102651-0

(COURT OF APPEALS NO. 57948-1-II)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Appellant

v.

DWAYNE EARL BARTHOLOMEW,

Defendant/Respondent.

PETITION FOR REVIEW

MacDONALD HOAGUE & BAYLESS

Timothy K. Ford, WSBA #5986
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604
Timf@mhb.com

ATTORNEYS FOR PETITIONER

Table of Contents

Cases

Statutes

Rules

Constitutional Provisions

INTRODUCTION

In March 2021, this Court ordered the Pierce County Superior Court to conduct resentencing proceedings to determine if Dwayne Bartholomew's life without parole sentence was constitutional. After an extensive review of the record and a two-day hearing, Pierce County Superior Court Judge Michael Schwartz held that sentence unconstitutional and entered a new Judgment imposing a sentence of "life with the possibility of release or parole." The State did not appeal.

Just before the time for appeal ran, Judge Schwartz received a letter from the Indeterminate Sentence Review Board (ISRB) asking the court to set a minimum term so the ISRB could comply with its Judgment. The State responded to the ISRB letter saying the court had no power to do that. See CP 851. But no appeal was filed, so Judge Schwartz entered an additional Order setting a minimum term of 380 months, which was less time than Mr. Bartholomew had already served.

The State appealed that Order and the Court of Appeals reversed, holding the ISRB has no power to parole prisoners like Mr. Bartholomew. See Appendix A at 9n.2 ("chapter 9.95 RCW does not apply to sentences for aggravated first degree murder."). That left Mr. Bartholomew in prison for life without any possibility of parole or release, even though that sentence has been found unconstitutional in a final trial court Judgment from which the State did not appeal. Acknowledging this, a concurring judge noted that Mr. Bartholomew's only avenue for relief may be a personal restraint petition. App. A-11n4.

Mr. Bartholomew has now filed a Personal Restraint Petition seeking his release from this unconstitutional sentence. By this Petition, he is also seeking review of the Court of Appeals' decision in this state's appeal. He is doing so to exhaust every possible avenue of relief, and because the decision regarding CrR 7.8 conflicts with those of other Courts of Appeals and involves a matter of great public importance. RAP 13.4(b)(3) and (4).

IDENTITY OF PETITIONER

Dwayne Bartholomew was one of the Petitioners in *Matter of Monschke/Bartholomew*, 197 Wn.2d 305, 482 P.3d 276 (2021) in whose case this Court vacated the sentence of life imprisonment without possibility of parole as unconstitutional under Article I, Section 14 of the Washington Constitution.

At resentencing, the trial court found he was subject to the mitigating qualities of youth at the time of the crime and imposed a sentence of "life imprisonment with the possibility of parole or release." By separate, later Order, the trial court responded to a question from the Indeterminate Sentence Review Board by setting a minimum term of 380 months.

The State let the time for appeal from the sentencing order run but appealed the minimum term Order, arguing that the trial court had no power to set such a term even if that meant that, under current law, Petitioner could not be paroled. The Court of Appeals agreed and vacated the minimum term, so Petitioner again is serving life without any possibility of parole.

DECISION BELOW

The Court of Appeals' opinion, *State v. Bartholomew*, ___ Wn. App. 2d ___ (No. 57948-1-II, November 28, 2023), is attached to this Petition as Appendix A.

ISSUES PRESENTED

Does RCW Chapter 9.95 apply to sentences imposed on youthful offenders found constitutionally ineligible for life without possibility of parole?

Is the issuance of a separate order which clarifies and is consistent with the terms of a previously-entered criminal judgment subject to the limitations of CrR 7.8?

FACTS RELEVANT TO PETITION

On March 11, 2021, this Court held that the mandatory life without parole sentence Petitioner Dwayne Bartholomew received for a murder he committed at age 20 violated the State constitution. *Monschke/Bartholomew*, 197 Wn.2d 305, 482 P.3d 276 (2021). It vacated his sentence and ordered the trial court to hold a new sentencing hearing to consider whether he was

subject to the mitigating qualities of youth at the time of the crime. *Id.* at 329. But it didn't specify the source of the trial court's authority to impose a new sentence if he was.

Nothing happened until, on December 13, 2021, Petitioner filed a Motion for Orders Regarding Resentencing Standards and Procedures in the Pierce County Superior Court. CP 5. That Motion argued, *inter alia*, that the trial court's authority to resentence could be found in RCW 10.95.030(1), the 1981 statute which mandated his life without parole sentence, if the portion of the statute which the Supreme Court held was "unconstitutional as applied to [Bartholomew's] conduct," 197 Wn.2d. at 326, were excised. See CP 9. The State responded that the authority must instead reside in RCW 10.95.030(3), a later enacted statute facially applicable to 16–18-year-olds. See CP 778, 789. The defense Motion had proposed that as an alternative source of authority (CP10), and the trial court accepted the State's position (CP 778, 779).

The trial court then issued a discovery schedule and set a hearing in February 2022 which was later postponed to March. The parties accordingly exchanged discovery and submitted exhibits and sentencing memoranda.

After it filed its Memorandum, the State changed its position and argued that the trial court had no authority to conduct the resentencing, even though this Court had ordered it. See CP 778-79 and note 2. Then, just days before the scheduled hearing, the State filed a Motion in this Court to recall the Certificate of Finality in the Personal Restraint proceeding in which the resentencing was ordered, making this newly hatched argument. *Id.* The resentencing was continued pending consideration of that Motion.

In the briefing that ensued, the State changed positions again, this time agreeing with the original defense argument that resentencing could be authorized by RCW 10.95.030(1) and that the trial court could only impose sentences of life imprisonment with or without parole. CP 784-85; see CP 790.

On May 5, 2022, a Department of the Court denied the State's Motion to Recall without comment, and the resentencing was rescheduled once again. The State then repeated its stipulation in the trial court.

The resentencing was held over two days in July 2022. RP 1-210. The trial court recessed the proceedings in order to complete its review of the lengthy record and numerous exhibits that had been submitted (RP 210) and then reconvened on August 10, 2022.

On that date the trial judge delivered an oral opinion which concluded that the defendant was subject to the mitigating qualities of youth at the time of the crime and so should have the opportunity to be considered for parole. RP 215-35; CP 837-50. It then signed a standard form Judgment and Sentence that made clear—twice—that the sentence was imposed "with the possibility of parole or release." CP 827, 831. In colloquy with counsel, the trial judge said that he was attempting to draft a Judgment that would make it clear to the

ISRB that the defendant was no longer ineligible for parole. RP 236-37. In this context, he noted that in previous similar cases he had received responses from the ISRB regarding the findings and orders it needed to carry out the court's judgment. RP 237.

