth, and the court imposed the low end of the SRA range, believing it lacked discretion to impose anything less. *Ali*, slip op. at 25-26. There, the evidence of prejudice was overwhelming. However, actual and substantial prejudice is not limited to circumstances where defense counsel makes an argument that is not legally available and the sentencing judge explicitly states that they would deviate from the SRA on that basis if they could.

We do not expect lawyers to make every conceivable argument on the possibility that it may someday be recognized as a basis for an exceptional sentence.[7] Nor do we expect sentencing judges to always signal in their oral rulings that they would exercise more discretion if they felt they had the authority to do so. Instead, a petitioner establishes actual and substantial prejudice when a sentencing court fails to consider mitigating factors relating to the youthfulness of a juvenile tried as an adult and/or does not appreciate its discretion to impose any exceptional sentence in light of that consideration.

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[7] *See Greening*, 141 Wn.2d at 697 & n.9 (litigants should not be penalized for failing to raise unavailable arguments).

Unless the court meaningfully considers youth and knows it has absolute discretion to impose a lower sentence, we cannot be certain that an adult standard range was imposed appropriately on a juvenile under *Houston-Sconiers*. Here, there is no evidence that the sentencing judge considered any mitigating qualities of Domingo-Cornelio's youth or that she knew she had discretion to impose an exceptional sentence based on youth, just that she was aware of his age at the time of the crimes. Domingo-Cornelio's counsel did not argue any mitigating factors relating to youthfulness or request an exceptional sentence. The sentencing judge said nothing about whether Domingo-Cornelio's youth mitigated his culpability. But silence does not constitute reasoning. *See Ramos*, 187 Wn.2d at 444 (requiring courts sentencing juveniles to life without parole to "thoroughly explain [their] reasoning" as to why a juvenile deserves such a sentence, "specifically considering the differences between juveniles and adults" in the process). That Domingo-Cornelio's sentencing judge imposed the lowest standard range sentence when the State recommended the high end sentence is evidence that the judge was willing to consider mitigating factors that justify a lower sentence. More likely than not, Domingo-Cornelio would have received a lesser sentence had the court complied with the dual mandates of *Houston-Sconiers*.

Domingo-Cornelio has met his burden to establish prejudice. He has established that his sentencing did not comply with *Houston-Sconiers* and that more likely than not, he would have received a lesser sentence if it

had. Domingo-Cornelio is entitled to relief by this PRP because his restraint is unlawful, he has been actually and substantially prejudiced, and the State does not dispute that the other remedies are inadequate under the circumstances.[8]

III. CONCLUSION

Houston-Sconiers announced a significant change in the law, which is material to Domingo-Cornelio's sentence and requires retroactive application. Domingo-Cornelio was actually and substantially prejudiced by the sentencing court's failure to meaningfully consider youth and to appreciate its absolute discretion to impose a sentence below the adult SRA range for crimes he committed as a child. Domingo-Cornelio's PRP is granted, and we order resentencing consistent with *Houston-Sconiers*.

/s/ Montoya-Lewis, J

[8] The court "will only grant relief by a [PRP] if other remedies which may be available to the petitioner are inadequate under the circumstances." RAP 16.4(d). Unlike in *Ali*, the State does not contend that the *Miller*-fix statute, RCW 9. 94A. 730, could provide adequate relief to Domingo-Cornelio. That statute would permit Domingo-Cornelio to petition for early release after he serves 20 years—the full term of the sentence he originally received in violation of *Houston-Sconiers*—which is no relief at all.

WE CONCUR:

/s/ González, J.

/s/ Gordon McCloud, J.

/s/ Yu, J.

/s/ Owens, J /s/ Wiggins, JPT

JOHNSON, J. (dissenting)—For the reasons stated in my dissenting opinion in *In re Personal Restraint of Ali*, No. 95578-6, I dissent.

/s/ Johnson, J.

/s/ Stephens, C.J.

/s/ Madsen, J.

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 (Filed March 8, 2019)

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.

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

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.

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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.

The information alleged that each count occurred between November 2007 and November 2009.

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

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

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, 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,

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

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]

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.

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[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.

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.

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

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 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

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

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 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]

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[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

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]

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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.

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

Id.

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[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.

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 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.

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[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.

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

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[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).

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 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

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[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

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 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

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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.

> 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

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[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-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.

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

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

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[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).

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 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

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[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).

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.

/s/ Bjorgen, J.P.T.
Bjorgen, J.P.T.

We concur:

/s/ Worswick, P.J.
Worswick, P.J.

/s/ Johanson, J.
Johanson, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: SAID OMER ALI, Petitioner.	)))))	No. 95578-6 En Banc Filed September 17, 2020

MONTOYA-LEWIS, J.—"'Children are different.'" *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017) (quoting *Miller v. Alabama*, 567 U.S. 460, 480, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). The Eighth Amendment to the United States Constitution requires our criminal justice system to address this difference when punishing children. Central to this requirement is that courts must take into account the differences between children and adults in criminal sentencing. *State v. Ramos*, 187 Wn.2d 420, 428, 387 P.3d 650 (2017). Children's ability to assess risk and make judgments varies distinctly from that of adults because the brain is not fully mature before adulthood. *Miller*, 567 U.S. at 471-72. Differences in brain development mean that children possess lessened culpability, poorer judgment, and greater capacity for change than adults. *Id.* In order to comply with the Eighth Amendment, courts must consider the mitigating qualities of youth and have discretion to impose a proportional punishment based on those qualities. *Houston-Sconiers*, 188 Wn.2d at 19. In *Houston-Sconiers*, we recognized these Eighth Amendment requirements and 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 Reform Act of 1981 (SRA), ch. 9.94A RCW] range and/or sentence enhancements." *Id.* at 21.

In this case and its companion, *In re Personal Restraint of Domingo-Cornelio*, No. 97205-2, slip op. (Wash. Sept. 17, 2020), https://www.courts.wa.gov/opinions/, we consider whether the dual requirements of *Houston-Sconiers* apply retroactively on collateral review. We hold that *Houston-Sconiers* constitutes a significant and material change in the law that requires retroactive application. Further, we hold that Ali has established actual and substantial prejudice, and we remand to superior count for resentencing consistent with *Houston-Sconiers*.

I. FACTS AND PROCEDURAL HISTORY

A. Factual Background

In 2008, Said Omer Ali was arrested for his involvement in a series of robberies. Each of the crimes involved a group of male perpetrators, and four victims identified Ali as one of the assailants. A jury found Ali guilty of five counts of robbery in the first degree, two counts of attempted robbery in the first degree, and one count of assault in the first degree. Two of the robbery counts and the assault count carried a deadly weapon

enhancement. Ali was 16 years old at the time of the crimes, but he was charged and tried in adult court.[1]

Under the SRA, Ali faced a sentence between 240 and 318 months for the substantive charges, plus 24 months each for 3 weapon enhancements. Because the weapon enhancements must run consecutively under the SRA, the standard sentence range was 312 to 390 months. RCW 9.94A.533(4)(e).

