NO. 101691-3

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

JOHN T MCWHORTER,
Respondent.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 55774-6-II
Kitsap County Superior Court No. 97-1-00660-9

STATE'S PETITION FOR REVIEW

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	Lise Ellner Po Box 2711 Vashon, Wa 98070-2711 Email: liseellnerlaw@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 3, 2023, Port Orchard, WA _____ **Original e-filed at the Supreme Court; Copy as at left.** **Office ID #91103** kcpa@kitsap.gov

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I. IDENTITY OF RESPONDENT

The State of Washington asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals unpublished decision in *State v. McWhorter*, No. 55774-6-II (Nov. 8, 2022), in which the Court held that a CrR 7.8 order granting resentencing was not an appealable order. The State's motion for reconsideration was denied on January 12, 2023. A copy of the Court's decision and order denying reconsideration are attached as an Appendix.

III. ISSUES PRESENTED FOR REVIEW

Whether three of the four criteria set forth in RAP 13.4(b) are met, and this Court should thus accept review of the decision of the Court of Appeals, where:

1. The Court of Appeals decision conflicts with the

decision of this Court in *State v. Waller*, 197 Wn.2d 218, 481 P.3d 515 (2021), which held that granting of relief under CrR 7.8 amounts to vacating the judgment, and that no magic words need be uttered to make that ruling appealable.

2. The Court of Appeals decision conflicts with the decisions of the Court of Appeals in *State v. Whittington*, ___ Wn. App. 2d ___, 2023 WL 356027, *2 (Jan. 23, 2023), and *State v. Hughes*, 18 Wn. App. 2d 1020, 2021 WL 2935863 *1-2 (2021) (trial court's ruling ordering resentencing was appealable by the State as a matter of right); and

3. The petition involves an issue of substantial public interest that should be determined by this Court because it significantly limits the State's already narrow right to appeal, and forces the trial court and victims or survivors to go through a resentencing proceeding that may be unnecessary?

IV. STATEMENT OF THE CASE

The facts of this rape case were summarized in the direct

appeal opinion of the Court of Appeals:

> The victim of Counts I and II was B.W. She was at the home of her boyfriend, James Mickelson, on the morning of July 12, 1997, when McWhorter and co-defendant Anton Robinson forced their way in. McWhorter brandished a handgun and Robinson had a sawed-off shotgun. They locked Mickelson in the bathroom and forced B.W. at gunpoint to have oral and vaginal intercourse with them both. Each one raped her while the other held the gun to her head. Also, they both had vaginal and oral intercourse with her at the same time. Mickelson, from inside the bathroom, could hear B.W. screaming. Thereafter, McWhorter and Robinson brought Mickelson out of the bathroom and forced him at gunpoint to have intercourse with B.W. Throughout the incident, according to B.W., McWhorter was the instigator and was "pumping up" Robinson, stating it was "time to start killing people." McWhorter told Robinson to shoot B.W. because he did not want to leave a witness behind, and both men threatened to kill B.W.'s two sons.

CP 43 (*State v. McWhorter*, 95 Wn. App 1020 (1999) (unpublished)).

The events following the rapes are described in the statement of probable cause filed with the original information:

> At approximately 9:20 that same day,

moments after the rape occurred at Mickelson's residence, Nikole Patton reported that she was parked behind her house at 908 Park Street, Bremerton, when she noticed two black males approach her. One of the black males was light skinned and pulled what appeared to be a sawed off shotgun. He then demanded Patton's money and the keys to her car. When Patton's dog began barking the other suspect told her that the whole thing was just a joke. Both suspects then left the scene. Patton related that she was very concerned for her safety and believed they intended to rob her at first.

Officers continued their investigation by contacting Muriele Henslee at 1510 Snyder Ave., unit #6. Henslee related that she was familiar with individuals named "Yellowjacket" and "JR" and they had been over to her house earlier on the morning of July 12, 1997. She described "Yellowjacket" as a light skinned black male about 16 to 18 years old. She said that "JR's" mother's name is Tanya who lives at 1336 Rainier Ave.

Officers then went to 1336 Rainier Avenue and spoke with Quan McWhorter. Quan said that "JR" was his uncle, John McWhorter. John McWhorter's mother's name is Tanya Porter.

