No. 101004-4

IN THE SUPREME COURT IN THE STATE OF WASHINGTON

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STATE OF WASHINGTON

v.

JEREMY DUSTIN HUBBARD

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# RESPONSE TO PETITION FOR REVIEW

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**Cases**

A. Identity of Respondent

Jeremy Hubbard is the Respondent to the decision terminating review. The State filed a Petition for Review.

B. Court of Appeals Decision

The Court of Appeals affirmed the trial court's discretion granting his motion to have unsupervised contact with his biological children. Mr. Hubbard agrees with the holding of the Court of Appeals and urges this Court to deny review. If this Court grants review, the Court should also grant review of "issues raised but not decided in the Court of Appeals." RAP 13.4(d).

C. Counterstatement of Issues Presented for Review

1. Did the trial court abuse its discretion when it amended Mr. Hubbard's judgment and sentence to allow contact with his newborn child pursuant to CrR 7.8(b)(5)?

2. Is a motion to amend a judgment and sentence filed within a reasonable time pursuant to CrR 7.8(b)(5) subject to the one-year time bar of RCW 10.73.090?
3. If CrR 7.8(b)(5) motions must be filed within one year of the judgment becoming final, do any of the exceptions of RCW 10.73.100 apply?

D. Statement of the Case

In 2005, Mr. Hubbard committed a serious sex offense and eventually went to prison. Upon completing his prison sentence in 2015, he entered and completed sex offender treatment, maintained stable housing, and got married. Shortly after getting out of prison, Mr. Hubbard obtained employment for Watson Furniture. By the time of the instant motion, he had worked his way up to a management position.

In 2020, Mr. Hubbard's wife got pregnant. Shortly before his daughter's birth, he filed a motion to allow contact with his biological children. The Superior Court granted the order in

part and denied it in part, ordering that he is allowed to have supervised contact with his daughter, including being present for her birth. CP, 76. The Court ruled he could reraise the issue in six months. The State did not appeal from that order.

K.C.H. was born on August 11, 2020. CP, 87. Six months later, Mr. Hubbard again petitioned for unsupervised contact with his daughter. The State objected. At the hearing, the trial court heard uncontroverted evidence that Mr. Hubbard completed sex offender treatment on May 17, 2016. CP, 72. Since completing treatment, Mr. Hubbard has submitted to seven polygraphs, one approximately every six months, on November 5, 2019, April 9, 2019, July 10, 2018, January 29, 2018, July 12, 2017, January 9, 2017, July 11, 2016. With one minor exception, he has passed all of his polygraphs. The exception is January 29, 2018 when he admitted to allowing his girlfriend to drink alcohol in the home and for viewing pornography. His Community Corrections Officer decided not to sanction him for the violations, although he did require him

to report more often and installed Covenant Eyes on his phone and computer. CP, 73.

The Superior Court granted Mr. Hubbard's motion to have unsupervised contact with his daughter, holding it had discretion pursuant to CrR 7.8(b)(5). The Superior Court order reads, "The Defendant is allowed to have unsupervised contact with his children and grandchildren. In the event the Department develops reasonable suspicion that Mr. Hubbard poses a threat to community safety, including to his children and grandchildren, the Department has the authority to reinstate the no contact provisions and/or require that contact be supervised. The Department may immediately impose such conditions as are necessary to ensure community safety on an emergency basis, subject to later review by the Superior Court." CP, 106-07. This time, the State appealed.

The appeal tended to focus on two issues. First, whether the trial court had discretion pursuant to CrR 7.8(b)(5) to grant

the motion. Second, whether Mr. Hubbard's motion was time-barred.

The Court of Appeals affirmed the trial court's discretion. The Court of Appeals issued its unpublished decision on February 1, 2022. The unpublished decision did not address the State's time-bar argument, however. The defense filed a motion to publish, which was granted on February 15, 2022. The State then filed a motion for reconsideration, arguing that the Court of Appeals erred by ignoring its time-bar objection. The Court of Appeals granted the motion in part, issuing an amended decision addressing the time-bar issue. The final, published opinion was issued on April 26, 2022.

