NO. ~~102642-1~~

SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE EARL BARTHOLOMEW,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Michael E. Schwartz

No. 81-1-00579-1

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Dwayne Bartholomew received the exact sentence he requested during his resentencing hearing. Unhappy that his more lenient sentence did not result in his immediate release from prison, Bartholomew filed a CrR 7.8(a) motion. His requested modification, however, exceeded the relief available pursuant to that rule.

After conceding in the court of appeals that CrR 7.8(a) does not allow a trial court to make substantive changes to a final judgment and sentence and that legislative action is needed before he can be paroled, Bartholomew seeks review by this court. His request must be denied because the appellate court's decision regarding CrR 7.8(a) is consistent with existing case law and Bartholomew's claim that his current sentence is unconstitutional was not preserved below. If, however, this court should determine that Bartholomew's sentencing challenge

merits consideration by this court, Bartholomew's December 2023 personal restraint petition (PRP) is the better vehicle.[1]

II. STATE'S COUNTERSTATEMENT OF THE ISSUES

A. Is Bartholomew's request for a new or modified post-mandate sentence barred by his failure to file a timely notice of appeal or notice of cross-appeal?

B. Is the court of appeal's refusal to consider Bartholomew's alternative theories for upholding the minimum term consistent with long-standing rules governing issue preservation and presentation?

III. STATEMENT OF THE CASE

On August 1, 1981, the then 20-year-old Dwayne Earl Bartholomew murdered 17-year-old Paul Edward Turner. CP 827; *State v. Bartholomew*, 98 Wn.2d 173, 178, 654 P.2d 1170 (1982), *vacated*, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d

[1] Bartholomew mentions this PRP in his petition for review. The State has contemporaneously filed a "statement of related case" that includes copies of Bartholomew's PRP, the responses from both the Indeterminate Sentence Review Board and the State, and Bartholomew's reply. The State maintains its objections to this PRP as untimely and successive/abusive and believes that reaching the merits of Bartholomew's sentencing challenge in the PRP would also be improper.

1383, *adhered to on remand*, 101 Wn.2d 631, 683 P.2d 1079 (1984) (*Bartholomew I*). At the time of his death, Mr. Turner was an attendant at a Tacoma laundromat. CP 840. He was shot once in the head with a .22 caliber weapon. A second bullet was found lodged in a counter near his body. CP 840; *Bartholomew I*, 98 Wn.2d at 177; *Wood v. Bartholomew*, 516 U.S. 1, 2, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995).

Bartholomew was arrested for the murder shortly after it occurred. CP 840. He admitted that he had robbed the laundromat, but he claimed that he had shot Mr. Turner accidently during the robbery. CP 840; *Bartholomew I*, 98 Wn.2d at 177. The ballistics and expert testimony regarding the operation of the gun did not support Bartholomew's claim that his single action revolver discharged by accident -- twice. *Bartholomew I*, 98 Wn.2d at 178; *Wood*, 516 U.S. at 3. And Bartholomew had told his brother prior to the murder that he intended to rob the laundromat and "leave no witnesses." CP

840-41; *Bartholomew I*, 98 Wn.2d at 177-78; *Wood*, 516 U.S. at 3.

Bartholomew was convicted of aggravated first degree murder as defined by former RCW 10.95.020(7) (Laws of 1981, ch. 138, § 2(7)) and former RCW 9A.32.030(1)(a) (Laws of 1981, ch. 138, § 3). CP 827; *Bartholomew I*, 98 Wn.2d at 213. A jury initially sentenced Bartholomew to death. CP 50, 52-53. But this Court vacated his death sentence, and then a new jury sentenced him to life without the possibility of parole (LWOP). CP 119-21. *See Wood*, 516 U.S. at 4.

In 2018, Bartholomew filed a collateral attack in which he claimed that his mandatory sentence of LWOP violated article I, section 14 of the Washington Constitution and the Eighth and Fourteenth Amendments to the United States Constitution because he was only 20 years old at the time of the crime. His PRP was granted by a plurality opinion that did not bar either discretionary LWOP or a de facto life sentence. *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 325, 482 P.3d 276

(2021) ("the petitioners have neither argued nor shown that LWOP would be categorically unconstitutional as applied to older defendants").