Officers recontacted Muriele Henslee. After being shown the 6 person photo montage, Henslee correctly identified John McWhorter as the person she knew as "JR".

On July 13, 1997, at approximately 3:58 a.m., Bremerton Police Department officers were

advised of a shooting at 1011 4th Street, Bremerton, Kitsap County, Washington. Officers responded to the scene and found the victim, Kevin Lee Johnson, laying on the ground of the residence. Johnson was covered in blood and there was a large area blood on the kitchen floor. A bullet hole was found in a nearby microwave oven door. Johnson was not able to give any details other than statements that he was in pain. Johnson was transported to Harborview Emergency. Officers spoke to nearby resident Zack Martin who advised hearing loud "thuds" coming from the direction of 1011 4th Street. Shortly after hearing the noise, Martin observed two black males running from the area of 1011 4th Street. He described the first subject as a black male, wearing a black ski mask, bright red jacket, and dark pants. The second subject was described as shorter and heavier than the first, and had braids in his hair.

At approximately 4 :05 a.m. that same morning, Officers responded to a report of an armed robbery at 4th Street and High Ave. (the park at Coontz Field). Officers contacted victim Layton Lucas Corin at the scene. Corin advised he was at the park when a Ford Bronco with a dark stripe down the side pulled up next to him. Corin thought the Bronco was tan in color. Corin said he knew the passenger by the street name of "Lil Duece" [sic]. The passenger pointed a sawed off shotgun out the window and said "break yourself" to Corin, what Corin in understood as gang slang for "give me all your stuff". Lil Duece exited the vehicle with the driver, who was armed at the time with a small revolver. The two suspects then

robbed Corin at gunpoint, taking his jewelry, shoes and the money from his wallet. Some of Corin's jewelry had Nike brand insignias which were very unique.

B.P.D. officer Carver began a wide search for the Bronco in the area. At the intersection of Baer Blvd. and Gaylan Dr., officer Carver observed a silver colored Ford Bronco with black stripe approaching Arsenal Way. The officer followed the vehicle which rapidly accelerated. The officer followed until both vehicles reached 70 m.p.h. in a 20 m.p.h. zone. The Bronco then rammed the locked gate at Marine Park. The Bronco stopped. The driver and passenger exited the vehicle and ran toward Jackson Park Naval Housing. The officer followed them, but lost track. Officer Carver returned to the Bronco and performed a search. The officer found a pump action shotgun with short barrel on the passenger floor, a tennis shoe next to the shotgun, a six hole steel revolver cylinder section on the driver's front floor boards, and a matching tennis shoe on the rear seat. The Bronco was reported stolen out of Tacoma by the owner, Brandon Wells.

At approximately 9:45 a.m. the same morning, officers recontacted witness Muriele Henslee. Henslee said that the morning of July 12, 1997, when "Yellowjacket" and "JR" came to her residence, "JR" was wearing jewelry which appeared brand new, including a gold ring that had a Nike emblem on it. Henslee also said that the two suspects had come to her residence in a silver Bronco. Officers showed Henslee a picture of the

> Ford Bronco which crashed into the locked gate at Marine Park. Henslee indicated the vehicle in the picture was the same vehicle she saw the two suspects arrive in.
>
> On July 14, 1997, officers created another photo montage using a picture of Anton Robinson, whom officers suspected might be "Yellowjacket" based on a previous police report which linked Robinson to that street name.
>
> Officers recontacted Layton Lucas Corin , victim of the robbery. Upon being shown the photo montage, Corin picked out Robinson's photo and indicated this was the person who had robbed him.
>
> Officers recontacted Bradley James Mickleson, [sic] witness to the rape, and showed him the photo montage. He immediately pointed to Robinson's photo, replying, "That's the dude, I'll never forget him."

CP 4-6.