At the State's request, the Judgment was left open with regard to possible restitution, and a further hearing on that issue was scheduled. RP 241-42; see CP 830.

On September 7, 2022, Judge Schwartz received a letter from the ISRB asking that the court set a minimum term, which the Board believed was necessary to consider Mr. Bartholomew for parole consistent with RCW 9.95.011. See RP 870; CP 852.[1] On September 9, 2022—two hours before the time for appealing the sentencing order ran—Deputy Prosecutor Pamela Loginsky responded to the ISRB letter on behalf of the State, saying that RCW 9.95.011 did not apply to this case and that the court had no power to set a minimum term. CP 851-53.

[1]The ISRB letter is not in the Clerks Papers and does not appear to have been filed with the trial court.

Defense counsel then filed a motion to set a minimum term "pursuant to CrR 7.8(a)" to bring the issue before the court. CP 854. The State filed an objection (CP 858) and another hearing was held.

At the new hearing, the trial judge first confirmed that all parties had understood that his Judgment was intended to make the defendant eligible for parole. RP 261-62. He then addressed the prosecutor's objections to setting a minimum term in order to carry out that intention:

> Ms. Sanchez has conceded … that if the Court were to sentence Mr. Bartholomew to a life sentence, that the actual term of his sentence would be set by the ISRB. That was discussed, I think, rather at length when the Court resentenced Mr. Bartholomew. And so I think it's clear that that was the intention at the time of the sentencing. And therefore, 7.8(a) does apply in these instances.
>
> The next question is whether the Court can actually lawfully impose a minimum term. Here, the State argues that 9.94, or excuse me, 9.95.011 does not apply to Mr. Bartholomew's case here because he was sentenced for aggravated murder. The fallacy in that reasoning, though, is that 9.95.011 was enacted after the aggravated murder statute. In other words, the legislature presumably had knowledge that there were people who would fall under that particular statute, and there's nothing within the

> language of 9.95.011 that excepts people who are positioned like Mr. Bartholomew who got sentenced for murder in the first degree with aggravating circumstances. In fact, Subsection 1 plainly imposes a mandatory duty that the Court shall, at the time of sentencing, fix a minimum term. That persuades this court that that's exactly what this court should do, is set a minimum term for Mr. Bartholomew.

RP 268-69. The court then entered an "Order Modifying Judgment and Setting Minimum Term" which said this:

> RCW 9.95.011(1) requires the Court to fix a minimum term "at the time of sentencing" "[w]hen the court commits a convicted person to the department of corrections."
>
> By oversight, the Judgment and Sentence entered August 10, 2022 did not do so. Neither party has appealed from the Judgment and Sentence entered August 10, 2022, and the time for appeal has run.
>
> The Judgment provided that the Defendant's sentence included "the possibility of parole or release." Fixing a minimum term pursuant to statute is necessary to give effect to that aspect of the Judgment and does not alter it. It is therefore permissible pursuant to CrR 7.8(a).
>
> Consistent with its sentencing decision and for the reasons set forth therein, the Court determines that the minimum sentence in this case should be 380 months.

CP 872.

The State appealed. CP 874. In the Court of Appeals, it argued that trial courts have no authority to set minimum terms or to impose any sentence other than life with or without parole because "the resentencing was conducted pursuant to chapter 10.95 RCW, not chapter 9.95 RCW." App. Br. 15. It said that was so even if it meant there was no "alternative to mandatory LWOP for that subgroup of the *Monschke* class whose murders reflected youthful immaturity, impetuosity, or failure to appreciate risks and consequences." App. Br. 6-7, 19. It also argued the October 6 Order was improper because it involved more than correction of a "clerical error." *Id*. at 13-17.

Petitioner responded that the State's position "would leave Mr. Bartholomew in prison for life without any possibility of parole or release, even though the trial court has determined that sentence is unconstitutional … in a final Judgment the State did not appeal." Resp. Br. 2. He also argued that, despite its designation, the Order of October 6 did not necessarily implicate CrR 7.8 because it did not change or add

to the Judgment and Sentence; it simply answered a question in order to give effect to it. *Id*. at 10-13. He also pointed out that RCW 9.95.030 authorizes trial courts to answer questions from the ISRB after their judgments have been entered and become final. *Id.* at 11n.7, 14.

At argument, the Court of Appeals judges questioned if RCW 9.95.030 could be considered authority for the minimum term Order. Petitioner then sought leave to ask for modification of the October 6 Order to answer that question, but that was denied without comment. Petitioner then filed a CrR 7.8(b) Motion to Modify October 6 Order in the trial court (App. B), but that was referred back to the Court of Appeals (App. C). Days later, the Court of Appeals issued its decision holding that "Chapter 9.95 RCW does not apply to sentences for aggravated first degree murder." App. A at 9n1. That made the October 6 Order moot, implicitly rejected the CrR 7.8(b) Motion, and made further argument about the trial court's power to recommend minimum parole terms futile.

ARGUMENT

A. THE COURT OF APPEALS' HOLDING THAT "CHAPTER 9.95 DOES NOT APPLY TO SENTENCES FOR AGGRAVATED FIRST DEGREE MURDER" INVOLVES AN ISSUE OF CONSTITUTIONAL LAW OF GREAT PUBLIC IMPORTANCE THAT IS NOW BEFORE THE COURT IN OTHER PENDING CASES.

The Court of Appeals' holding that "RCW Chapter 9.95 does not apply to sentences of aggravated murder," so the trial court never had the power to enter a minimum term—means that the resentencing in this case was a fool's errand: a determination that a defendant should be eligible for parole, when parole was legally impossible.

The Court of Appeals is wrong. The cure for an unconstitutionally excessive sentence is not the same sentence under a different name. The argument for severance of the words "without possibility of parole" from RCW 10.95.030(1) was that removing those words would create a possibility of parole and restore trial courts' constitutionally mandated discretion. See CP 9. If RCW 9.95 does not apply to cases of aggravated murder, then there is no legal possibility of parole in

such cases, and the constitutional defect has not been cured by the severance.

The Court of Appeals did not explain its statement that aggravated murder cases are exempt from RCW Chapter 9.95. The State's argument for that position below—that "the resentencing was conducted pursuant to chapter 10.95 RCW, not chapter 9.95 RCW"—is nonsense. No criminal defendant is sentenced "pursuant to chapter 9.95"; crimes and punishments are described in other chapters of RCW Title 9, RCW Chapter 9A, and elsewhere in the law. The fact that the aggravated murder statute is not located in Chapter 9.95 is meaningless.