At sentencing, the State recommended imprisonment for 390 months, which was the high end of the standard range for adults and included the three mandatory consecutive weapon enhancements. The State argued that youth was not a factor that would justify an exceptional sentence, citing *State v. Ha'mim*, 82 Wn. App. 139, 916 P.2d 971 (1996), *aff'd*, 132 Wn.2d 834, 940 P.2d 633 (1997), *overruled in part by State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015).

Defense counsel requested an exceptional sentence of 10 years (120 months), which was below the standard range, and argued that the presumptive range was "grossly excessive in light of the SRA purposes and that the Court does have legal and factual basis to impose something exceptional below that." 13 Verbatim Report of Proceedings (Mar. 27, 2009) (VRP) at 1419-20, 1423. The defense maintained that the

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[1] There was a dispute over Ali's age at trial, but all parties now agree that Ali was 16 years old at the time of the crimes. The State concedes that Ali is entitled to an order correcting his date of birth on the judgment and sentence to reflect his true year of birth as 1992.

mitigating factors listed in the SRA were nonexclusive and that the court should consider Ali's age and background. Ali was only 17 years old at sentencing, and the State recommended a sentence of 32.5 years. Defense counsel argued that Ali was "a young adolescent" who "endured extreme turmoil in his young life" and that "[v]ery little will be gained by crushing his hope and spirit by sending him away for two lifetimes." 13 VRP at 1420-23.

Ali presented mitigating testimony regarding his youthfulness and difficult childhood. Dozens of members of his community submitted letters to the court requesting leniency in his sentencing. Four people also spoke on his behalf at the sentencing hearing, describing Ali as young and inexperienced but capable of reform. One community member explained that Ali "has dealt with gang dealing and peer pressure." 13 VRP at 1426. Another described him as "a young boy who is a victim for his whole life, back at home and here" because Ali was born in the midst of a civil war, grew up in refugee camps, and was placed in high school instead of middle school when he arrived in the United States at age 13. 13 VRP at 1429. A family friend asked the court to

> look this young boy on a keen eye, give him another chance to rebuild his life, become an active citizen again. And I am sure he will thrive and grow up with dignity and respect with others and to himself. To conclude my statement, as a father, a parent, and a

> humanitarian, our children make mistakes. And he's one of those.

13 VRP at 1428.

After hearing the statements from the community members on Ali's behalf, the sentencing judge explained,

> Well, it's very clear that Mr. Ali has wonderful community and family support. These are individuals of great stature in the community and it is clear that he has a lot of folks looking out for him. But I can't simply look at the popular support, I have to look at the law. And the question is what does the law require me to impose and is there any justification under the law for imposing a sentence below the standard range. And I cannot find that there is any legal justification that would allow that. So I find that the law requires me to impose a sentence within the standard range.

13 VRP at 1431-32. The court imposed a total sentence of 312 months: the lowest possible sentence within the standard range with the mandatory enhancements. The low end of the standard range for each charge would run concurrently, and the mandatory deadly weapon enhancements would run consecutively. The sentencing judge acknowledged that 312 months "is a huge sentence for someone of your age. And I'm very mindful of that. But the law does not allow me to depart from it simply because of your age." 13 VRP at 1432. The court also made a point "to note, for the record that the sentence that was imposed was the lowest

sentence that I legally felt I had the option of imposing in this case. I recognize Mr. Ali's young age and that is primarily the reason why that was imposed." 13 VRP at 1436.

B. Procedural History

Ali appealed unsuccessfully, and his judgment and sentence became final in 2011. Ali filed this personal restraint petition (PRP) in the Court of Appeals in 2017, asserting that his continued restraint is unlawful under RAP 16.4(c)(2). He argues that even though it was filed more than a year after his judgment and sentence became final, his petition is timely under RCW 10.73.100(6)'s exception to the time bar: there has been a significant change in substantive law that is material to his sentence and sufficient reasons exist to require retroactive application of the changed legal standard. He argues that *Houston-Sconiers* provides a basis both to overcome the time bar and to entitle him to relief.

The Court of Appeals transferred his petition to this court as a successive petition that raises new grounds for relief. We set Ali's petition for full consideration on the merits and also granted review of a companion case, *Domingo-Cornelio*, slip op. at 4.

II. ANALYSIS

Ali was sentenced as an adult for crimes he committed as a child. He seeks collateral review of that

sentence. He filed this PRP more than one year after his judgment and sentence became final, so the petition is untimely unless it is based solely on a statutory exception to the time bar. RCW 10.73.090, .100. Ali relies on the exception for a significant change in the law that is material to his sentence and requires retroactive application. RCW 10.73.100(6). Ali argues he can overcome the time bar and is entitled to relief based on *Houston-Sconiers*. We agree.

In *Houston-Sconiers*, we held that when juveniles are adjudicated as adults, "[t]rial 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." 188 Wn.2d at 21 (emphasis added). There, 16- and 17-year-old defendants were adjudicated as adults for a series of robberies they committed on Halloween. *Id.* at 8. The charges triggered the mandatory automatic decline statute, RCW 13.04.030(1)(e)(v), and both defendants were tried and convicted as adults. *Id.* at 12. Each was convicted of several counts of robbery in the first degree, one count of conspiracy to commit robbery, one count of assault in the second degree, and multiple firearm enhancements. *Id.* Under the SRA, one defendant faced a sentencing range of 501-543 months, which included 372 months for the firearm enhancements; the other faced a sentencing range of 441-483 months, which included 312 months for the firearm enhancements. *Id.* at 12-13. The State recommended, and the trial court accepted, an exceptional sentence below the standard range: zero months on

each of the substantive counts for both defendants. *Id.* at 13. The defendants received 372 and 312 months, respectively, the full time for the consecutive weapon enhancements. *Id.* At sentencing, the judge heard mitigating testimony regarding both defendants' youth but "expressed frustration at his inability to exercise greater discretion over the sentences imposed." *Id.* The Court of Appeals affirmed the convictions and rejected the defendants' challenges to their sentences. *Id.*

On review, we traced the United States Supreme Court's recent decisions that "explicitly hold that the Eighth Amendment to the United States Constitution compels us to recognize that children are different." *Id.* at 18; *see*, *e.g.*, *Miller*, 567 U.S. at 479-80 (the Eighth Amendment forbids mandatory sentences of life without parole (LWOP) for juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (the Eighth Amendment forbids LWOP for non-homicide juvenile offenders); *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (the Eighth Amendment forbids the death penalty for juvenile offenders). "In each case, [*Roper, Graham*, and *Miller,*] the Court found that legitimate penological goals failed to justify the sentences [that it] invalidated as applied to youth." *Id.* at 19 n.4. Those cases held that certain punishments are impermissible because of three significant differences between children and adults: (1) juveniles are more likely to possess a "lack of maturity and an underdeveloped sense of responsibility . . . [and t]hese qualities often result in impetuous and ill-considered actions and decisions," (2)

"juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and (3) "the character of a juvenile is not as well formed as that of an adult [and t]he personality traits of juveniles are more transitory, less fixed," and more capable of reform. *Roper*, 543 U.S. at 569-70 (citing studies).