McWhorter pled guilty to one count of first-degree and one count of second-degree rape of BW and one count first-degree robbery of Corin, each with a firearm enhancement. CP 14, 19, 30. The State agreed to recommend of a standard range sentence. CP 15, 20, 32. The trial court nevertheless imposed an exceptional sentence on Count I of 316 months, and standard

range sentences of 102 months on Count II and 68 months on Count III. CP 35. The court also imposed three consecutive firearm enhancements of 60 months each, for a total of 496 months. *Id.* The court made the following findings in support of the exceptional sentence:

> (A) Under the rationale of *State v. Tulley*, 83 Wn. App. 750 (1996), *affirmed*,·134 Wn.2d 176 (1998), the defendant manifested deliberate cruelty toward the victim of the crime.
>
> (B) Under the rationale of State v. Herzog, 69 Wn. App. 521, *review denied*, 122 Wn.2d 1021 (1993), the defendant engaged in multiple sexual acts against the victim and those multiple acts were not part of the plea agreement.
>
> (C) Under the rationale of *State v. Perez*, 69 Wn. App. 133, *review denied*, 122 Wn.2d 1015 (1993), the underlying facts of Count I are especially egregious. ·
>
> (D) This defendant, as well as the co-defendant, raped the victim while a gun was held to her head.
>
> (E) The defendant forced both oral and vaginal sex upon the victim.
>
> (F) The victim's boyfriend, who was present for the rape, was forcibly made to engage in sexual acts with the victim.
>
> (G) The defendant threatened to kill the victim, her son, and her boyfriend during the rape.

> (H) The rape extended over a protracted period of time.
>
> (I). The defendant was the instigator of the rape and stated, during the rape, that it was time to start killing people.
>
> (J) The acts of the defendant are significantly greater and significantly more egregious than those required to meet the elements of Rape in the First Degree.
>
> (K) The defendant engaged in multiple sex acts against the victim with his co-defendant.
>
> (L) Simultaneous acts of sexual intercourse by both co-defendants.

CP 28-29. The court also held that these reasons "taken together or considered individually, constitute sufficient cause to impose the exceptional sentence" and that it would impose the same sentence if only one of the reasons listed were held to be valid. CP 29.

On appeal, the Court of Appeals affirmed McWhorter's exceptional sentence, but reversed the consecutive firearm enhancements, in accordance with then-controlling precedent. CP 47-48 (*citing In re Charles*, 135 Wn.2d 239, 253-54,955

P.2d 798 (1998)). The court specifically rejected the claim that his sentence was unjustified or excessive:

> The trial court's twelve findings actually constitute three aggravating factors: (1) the defendant manifested deliberate cruelty toward the victim; (2) the crime involved multiple sexual acts and (3) the defendant was the instigator of the crime. Deliberate cruelty is a statutory aggravating factor justifying an exceptional sentence. It can include gratuitous violence or other conduct that inflicts physical, psychological or emotional pain on the victim as an end in itself. In order to commit first degree rape, McWhorter had to have engaged in sexual intercourse with the victim by forcible compulsion while he or his codefendant used or threatened to use a deadly weapon, or feloniously entered the building where the victim was located. RCW 9A.44.040(1). Everything else McWhorter did was gratuitous. That included threatening to kill the victim's sons and her boyfriend, forcing her to submit to simultaneous penetrations, and continuing these activities over a 2½-hour period.
>
> Multiple penetrations of the rape victim can also support an exceptional sentence. Multiple acts prolong the period of danger and degradation endured by the victim and thus establish a level of culpability greater than the Legislature contemplated for a single act of first degree rape. McWhorter contends that the multiple and simultaneous sex acts should not be considered because they go beyond the scope of the plea agreement. However, these acts are part and parcel

of the offense, which the sentencing court may consider as part of the immediate context of the charged crime.

McWhorter does not challenge the finding that he was the instigator of the crime, and that, too, is a basis for an exceptional sentence.

By threatening the lives of the victim's children and boyfriend, by committing multiple acts of intercourse with the victim, by being the instigator of the crime and encouraging his accomplice to commit similar acts, and by subjecting the victim to simultaneous rapes, McWhorter went above and beyond that which the Legislature contemplated for culpability for first degree rape. These criminal acts had a profound impact on· the victim, bringing about nightmares and depression, making her reclusive, and causing a fear of men so generalized that she has difficulty even being in the company of her own sons. The trial court had a firm basis for its finding that McWhorter's conduct was more egregious than typical, justifying an exceptional sentence.