Five members of the plurality agreed that the Eighth Amendment prohibition on mandatory LWOP for juveniles established by *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), extends under the state constitution to individuals who committed aggravated first degree murder when they were 18-, 19-, or 20-years-old. *Monschke*, 197 Wn.2d at 306-07, 326-28. This court, therefore, remanded Bartholomew "for a new sentencing hearing at which the trial court must consider whether [he] was subject to the mitigating qualities of youth." *Id.* at 329; CP 3. This court did not, however, identify the procedure or statutory authority to be applied at the resentencing. CP 7-8, 34.

Post remand, Bartholomew and the State agreed that, absent legislative action, there were only two sentencing options available to the trial court:

- "[L]ife imprisonment without possibility of release or parole" pursuant to RCW 10.95.030(1), or

- "[L]ife imprisonment ~~without possibility of release or parole~~" pursuant to RCW 10.95.030(1), *In re Pers. Restraint of Monschke*, 197 Wn.2d 305 (2021), and Laws of 1981, ch. 138, §22 [2] (severability clause).

CP 8-9, 159, 777, 781.

The State and Bartholomew disagreed, however, on whether a sentence of life with the possibility of parole would result in an immediate release. The State claimed that the sentence would not be implementable until the legislature amended RCW 10.95 to authorize the Indeterminate Sentence Review Board (ISRB) to release individuals convicted of aggravated first degree murder after their eighteenth but prior to their twenty-first birthday. CP 782.

[2]The session law is cited for the severability clause because the Code Reviser may remove references to severability clauses ten years after a session law is adopted and/or may choose not to codify a severability provision. Severability sections that are not codified and/or do not appear in the Revised Code of Washington or its annotation are still valid. *See* RCW 1.08.017.

Bartholomew claimed that the ISRB could immediately implement a parolable life sentence pursuant to chapter 9.95 RCW because Bartholomew murdered Mr. Turner prior to the effective date of the Sentencing Reform Act (SRA). CP 789 and 791, *citing* RCW 9.95.115. Bartholomew, who was concerned about the impact his persistent drug use while in prison might have on the trial court,[3] repeatedly took the position that the trial court should not set a minimum term. *See, e.g.*, CP 801 (defendant's drug problems irrelevant as no minimum term is set pursuant to RCW 10.95.030(1)); CP 821 (ISRB to set minimum term); RP 157 (question before this court is not when Bartholomew should be released from prison); RP 172 ("There's only two decisions before the Court. It's not a minimum term.").

[3] Bartholomew's history of drug use and drug sanctions while in prison was well documented by the Department of Corrections. His drug violation history as well as that of his peers were before both the trial court and the ISRB. *See, e.g.,* RP 26-42; 67, 89-107. Even while incarcerated in the Pierce County Jail, Bartholomew had to be rushed to the hospital where he was found to have amphetamine in his system. RP 234-35.

The sentencing court ultimately determined that Bartholomew "was subject to the mitigating qualities of youth and therefore [should] be sentenced to life in prison." CP 850. Consistent with Bartholomew's position that the court did not need to set a minimum term and the State's position that the court lacked the authority to set a minimum term, a judgment and sentence was entered that vacated the December 16, 1986, sentence of LWOP and that imposed "life with the possibility of release or parole." RP 831.[4] Neither Bartholomew nor the State appealed the post-remand August 10, 2022, sentence. CP 872.

On September 16, 2022, Bartholomew filed a motion to set a minimum term pursuant to CrR 7.8(a). CP 854 ("moves pursuant to CrR 7.8(a) for an order complying with the ISRB's September 9, 2022, request that it set a minimum term pursuant to RCW 9.95.011(1)"). Bartholomew filed this motion in

[4] This sentence is more lenient than LWOP as it grants Bartholomew access to more programs in prison and to other opportunities. *See, e.g.*, RCW 72.09.460(6)(a)(i).

response to the ISRB's September 9, 2022, request that a minimum term be set. *Id.* Bartholomew's motion and reply in support of the motion did not cite to either CrR 7.8(b) or RCW 9.95.030. *See* CP 854-56, 867-70. And Bartholomew did not mention either during oral argument, even after the State explained that CrR 7.8(b) would be the better vehicle for the relief Bartholomew sought. *See* RP 257-59, 264, 267-68. The court granted Bartholomew's request over the State's objections, setting a minimum term pursuant to RCW 9.95.011 of 380 months. CP 872; *see also* CP 858. The State filed a timely notice of appeal from the trial court's order modifying the judgment and sentence. CP 874.