In *Houston-Sconiers*, we recognized that those cases invalidated certain sentences for juvenile offenders because children have diminished culpability, which renders some punishments "unconstitutionally disproportionate for youth." 188 Wn.2d at 19 n.4. We concluded that

> [t]hese cases make two substantive rules of law clear: first, "that a sentencing rule permissible for adults may not be so for children," rendering certain sentences that are routinely imposed on adults disproportionately too harsh when applied to youth, and second, that the Eighth Amendment requires another protection, besides numerical proportionality, in juvenile sentencings—the exercise of discretion.

Id. (citation omitted) (quoting *Miller*, 567 U.S. at 481). We held 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. . . . To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled." *Id.* at 21 (footnote omitted) (citing *State v. Brown*, 139

Wn.2d 20, 29, 983 P.2d 608 (1999)). Finally, we 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 range and/or sentence enhancements." *Id.* (emphasis added).

Following *Miller, Graham*, and *Roper, Houston-Sconiers* identified a *category* of sentences that are beyond courts' authority to impose: *adult standard SRA ranges and enhancements that would be disproportionate punishment for juveniles with diminished culpability.* Recognizing that "legitimate penological goals fail[ ] to justify" certain sentences as applied to youth, we held that courts *must* exercise discretion and consider the mitigating qualities of youth to determine whether standard SRA ranges and enhancements are proportionate for a particular juvenile in order to avoid imposing unconstitutionally disproportionate sentences. *Id.* at 19 n.4. Thus, we recognized that the Eighth Amendment requires that the sentencing judge consider the defendant's youthfulness *and* retain absolute discretion to impose a lower sentence. *Id.* at 34.

Not long after we decided *Houston-Sconiers*, we accepted review of *In re Personal Restraint of Meippen*, 193 Wn.2d 310, 440 P.3d 978 (2019). A majority of the court declined to reach the question of retroactivity in that case, instead holding that "[e]ven assuming Meippen can show that *Houston-Sconiers* is a significant, material change in the law that applies retroactively, [the petitioner was] not entitled to collateral relief because he [did] not demonstrate that any error actually

and substantially prejudiced him." *Id.* at 312. As discussed below, Ali does demonstrate actual and substantial prejudice, so we must decide whether *Houston-Sconiers* is a significant and material change in the law that requires retroactive application.[2]

A. *Houston-Sconiers* Requires Retroactive Application

Under RCW 10.73.100(6), the one year time limit to file a PRP does not apply when a petition is based on a significant change in the law, which is material to the conviction or sentence, and sufficient reasons exist to require retroactive application of the changed legal standard. *Houston-Sconiers* constitutes such a change in the law, and Ali's PRP is, therefore, timely.

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[2] Although we assumed without deciding the retroactivity question in *Meippen* and dismissed that PRP based on the petitioner's failure to establish prejudice, we are not required to conduct the analysis in that order. Whether a PRP is exempt from the one year time limit under RCW 10.73.090 "is a threshold inquiry; we do not have to decide whether the entire claim is completely meritorious in order to decide whether it fits within an exception to the time bar." *In re Pers. Restraint of Schorr*, 191 Wn.2d 315, 320, 422 P.3d 451 (2018) (citing *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 99-108, 351 P.3d 138 (2015)). "To *actually obtain relief* on collateral review based on a constitutional error the petitioner must demonstrate [prejudice] by a preponderance of the evidence." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004) (emphasis added).

1. Significant Change in the Law

Houston-Sconiers represents a significant change in the law because it *requires* the sentencing count to consider the youthfulness of the defendant. A significant change in the law exists "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) (citing *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 104, 351 P.3d 138 (2015)). Prior to *Houston-Sconiers*, we held that the SRA "deprives a sentencing court of discretion to impose an exceptional sentence downward below the time specified for a mandatory deadly weapon enhancement." *Brown*, 139 Wn.2d at 22. Under *Brown*, Ali's sentencing court was required to run each of his weapon enhancements consecutively and had no discretion to run them concurrently. In *Houston-Sconiers*, we stated explicitly that we overruled any interpretation that would bar such discretion with regard to juveniles, citing to *Brown* and recognizing that the case failed to address juveniles. 188 Wn.2d at 21 n.5. Prior to *Houston-Sconiers*, sentencing courts did not have discretion to consider the defendant's age at sentencing as a basis to run weapon enhancements concurrently. Thus, *Houston-Sconiers* is a significant change in the law because it overruled *Brown*.

Another "'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.'" *Miller*, 185 Wn.2d at 115 (alteration in original) (internal quotation

marks omitted) (quoting *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258-59, 111 P.3d 837 (2005)). Even if Ali's sentencing court had discretion to run the sentence enhancements concurrently before *Houston-Sconiers*, Ali could *not* have argued that the court *must* consider the mitigating factors of his youthfulness and that it had absolute discretion to impose *any* sentence below the applicable SRA range and sentence enhancements. 188 Wn.2d at 21. Ali could have, and did, argue that the court had some discretion and that it should consider youthfulness. But before *Houston-Sconiers*, he could not have argued that the court was *required* to consider youthfulness and could impose a lesser sentence based on youth. Under either test proffered to demonstrate a significant change in the law, *Houston-Sconiers* qualifies.

2. Materiality

Houston-Sconiers is material to Ali's case. Ali was sentenced to a standard adult range under the SRA, which included mandatory consecutive weapon enhancements, just as in *Houston-Sconiers*. If *Houston-Sconiers* applies retroactively, it would affect a materially determinative issue in Ali's petition: whether the sentencing judge had discretion to impose a lower sentence given the mitigating testimony regarding his youthfulness. The sentencing judge heard testimony and argument regarding Ali's youthfulness but felt that she had no discretion to impose any sentence below the bottom of the standard range, explaining that "the law does not allow me to depart from it simply

because of your age." 13 VRP at 1432. If *Houston-Sconiers* applies retroactively, it would materially affect Ali's sentence because it would allow the sentencing judge discretion to run the weapon enhancements concurrently or impose any exceptional sentence downward based on youthfulness.[3] Ali received the kind of sentence that implicates *Houston-Sconiers*; therefore, that case is material.