The State's related argument that RCW Chapter 10.95 is "complete and specific, leaving no room for the application of general sentencing statutes," (App. Br. 24) makes no more sense. Whether or not that was true before this Court's decision in *Monshke/Bartholomew*, it clearly was not true afterwards. The State admitted as much when it conceded in this Court and

the trial court that the statute could be saved and applied if, and only if, some of its provisions are severed or modified.

Chapter 9.95 does not support the Court of Appeals' decision. RCW 9.95.030 says the ISRB may "obtain" judges' statements regarding "what, in their judgment, should be the duration of the convicted person's imprisonment," after a "convicted person is transported to the custody of the department of corrections." RCW 9.95.011 requires trial courts to "fix the minimum term" "[w]hen the court commits a convicted person to the department of corrections …." RCW 9.95.115 gives the ISRB "authority to parole any person sentenced … under a mandatory life sentence for a crime committed before July 1, 1984, except those persons sentenced to life without the possibility of parole."

None of these statutes say, "unless the convicted person was sentenced under RCW Chapter 10.95." The trial court here "commit[ed] a convicted person to the department of corrections," under a "mandatory life sentence for a crime

committed before July 1, 1984." When the person got to prison, the ISRB wrote to "obtain" a minimum term from the trial court. RCW 9.95.030. The statutes apply by their plain terms.

The Court of Appeals brushed these statutes aside, holding that none of them apply to aggravated murder cases. App. A at 9n.9, 10 (concurring opinion). It vacated the minimum term Order and let the sentence stand, providing no guidance to the trial court about how to cure the resulting constitutional problem. The concurring judge wrote that the constitutional violation might have been avoided if the ISRB had filed a "petition for post-sentence review under RCW 9.94A.585(7) and RAP 16.18(a)," or might be cured if Petitioner filed a Personal Restraint Petition. *Id*. at 11 and n.4.[2] However, she acknowledged that the State could be correct that the constitutional problem could not be solved under current law and might require legislative action. *Id.* at 11-12.

[2] To insure he has exhausted every avenue of relief, Petitioner intends to file a Personal Restraint Petition in this Court to be considered along with this Petition.

This Court currently has before it at least two other cases that present this same conundrum, *State of Washington v. Kimonti Dennis Carter and Shawn Dee Reite,* No. 101777-4. In those cases, the trial courts applied a different analysis and reached a different solution. They held that *Monshke/ Bartholomew* requires the word "shall" in RCW 10.95.030(1) to be read as "may," giving discretion to the trial court to impose a determinate sentence of a term of years. In appealing those judgments, the State has continued to argue that there is no legal means by which prisoners in the *Monshcke* class can be sentenced to anything other than life without parole.

This is plainly an important question of constitutional law on which lower courts are divided and need guidance from this Court. RAP 13.4(b)(2), (3) and (4). The Court therefore should grant review here and consider this case along with, or in light of, *Carter/Reite*. If it holds the trial courts in those cases were correct, Petitioner was eligible for a determinate sentence, but neither the trial court, nor the defense, nor the State, nor the

ISRB knew it. If it holds the Court of Appeals was correct that Chapter 9.95 RCW cannot apply to aggravated murder cases, the trial court erred by including the words "with possibility of parole or release" in the Judgment and Sentence, because the law did not allow such a possibility. In either case, the case should be remanded to the trial court with instructions to issue appropriate orders curing the error. If the trial court was correct that parole was possible and it was necessary to set a minimum term to make it so, the decision of the Court of Appeals should be reversed.

B. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURT OF APPEALS' REGARDING THE MEANING OF CrR 7.8.

CrR 7.8(a) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Whether a court may issue a subsequent order relating to previously entered judgment depends on whether it is

"correct[ing] language that did not correctly convey the court's intention" or adding language that was unintentionally left out of the original judgment. *State v. Morales*, 196 Wn. App. 106, 117, 383 P.3d 539 (2016). If the language in a judgment and sentence which order purports to amend did not convey the trial court's intention, then it is a judicial error and cannot be fixed by amendment under CrR 7.8(a). *See Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). In other words, as Division II itself has recognized in previous cases, CrR 7.8 permits amendments if, but only if, they reflect "the intention of the court as expressed in the trial record." *State v. Rouse*, No. 55491-7-II, 2022 Wash. App. LEXIS 1002, at *7 (May 10, 2022).

This principle is applied by trial courts on a regular basis. Most commonly and obviously, criminal judgments are often entered without a determination of the amount (or availability) of restitution, which is left to future hearings—as it was in this case. See RP 241-42. Similar actions have been approved in

other circumstances where sentencing forms do not include all the specifics necessary to effectuate a judgment. *See, e.g.*, *State v. Townsend*, 2023 Wash. App. LEXIS 1227, at *9 (Division II, June 27, 2023) (revisiting judgment to check box to authorize exceptional sentence); *State v. Collins*, 2022 Wash. App. LEXIS 2268, at *26 (Division II, Nov. 29, 2022) (amending judgment appendix to fix inconsistency); *State v. Reed,* 2021 Wash. App. LEXIS 984, at *7-9 (Division 1, Apr. 26, 2021) (state's motion to amend judgment to change community custody provision); *State v. Williams*, 15 Wash. App. 2d 841, 844 n.1, 480 P.3d 1145 (Division III 2020) (state permitted to move to amend warrant of commitment to provide sentences were to run concurrently); *State v. Zavala-Reynoso,* 127 Wash. App. 119, 123-24, 110 P.3d 827 (Division III 2005) (defendant's motion to amend judgment granted to change sentence exceeding statutory maximum).

Even more relevant to this case, RCW 9.95.030 expressly allows the ISRB to "obtain" trial judges' recommendations

regarding "what, in their judgment, should be the duration of the convicted person's imprisonment," *after* a "convicted person is transported to the custody of the department of corrections." Under the reading of CrR 7.8(a) in the decision below, courts would lack the power to provide the answer which this statute authorizes the ISRB to obtain from them.

The Court of Appeals' error may derive from the premise that CrR 7.8 applies here at all. Although the trial court's Order cited CrR 7.8(a) it did not correct a "mistake in [a] judgment[]." It asked the trial court to answer a separate question to which the Judgment itself did not and was not required to speak.[3] This was pointed out in the briefing below to no avail.