Neither is the sentence clearly excessive. The length of an exceptional sentence will not be set aside as clearly excessive unless it constitutes an abuse of discretion, i.e., if the sentence is based on untenable grounds or is an action no reasonable judge would have taken. The aggravating factors discussed above provide a tenable basis for the sentence imposed. The fact that McWhorter's co-defendant got a lesser sentence is not determinative. The facts of this case demonstrate that McWhorter, as the instigator of the crime, had

a significantly different role in the crime.

CP 45-47 (footnotes omitted).

The mandate issued on July 21, 1999. CP 41. The trial court entered an order amending the judgment and sentence in compliance with the mandate on September 10, 1999. CP 49.

McWhorter thereafter filed a personal restraint petition based on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which the Court of Appeals dismissed as untimely. *In re McWhorter*, No. 31914-4-II (Apr. 25, 2005), *review denied*, No. 77144-8 (Sep. 8, 2005). He also filed a federal habeas corpus petition that was denied as untimely. *McWhorter v. Swensen*, 2006 WL 3386861 (W.D. Wash. Nov. 21, 2006). McWhorter next filed another PRP, alleging that the superior court lacked jurisdiction over him at the time he was sentenced. The Court of Appeals rejected that claim on its merits. *In re McWhorter*, No. 36395-0-II (Feb. 26, 2008).

McWhorter filed the present petition as a CrR 7.8 motion on August 8, 2016. CP 66. The trial court transferred the motion to the Court of Appeals for consideration as a PRP. CP 67 (*In re McWhorter*, No. 49557-1-II). CP On November 3, 2020, the Court of Appeals entered an order remanding the matter to "to the superior court for further consideration of whether his motion is time barred in light of *Ali* and *Domingo-Cornelio*." CP 70.

McWhorter thereafter filed his "Memorandum of Law in Support of Resentencing." CP 71. Following a stay pending the certiorari petitions in *Ali* and *Domingo-Cornelio*, the State filed its response to McWhorter's memorandum of law, and further asked that the matter be returned to the Court of Appeals because McWhorter's motion for resentencing lacked substantive merit. CP 77. After a hearing, the court ordered a resentencing:

> Because Mr. McWhorter's motion is not time barred and he has made a substantial showing that

> he is entitled to relief, the State's motion to transfer Mr. McWhorter's Motion to the Court of Appeals as a PRP is DENIED.
>
> A resentencing hearing shall be scheduled at the earliest convenient date.

CP 170.

The State filed a timely notice of appeal. CP 172. In its briefing the State argued that McWhorter had failed to show entitlement to resentencing.

The Court of Appeals dismissed the appeal without reaching the merits, ruling:

> Here, the order denying the State's motion to transfer McWhorter's CrR 7.8 motion is not appealable under any provision of RAP 2.2(b) nor does it necessarily vacate McWhorter's judgment and sentence. Further, the superior court's order granting resentencing, in this case, does not necessarily vacate McWhorter's judgment and sentence. McWhorter did not request that the superior court vacate his judgment and sentence, and nothing in the superior court's oral ruling or written order states that McWhorter's judgment and sentence is vacated prior to the resentencing. Based on the record before this court, McWhorter's judgment and sentence was not necessarily vacated by the superior court's order.

> Accordingly, neither portion of the superior court's order is appealable by the State.

Opinion, at 3-4.

V. ARGUMENT

THIS COURT SHOULD ACCEPT REVIEW OF THE COURT OF APPEALS DECISION BECAUSE THREE OF THE FOUR CONSIDERATIONS SET FORTH IN RAP 13.4(B) SUPPORT ACCEPTANCE OF REVIEW.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should accept review three of these four criteria are met. The Court of Appeals decision conflicts with the decision

of this Court in *State v. Waller*, 197 Wn.2d 218, 481 P.3d 515 (2021), which held that granting of relief under CrR 7.8 amounts to vacating the judgment, and that no magic words need be uttered to make that ruling appealable. It also conflicts with the decisions of the Court of Appeals in *State v. Whittington*, ___ Wn. App. 2d ___, 2023 WL 356027, *2 (Jan. 23, 2023) ((“The trial court’s order granting Whittington’s CrR 7.8(b)(4) motion for resentencing served to vacate Whittington’s judgment and sentence.”), and *State v. Hughes*, 18 Wn. App. 2d 1020, 2021 WL 2935863 *1-2 (2021) (trial court’s ruling ordering resentencing was appealable by the State as a matter of right). Finally, the petition presents an issue of substantial public interest that should be determined by this Court because it significantly limits the State’s already narrow right to appeal, and forces the trial court and victims to go through a resentencing proceeding that may be unnecessary.