The State argues that *Houston-Sconiers* is a significant change in the law but is not material to Ali's case because *Houston-Sconiers* is limited to effective life sentences. Nothing in *Houston-Sconiers* limited the holding to life sentences or the functional equivalent. In fact, one of the defendants in *Houston-Sconiers* received a sentence of 312 months, the same as Ali. 188 Wn.2d at 13. We explicitly stated 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," and 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 range and/or sentence enhancements.*" *Id.* at 21 (emphasis added).[4] *Houston-Sconiers* applies

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[3] If, for example, the sentencing judge had run enhancements concurrently, the sentence would have been shortened by 48 months.

[4] *See also State v. Gilbert*, 193 Wn.2d 169, 175-76, 438 P.3d 133 (2019) ("Our opinion in [*Houston-Sconiers*] cannot be read as confined to the firearm enhancement statutes as it went so far as to question *any* statute that acts to limit consideration of the mitigating factors of youth during sentencing.").

to adult standard range sentences as well as mandatory enhancements under the SRA imposed for crimes committed while the defendant was a child. This is material to Ali's case because he was sentenced as an adult under the SRA for crimes he committed as a child.

3. Retroactivity

Houston-Sconiers announced a new substantive constitutional rule that must be applied retroactively upon collateral review. Washington courts follow the test laid out in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) to determine whether a rule applies retroactively. *See In re Pers. Restraint of Colbert*, 186 Wn.2d 614, 623-26, 380 P.3d 504 (2016). Under *Teague*, a new rule applies retroactively on collateral review only if it is a new substantive rule of constitutional law or a watershed rule of criminal procedure. *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 728, 193 L. Ed. 2d 599 (2016). *Houston-Sconiers* applies retroactively because it announced (1) a new rule (2) of constitutional magnitude (3) that is substantive.

First, *Houston-Sconiers* announced a new rule. Whether there is a "new rule" under *Teague* is a distinct inquiry from whether there has been a significant change in the law. *Tsai*, 183 Wn.2d at 103-05. A new rule is one that breaks new ground or imposes a new obligation, or "'if the result was not *dictated* by precedent existing at the time the defendant's conviction

became final.'" *Id.* at 104 (internal quotation marks omitted) (quoting *Stale v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627 (2005)). "'If before the opinion is announced, reasonable jurists could disagree on the rule of law, the rule is new.'" *Id.* (quoting *Evans*, 154 Wn.2d at 444). The dual mandates of *Houston-Sconiers*, that sentencing courts *must* consider youth and *must* have discretion to impose any exceptional sentence downward based on youth, were not dictated by existing precedent at the time Ali's conviction became final. Reasonable jurists could disagree whether the court had such discretion or whether they could consider youth; however, because no prior precedent *required* courts to do so, *Houston-Sconiers* announced a new rule.

Second, we decided *Houston-Sconiers* on constitutional grounds. We concluded that "the Eighth Amendment to the United States Constitution compels us to recognize that children are different" and "courts must address those differences in order to comply with the Eighth Amendment[] with discretion to consider the mitigating qualities of youth." *Houston-Sconiers*, 188 Wn.2d at 18-19. We reached this conclusion based on rules stemming from *Roper, Graham*, and *Miller*, which we identified as "substantive rules": some sentences routinely imposed on adults are disproportionately too harsh when imposed on children who lack adult culpability, and the Eighth Amendment requires the exercise of discretion in order to protect such children from disproportionate punishment. *Id.* at 19 n.4.

Third, *Houston-Sconiers* announced a substantive constitutional rule. "Substantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose" and include "'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Montgomery*, 136 S. Ct. at 729, 728 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)). "Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Id.* at 730 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)). *Houston-Sconiers* established a category of punishments that are prohibited: adult standard SRA ranges and enhancements that would be disproportionate punishment for juveniles who possess diminished culpability. It also established a mechanism necessary to effectuate that substantive rule: sentencing courts must consider the mitigating qualities of youth and have discretion to impose sentences below what the SRA mandates.

Following *Miller, Graham*, and *Roper, Houston-Sconiers* recognized that "legitimate penological goals fail[] to justify" certain sentences as applied to youth, and courts must have the discretion to impose sentences below the SRA, proportionate to the individual's culpability. 188 Wn.2d at 19 n.4. Without the context of

a defendant's youthfulness and the discretion to impose something less than what the SRA mandates, sentencing counts cannot protect juveniles' Eighth Amendment right to be free from unconstitutionally disproportionate punishment. The discretion and consideration that *Houston-Sconiers* requires are necessary to effectuate the substantive rule that certain punishments routinely imposed on adults are unconstitutional as applied to youth.

Miller and *Montgomery* compel the conclusion that *Houston-Sconiers* is a new substantive constitutional rule. *Miller* held that mandatory LWOP sentences for juveniles violate the Eighth Amendment because "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." 567 U.S. at 479. In *Montgomery*, the Supreme Court explained that "*Miller* took as its stalling premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing.'" 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. at 471). The Count concluded that mandatory LWOP for children constitutes cruel and unusual punishment because those differences "result from children's 'diminished culpability and greater prospects for reform," and "'the distinctive attributes of youth diminish the penological justifications'" for imposing certain punishments on juveniles. *Id.* (quoting *Miller*, 567 U.S. at 471-72). A life sentence for a child is rarely constitutional, and the sentencing count must exercise discretion and consider

youth and its effect on a child's culpability and capacity for change in order to distinguish between "children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Id.* at 734.[5]

The same constitutional principles form the foundation of *Houston-Sconiers*. In *Houston-Sconiers*, we recognized that the Eighth Amendment compels courts to treat children differently from adults because the legitimate penological goals fail to justify certain sentences for juveniles in light of the mitigating qualities of youth. 188 Wn.2d at 18. We concluded that the Eighth Amendment requires courts to consider the mitigating qualities of youth at sentencing and to have absolute discretion to impose anything less than the standard adult sentence because children possess diminished culpability, and "certain sentences that are routinely imposed on adults [are] disproportionately too harsh when applied to youth." *Id.* at 18, 19 n.4. *Houston-Sconiers* is substantive because it placed certain adult sentences beyond counts' authority to impose on juveniles who possess such diminished

[5] As the dissent correctly acknowledges, *Miller* contained both a substantive and a procedural component: *Miller* categorically banned LWOP for juveniles whose crimes reflect the transient immaturity of youth and required the exercise of discretion as the mechanism to protect that substantive rule. Like *Miller, Houston-Sconiers*'s procedural component (consideration of youth and discretion to impose sentences below the SRA) is necessary to achieve the substantive protection (punishment proportionate to culpability).

culpability that the adult standard SRA ranges and enhancements would be disproportionate punishment.