As recounted above, the Court of Appeals did not rest its decision wholly on its reading of CrR 7.8(a), but avoided the question of whether the minimum term Order could be cured

[3] RCW 9.95.011 says trial courts must "fix the minimum term" "*at the time* of sentencing," but it doesn't require that the term be set out *in* the judgment and sentence itself. And as noted, RCW 9.95.030 assumes the court will address the minimum term question after sentencing, if asked to do so.

under CrR 7.8(b) or in any other way by holding that Chapter 9.95 RCW does not apply to aggravated murder cases. But wholly apart from that holding, the analysis of CrR 7.8(a) in this published opinion merits review because it conflicts with the decisions of other Courts of Appeals cited above, and calls into question trial courts' power to enter all sorts of orders that address subjects not specifically addressed in the body of criminal judgments. See RAP 13.4(b)(2), (3) and (4).

CONCLUSION

Review should be granted, and the decision below should be reversed. The trial court's Order should be affirmed or the case remanded with instructions to enter an appropriate order giving effect to the decision that Petitioner is constitutionally entitled to a sentence less than life without parole.

RESPECTFULLY SUBMITTED December 15, 2023.

This document was word processed and consists of 3817 words. RAP 18.17(c).

Tim Ford
Timothy K. Ford, WSBA #5986
Attorney for Petitioner

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

November 28, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. DWAYNE EARL BARTHOLOMEW, Respondent.	No. 57948-1-II PUBLISHED OPINION

PRICE, J. — Forty years after his conviction for aggravated first degree murder under chapter 10.95 RCW, Dwayne E. Bartholomew's sentence of life in prison without the possibility of release was declared unconstitutional. Bartholomew was resentenced to life in prison with the possibility of release, but at the urging of the parties, the sentencing court did not set a minimum term of confinement.

Shortly thereafter, the Indeterminate Sentence Review Board (ISRB) sent a letter requesting that the sentencing court fix a minimum term for Bartholomew's confinement pursuant to RCW 9.95.011. Following the ISRB letter, Bartholomew moved under CrR 7.8(a) for the sentencing court to fix a minimum term, asserting that failing to do so initially was a clerical error. The sentencing court granted Bartholomew's motion and fixed a minimum term of 380 months in confinement with credit for time served.

The State appeals, arguing that fixing a minimum term was outside of the relief available under CrR 7.8(a). The State also argues that fixing a minimum term for Bartholomew's conviction

under chapter 10.95 RCW is not authorized until the legislature amends the sentencing laws. We hold that the sentencing court's order exceeded the relief available under CrR 7.8(a) and reverse.

FACTS

I. BACKGROUND

In 1981, when he was 20 years old, Bartholomew fatally shot an employee of a laundromat during a robbery. Bartholomew was convicted of aggravated first degree murder under 10.95 RCW, and in accordance with the sentencing statute specific to that crime, RCW 10.95.030, he was sentenced to the mandatory sentence of life in prison without the possibility of release.

In 2021, our Supreme Court reversed Bartholomew's sentence. *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 329, 482 P.3d 276 (2021). The Supreme Court determined that mandatory sentences of life in prison without the possibility of release were unconstitutional for defendants under 21 years old who were convicted of aggravated first degree murder. *Id.* at 325-26. The Supreme Court reasoned that there was no meaningful neurological difference between many 17-year-olds and 19- to 20-year-olds and explained that "sentencing courts must have discretion to take the mitigating qualities of youth . . . into account for defendants younger and older than 18." *Id.* at 326. The Supreme Court vacated Bartholomew's sentence and remanded his case for resentencing with the consideration of whether mitigating qualities of youth applied to him. *Id.* at 329.

II. BARTHOLOMEW'S RESENTENCING

A. SENTENCING COURT'S INITIAL DECISION

In January 2022, at his resentencing, Bartholomew argued the Supreme Court's decision in *Monschke* should be construed as extending the exceptions for defendants under 18 years old

included in former RCW 10.95.030 (2015) to defendants under 21 years old. Former RCW 10.95.030 generally requires life imprisonment without the possibility of release and, therefore, no minimum term of confinement:

> 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.

Former RCW 10.95.030(1). But the statute also includes exceptions for youthful offenders. For example, offenders between the ages of 16 and 18 are entitled to receive a minimum term:

> 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.

Former RCW 10.95.030(3)(a)(ii).

Bartholomew primarily argued that, following *Monschke*, the language of the statute meant that, because he was over 18, the sentencing court could *recommend* a minimum term of confinement to the ISRB, but could not *require* a minimum term. Alternatively, Bartholomew argued that *Monschke* should be construed as extending the exception for offenders between the ages of 16 and 18 to those under the age of 21. At that point, the State agreed with Bartholomew's alternative argument and urged the sentencing court to resentence Bartholomew under the exception for those offenders between 16 and 18 in former RCW 10.95.030(3)(a)(ii).

The sentencing court agreed with the State's proposal and orally ruled that it would apply the exception for Bartholomew's resentencing.

B. STATE'S MOTION FOR RECONSIDERATION

Four months later, the State reversed its position. The State moved for reconsideration, arguing that the exception for offenders between 16 and 18 years of age could not be extended to those under 21. The State contended that although the Supreme Court's opinion in *Monschke* made Bartholomew's mandatory life sentence unconstitutional, the sentencing court had no authority under the current sentencing statutes to fix any sort of minimum term.

The State explained that it believed the sentencing court could only impose two possible sentences:

> "[L]ife imprisonment without possibility of release or parole" pursuant to [former] RCW 10.95.030(1)[.]

Clerk's Papers (CP) at 781 (first alteration in original). Or, if Bartholomew's culpability was affected by the mitigating qualities of youth, then the State contended the statute would be modified by the *Monschke* decision as:

> "[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 (severability clause).

CP at 781 (alterations in original). But because former RCW 10.95.030 did not expressly address the setting of a minimum term for offenders over the age of 18, the State argued that no minimum term could be set without an amendment from the legislature.

In response, Bartholomew agreed that former RCW 10.95.030(1) applied, but argued that even if the sentencing court did not set a minimum term, the ISRB, under a different statute, would be able to release him.[1]

Without expressly addressing whether a minimum term was necessary, the sentencing court agreed that former RCW 10.95.030(1) applied and heard arguments from the parties about the role of Bartholomew's youth at the time of his crimes, ultimately determining that Bartholomew "was subject to the mitigating qualities of youth . . . ." CP at 850. Thus, on August 10, 2022, the sentencing court entered a judgement and sentence that imposed a life sentence *with the possibility of release*. As before, the sentencing court did not mention any consideration of a minimum term.