Although it cites to the case, the opinion below is in

direct conflict with the relatively recent decision of this Court in *Waller*.[1] The procedural facts of *Waller* are virtually identical to those here:

> In this case, however, the superior court did not clearly state that it was "arresting or vacating" Anthony Waller's judgment, or even granting his motion, in its first order on his CrR 7.8 motion. Instead, it skipped straight ahead to ordering a resentencing hearing.

Waller, 197 Wn.2d at 219–20. The ruling of the Court of Appeals in *Waller* was almost identical to that in this case:

> The Court of Appeals then held that under RAP 2.2(b)(3) and CrR 7.8(b), the State had no right to appeal. It reasoned that the State may appeal only from "an order vacating a judgment," but where "the court does not amend the sentence, the judgment remains in effect." It began with the premise that CrR 7.8(b) motions "'do[ ] not affect the finality of the judgment or suspend its operation'" and "[t]he uncontroverted record establishe[d] the court did not amend the judgment and sentence," and then concluded that the trial court had not vacated the judgment. The Court of Appeals rejected the argument that the superior

[1] McWhorter agreed in superior court that under *Waller*, the trial court's ruling was appealable as of right. RP (4/30) 3. The issue was not raised in the Court of Appeals.

> court's decision "grant[ing] Waller's CrR 7.8(b)(5) motion" and scheduling a resentencing hearing vacated the judgment.

Waller, 197 Wn.2d at 224 (citations omitted).

This Court reversed, finding that granting of relief under CrR 7.8 amounts to vacating the judgment, and that no magic words need be uttered to make that ruling appealable:

> We acknowledge that we have also stated that a judgment may not be "vacated by implication." *Wagner v. N. Life Ins. Co.*, 70 Wash. 210, 212, 126 P. 434 (1912). But a court need not speak the magic words, "this judgment is vacated," either. For example, an appellate court that "reverses a sentence ... effectively vacates the judgment," even if it does not use the word "vacate" in its opinion. *In re Skylstad*, 160 Wn.2d 944, 954, 162 P.3d 413 (2007). After the appellate court reversed Skylstad's sentence "there was no valid judgment." *Id.* Although the appellate court on Skylstad's direct appeal had not *stated* that it "vacated" Skylstad's sentence, *State v. Skylstad*, until Skylstad had been resentenced, there was "no judgment for Skylstad to collaterally attack" because his judgment had been vacated. 160 Wn.2d at 954. *Granting a CrR 7.8 motion similarly vacates the old sentence until the defendant can be resentenced*.

Waller, 197 Wn.2d at 227–28 (footnote omitted, emphasis

supplied).

The Court in *Waller* noted that some of the confusion arose in that case because the superior court did not follow the requirement in CrR 7.8(c)(3) that it schedule a show-cause hearing granting the motion. Here, however, the after the Court of Appeals ordered the superior court to reconsider its conclusion that the motion was time barred, both McWhorter and the State briefed the issues. Counsel's post-remand briefing was titled "Memorandum of Law in Support of Resentencing." CP 72. In his original pro se CrR 7.8 motion, McWhorter's prayer for relief asked the court to "reverse his sentence and conduct a new sentence hearing." CP 65. The State's response/motion addressed both whether the superior court should retain the matter and why McWhorter was not entitled to relief. CP 77 ("State's Response to Memorandum of Law re Resentencing and Motion to Transfer to Court of Appeals"). In his reply, McWhorter again asked the court to order

resentencing. CP 165.

With that framing of the issues the trial court entertained oral argument on the matter. Although the issues presented at the hearing compressed the consideration of the issues presented under CrR 7.8(c)(2) (whether to transfer) and (3) (whether to grant relief) into a single hearing, the parties had briefed both issues and the court considered them as separate questions.