The fact that a juvenile *could* receive a sentence within the adult standard range if the sentencing court complies with the dual requirements of *Houston-Sconiers* does not render *Houston-Sconiers* procedural. *Miller* did not foreclose a sentencing court's ability to impose LWOP on all juveniles; it acknowledged that such a punishment may be appropriate for "'the rare juvenile offender whose crime reflects irreparable corruption,'" as long as the sentencing court takes the defendant's youth into consideration as the Eighth Amendment requires. *Miller*, 567 U.S. at 479-80 (quoting *Roper*, 543 U.S. at 573). But the sentencing court must engage in this consideration in order to determine whether the juvenile falls within the category of people for whom such a severe and rarely imposed punishment would be permissible. Similarly, under *Houston-Sconiers*, sentencing courts must exercise discretion and consider youth to determine whether the child falls within the category of juveniles for whom standard adult sentences or enhancements are permissible. Like in *Miller, Houston-Sconiers* announced a procedural component as a mechanism to protect the substantive rule. The substantive protection of proportionate punishment ceases to exist without the mechanism to determine whether the juvenile belongs in the class of culpability that would allow adult sentences versus the more likely outcome of a sentence that reflects the juvenile's immaturity. This does not

transform *Houston-Sconiers*'s substantive rule into a procedural rule.

In *Montgomery*, the Supreme Court held that *Miller* was not procedural because it "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 472). In reaching that conclusion, the Court rejected the State's argument that *Miller* announced a procedural rule because it mandated a process of considering youth before imposing a particular sentence. *Id.* at 734. The Court explained that that argument

> conflates a procedural requirement necessary to implement a substantive guarantee with a rule that "regulate[s] only the *manner of determining* the defendant's culpability." There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish. . . . Those procedural requirements do not, of course, transform substantive rules into procedural ones.

Id. at 734-35 (alteration in original) (citations omitted) (quoting *Schriro*, 542 U.S. at 353). The Court concluded that *Miller* announced a substantive rule of constitutional law because "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders

whose crimes reflect the transient immaturity of youth." *Id.* at 734 (quoting *Penry*, 492 U.S. at 330).

Our holding in *Houston-Sconiers* contains the same substantive and procedural components as *Miller*. *Houston-Sconiers* followed *Miller* and its progeny, which centered on the substantive guaranty of the Eighth Amendment: punishment proportionate to culpability. *Montgomery*, 136 S. Ct. at 732-33 ("Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence."). Like *Miller, Houston-Sconiers* includes a procedural component that specifies a method of achieving its substantive requirement: courts must consider youthfulness with the knowledge that they have absolute discretion to impose any sentence less than the standard adult sentence based on a finding of diminished culpability due to youth.

Again, this does not render *Houston-Sconiers* procedural. Rather than merely establishing a manner of determining the defendants' culpability, *Houston-Sconiers* prohibits certain punishments when imposed without the consideration and discretion that the Eighth Amendment requires. *See Montgomery*, 136 S. Ct. at 735 ("The hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."). *Houston-Sconiers* prohibits a certain category of punishment (adult standard SRA ranges and enhancements) for a class of juvenile defendants because of their status

(juveniles who possess such diminished capacity that those punishments would be unconstitutionally disproportionate). That *Houston-Sconiers* prohibits a broader category of punishments than LWOP or an effective life sentence is inapposite. The difference is one of scope, not of kind.[6] Like *Miller, Houston-Sconiers* protects juveniles from receiving certain disproportionate sentences. *Houston-Sconiers* rendered certain adult sentences beyond the courts' authority to impose on juveniles who possess such diminished culpability that the standard SRA ranges and sentences would be disproportionate punishment. The Eighth Amendment requires *both* consideration of youthfulness *and* absolute discretion in order to avoid imposing unconstitutionally disproportionate sentences on juveniles. *Houston-Sconiers* announced a new substantive rule that must be applied retroactively.

Houston-Sconiers satisfies RCW 10.73.100(6)'s exemption to the time bar: (1) it constitutes a significant change in the law (2) that is material to Ali's sentence and (3) requires retroactive application. Therefore,

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[6] To the extent the dissent argues that *Houston-Sconiers* is not substantive because, as it contends, the reasoning of *Roper, Graham*, and *Miller* should not apply to lesser sentences, the dissent's dispute is with the holding of *Houston-Sconiers* itself, not with our conclusion about the substantive nature of that holding. In order for us to reconsider an established rule of law that is otherwise entitled to stare decisis, there must be a clear showing that the rule is incorrect and harmful, or that the legal underpinnings have changed or disappeared altogether. *State v. Pierce*, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) (plurality opinion). No party has argued that *Houston-Sconiers* is incorrect and harmful, or that its legal underpinnings have changed, nor does the dissent.

Ali's PRP is timely under RCW 10.73.100(6), and he may be entitled to relief. In order to obtain relief, he must show that he was actually and substantially prejudiced by the error in sentencing and there are no other adequate remedies available under the circumstances.

B. Ali Demonstrates Actual and Substantial Prejudice

"We have three available options when reviewing a personal restraint petition: (1) dismiss the petition, (2) transfer the petition to a superior court for a full determination on the merits or a reference hearing, or (3) grant the petition." *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). A petitioner must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the constitutional error in order to obtain relief on collateral review. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004). A reference hearing "is appropriate where the petitioner makes the required prima facie showing, but 'the merits of the contentions cannot be determined solely on the record.'" *Yates*, 177 Wn.2d at 18 (quoting *In re Pers. Restraint of Heirs*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983)).

In *Houston-Sconiers*, we explained that the sentencing court should have considered

> mitigating circumstances related to the defendant's youth—including age and its "hallmark features," such as the juvenile's

> "immaturity, impetuosity, and failure to appreciate risks and consequences." It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and "the way familial and peer pressures may have affected him [or her.]" And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.

188 Wn.2d at 23 (alteration in original) (citations omitted) (quoting *Miller*, 567 U.S. at 477); *see also Gilbert*, 193 Wn.2d at 176. We also held that "sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements." *Houston-Sconiers*, 188 Wn.2d at 9.