C. BARTHOLOMEW'S CRR 7.8(a) MOTION

About a month after Bartholomew's new sentence was entered, the ISRB sent the sentencing court a letter requesting a minimum term for Bartholomew's sentence. The ISRB's letter cited RCW 9.95.011, which generally requires the sentencing court to set a minimum term during sentencing for convictions before 1984. The statute provides,

> When the court commits a convicted person to the department of corrections on or after July 1, 1986, for an offense committed before July 1, 1984, the court shall, at the time of sentencing or revocation of probation, fix the minimum term. The term so fixed shall not exceed the maximum sentence provided by law for the offense of which the person is convicted.

[1] Bartholomew referenced RCW 9.95.115, which provides, "The indeterminate sentence review board is hereby granted authority to parole any person sentenced to the custody of the department of corrections, under a mandatory life sentence for a crime committed before July 1, 1984, except those persons sentenced to life without the possibility of parole. No such person shall be granted parole unless the person has been continuously confined therein for a period of twenty consecutive years less earned good time[.]"

RCW 9.95.011(1).

The State responded to the ISRB's letter, explaining its position that RCW 9.95.011 did not apply to aggravated first degree murder under chapter 10.95 RCW. The State reasoned that RCW 9.95.011 was a general statute and did not apply because a more specific statute, former RCW 10.95.030, governed sentencing for aggravated first degree murder. The State reiterated the point it made earlier to the sentencing court that there was no authority to impose a minimum term without a legislative fix.

A few weeks later, Bartholomew filed a motion with the sentencing court to set a minimum term. The motion exclusively relied on CrR 7.8(a), which allows the sentencing court to correct "clerical mistakes" "arising from oversight or omission" of the court. CrR 7.8(a). Bartholomew characterized the lack of a minimum term as a clerical error. Adopting the ISRB's position, Bartholomew argued that the more general sentencing statute, RCW 9.95.011, applied and asked the court to impose a minimum term of 360 months.

The State objected. The State argued that Bartholomew's motion exceeded the relief permitted by CrR 7.8(a) because setting a minimum term would not be correcting a clerical error. And the State repeated its position that even if the motion could be considered, the sentencing court had no authority to set a minimum term without a legislative fix.

The sentencing court granted the CrR 7.8(a) motion and set a minimum term, citing the authority in RCW 9.95.011(1). The superior court said that fixing a minimum term was necessary to give effect to Bartholomew's sentence and characterized its initial failure to fix a minimum term as an "oversight." CP at 872. The sentencing court set Bartholomew's minimum term as 380 months with credit for time served.

The State appeals.

ANALYSIS

The State's appeal implicates two separate but related issues: (1) whether a CrR 7.8(a) motion was a proper vehicle for the sentencing court to add a minimum term to Bartholomew's judgment and sentence, and (2) if so, whether the sentencing court was authorized to set a minimum term.

I. FAILURE TO SET A MINIMUM TERM WAS NOT A CLERICAL ERROR

The State argues that the sentencing court erred by granting Bartholomew's CrR 7.8(a) motion. The State asserts the setting of a minimum term was a substantive change, not a clerical error. Bartholomew responds that the sentencing court's initial failure to fix a minimum term was an oversight that warranted correction under CrR 7.8(a). According to Bartholomew, the sentencing court's order fixing a minimum term gave effect to its intent to provide for the possibility of release. We agree with the State.

CrR 7.8(a) allows the trial court to correct judgments when errors within resulted from an oversight or omission. The rule specifically states,

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

CrR 7.8(a). "Clerical errors are those that do not embody the trial court's intention as expressed in the trial record." *State v. Morales*, 196 Wn. App. 106, 117, 383 P.3d 539 (2016), *review denied*, 187 Wn.2d 1015 (2017). "These errors allow for amended judgments to correct language that did not correctly convey the court's intention or 'supply language that was inadvertently omitted from

the original judgment.' " *Id.* (quoting *Presidential Estates Apt. Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). "Errors that are not clerical are characterized as judicial errors, and trial courts may not amend a judgment under CrR 7.8 for judicial errors." *Id*. at 118.

Here, there is no question the sentencing court expressly sentenced Bartholomew to life with the possibility of release. Both the State and Bartholomew agreed that, after *Monschke*, such a sentence was appropriate. But the parties did not agree that a minimum term could be set, with the State arguing that no minimum term was authorized. Notably, following these arguments, the sentencing court did not mention setting a minimum term or cite to any authority that would enable it to set a minimum term.

It was only after the ISRB letter requesting a minimum term that Bartholomew moved for the sentencing court to fix a minimum term, arguing that the failure to do so was a clerical error. The sentencing court agreed with Bartholomew, fixed a minimum term, and characterized its failure to fix a minimum term earlier as an "oversight." CP at 872.

But the sentencing court minimized the significance of its alteration. In the face of strongly divergent arguments from the State and Bartholomew, the sentencing court's silence about a minimum term shows it did not intend to fix one when it entered the judgment and sentence. Whether that decision was based on its belief that it did not have authority to fix a minimum sentence or that it was unnecessary, nothing in the record demonstrates that the failure to fix a minimum term was a mere oversight. It was a substantive addition.

In fact, the sentencing court's decision to switch its statutory basis as authority to fix a minimum term can be seen as an admission that it needed a wholly different statutory foundation for its decision. Regardless of whether the sentencing court's newly adopted authority of RCW

9.95.011(1) for imposing a minimum term is correct or not, the acknowledgment that it needed to rely on different legal authorities shows this was a judicial error or mistake, not a clerical error under CrR 7.8(a).[2] Thus, the relief requested in Bartholomew's motion exceeded the scope of CrR 7.8(a) and the sentencing court erred by granting it. Because we reverse the sentencing court's CrR 7.8(a) order, we do not further address the sentencing court's authority to impose a minimum term.

CONCLUSION

We reverse the sentencing court's CrR 7.8(a) order. Bartholomew's judgment and sentence, entered August 10, 2022, stands.

PRICE, J.

I concur:

LEE, J.

[2] At oral argument, counsel for Bartholomew suggested that we could consider his motion as having been pled under CrR 7.8(b) if we concluded that the order amending the judgment and sentence in this case did not correct a clerical error as contemplated by CrR 7.8(a). Wash. Court of Appeals oral argument, *State v. Bartholomew*, No. 57948-1-II (Sept. 11, 2023), at 17 min., 35 sec. through 17 min., 50 sec. (on file with court). But we are neither permitted to raise an unpleaded claim sua sponte nor consider an entirely new theory for relief of which the opposing party has had no notice or opportunity to rebut. *See Dalton M, LLC v. N. Cascade Tr. Servs., Inc.*, ___ Wn. App. 2d ___, 534 P.3d 339 (2023); RAP 12.1.

But even if Bartholomew had brought a CrR 7.8(b) motion, we agree with the concurrence that relief would not have been appropriate because chapter 9.95 RCW does not apply to sentences for aggravated first degree murder.