The State tendered two arguments in support of its appeal. First, the State asserted that a trial court is prohibited from making substantive changes to a judgment pursuant to CrR 7.8(a). *See* Brief of Appellant at 1, 2, 13-17. Second, the State asserted that absent legislation, the trial court lacked the authority to set a minimum term for a defendant convicted of aggravated

first degree murder for a crime committed after the defendant's eighteenth birthday. *See Id.*, at 1, 2, 17-32. Bartholomew conceded both issues. *See* Respondent's Brief at 13 (he was "mistaken" in believing that "the minimum term setting fell within CrR 7.8(a)," and the amendment actually "'modifi[ed]' the Judgment and Sentence"); *Id.* at 16 (it is necessary for the legislature to "reference and incorporate sentencing provisions outside [of chapter 10.95 RCW] with regard to those in the *Monschke* class"). And Bartholomew did not cite or discuss CrR 7.8(b) in his brief. *See* Respondent's Brief.[5]

The court of appeals issued a published opinion granting the State's appeal from the CrR 7.8(a) order on November 28, 2023. *State v. Bartholomew*, 28 Wn. App. 2d 811, 539 P.3d 22

[5]The court of appeals declined Bartholomew's oral argument request that the court treat his "motion as having been pled under CrR 7.8(b)." *Bartholomew II*, 28 Wn. App. 2d at 819 n. 2. This decision is consistent with this court's precedent. *See State v. Johnson*, 119 Wn.2d 167, 170, 829 P.2d 1082 (1992) (legal theory raised by an appellant for the first time at oral argument does not merit consideration).

(2023) (*Bartholomew II*). All three members of the panel agreed that chapter 9.95 RCW does not apply to sentences for aggravated first degree murder, and the majority vacated the order fixing a minimum term as outside of the relief available under CrR 7.8(a). *Bartholomew II*, 28 Wn. App. 2d at 813, 818-19.

Bartholomew filed a timely petition for review from the decision. This court has called for a response from the State.

IV. ARGUMENT

Bartholomew's petition for review challenges the constitutionality of his post-remand sentence. The relief he requests is some other sentence than what was imposed in the post-remand judgment and sentence. *See* Petition for Review at 17-18. Bartholomew's petition for review on this issue must be denied because he did not file a timely notice of appeal from his sentence, and he did not assert this argument in the court of appeals.

Bartholomew also claims that review should be granted because the appellate court's CrR 7.8(a) ruling conflicts with decisions applying CrR 7.8(b) and unpublished decisions applying CrR 7.8(a). Bartholomew, however, only sought relief pursuant to CrR 7.8(a) and the appellate court's refusal to reach the alternative grounds for relief is consistent with published opinions from both this court and the court of appeals.

A. Bartholomew's Request for a Different Sentence is Not Properly Before This Court.

An aggrieved party has 30 days from entry of the order that it seeks review of to file a notice of appeal. RAP 5.2(a). That date begins to run on the day the trial court submits the order to the clerk for filing. RAP 5.2(c); CR 5(e); CR 58(b). Neglecting the 30-day deadline will almost always be fatal as appellate courts will extend the time for filing a notice of appeal only in the most extreme and unusual circumstances. *See generally* RAP 18.8(b); *Beckman v. State*, 102 Wn. App. 687, 694, 11 P.3d 313 (2000) ("negligence, or the lack of 'reasonable diligence,' does not amount to 'extraordinary circumstances'").

The State filed a timely notice of appeal in this case that identified the only order subject to the appeal. *See* CP 874 ("The State of Washington seeks review by the Court of Appeals, Division II, of the Order Per CrR 7.8(a) Modifying Judgment and Setting Minimum Term that was entered on October 6, 2022 by the Honorable Michael Schwartz in the above-captioned matter."). This notice of appeal limited the appellate court's scope of review to whether the trial court abused its discretion in entering the CrR 7.8(a) order. *See* RAP 5.3(a); RAP 2.4(a); *State v. Bogart*, ___ Wn. App. 2d ___, ___ P.3d ___, 2024 WL 1617097 at * 2 (2024).