Ali has demonstrated actual and substantial prejudice. His sentencing judge was presented with, and considered, testimony and evidence regarding the mitigating factors of Ali's youthfulness, but she found that she lacked the discretion to impose an exceptional sentence downward based on those mitigating factors. The State requested a high end standard sentence of 390 months. Ali's defense counsel requested an exceptional downward sentence of 10 years (120 months), arguing that Ali was a "young adolescent" at the time of the crimes, and "[v]ery little will be gained by crushing his hope and spirit by sending him away for two lifetimes, which is what the State is asking for." 13 VRP at 1420, 1422. Ali presented letters and testimony from

members of his community, who referenced his age, inexperience, and susceptibility to peer pressure, and the fact that "children make mistakes." 13 VRP at 1424-29.

Ali has demonstrated prejudice by a preponderance of the evidence. The judge imposed 312 months, the minimum sentence she had discretion to impose under the SRA. She imposed the lowest available sentence after hearing and considering testimony from family, friends, and community members who knew Ali well and described his inexperience, challenges with peer pressure, and potential for rehabilitation. She made a point to note for the record that she was imposing what she believed to be the lowest available sentence and that Ali's age was the primary reason she imposed the low end sentence.

Ali's case is unlike *Meippen*, where the sentencing judge imposed a high end standard range sentence but said nothing about whether his discretion was limited to the standard range and, instead, emphasized his reasons for imposing a sentence at the high end of the range. 193 Wn.2d at 313. While nothing in the record in *Meippen* suggested that the sentencing judge would have exercised discretion to depart from the SRA in light of the defendant's youth, *id.* at 317, here, the sentencing judge made a point to state that she was ordering the lowest sentence she had discretion to and that she was doing so primarily because of Ali's age.

Ali's sentencing comported with only one of the two constitutional requirements we announced in *Housion-Sconiers*. The sentencing judge considered the

mitigating factors of Ali's youth and arguments for an exceptional sentence, but because she did not have the discretion to impose any sentence below the standard SRA range and mandatory enhancements, she sentenced according to the SRA's mandates for adult sentencing. Based on the record, it appears that more likely than not, the judge would have imposed a lower sentence had she understood that the Eighth Amendment requires absolute discretion to impose any sentence below the standard range based on youthful diminished culpability. Since *Houston-Sconiers* applies retroactively, Ali was actually and substantially prejudiced by the sentencing court's (understandable) error.

C. Ali Is Entitled to Resentencing

A court will only grant relief by a PRP if other remedies available to the petitioner are inadequate under the circumstances. RAP 16.4(d). The State argues that Washington's *Miller*-fix statute, RCW 9.94A.730, is an adequate remedy because it would allow Ali to petition for early release after serving 20 years of his 26 year sentence. We disagree.

The *Miller*-fix statute does not necessarily provide a remedy to a *Houston-Sconiers* violation. RCW 9.94A.730 permits a person convicted of crimes committed when they were under 18 years old to petition for early release after serving 20 years in confinement. After receiving the petition, the Department of Corrections will assess the petitioner's dangerousness and the likelihood that they will engage in future criminal

behavior. RCW 9.94A.730(3). The assessment at this stage is not whether the person possessed adult culpability at the time of the crimes but whether they pose a continued danger after 20 years of incarceration. In *Houston-Sconiers*, we emphasized that sentencing courts must consider the mitigating qualities of youth and have absolute discretion "*at the time of sentencing itself*, regardless of what opportunities for discretionary release may occur down the line." 188 Wn.2d at 20 (emphasis added). We acknowledged that "[s]tatutes like RCW 9.94A.730 *may* provide a remedy on collateral review," but we viewed that statute as "just one possible remedy . . . on postconviction review." *Id.* at 23, 22 (emphasis added).

Additionally, *Houston-Sconiers* applies to all juveniles sentenced as adults under the SRA, including those who received far less than life sentences. *Id.* at 21. While RCW 9.94A.730 might provide an adequate remedy for a *Miller* violation, it may be grossly inadequate under the circumstances of a *Houston-Sconiers* violation. As explained above, *Houston-Sconiers* is not limited to life sentences, and, in this case, the *Miller*-fix statute would still require Ali to serve most of the sentence imposed in violation of *Houston-Sconiers* before he could even be considered for early release. Although *Miller* is limited to life sentences and de facto life sentences, *Houston-Sconiers* applies to *any* adult standard sentence imposed on a juvenile, so RCW

9.94A.730 cannot provide an adequate remedy under all circumstances.[7]

A statute that permits early release after 20 years of incarceration based on rehabilitation is not always an adequate remedy when a sentencing court fails to comply with the dual mandates of *Houston-Sconiers*. That case announced a rule requiring something more than *Miller*. It is *imperative* for courts to consider youthfulness at sentencing and for courts to have absolute discretion to impose any sentence below the SRA, including as little as no prison time, for crimes committed by children. Thus, under *Houston-Sconiers*, Ali's sentencing range went from 312-390 months to 0-390 months. RCW 9.94A.730 would permit Ali to petition for early release only after serving 240 months of the 312 month sentence imposed in violation of *Houston-Sconiers*. Under these circumstances, other available remedies are inadequate, and Ali is entitled to resentencing.

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[7] *Compare State v. Scott*, 190 Wn.2d 586, 594, 416 P.3d 1182 (2018) (the *Miller*-fix statute provided an adequate remedy for a juvenile sentenced to 900 months because it transformed a de facto life sentence without the possibility of parole to a life sentence with " 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' ") (quoting *Miller*, 567 U.S. at 479), *with Domingo-Cornelio*, slip op. at 14 n.8 (the *Miller*-fix statute would not provide an adequate remedy for a petitioner sentenced to 20 years because it would not allow early release until he served the full sentence imposed in violation of *Houston-Sconiers*).

III. CONCLUSION

We hold that *Houston-Sconiers* is a significant and material change in the law and that it announced a new substantive constitutional rule that must be applied retroactively upon collateral review. Ali has established actual and substantial prejudice, and his PRP is granted. We remand to superior court for resentencing consistent with *Houston-Sconiers*.

/s/ Montoya-Lewis, J

WE CONCUR:

/s/ González, J.

/s/ Gordon McCloud, J.

/s/ Yu, J.

/s/ Owens, J

/s/ Wiggins, JPT

JOHNSON, J. (dissenting)—I disagree with the majority's conclusion that our cases establish a substantive rule of constitutional interpretation requiring retroactive application—though I agree our cases can be read to establish a procedural factor requiring sentencing judges to consider general qualities of youth in considering the discretionary sentencing decision. Our cases, however, also recognize that the sentencing framework

under the Sentencing Reform Act of 1981, ch. 9.94A RCW, continues to guide sentencing decisions for juveniles in adult court. In order to maintain principles of consistency and finality in sentencing, I view our cases as establishing additional procedural factors applicable to the sentencing process, and, as being procedural not retroactive. I dissent.