CRUSER, A.C.J. (concurring) — I concur with the majority that Bartholomew was not entitled to relief under CrR 7.8(a). In my view, Bartholomew would also not have been entitled to relief under CrR 7.8(b) even if he had sought relief under that provision.

In this case Bartholomew argued, and the trial court agreed, that RCW 9.95.011 allowed the court to set a minimum term of confinement after which Bartholomew would become eligible for parole. I disagree. Because Bartholomew was convicted of aggravated first degree murder under RCW 10.95.020, his sentencing is exclusively governed by RCW 10.95.030. RCW 10.95.030 is, as the State notes, a specific sentencing statute that is "complete and specific, leaving no room for the application of general sentencing statutes." Br. of Appellant at 24. This is unlike ordinary first degree murder, which is prescribed in RCW 9A.32.030 and sentenced under the Sentencing Reform Act of 1981 (ch. 9.94A RCW).

Pursuant to 10.95.030(1) and the legislature's severance provision relating to chapter 10.95 RCW,[3] the only sentence the trial court had the authority to impose in this case was life in prison *with* the possibility of parole—which is the sentence the trial court imposed in the August 15, 2022 order on resentencing. Unfortunately, here, the Indeterminate Sentence Review Board (ISRB) has taken the position that it cannot execute the sentence of the court in the absence of the setting of a minimum term. But the plain language of Bartholomew's sentence makes him eligible for parole without the precondition of a minimum term. If the ISRB believed it could not execute this

[3] Pursuant to LAWS OF 1981, ch. 138, § 22, "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected."

sentence, then the proper procedure would have been for it to file a petition for post-sentence review under RCW 9.94A.585(7) and RAP 16.18(a).

Additionally, it is critical that the legislature enact a statutory provision covering offenders such as Bartholomew who committed aggravated first degree murder while they were 18, 19, or 20 years old, and for whom the trial court has determined that their crime was marked by the youthful offender's " 'immaturity, impetuosity, and failure to appreciate risks and consequences' " of their crime. *State v. Rogers*, 17 Wn. App. 2d 466, 474, 487 P.3d 177 (2021) (internal quotation marks omitted) (quoting, *inter alia*, *Miller v. Alabama*, 567 U.S. 460, 477, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). RCW 10.95.030 currently addresses only those offenders convicted of aggravated first degree murder who were either under the age of 16 when they committed their crime (RCW 10.95.030(2)(a)(i)), or who were at least 16 but under the age of 18 when they committed their crime (RCW 10.95.030(2)(a)(ii)). The offenders convicted of aggravated first degree murder who were 18, 19, or 20 at the time of their crime are not addressed by the statute.[4]

[4] Although I agree with the State that it is incumbent on the legislature to act, and that principles rooted in separation of powers prevents us from rewriting sentencing statutes, I am not prepared to agree with the State's assertion that the only way an offender such as Bartholomew can obtain relief is to institute civil legal action against the ISRB or the legislature, and that the judiciary is powerless to act in the face of restraint that may be unconstitutional. Pursuant to RAP 16.4(c)(6) and (7), the court may grant relief to a personal restraint petitioner who demonstrates that the conditions or manner of the restraint are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or that other grounds exist to challenge the legality of the petitioner's restraint. Bartholomew, it must be noted, did not seek relief in this case pursuant to RAP 16.4.

As we near the third anniversary of our supreme court's decision in *In re Personal Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021), it is long overdue for the legislature to address this situation.

CRUSER, A.C.J.

APPENDIX B

Hon. Michael Schwartz
Department 3

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, v. DWAYNE EARL BARTHOLOMEW. Defendant.	No. 81-1-00579-1 DEFENDANT'S MOTION TO MODIFY ORDER OF OCTOBER 6, 2022 NOTED FOR: December 8, 2023

Defendant Dwayne Bartholomew moves pursuant to CrR 7.8(b) for an order modifying this Court's Order of October 6, 2022, which responded to a request from the ISRB to set a minimum term in this case. Specifically, Defendant asks that the Court clarify that it issued the October 6, 2022 Order pursuant to the authority granted to it by RCW 9.95.030.

Because the Court of Appeals has accepted review in this case, this Motion cannot be granted without the approval of the Court of Appeals pursuant to RAP 7.2(e)(2).

NOTICE

Following argument on the State's appeal from the October 6 2022 Order, Defendant filed a Motion under RAP 7.2(e) in the Court of Appeals for leave to file this Motion. Exhibit 7.[1] The Motion for Leave was denied without explanation. Exhibit 10. However, RAP 7.2(e) does not require appellate courts' permission to file posttrial motions, only to grant them. Because of that, Defendant is filing this Motion to be sure he has preserved the issues it raises. Out of respect for the Court of Appeals, Defendant has noted this Motion far in advance to allow time for the it to issue its decision on the State's appeal, which may clarify the basis for the denial of the RAP 7.2(e) Motion and/or render this Motion moot. He is also notifying the Court of Appeals that this Motion is being filed.

[1] Exhibits cited in this Motion are attached to the Declaration of Timothy Ford filed with it.

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

FACTS UNDERLYING MOTION

On March 11, 2021, the Supreme Court held that the mandatory life without parole sentence Dwayne Bartholomew received for a murder he committed at age 20 violated the State constitution. *Matter of Monschke/Bartholomew*, 197 Wn.2d 305, 482 P.3d 276 (2021). It vacated his sentence and ordered this Court to hold a new sentencing hearing to consider the extent to which he was subject to the mitigating qualities of youth at the time of the crime.

The resentencing was held over two days in July 2022. Sentencing occurred on August 10, 2022. After a review of the record, this Court delivered a lengthy oral opinion in which it concluded that the defendant was subject to the mitigating qualities of youth at the time of the crime and so should have the opportunity to be considered for parole by the ISRB. Exhibit 2 at 7-10. The Court then signed a standard form Judgment a that made clear—twice—that the sentence was imposed "with the possibility of parole or release." Exhibit 1. In doing so, the Court noted that in previous similar cases it had received responses from the ISRB regarding the findings and orders it needed to do to carry out the court's judgment. RP 237.

On September 7, 2022, the Court received a letter from the ISRB asking that the court set a minimum term, which said the Board believed that was necessary to consider Defendant for parole under RCW 9.95.011. Defense counsel accordingly filed a motion to set a minimum term "pursuant to CrR 7.8(a)" to bring the issue before the Court. The State filed an objection, and another hearing was held where the Court confirmed that all parties had understood that the Judgment he issued was intended to make the defendant eligible for parole and entered an "Order Modifying Judgment and Setting Minimum Term" proposed by the defense, which said this:

> RCW 9.95.011(1) requires the Court to fix a minimum term "at the time of sentencing" "[w]hen the court commits a convicted person to the department of corrections."

