102651-0

NO. ~~102642-1~~

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Plaintiff/Appellant

v.

DWAYNE EARL BARTHOLOMEW,

Defendant/Respondent.

REPLY ON PETITION FOR REVIEW

MacDONALD HOAGUE & BAYLESS

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ATTORNEYS FOR PETITIONER

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INTRODUCTION

True to form, the State's Answer to this Petition says nothing about the appropriateness of review under the standards of RAP 13.4(b), but instead seeks to divert the Court from that question with made up procedural obstacles.

The State's Answer leads with a bizarre argument that was not raised before or considered by the Court of Appeals below: it says that review should be denied and Mr. Bartholomew should be left in prison for life without possibility of parole, because his lawyer did not file a notice of appeal from the trial court's order sentencing him to life *with* the possibility of parole. See St. Answer 12-16. It should be no surprise that no law supports that illogical proposition.

The State's second point is one it first raised and almost prevailed on in the Court of Appeals: that Mr. Bartholomew forfeited his right to parole because his lawyer cited CrR 7.8(a) instead of CrR 7.8(b) in his motion to set the minimum term requested by the ISRB. St. Answer 18-20. The Court of

Appeals agreed with this in *dicta*, but it ultimately did not rest its decision on that technicality alone. Instead, it accepted the State's position on the merits and held, as we have shown, that "chapter 9.95 RCW does not apply to sentences for aggravated first degree murder" (Pet. Rev. App. A at 9n2, 10) —so youthful offenders convicted of that crime cannot be made eligible for parole, despite this Court's ruling in *Matter of Monschke/Bartholomew*, 197 Wn.2d 305, 482 P.3d 276 (2021). The Court of Appeals may have reached that broad issue instead of relying on what it said about CrR 7.8(a) because, in response to the State's technical arguments about the subsections of CrR 7.8, Petitioner's counsel filed timely motions in both the Court of Appeals and the trial court seeking to amend his minimum term motion to rest it on both of them. See Respondent's RAP 7.2 (e)(2) Motion For Permission To File Motion In Trial Court (filed 9/12/24) (attached as Appendix D); Supp. CP 1-162 (filed 12/1/24).

Neither of the State's arguments in avoidance provides a good reason this Court cannot or should not grant review and reach the merits of the Court of Appeals' sweeping and aberrant decision. This Reply will briefly address them in turn.

1. PETITIONER IS NOT ASKING FOR A NEW SENTENCE BUT IS SEEKING TO REINSTATE THE SENTENCE THE TRIAL COURT IMPOSED AND THE COURT OF APPEALS REVERSED: LIFE IMPRISONMENT WITH A REAL, NOT IMAGINARY, POSSIBILITY OF PAROLE.

The State is right that "[i]f Bartholomew desired a different or modified sentence than that imposed in the August 10, 2022, post-remand judgment, he was required to file a notice of appeal no later than September 10, 2022." St. Answer at 14. The reason the defense did not do that is that it did not desire a different sentence from the one the trial court imposed. The sentence the trial court imposed was life imprisonment *with* the possibility of parole. The trial court made that clear in its sentencing order and its judgment, and the State has conceded in the trial court that was the court's intent. See Pet. Rev. 7-10. That was the sentence that the defense had sought and the State

had opposed. There was nothing the defendant could appeal from. An appeal would have eliminated his double jeopardy protections and exposed him to a new sentence of life without parole, and at best would have been dismissed as moot.

Lacking law or logic to support this argument, the State doubles down, saying Petitioner "did not raise the issue of a new sentence in the court of appeals." St. Answer 15-16. That is true for the same reason: Petitioner was not asking for a new sentence but was defending a supplemental order the trial court issued to give effect to the sentence it already imposed. [1] The State is arguing against something that hasn't happened.

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[1] It is remarkable that the State is making this argument now, because did not make it in either court below, thereby waiving its claim of waiver. *See Danard, Inc. v. Skagit Cty.*, 99 Wash. 2d 577, 581, 663 P.2d 487 (1983). It is also surprising that the State did not make this argument earlier because it appears to have been setting it up from the beginning, waiting until the thirtieth day after sentencing before objecting that the trial court could not implement its judgment by setting a minimum sentence. CP 851-52. That left Petitioner no time to appeal if he wanted to.

II. THE COURT OF APPEALS HELD "CHAPTER 9.95 RCW DOES NOT APPLY TO SENTENCES FOR AGGRAVATED FIRST DEGREE MURDER" AND COULD NOT REST ITS DECISION ON THE DIFFERENCE BETWEEN CrR 7.8(a) AND CrR 7.8(b) BECAUSE PETITIONER TIMELY SOUGHT TO PLACE THE MINIMUM TERM ORDER UNDER BOTH SECTIONS OF THE RULE.