As to the first issue, whether the trial court had discretion pursuant to CrR 7.8(b)(5), the Court of Appeals properly concluded it did. As to the second issue, the Court of Appeals concluded Mr. Hubbard's motion was not time-barred. In his original briefing, Mr. Hubbard argued RCW 10.73.090 does not apply to CrR 7.8(b)(5) motions. In the alternative, Mr. Hubbard

argued the exception contained in RCW 10.73.100(2) applies (the community custody provision was unconstitutional "as applied to the defendant's conduct"). As noted, the Court of Appeals' original unpublished decision did not rule on this issue. In its amended published decision, the Court held that although RCW 10.73.090 does apply, the motion was not time-barred pursuant to the exception of RCW 10.73.100(1) (newly discovered evidence). The State filed a Petition for Review.

E. Argument Why Review Should Be Denied

Mr. Hubbard has a constitutional right to parent his daughter, assuming that can be safely done. *State v. LeTourneau*, 100 Wn.App. 424, 997 P.2d 436 (2000). The trial court properly balanced these competing interests and exercised its discretion, entering an ordering allowing him to have contact with his daughter. K.C.H. has been living in the family home for nearly two years with her father and mother without incident. Should this Court reverse the trial court, it would be extremely disruptive for her and her parents, effectively

requiring Mr. Hubbard to wait for his daughter's eighteenth birthday before resuming a relationship with her. The Court of Appeals properly concluded that the trial court had the discretion to permit unsupervised contact with his daughter and that the petition was not time barred. This Court should deny review.

The State in its petition repeatedly asserts Mr. Hubbard presented no evidence to the trial court demonstrating he could safely have contact with his biological children. See State's Petition for Review, 1 ("He presented nothing to contradict the finding of a prior psychosexual evaluation that he would be a danger to minor children who resided with him."); 9 ("Hubbard provided no evidence that his newly "discovered" paternity would make him any less of a danger to a child he resided with."); 10 ("He failed to present any evidence that he was not still a danger to children with whom he resided."); 25 ("The mere fact of paternity is immaterial to the question of whether Hubbard would be a danger to reoffend if he lives in an

unsupervised parental role with a child."). This assertion is completely false.

Mr. Hubbard presented uncontroverted evidence he had completed sex offender treatment, repeatedly passed polygraphs indicating he was strictly complying with his community custody conditions, had steady employment in a job with significant responsibilities, and established a stable family life. All of these things have been shown to reduce recidivism and provide ample support for the trial court's exercise of its discretion. R. Karl Hanson, Andrew J. R. Harris, Elizabeth Letourneau, L. Maaike Helmus, David Thornton, "Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender," Psychology, Public Policy, and Law, Vol. 24, No. 1, 48, 2018.

The State argues the trial court lacked discretion to amend the judgment and sentence pursuant to CrR 7.8(b)(5). See PFR, 26-27, citing *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989). *Shove* is disguisable, however, and does not restrict

the trial court's discretion to modify community custody conditions to account for circumstances that did not exist at the time of the original judgment. In *Shove*, the court sentenced the defendant to twelve months incarceration. After she had served the first five months, she successfully petitioned to reduce the sentence to credit for time served. After examining the language and structure of the Sentencing Reform Act (SRA), this Court reversed, holding that sentencing courts are required to impose a "determinate sentence" and that nothing in the SRA "provides authority for the reduction of Shove's term of incarceration." *Shove* at 86-87. *Accord State v. Harkness*, 145 Wn.App. 678, 186 P.3d 1182 (2008) (trial court erred by modifying 90 month period of incarceration to a DOSA sentence); *State v. Cirkovich*, 42 Wn.App. 403, 711 P.2d 374 (1985) (juvenile court erred by reducing term of incarceration after defendant's unsuccessful appeal).