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

> By oversight, the Judgment and Sentence entered August 10, 2022 did not do so. Neither party has appealed from the Judgment and Sentence entered August 10, 2022, and the time for appeal has run.
>
> The Judgment provided that the Defendant's sentence included "the possibility of parole or release." Fixing a minimum term pursuant to statute is necessary to give effect to that aspect of the Judgment and does not alter it.
>
> It is therefore permissible pursuant to CrR 7.8(a).
>
> Consistent with its sentencing decision and for the reasons set forth therein, the Court determines that the minimum sentence in this case should be 380 months.

October 6, 2022 Order, Exhibit 5.

The State appealed. Its appellate arguments reiterated its position that the Defendant cannot be paroled until the legislature enacts a new law and said that the Court erred in entering the October 6 Order on two technical grounds: that RCW 9.95.011, which requires trial courts to set minimum terms in does not apply to convictions under RCW 10.95.030; and that, even if it did, this Court did not have power to set a minimum term under CrR 7.8(a) because any failure to do so previously was judicial rather than clerical error.

In response, Defendant pointed out that the October 6 Order did not alter the sentence but effectuated it; that RCW 9.95.030 clearly gives the Court the power to respond to requests from the ISRB regarding minimum terms after a judgment has become final; and that the Order could properly have been entered under CrR 7.8(b) as well as CrR 7.8(a). However, at argument the State contended—and some questions from the Court indicated it might rule—that these defense arguments were barred because the October 6 Order had cited RCW 9.95.011 and CrR 7.8(a) instead of these alternate provisions. See Exhibit 7.

Because the case was then pending decision, Defendant moved the Court of Appeals for leave to file a motion modifying the October 6 Order to clarify if it also rested or could on these alternative bases. Exhibit 7. The State opposed the Motion, and it was denied without explanation. Exhibit 10. Because of that, Defendant is filing this Motion to preserve these arguments.

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

ARGUMENT

1. RCW 9.95.030 and CrR 7.8(b) as well as RCW 9.95.011 and CrR 7.8(a) Gave the Court Power to Issue the October 6 Order.

RCW 9.95.030 expressly authorizes trial courts to "indicate to the [ISRB], for its guidance, what, in their judgment, should be the duration of the convicted person's imprisonment" in response to requests from the Board which are submitted to the Court "[a]t the time the convicted person is transported to the custody of the department of corrections …." This statute indisputably gives trial courts the power to provide such "indications" regarding a sentence's "duration" after the judgment sentencing the person to the Department of Corrections has been entered and become final. It conclusively rebuts the State's claim that this Court did not have the power to enter any such Order because it didn't fit the criteria of CrR 7.8(a).

The State has argued, among other things, that Defendant is barred from making this argument because the defense Motion and the October 6 Order granting it referenced RCW 9.95.011 and not RCW 9.95.030. Defendant did not intend by that reference to so limit the Court's power and he does not believe that the Court intended to indicate that its power was so limited. Defendant therefore requests that the Court modify the October 6 Order to state that it was based on the power granted by both these statutes.

1. RCW 9.95.030 Authorized the Court to Answer the ISRB's Request.

RCW 9.95.030 provides:

> At the time the convicted person is transported to the custody of the department of corrections, the indeterminate sentence review board shall obtain from the sentencing judge and the prosecuting attorney, a statement of all the facts concerning the convicted person's crime and any other information of which they may be possessed relative to him or her, and the sentencing judge and the prosecuting attorney shall furnish the board with such information. The sentencing judge and prosecuting attorney shall indicate to the board, for its guidance, what, in their judgment, should be the duration of the convicted person's imprisonment.

By authorizing trial courts to answer inquiries like the one the ISRB submitted to this Court "[a]t the time the convicted person is transported to the custody of the department of corrections" this

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

statute plainly confers power on trial courts to give the ISRB the benefit of their judgment regarding "what … should be the duration of the convicted person's imprisonment" after a sentence has already become final. It does not make that authority depend on the court rules governing post-judgment motions. RCW 9.95.011, on the other hand, requires trial courts to "fix the minimum term" "at the time of sentencing or revocation of probation …." It says nothing about setting or recommending a minimum term any time after "the time of sentencing," so any authority to act beyond that must come from the court rules.

This Court did not address the issue of minimum term "at the time of sentencing." The Court's October 6, 2022 Order set out its judgment regarding the appropriate minimum duration of the Defendant's imprisonment in response to a request from the ISRB. That Order says the Court "determine[d] that the minimum sentence in this case *should be* 380 months" and that "[t]he Defendant *should be* given credit for all time served to date …" (Emphasis added.) It did not purport to "fix" a minimum term. Because of all that, the Court's power to issue that Order may more properly lie in RCW 9.95.030 rather than RCW 9.95.011. Defendant respectfully maintains that power can be found in both places, and in CrR 7.8 and the Court's Order should be modified to reflect that.

2. The October 6 Order should be modified under CrR 7.8(b) to clarify its jurisdictional basis and scope.

CrR 7.8(b) authorizes the Court to modify orders for a number of reasons, including: "(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order; ,,, (4) The judgment is void; or (5) Any other reason justifying relief from the operation of the judgment." CrR 7.8(b) authorizes the Court to modify its October 6 Order on all three of these grounds.

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

If the State is correct, defense counsel was in error by citing RCW 9.95.011 and CrR 7.8(a) instead of RCW 9.95.030 in the motion he filed in response to the ISRB letter and in the proposed Order the Court signed. That was due to a "[m]istake[], inadvertence, …and excusable neglect … in obtaining a judgment or order." This is a completely novel situation. The defense was responding to a request from the ISRB and was attempting to effectuate the Court's decision that it would be unconstitutional to keep the Defendant in prison for life without the possibility of parole because of his youth at the time of the crime. The ISRB's letter said a minimum term was necessary to consider the Defendant for release and cited RCW 9.95.011. Defense counsel's Motion cited that provision because of that, and cited CrR 7.8(a) because the Motion sought only to effectuate the Court's previous decision that the Defendant should be eligible for parole. If that was in error and the motion and proposed order should have cited RCW 9.95.030 instead, or in addition, that was plainly inadvertent and at most constituted excusable neglect.

In addition, if the State's appeal arguments are correct, the October 6 Order is "void" because the Court had no power to enter it under CrR 7.8(a). That is a separate ground for modifying the Order under CrR 7.8(b)(4).