The State's alternative argument is that even if the trial court had the power to set a minimum term and had to do so for Petitioner to be eligible for parole,[2] Petitioner should continue to serve life without parole because his counsel asked for the minimum term citing CrR 7.8(a) instead of CrR 7.8(b). St. Answer 18-21.

[2] No court has decided whether the ISRB was correct that Petitioner could not be considered for parole unless the trial court set a minimum term; the trial court accommodated the request without questioning it. In fact, the ISRB position appears to be incorrect with respect to a pre-1984 case like Petitioner's. *See, e.g.,* RCW 9.95.030. If the Court of Appeals decision is affirmed or let stand, and the ISRB therefore refuses to further consider Petitioner for parole, that issue will remain to be litigated in a separate proceeding.

The Court of Appeals did say that the trial court did not have the power to take the action it did under CrR 7.8(a). See Pet. Rev. App. A 8-9. It did so without mentioning the many contrary decisions of trial courts and other courts of appeals which have allowed trial courts to do much the same thing. See Pet. Rev. 19-20. But it did not rest its decision on that point. Instead, it ruled much more broadly "that chapter 9.95 RCW does not apply to sentences for aggravated first degree murder"—thus accepting the State's argument that the trial court did not have the power to set a minimum term at all, and rendering the question of whether the trial court could do so act under one part of CrR 7.8 or the other a moot point.

Although the Court of Appeals' decision did not say so, it was logically driven to reach that broader question because Petitioner ultimately placed his request to set a minimum term under both subsections of the rule. He did that by first asking the Court of Appeals and then the trial court for leave to amend his Motion for a minimum sentence to place it under CrR 7.8(b)

as well as CrR 7.8(a). See Respondent's RAP 7.2 (e)(2) Motion For Permission To File Motion In Trial Court (filed 9/12/24) (attached as Appendix D); Supp. CP 1-162 (filed 12/1/24). The Court of Appeals rejected the request without comment.[3] Appendix E, attached.

In any event, whether Petitioner's attempt to place the trial court's authority to issue the minimum term Order under both sections of CrR 7.8 was effective places no obstacle in the way of the Court's consideration of the two issues presented here. At most it might mean that a separate issue regarding the scope of CrR 7.8(b) could be left open by the Court's decision—as it was by the Court of Appeals'. That is no reason to deny review of issues that meet the standards of RAP 13.4.

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[3] The trial court wrongly accepted the State's argument that Petitioner's request to modify the Order to specify a different procedural basis was actually a new PRP, and transferred it to the Court of Appeals. It did that even though the request did not seek any change in the sentence or custody status and could not be deemed a PRP. See Motion to Correct Case Caption, "In re the Personal Restraint of Dwayne Earl Bartholomew," CoA No. 58992 (Appendix F, attached).

III. THE STATE DOES NOT DISPUTE THAT BOTH OF THE ISSUES PRESENTED BY THIS APPEAL WARRANT REVIEW UNDER RAP 13.4(b).

What the State's Answer conspicuously does not address are the criteria for review under RAP 13.4(b). It's hard to imagine what it could say. It cannot dispute that other lower courts have upheld the power of trial courts to enter orders under CrR 7.8(a) that are necessary to give effect to their judgments but are not included in the judgment itself—or that denying trial courts the power to take such actions has the potential to be disruptive and wasteful of judicial resources. Pet. Rev. 18-21. Nor can it plausibly claim that the Court of Appeals broader holding that aggravated murder convictions are not subject to RCW Chapter 9.95, and therefore are not parolable, is not worthy of this Court's review—although it contravenes lower court decisions in other *Monschke/ Bartholomew* cases (including two which are already pending for decision in this Court), and it threatens to undermine the Court's decision in that landmark case.

CONCLUSION

Review should be granted in this case. RAP 13.4(b)(2), (3), and (4).

RESPECTFULLY SUBMITTED May 15, 2024.

This document was word processed and consists of 1557 words. RAP 18.17(c).

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

APPENDIX D

NO. 57948-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Appellant

v.

DWAYNE EARL BARTHOLOMEW,

Defendant/Respondent.

RESPONDENT'S RAP 7.2 (e)(2) MOTION FOR PERMISSION TO FILE MOTION IN TRIAL COURT

IDENTITY OF MOVING PARTY

Dwayne Bartholomew is the Respondent in this case and was the defendant below.