Subsequent courts have limited *Shove* to its holding that it is improper to modify the term of incarceration after

sentencing, ruling that it does not apply to community custody conditions. *State v. Hayden*, 72 Wn.App. 27, 30, 863 P.2d 129 (1993); *State v. Dana*, 59 Wn.App. 667, 800 P.2d 836 (1990). *See, also, State v. Richard*, 58 Wn.App. 357, 792 P.2d 1279 (1990) (Court, in dicta, condoned post-sentencing modification of judgment to add curfew requirement). In *Hayden*, the juvenile prosecutor successfully sought to modify the conditions of community supervision to include a provision prohibiting contact with children less than two years younger. In *Dana*, the trial court modified the sentence to allow the defendant to attend a welding class. The *Hayden* Court distinguished *Shove* and *Cirkovich* saying, "First, the defendants in both cases had obtained outright reductions of their terms of confinement, whereas the order here merely modified the conditions of Hayden's community supervision." *Hayden* at 30, citing *State v. Dana*. The trial court was well within its discretion to grant Mr. Hubbard's CrR 7.8(b)(5) motion.

While the State's Petition does object to the trial court's exercise of discretion pursuant to CrR 7.8(b)(5), the State's primary concern, and the one to which it devotes the lion's share of its brief, is the alleged time-bar issue. RCW 10.73.090 requires a motion for collateral attack to be filed within one year of the conviction becoming final. Although the Court of Appeals concluded RCW 10.73.090 applies to Mr. Hubbard's motion, it also concluded his motion included "newly discovered evidence," a recognized exception to the one-year time bar. The State devotes 18 pages of its Petition to this issue. While Mr. Hubbard believes review should be denied, he does concede that this is an area of the law where further clarification would be of assistance to trial courts.

As Mr. Hubbard argued in his Court of Appeals briefing, RCW 10.73.090 does not apply to CrR 7.8(b)(5) motions. CrR 7.8(b) reads:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court

> may relieve a party from a final judgment, order, or proceeding for the following reasons:
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (4) The judgment is void; or
> (5) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

In accordance with the last paragraph, CrR 7.8(b) motions shall be brought within a "reasonable time." Mr. Hubbard first brought the motion three months before his daughter's birth and renewed the motion, as suggested by the Superior Court's original order, six months later. The motion was brought within a reasonable time. The Court of Appeals

concluded his motion was brought within a reasonable time, and it is difficult to conceive how Mr. Hubbard could have brought the motion any earlier.

Nevertheless, the State argued the motion was not brought within one year, in violation of RCW 10.73.090. But motions brought pursuant to CrR 7.8(b)(5) need not be brought within one year. There are two possible ways to read the final paragraph of CrR 7.8(b).

> 1) The motion shall be made within a reasonable time;
> 2) and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140.

Or,

> 1) The motion shall be made within a reasonable time;
> 2) and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken;
>
> and is further subject to RCW 10.73.090, .100, .130, and .140.

Read properly, the dependent clause "and is further subject to RCW 10.73.090, .100, .130, and .140." modifies "for reasons

(1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken" and does not modify "the motion shall be made within a reasonable time." The requirement that the motion be subject to RCW 10.73.090 does not apply to reasons (3), (4), and (5).

The issue of how properly to interpret CrR 7.8(b) invokes two competing rules of statutory construction. On the one hand, the series-qualifier rule says that a modifying phrase that comes at the end of the list modifies all subjects on the list. On the other hand, the last antecedent rule says that the modifying phrase modifies only the last subject of the list. Washington does not apply either the series-qualifier rule or last antecedent rule in a rigid manner but looks for structural and contextual evidence in properly interpreting the clause. *PeaceHealth v. DOR*, 9 Wn.App.2d 775, 449 P.3d 676 (2019). As the United States Supreme Court recently emphasized, the series-qualifier rule cannot be construed in a vacuum and must give way when it would yield a "contextually implausible outcome" *Yellen v.*

*Confederated Tribes of the Chehalis Reservation,* __ U.S. __, 141 S.Ct. 2434, 210 L.Ed.2d 517 (2021). It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. *Yellen* at 2448.