In addition to that, the novel circumstances here—and the gross inequity that would result if the Defendant were forced to serve an unconstitutional sentence because his lawyer cited the wrong statutory basis for a meritorious Motion—constitute another justification for "relief from the operation of the judgment" here. CrR 7.8(b)(5).

In clarifying the basis for the October 6 Order, the Court would also clarify its intent. The State has argued on appeal that by answering the ISRB's query the Court has effectively converted this sentence to one imposed under RCW 10.95.030(2) instead of RCW 10.95.030(1) read in light of *Monschke/Bartholomew.* The Court's Order holding that the Defendant is constitutionally eligible for parole, and its remarks at the time of the entry of the October 6 Order indicate otherwise: that its minimum term was informed by the constitutional considerations that led to its decision allowing the Defendant parole and the factors guiding criminal sentences under the precedents that led to the remand for resentencing and the Sentencing Reform Act.

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

See Exhibit 2 at 7-10; Exhibit 4 at 279-80. To make that clear, the October 6 2022 Order also should be modified to so state.

2. The Court of Appeals' Denial of Defendants' Request for Leave to File this Motion Doesn't Preclude this Court from Provisionally Granting It.

RAP 7.2(e)(2) provides that trial courts can entertain

> actions to change or modify a decision that is subject to modification by the court that initially made the decision. The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion. The decision granting or denying a postjudgment motion may be subject to review**.**

Although this Rule requires "permission of the appellate court … prior to the formal entry of the trial court decision," it does not require a party to obtain permission from the appellate court before filing such a motion, or a trial court to obtain permission before making a "determination" how it will rule.

Defendant nonetheless sought such advance permission from the appeals court here because that Court had just heard argument and taken the case under advisement. Although his Motion was denied, the Order denying it did not forbid him from taking the action in the trial court he had proposed. Neither did any other rule, and the one-year deadline under CrR 7.8(b) will pass October 6, 2023. Defendant has therefore filed this Motion to ensure that there is no basis for denying it on the ground that the deadline has passed.

Defense counsel ordinarily might not take this unusual extra step to insure preservation of such an argument. He has done so here because of the State's demonstrated willingness and intent to use technical procedural arguments to prevent the Defendant from obtaining the release from lifelong imprisonment to which the Court has held he is constitutionally entitled. It would be fully consistent with this track record for the State to argue that, despite the Court of Appeals'

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

denial of his RAP 7.2(e) Motion, he still could have filed this request for modification and failed to do so before the CrR 7.8(b)(1) deadline.

To forestall another round of such arguments, the Defendant is filing this Motion now and noting it for a future date to demonstrate he means no disrespect for the Court of Appeals order.

CONCLUSION

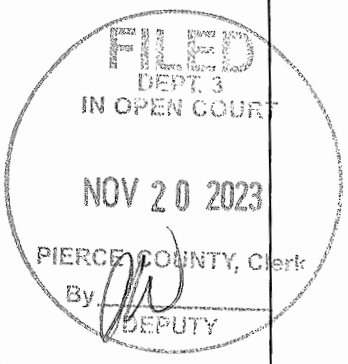
The Proposed Order Clarifying Order of October 6, 2022 should be entered.

DATED this 5th Day of October 2023.

Tim Ford_____
Timothy K. Ford, WSBA #5986
Attorney for Defendant

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

APPENDIX C



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. DWAYNE EARL BARTHOLOMEW, Defendant.	Cause No: 81-1-00579-1 ~~[PROPOSED]~~ ORDER ON DEFENDANT'S CrR 7.8(b) MOTION TO CLARIFY ORDER OF OCTOBER 6, 2022 **CLERK'S ACTION REQUIRED**

THIS MATTER came before the undersigned judge of the above entitled court upon review of the defendant's motion(s) filed on October 5, 2023. After reviewing the defendant's written pleadings, the court now enters the following order:

A. [X] IT IS HEREBY ORDERED that this CrR 7.8(b) motion is transferred to the Court of Appeals, Division II, pursuant to CrR 7.8(c)(2) to be considered as a personal restraint petition. The petition is being transferred because:

[X] it appears to be time-barred under RCW 10.73.090; and/or

[X] if not time-barred, it does not appear that the defendant has made a substantial showing that he is entitled to the relief requested and resolution of the motion will not require an evidentiary hearing.

B. [X] IT IS HEREBY ORDERED that this CrR 7.8(b) motion is transferred to the Court of Appeals, Division II, to be considered as a personal restraint petition. The motion is being transferred because:

[X] it appears to be successive and/or abusive time-barred under case law and RCW 10.73.140 which is applicable to CrR 7.8(b) motions; and/or

[X] the Court of Appeals, Division II, has accepted review of the October 6, 2022, order and that Court has not authorized the trial court to change or modify the order as required by RAP 7.2(e).

If box "A" and/or "B" above are checked, the Pierce County Superior Court Clerk shall forward a copy of this order as well as the following pleadings to the Court of Appeals:

1. Defendant's Motion to Modify Order of October 6, 2022 (Oct. 5, 2023)
2. Order Directing a Response from the State (Oct. 9, 2023)
3. State's Response to Defendant's CrR 7.8(b) Motion (Oct. 18, 2023).

DATED this 20 day of Nov., 2023.

M. Schwartz

Michael Schwartz
Pierce County Superior Court Judge

FILED
DEPT. 3
IN OPEN COURT
NOV 20 2023
PIERCE COUNTY, Clerk
By _____ DEPUTY

Presented by :

/s/ *Pamela Beth* Loginsky
Pamela B. Loginsky
WSBA No. 18096
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 15th day of December 2023, I electronically filed the foregoing with the Clerk of Court using the Washington State Appellate Courts' Portal.

I certify that all participants in the case are registered Washington State Appellate Courts' Portal users, and that service will be accomplished by the Washington State Appellate Courts Portal system.

__/s/__ *Chris Bascom* _____
Legal Assistant

MACDONALD HOAGUE & BAYLESS

December 15, 2023 - 10:56 AM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington, Appellant v. Dwayne Earl Bartholomew, Respondent (579481)

The following documents have been uploaded:

- PRV_Petition_for_Review_20231215105534SC750163_5158.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review with Appendices and Tables.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- pamela.loginsky@piercecountywa.gov
- pcpatcecf@piercecountywa.gov
- pcpatvecf@piercecountywa.gov

Comments:

Sender Name: Timothy Ford - Email: timf@mhb.com
Address:
705 2ND AVE STE 1500
SEATTLE, WA, 98104-1796
Phone: 206-622-1604

Note: The Filing Id is 20231215105534SC750163