RELIEF REQUESTED

Respondent seeks leave under RAP 7.2(e) to file a Motion in the trial court pursuant to CrR 7.8(b) to vacate and modify the Order entered October 6, 2022, to clarify its legal basis and give effect to the trial court's judgment.

FACTS UNDERLYING MOTION

Respondent assumes the Court is familiar with the facts and procedural history of this case, which was argued September 11, 2023.

The State appealed from the trial court's Order of October 6, 2022, which set a "minimum term" of 380 months, 112 months less than Respondent had already served. The State argues that, although the ISRB asked the trial court to provide this minimum term, trial courts cannot grant such requests after judgment has been entered, and the trial court here never had authority to set a minimum term in the first place.

Respondent has argued that the trial court had authority to entertain the ISRB's request under CrR 7.8(a), because the "minimum term" the Court set did nothing to change the judgment: both before and after the October Order was entered, the judgment made Respondent immediately eligible for parole, as the trial court made clear it intended. Resp. Br. 10-13.

Respondent has also argued that the trial court's authority to respond to requests from the ISRB like the one that gave rise to the October Order is explicitly granted by RCW 9.95.030. Resp. Br. 11, 14. RCW 9.95.030 does not use the words minimum term; it simply authorizes the ISRB to ask for, and sentencing courts to provide, supplementary statements after which "indicate to the board, for its guidance, what, in [the court's] … judgment, should be the duration of the convicted person's imprisonment" after the person sentenced arrives in prison. Because this is authorized by statute it does not require a Motion under CrR 7.8(a) or any other rule.

However, it was pointed out in argument that the Motion and Order and the ISRB's request cited RCW 9.95.011(1), not RCW 9.95.030. It was also pointed out in argument that Respondent's counsel may have erred in couching the request for response to the ISRB under CrR 7.8(a) rather than CrR 7.8(b), and that an appellate court cannot alter the basis for a trial court order that was not relied on below.

The Order challenged here was issued less than a year ago and therefore still is subject to a motion under CrR 7.8(b). Respondent seeks leave to file such a motion to ask the trial court to consider modifying its October Order to eliminate the State's technical objections and make clear (1) that the court is answering the ISRB's request to fulfil its obligation under RCW 9.95.030 to indicate what it believes the duration of the Respondent's imprisonment should be; (2) that in its judgment, based on the considerations set out in its sentencing order, the duration of Respondent's imprisonment should have been a minimum of 380 months; and (3) that this does not alter the judgment and sentence that it previously entered in any way, because that judgment made Respondent immediately eligible for parole, exactly as he was after the entry of the October Order, and he will remain so whether this "indication" is considered a statement of opinion under RCW 9.95.030 or a binding minimum term under RCW 9.95.011(1).

Because that Motion would seek a change in the language of the Order that is currently under review by this Court, leave under RAP 7.2(e) would be necessary for the trial court to grant it. Respondent is asking for leave to seek such a change in advance because the case is under submission, and because the one-year time limit for seeking relief on certain grounds under CrR 7.8(b) is fast approaching.

ARGUMENT SUPPORTING MOTION

The court rules are supposed to be interpreted to promote justice and the resolution of cases on their merits. RAP 1.2(a); CrR 1.2. That is critical where their interpretation and application directly impacts constitutional rights.

The State's objections to granting Dwayne Bartholomew the parole eligibility to which the Supreme Court and the trial court held he is constitutionally entitled have devolved into pure technicalities. The State says the trial court had no authority to tell the ISRB what Dwayne's "minimum term" should be, although it doesn't dispute that RCW 9.95.030 says

trial courts can "indicate" to the ISRB what the "duration" of a sentence should be. In the circumstances of this case, where the defendant has already served much more than the mandated or recommended minimum term, those two things are not only linguistically but practically identical.

Because the October Order did not change the legal or practical effect of the original judgment and sentence, which made Dwayne eligible for parole the minute it was signed, Respondent believes it was properly issued under RAP 7.8(a). However, the Court's questions in argument pointed out that the Order arguably could have been sought and granted under RAP 7.8(b) as well.

Defense counsel's failure to correct or clarify the basis for the trial court's authority to respond to the ISRB in this novel situation does not provide a just reason to leave the defendant in prison with no legal way to obtain the parole to which the trial court has held he is constitutionally entitled. The trial court should be allowed to consider whether its

October Order should be vacated and amended to clarify its legal basis, in order to give effect to the life with parole sentence the trial court has made clear it intended to impose.

CONCLUSION

The Court should grant leave pursuant to RAP 7.2(e) for Respondent to file an appropriate motion in the trial court to vacate and amend its Order of October 6, 2022, to address these technical procedural issues.