ANALYSIS

This case asks us to decide whether *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), announced a new, substantive rule of constitutional law that applies retroactively. There, we held that "courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable [Sentencing Reform Act of 1981] range and/or sentence enhancements." *Houston-Sconiers*, 188 Wn.2d at 21. The majority reasons that *Houston-Sconiers* must apply retroactively because it established the same kinds of substantive and procedural components as the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *Miller* applies retroactively. *See Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 732, 193 L. Ed. 2d 599 (2016). I disagree.

In my view, *Houston-Sconiers* does not contain a substantive rule because, unlike *Miller*, it does not set a category of punishment altogether beyond the State's power to impose for a class of offenders. To understand

the distinction between substantive and procedural rules, we must engage with the Eighth Amendment analysis at the heart of the United States Supreme Court's juvenile sentencing decisions. U.S. CONST. amend. VIII.

The United States Supreme Court has told us that the Eighth Amendment prohibits cruel and unusual punishments, including "'extreme sentences that are grossly disproportionate to the crime.'" *Graham v. Florida*, 560 U.S. 48, 60, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (internal quotations marks omitted) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680 115 L. Ed. 2d 836 (1991) (controlling opinion of Kennedy, J., concurring in part and concurring in judgment)). *Miller* implicated two lines of United States Supreme Court precedent regarding the proportionality of punishments. 567 U.S. at 470.

The first line of precedent "has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 567 U.S. at 470. These categorical bans create substantive rules of constitutional law: they place certain punishments "altogether beyond the State's power to impose." *Montgomery*, 136 S. Ct. at 729. Substantive rules are retroactive because when the State imposes an unconstitutional sentence, that punishment is always unlawful. When a substantive rule has eliminated the State's power to impose a particular punishment, the "possibility of a valid result does not exist"—even "the use of flawless sentencing procedures [cannot] legitimate a punishment where

the Constitution immunizes the defendant from the sentence imposed." *Montgomery*, 136 S. Ct. at 730.

The second line of precedent holds that sentencing laws that make the harshest punishments mandatory pose "too great a risk of disproportionate punishment," so those sentences can be imposed only when a sentencing court is able to "consider the characteristics of a defendant and the details of his offense" to ensure the harshness of the punishment matches the individual offender's culpability for the crime. *Miller*, 567 U.S. at 479, 470. These cases condition the imposition of the law's harshest sentences on a particular procedure—namely, a sentencing judge's consideration of the offender's individual culpability—"to enhance the accuracy of a . . . sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 730 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)). New procedural rules are generally not retroactive because they merely enhance the accuracy of future sentencing rather than taking a category of punishments out of the State's hands altogether. Accordingly, the announcement of a new procedural rule does not "have the automatic consequence of invalidating a defendant's conviction or sentence." *Montgomery*, 136 S. Ct. at 730. Automatically invalidating sentences imposed under procedures that were understood to be constitutional at the time would "seriously undermine [] the principle of finality which is essential to the operation of our criminal justice system" and deprive criminal law "of much of its deterrent effect." *Teague v.*

Lane, 489 U.S. 288, 309, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

Drawing from both lines of precedent, in my view, *Miller* announced both a new substantive rule and a new procedural requirement. *Miller*'s substantive rule "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth"—because the distinctive attributes of youth are inconsistent with the penological justifications for imposing life without parole. *Montgomery*, 136 S. Ct. at 734 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)). In order to enforce that categorical constitutional guaranty, *Miller*'s procedural component requires a sentencing judge to consider a juvenile offender's youth and attendant characteristics "to separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 136 S. Ct. at 735. These rules work together: "when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class." *Montgomery*, 136 S. Ct. at 735. Both rules apply to juvenile sentences imposed after *Miller*.

However, only *Miller*'s substantive rule applies to juvenile sentences imposed before *Miller* was decided. *See Montgomery*, 136 S. Ct. at 736. States must ensure that juveniles whose crimes reflected only transient immaturity will not be forced to serve a

disproportionate sentence in violation of the Eighth Amendment, but *Miller "does* not require States to relitigate sentences" so a sentencing judge can consider youthfulness under the procedures *Miller* established "in every case where a juvenile offender received mandatory life without parole." *Montgomery*, 136 S. Ct. at 736. Instead, States can establish their own procedures to remedy such sentences retroactively, including "by permitting juvenile homicide offenders to be considered for parole." *Montgomery*, 136 S. Ct. at 736 (citing WYO. STAT. ANN. § 6-10-301(c) (2013) ("juvenile homicide offenders eligible for parole after 25 years")).[1] Under the Eighth Amendment, the procedural sentencing requirements *Miller* prescribed do not apply retroactively.

Houston-Sconiers announced a similar procedural rule that should not apply retroactively. It does not bar any particular punishment for a category of offender but, instead, requires the sentencing court to consider a juvenile offender's youthful attributes with the knowledge it has the discretion to impose a sentence

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[1] Two years ago, this court approved Washington's similar "*Miller* fix" statute—RCW 9.94A.730, which allows juvenile offenders sentenced as adults to petition for early release after serving 20 years—without dissent. *State v. Scott*, 190 Wn.2d 586, 597, 416 P.3d 1182 (2018) *("Montgomery* provides that the Washington *Miller* fix statute's parole provision cures the *Miller* violation in Scott's case."), 603 (Gordon McCloud, J., concurring) (agreeing "that under current Eighth Amendment precedent, RCW 9.94A.730 . . . provides an adequate remedy for the *Miller* violation" and writing separately "to clarify that the adequacy of the statutory remedy available to Scott . . . remains an open question [only] under Washington law").

below the standard SRA range because of those attributes. 188 Wn.2d at 21. So long as those proper procedures are followed, *Houston-Sconiers* does not categorically place any sentence beyond the authority of the judge to impose. The majority seemingly recognizes this: "a juvenile *could* receive a sentence within the adult standard range if the sentencing court complies with the dual requirements of *Houston-Sconiers*." Majority at 19. Because *Houston-Sconiers* does not categorically bar any SRA sentence for juvenile offenders, it should not be viewed as announcing a substantive rule. *See Montgomery*, 136 S. Ct. at 729 ("Substantive rules . . . set forth categorical constitutional guarantees that place certain . . . punishments altogether beyond the State's power to impose."). Because *Houston-Sconiers* did not announce a substantive rule, it does not apply retroactively.