After the hearing the trial court denied the State's motion to return the case to the Court of Appeals and granted McWhorter's motion to hold a resentencing hearing, which it ordered to be scheduled "at the earliest convenient date." If that were not clear enough, the trial court's oral ruling made it quite plain it was ordering a resentencing. *See In re Yates*, 17 Wn. App. 772, 773, 565 P.2d 825 (1977) (an appellate court may utilize the trial court's oral opinion to clarify formal findings). It first concisely stated the issue before it at the hearing:

> [T]he major issue before the Court is whether or not Mr. McWhorter could show he is actually and substantially prejudiced in order to be entitled to a resentencing in Superior Court.

RP (4/19) 17. This is a paraphrase of the standard under CrR 7.8(c)(2)(1). It concluded that McWhorter had met that burden, and further that on the merits, he was entitled to resentencing:

> So I am finding, because *Houston-Sconiers* says it's required that you have to consider mitigating circumstances at sentencing, Judge Conoley did not do that. I'm not faulting her for not doing it. She didn't do it because the law didn't allow her to do it, and it is because of that that I am going to deny the State's motion [to transfer to the Court of Appeals], and *the matter will be continued for resentencing* in Superior Court.

RP (4/19) 18-19. Finally, if *that* were not clear enough, McWhorter indicated that he was ready to immediately proceed to resentencing. RP (4/19) 19. In setting the matter out, the court's response was not that it had not ordered resentencing, but that it was not prepared to proceed at that time:

> I think we need to continue it. I don't have new standard ranges, I don't have briefs about sentencing, so the Court is not really prepared to

resentence him today either.

RP (4/19) 19. [2]

Under indistinguishable circumstances, *Waller* held that "the intent and effect of the trial court's orders was nevertheless clear: the trial court intended to, and did, grant Waller's CrR 7.8 motion to vacate." *Waller*, 197 Wn.2d at 229. The Court further concluded that under those circumstances, "RAP 2.2(b)(3) gives the State the right to appeal that order *without waiting for the resentencing hearing*." *Waller*, 197 Wn.2d at 229; *see also Whittington*, 2023 WL 356027, at *2 ("The trial court's order granting Whittington's CrR 7.8(b)(4) motion for resentencing served to vacate Whittington's judgment and sentence."); *Hughes*, 2021 WL 2935863 at *1-2 (trial court's ruling ordering resentencing was appealable by the State as a matter of right).[3]

In view of the foregoing it is plain that the Court of

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[2] The CrR 7.8 judge was not the original trial judge.

[3] *Whittington* and *Hughes* are unpublished. *See* GR 14.1(a).

Appeals decision directly conflicts with the two-year-old holding of *Waller.* Review should be granted.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant review of the decision of the Court of Appeals and remand the matter to that court for resolution of the appeal on its merits.

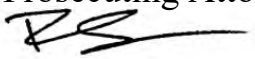
VII. CERTIFICATION

This document contains 4,350 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED February 3, 2023.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney



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APPENDIX

Filed
Washington State
Court of Appeals
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. JOHN MCWHORTER, Respondent.	No. 55774-6-II UNPUBLISHED OPINION

LEE, J. — The State appeals the superior court's order denying its motion to transfer John McWhorter's CrR 7.8 motion to this court and granting a resentencing hearing. Because the superior court's order is not appealable under RAP 2.2(b), we dismiss the State's appeal.

FACTS

In 1997, McWhorter pleaded guilty to first degree rape, second degree rape, and first degree robbery all with firearm sentencing enhancements. McWhorter was 17 years old at the time of the crimes.

Per the plea agreement, both McWhorter and the State argued for a sentence within the standard sentencing range, which was 120-158 months for the first degree rape plus a 60 month firearm sentencing enhancement, 77-102 months on second degree rape plus a 60 month firearm sentencing enhancement, and 51-68 months on first degree robbery plus a 60 month firearm sentencing enhancement. However, they disagreed about how the three firearm sentencing enhancements should be imposed—consecutively or concurrently.