Bartholomew, as the prevailing party, was not required to cross-appeal the trial court's CrR 7.8(a) order if he sought no further relief from the court. *State v. Bobic*, 140 Wn.2d 250, 257-58, 996 P.2d 610 (2000). RAP 2.4(a); RAP 5.1(d).[6] And

[6] The deadline for Bartholomew to file a notice of cross-appeal in this case expired on November 7, 2022. *See* CP 872; RAP 5.2(f).

Bartholomew did not seek affirmative relief in the court of appeals. He does, however, seek further relief from this court—namely a new sentence. *See* Petition for Review at 15-18 (determinate sentence, or entry of orders to allow for parole). Bartholomew's request that this court authorize a different sentence and/or direct amendments to his current post-remand sentence must be denied as he did not file a timely notice of appeal from his sentence or a timely notice of cross-appeal from the CrR 7.8(a) order.

If Bartholomew desired a different or modified sentence than that imposed in the August 10, 2022, post-remand judgment, he was required to file a notice of appeal no later than September 10, 2022. *See* CP 827; RAP 5.2(a). He did not do so, electing instead to file a CrR 7.8(a) motion. CP 872. Bartholomew's success in obtaining a CrR 7.8(a) order does not reopen or extend the period for filing a notice of appeal from the August 10, 2022, judgment. *See State v. Gaut*, 111 Wn. App. 875, 46 P.3d 832 (2002) ("an unappealed final judgment cannot be restored to an

appellate track by means of moving to vacate and appealing the denial of the motion"); 15 Douglas J. Ende, Washington Practice: Civil Procedure § 39.12 (Mar. 2024 Update) ("If counsel wishes to challenge the judgment on the basis of errors during trial, the appeal should be from the final judgment, not from the ruling on the motion to vacate."); 14A Douglas J. Ende, Washington Practice: Civil Procedure § 34:28 (Mar. 2024 Update) (an appeal from an order granting or denying a motion to vacate is of "limited utility because it does not bring the final judgment up for review"); RAP 5.2(e) (CrR 7.8 motions not included in the post-judgment orders that extend the time for filing a notice of appeal from the underlying judgment); RAP 2.4(c) (CrR 7.8 motions do not allow for review of a final judgment not designated in the notice of appeal). Thus, this court must reject Bartholomew's first ground for review.

Bartholomew's first ground must also be rejected because he did not raise the issue of a new sentence in the court of appeals. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961

P.2d 350 (1998) (court will decline to consider an issue first raised in a petition for review). And Bartholomew has not provided this court with an adequate record (the pleadings and transcript from the post remand sentencing proceedings) from which to decide his newly asserted request for affirmative relief. *In re Detention of Halgren*, 156 Wn.2d 795, 804-05, 132 P.3d 714 (2006) (declining to review the merits of a claim because the petitioner failed to satisfy his burden of providing an adequate appellate record); *State v. Wade*, 138 Wn.2d 460, 464-66, 979 P.2d 850 (1999) (appellate court does not have an obligation to order supplementation of the record where the party seeking relief does not provide a sufficient record).

B. The Court of Appeal's Denial of Bartholomew's Request to Sustain the Setting of a Minimum Term By Applying Other Statutes or Court Rules Does Not Merit Further Review

Bartholomew contends that review should be granted because the court of appeals limited its review to the propriety of the trial court's setting of a minimum term pursuant to CrR 7.8(a), instead of considering whether a minimum term could be

set pursuant to CrR 7.8(b) or pursuant to RCW 9.95.030. *See* Petition for Review at 20-22. But Bartholomew limited his motion in the trial court to CrR 7.8(a), and his requested relief was for an order setting "a minimum term pursuant to RCW 9.95.011(1)" as requested by the ISRB. CP 854, 856; *see also* CP 867. He did not raise CrR 7.8(b) until oral argument, and while he cited RCW 9.95.030 in his respondent's brief, Bartholomew did not present any legal argument that an RCW 9.95.030 recommendation was the equivalent to the RCW 9.95.011(1) minimum term requested by the ISRB, or that such a recommendation was both responsive to the ISRB's request and would enable the ISRB to proceed with a parole hearing. *See* Respondent's Brief at 11 n. 2, 14.[7]

[7] Bartholomew's silence on this point is supported by the plain language of RCW 9.95.011(1), which provides that "the expiration of the minimum term set by the court . . . . constitutes the parole eligibility review date, at which time the board may consider the convicted person for parole." RCW 9.95.030 does not contain any language that authorizes the ISRB to parole a defendant upon his service of the sentencing judge's recommended "duration of the convicted person's imprisonment.