The majority disagrees, reasoning that "*Miller* and *Montgomery* compel the conclusion that *Houston-Sconiers is* a new substantive constitutional rule" because "[o]ur holding in *Houston-Sconiers* contains the same substantive and procedural components as *Miller.*" Majority at 18, 21. I disagree because this conclusion, in my view, blurs the distinction between *Miller*'s substantive and procedural components and consequently it mischaracterizes the nature of *Houston-Sconiers'* s holding in three ways.

First, I disagree with the majority's claim that *Houston-Sconiers* is like *Miller* because both "announced a procedural component as a mechanism to protect the substantive rule." Majority at 20. But

unlike *Miller*, the majority's description of *Houston-Sconiers* fails to provide an adequate distinction between the substantive and procedural components. The United States Supreme Court has discussed how *Miller*'s substantive rule is distinct from the procedure protecting the rule: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479 (quoting *Roper v. Simmons*, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005))). *Miller* announced a substantive rule precisely because it took a category of punishment (life without parole sentences) off the table for a class of offenders (juveniles whose crimes reflect the transient immaturity of youth) *regardless of the procedures followed in imposing that punishment.* In contrast, *Houston-Sconiers* announced a procedural rule because it took a category of punishment (standard SRA sentences and enhancements) off the table for a class of offenders (juveniles) *unless the sentencing judge considers the mitigating qualities of youth at sentencing with the knowledge it has the discretion to impose a lesser sentence because of those qualities.* 188 Wn.2d at 21. What this means is that the sentencing judge retains discretion to determine the appropriate sentence under the SRA and the sentencing range remains the same.

That is the difference I see in these cases. *Miller*'s substantive rule is categorical and distinct from its procedural requirements, while *Houston-Sconiers*'s

holding is conditional and can best be described in terms of its procedural requirements.

Second, I disagree with the majority that the "fact that a juvenile *could* receive a sentence within the adult standard range" after *Houston-Sconiers* "does not render *Houston-Sconiers* procedural." Majority at 19. The majority bases this conclusion on the fact that *Miller* applies retroactively even though "*Miller* did not foreclose a sentencing court's ability to impose LWOP [life without parole] on all juveniles; it acknowledged that such a punishment may be appropriate for 'the rare juvenile offender whose crime reflects irreparable corruption.'" Majority at 19-20 (quoting *Miller*, 567 U.S. at 479-80). But I view that reading of *Miller* as being rejected by the United States Supreme Court in *Mongtomery v. Miller* did not purport to categorically bar life without parole for all juvenile offenders: "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 734. That *Miller*'s substantive rule does not bar life without parole for every single juvenile offender does not make it equivalent to *Houston-Sconiers*'s procedural rules.

Finally, I disagree that the difference between *Miller* and *Houston-Sconiers* "is one of scope, not of kind." Majority at 22. The United States Supreme Court has reasoned: "Life-without-parole terms . . . 'share some characteristics with death sentences that are shared by no other sentences.'" *Miller*, 567 U.S. at 474 (quoting *Graham*, 560 U.S. at 69). But *Houston-Sconiers*

concerns the "other sentences" that do not share characteristics of life without parole or the death penalty. According to *Miller* itself, that difference is one of kind and not merely of scope.

And the difference between the "ultimate penalt[ies] for juveniles" and lesser sentences is crucial. *Miller*, 567 U.S. at 475. After all, the Eighth Amendment "'does not require strict proportionality between crime and sentence,' but rather 'forbids only extreme sentences that are grossly disproportionate to the crime.'" *Graham*, 560 U.S. at 60 (internal quotations marks omitted) (quoting *Harmelin*, 501 U.S. at 1001). The analytical justifications that inform the substantive rules announced in *Roper, Graham*, and *Miller* should not apply to the lesser sentences, however long in duration.

While I agree *Houston-Sconiers* proscribes new, better methods of determining a juvenile offender's culpability, not every juvenile offender previously sentenced as an adult is suffering from an unconstitutionally cruel and unusual punishment. That conclusion is not supported by the United States Supreme Court's decisions in *Roper, Graham, Miller*, or *Montgomery* or the Eighth Amendment itself. Accordingly, I dissent.

CONCLUSION

I would hold that *Houston-Sconiers*'s rules are procedural and apply only prospectively. I would therefore dismiss the personal restraint petition.

/s/ Johnson, J.

/s/ Madsen, J.

/s/ Stephens, C.J.

Wash. Rev. Code § 9.94A.507 (2020)

Sentencing of sex offenders.

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

* * *

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c)(i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(ii) If the offense that caused the offender to be sentenced under this section was rape of a child in the

first degree, rape of a child in the second degree, or child molestation in the first degree, and there has been a finding that the offense was predatory under RCW 9.94A.836, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section was rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section is rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding under RCW 9.94A.838 that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the minimum sentence shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.

(d) The minimum terms in (c)(ii) of this subsection do not apply to a juvenile tried as an adult pursuant to RCW 13.04.030(1)(e) (i) or (v). The minimum term for such a juvenile shall be imposed under (c)(i) of this subsection.

* * *

Wash. Rev. Code § 9.94A.535 (2020)

Departures from the guidelines.

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

* * *

(1) Mitigating Circumstances—Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

* * *

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

* * *

Wash. Rev. Code § 9.94A.730 (2020)

Early release for persons convicted of one or more crimes committed prior to eighteenth birthday—Petition to indeterminate sentence review board—Conditions—Assessment, programming, and services—Examination—Hearing—Supervision—Denial of petition.

(1) Notwithstanding any other provision of this chapter, any person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement, provided the person has not been convicted for any crime committed subsequent to the person's eighteenth birthday, the person has not committed a disqualifying serious infraction as defined by the department in the twelve months prior to filing the petition for early release, and the current sentence was not imposed under RCW 10.95.030 or 9.94A.507.

* * *

Wash. Rev. Code § 10.95.030 (2020)

Sentences for aggravated first degree murder.

(1) Except as provided in subsections (2) and (3) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

* * *

(3)(a)(i) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years.

A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in Miller v. Alabama, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

* * *

Wash. Rev. Code § 36.27.130 (2020)

Felony resentencing.

(1) The prosecutor of a county in which an offender was sentenced for a felony offense may petition the sentencing court or the sentencing court's successor to resentence the offender if the original sentence no longer advances the interests of justice.

(2) The court may grant or deny a petition under this section. If the court grants a petition, the court shall resentence the defendant in the same manner as if the offender had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence.

(3) The court may consider postconviction factors including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated;

evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence; and evidence that reflects changed circumstances since the inmate's original sentencing such that the inmate's continued incarceration no longer serves the interests of justice. Credit shall be given for time served.

* * *