Despite the plea agreement, the sentencing court imposed a sentence of 496 months total confinement, which included an exceptional sentence of 316 months and three consecutive 60 month firearm sentencing enhancements. Following appeal, McWhorter's sentence was amended to order the firearm sentencing enhancements to run concurrent to each other but consecutive to the exceptional upward sentence. This resulted in 376 months of total confinement.

In August 2016, McWhorter filed a motion to modify his judgment and sentence to consider youth as a mitigating factor. The motion was transferred to this court for consideration as a personal restraint petition (PRP) because the superior court determined the motion was time barred. We stayed consideration of the PRP pending the outcome of various cases addressing juvenile sentencing. *See* Order Remanding CrR 7.8(c) Transfer Order, *In re Pers. Restraint of McWhorter*, No. 49557-1-II (November 3, 2020); Letter Ruling, *In re Pers. Restraint of McWhorter*, No. 49557-1-II (January 17, 2020). We then remanded the case back to the superior court for further consideration in light of recent Supreme Court opinions addressing juvenile sentencing. Order Remanding CrR 7.8(c) Transfer Order, *In re Pers. Restraint of McWhorter*, No. 49557-1-II (November 3, 2020).

McWhorter filed a memorandum arguing that he was entitled to resentencing because it was clear that his youth was not considered as a mitigating factor in his sentencing. The State moved to transfer McWhorter's motion back to this court because McWhorter could not make a substantial showing that he was entitled to relief. The State argued that McWhorter was unable to make a substantial showing that he is entitled to relief because he could not show actual and substantial prejudice.

The superior court concluded that McWhorter's motion was not time barred. The superior court also concluded:

> The second issue is whether Mr. McWhorter has made a substantial showing that he is entitled to relief. The State argues he has not shown prejudice, citing the case of *In re the PRP of Meippen*, 193 Wn.2d 310, 440 P.3d 978 (2019). The Court concludes *Meippen* is factually and legally distinguishable. In particular, the *Ha'mim* [case, 132 Wn.2d 834, 940 P.2d 633 (1997),] which was decided just six months prior to Mr. McWhorter's sentencing, demonstrates that his age and youth were not and could not be considered by Judge Conoley. Mr. McWhorter has made a substantial showing that he is entitled to relief.

Clerk's Papers at 170. The superior court denied the State's motion to transfer McWhorter's CrR 7.8 motion and ordered a resentencing hearing.

The State appeals.

ANALYSIS

The State appeals the superior court's order denying its motion to transfer McWhorter's CrR 7.8 motion and granting a resentencing hearing. Because this order is not appealable by the State under RAP 2.2(b), we dismiss the State's appeal.

In a criminal case, the State may only appeal the following decisions: a final decision other than a not guilty verdict, a pretrial order suppressing evidence, an order arresting or vacating judgment, an order granting a new trial, certain juvenile dispositions, and certain sentences. RAP 2.2(b)(1)-(6). A CrR 7.8 order may be appealable by the State, if the order is an order that necessarily vacates the current judgment and sentence. *State v. Waller*, 197 Wn.2d 218, 225, 229, 481 P.3d 515 (2021).

Here, the order denying the State's motion to transfer McWhorter's CrR 7.8 motion is not appealable under any provision of RAP 2.2(b) nor does it necessarily vacate McWhorter's judgment and sentence. Further, the superior court's order granting resentencing, in this case, does not necessarily vacate McWhorter's judgment and sentence. McWhorter did not request that the superior court vacate his judgment and sentence, and nothing in the superior court's oral ruling or

written order states that McWhorter's judgment and sentence is vacated prior to the resentencing. Based on the record before this court, McWhorter's judgment and sentence was not necessarily vacated by the superior court's order. Accordingly, neither portion of the superior court's order is appealable by the State.

Because the superior court's order is not appealable by the State under RAP 2.2(b), we dismiss the State's appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, J.

Cruser, A.C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. JOHN MCWHORTER, Respondent.	No. 55774-6-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, State of Washington, filed a motion for reconsideration of this court's unpublished opinion filed on November 8, 2022. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Worswick, J.P.T., Lee, Cruser

LEE, JUDGE

KITSAP CO PROSECUTOR'S OFFICE

February 03, 2023 - 5:49 PM

Transmittal Information

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Superior Court Case Number:	97-1-00660-9

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