Read in context, the most logical approach is to apply the last antecedent rule, rather than the series-qualifier rule, to CrR 7.8(b). It makes no sense to require that motions brought pursuant to CrR 7.8(b)(3)-(5) be subject to the one-year time bar of RCW 10.73.090. Judgments obtained by fraud affect the underlying validity of the judgment and should be corrected within a reasonable time of the discovery of the fraud regardless of the one-year time bar. Similarly, void judgments, generally defined as judgments issued by a court that lacked subject-matter jurisdiction, should not be allowed to stand despite the fact that more than one year has passed. Finally, given that CrR 7.8(b)(5) is generally limited to circumstances that did not exist at the time the judgment was entered, it makes sense to require

the motion be brought within a reasonable time after the advent of whatever new circumstance prompted the motion without regard to the one year time bar.

The conclusion that CrR 7.8(b) is subject to the last antecedent rule rather than the series-qualifier rule is consistent with the few cases that discuss the issue. In *State v. Hardesty*, 129 Wn.2d 303, 915 P.2d 1080 (1996) this Court said that an attack on a judgment obtained by fraud could be brought "within a reasonable time, even if more than one year after the judgment is entered." *Hardesty* at 315. In *State v. Zavala-Reynoso*, 127 Wn.App. 119, 122-23, 110 P.3d 827 (2005) the Court of Appeals said that motions pursuant to subsections (4) and (5) must only be brought within a reasonable time and are not subject to the one-year requirement of RCW 10.73.090. Mr. Hubbard's motion pursuant to CrR 7.8(b)(5), which was unquestionably brought within a reasonable time, is not subject to the one-year time bar of RCW 10.73.090.

This interpretation is also consistent with the interpretation of the similarly worded CR 60. Specifically, CrR 60(b)(11) authorizes civil judgments to be vacated for "[a]ny other reason justifying relief from the operation of the judgment," a word-for-word recitation of CrR 7.8(b)(5). A motion to vacate a civil judgment pursuant to CR 60(b)(11) need only be brought within a reasonable period of time. *Ellison v. Process Systems Inc.,* 112 Wn.App. 636, 661, 50 P. 3d 658 (2002) (motion brought more than two years after the judgment); *Suburban Janitorial Services v. Clark American*, 72 Wn.App. 302, 863 P.2d 1377 (1993) (17 months). A motion to vacate a void civil judgment is not subject to the one-year time bar and may be brought at any time, even several years after the fact. *Servatron v. Intelligent Wireless Products*, 186 Wn.App. 666, 679, 346 P.3d 831 (2015).

The Court of Appeals has emphasized the need to avoid strict time-bars for motions brought under the "any other reason" clauses of CrR 7.8(b)(5) and CR 60(b)(11). "The

finality of judgments is an important value of the legal system. However, in both civil and criminal cases, circumstances arise where finality must give way to the even more important value that justice be done between the parties. CR 60 is the mechanism to guide the balancing between finality and fairness." *Suburban Janitorial Services v. Clark American* at 313. This Court should interpret CrR 7.8(b)(5) to require only that the motion be brought within a reasonable period of time and not subject to a one-year time bar.

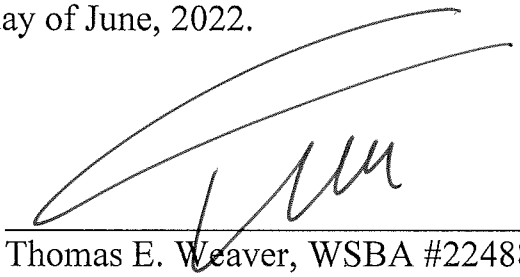
Should this Court conclude RCW 10.73.090 does create a one-year time bar, it should also conclude one of two exceptions apply. The Court of Appeals concluded RCW 10.73.100(1) applies because Mr. Hubbard's newborn daughter constitutes newly discovered evidence. In the alternative, a general restriction that prohibits a person from having contact with minors is an unconstitutional provision when applied to a person's biological children. RCW 10.73.100(2). *State v. LeTourneau*, 100 Wn.App. 424, 997 P.2d 436 (2000).

F. Conclusion

This Court should deny review. In the alternative, it should grant review of all issues raised by both parties.

This Response to Petition for Review contains 3017 words.

DATED this 14th day of June, 2022.



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