The court of appeals' determination that the trial court's "Order per CrR 7.8(a)" exceeded the scope of relief under that rule is consistent with published opinions issued both prior to and after its decision in *Bartholomew II* was issued. *Compare Bartholomew II*, 28 Wn. App. 2d at 818-20 *with Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996) (setting out the test necessary to determine whether an error is clerical or judicial under CR 60(a)[8]); *Bogart*, 2024 WL 1617097 at *3-5 (CrR 7.8(a) only allows the court to amend the judgment to make it correspond to the facts and law as actually decided and applies); *State v. Rooth*, 129 Wn. App. 761, 770, 121 P.3d 755 (2005) (only clerical mistakes can be corrected by the trial court pursuant to CrR 7.8(a)); *see also State v. Hendrickson*, 165 Wn.2d 474, 478, 198 P.3d 1029 (2008)

[8] The test for determining whether a clerical error exists under CrR 7.8(a), is the same as the test used under CR 60(a), the civil rule governing amendment of judgments. *State v. Rooth*, 129 Wn. App. 761, 770, 121 P.3d 755 (2005).

(explaining the difference between clerical and judicial errors with respect to nunc pro tunc orders). Bartholomew's request for review under RAP 13.4(b)(2), therefore, should be denied. And to the extent Bartholomew is claiming a conflict with other published appellate court opinions arising from the appellate court's failure to entertain his untimely CrR 7.8(b) and RCW 9.95.030 arguments, review is also not merited pursuant to RAP 13.4(b)(2).

An appellate court's refusal to consider issues or theories that were not advanced in the trial court and/or were not asserted until oral argument and/or were not supported by adequate legal argument is well-established. *See, e.g.,* RAP 2.5(a) (appellate court may refuse to consider any error not raised in the trial court); RAP 10.3(b) and RAP 10.3(6) (issues should be supported by argument and citations to legal authority); RAP 11.4(f) (argument limited to the issues raised and argued in the briefs); *State v. Johnson*, 119 Wn.2d 167, 170, 829 P.2d 1082 (1992) (legal theory raised by an appellant for the first time at

oral argument does not merit consideration); *Drummond v. Bonaventure of Lacey, LLC*, 20 Wn. App. 2d 455, 462, n. 3, 500 P.3d 198 (2021) (an appellate court is "not required to consider arguments for which only passing treatment is given, or for which reasoned argument is not provided"); *State v. Troutman*, ___ Wn. App. 2d ___, ___ P.3d ___, 2024 W 1506539 at *7 (2024) (a violation of a non-constitutionally mandated court rule[9] is not of "constitutional dimension" for the purposes of RAP 2.5(a)(3)).

The court of appeals rejected Bartholomew's tardy requests to preserve the order setting the minimum term by applying CrR 7.8(b) and/or to convert the RCW 9.95.011(1) minimum term into an RCW 9.95.030 recommendation in accordance with these well-established principles. The decision

[9] CrR 7.8(b) is not constitutionally mandated as the constitutional right of habeas corpus is limited to personal and subject matter jurisdiction and neither statutes nor court rules can expand the scope of the constitutional right. *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 441-43, 853 P.2d 424 (1993).

does not give rise to "a significant question of law under the Constitution of the State of Washington or of the United States," RAP 13.4(b)(3). Nor does it give rise to "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Bartholomew's request for review pursuant to "RAP 13.4(b)(2), (3) and (4)"[10] must, therefore, be denied.

V. CONCLUSION

Bartholomew's petition for review must be denied because none of his claimed errors were timely or adequately asserted.

Denying Bartholomew's petition for review does not condemn him to live out his life in prison. The legislature is working on the implementation of this court's *Monschke* decision.[11]

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[10] Petition for Review at 22.

[11] While the Legislature failed to pass the proposals that were introduced in the 2024 session, its work on those bills, House Bill (H.B.) 1396, 68th Leg. Reg. Sess. (Wash. 2024) and House Bill (H.B.) 2213, 68th Leg. Reg. Sess. (Wash. 2024), provide a starting point for compromise in a future session.

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Respectfully submitted this 1st day of May, 2024.

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5-1-24	*s/ Therese Nicholson*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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