DATED this 12th day of September 2023.

Respectfully submitted,

/s/ Timothy K. Ford
Timothy K. Ford
Attorney for Respondent

This document was produced by word processing software and consists of 971 words subject to RAP 18.17(c).

/s/ Timothy K. Ford

APPENDIX E

Filed
Washington State
Court of Appeals
Division Two

September 18, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

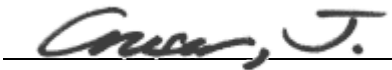
STATE OF WASHINGTON, Appellant, v. DWAYNE EARL BARTHOLOMEW, Respondent.	No. 57948-1-II ORDER DENYING RESPONDENT'S MOTION FOR PERMISSION TO FILE MOTION IN TRIAL COURT

Respondent in the above-entitled matter filed a motion for permission to file a motion in the trail court. A response and reply to the motion were received by the court. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. AMC, LCL, EDP

FOR THE COURT:



CRUSER, ACTING CHIEF JUDGE

APPENDIX F

No. 58992-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

"In re the Personal Restraint of

DWAYNE EARL BARTHOLOMEW,

Petitioner."

MOTION TO CORRECT CASE CAPTION

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IDENTITY OF MOVING PARTY

Dwayne Bartholomew is a Washington prisoner who is serving an unconstitutional sentence of life imprisonment without possibility of parole. *See Matter of Monschke/ Bartholomew,* 197 Wn.2d 305, 482 P.3d 276 (2021). He was the Respondent in *State v. Bartholomew*, ___ Wn. App. 2d ___ (No. 57948-1-II, November 28, 2023), *petition for review filed* December 15, 2023 (Supreme Ct. No. 1026510).

RELIEF REQUESTED

Mr. Bartholomew asks that this Court correct the case caption in this case, which wrongly labels it a personal restraint petition. The case should be captioned, "Referral of CrR 7.8(b) Motion by Pierce County Superior Court" because the Order which the Cr 7.8(b) Motion sought to clarify was not part of Petitioner's judgment and sentence, and the CrR 7.8(b) Motion did not seek any "relief from restraint," so it cannot be characterized as a personal restraint petition. See RAP 16.3(a).

FACTS UNDERLYING MOTION

This is a referral of a Motion under CrR 7.8(b) which was filed to clarify the trial court's jurisdictional basis for the post-sentencing order Following argument in this Court in *State v. Bartholomew*, ___ Wn. App. 2d ___ (No. 57948-1-II, November 28, 2023), *petition for review filed* December 15, 2023 (Supreme Ct. No. 1026510). The Motion did not ask the trial court to vacate or change the length of the petitioner's sentence in any way or alter his minimum or maximum term, but only to clarify the legal basis for a previous Order that recommended a minimum term.

After the trial court referred the CrR 7.8(b) Motion to this Court, the State moved to consolidate it with the appeal in No. 57948-1-II. Mr. Bartholomew agreed. This Court then issued its decision vacating the minimum term order, rendering the CrR 7.8 Motion moot, and Petitioner filed a petition for review, which is now pending in the Supreme Court.

GROUNDS FOR RELIEF

It is axiomatic that a Personal Restraint Petition must seek "relief from restraint." RAP 16.4(a).

> To obtain relief, a petitioner must show that he is currently under restraint and that the restraint is unlawful. RAP 16.4(a); *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 213, 227 P.3d 285 (2010). Under RAP 16.4(b), a petitioner is under restraint if he has limited freedom because of a criminal or civil court decision, is confined, is subject to imminent confinement, or is under some other disability from a judgment or sentence in a criminal case.

In re Pers. Restraint of McMurtry, 20 Wash. App. 2d 811, 814-15, 502 P.3d 906 (2022). This CrR 7.8(b) Motion did not ask that Mr. Bartholomew be relieved from any restraint, or that the restraint was unlawful, or that he was seeking relief from a disability imposed by a judgment and sentence in a criminal case. It simply asked the trial court to clarify the basis for an Order it had previously issued, an Order that did not impose any restraint on him. The CrR 7.8(b) Motion should not have been referred to this Court and it cannot be captioned a personal restraint petition under RAP 16.3(a).

CONCLUSION

The caption of this case should be changed to Referral of CrR 7.8 Motion by Pierce County Superior Court.

RESPECTFULLY SUBMITTED December 20, 2023.

This document was word processed and consists of 529 words. RAP 18.17(c).

__Tim Ford_____
Timothy K. Ford, WSBA #5986
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 15th day of May 2024, 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

May 15, 2024 - 4:22 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Tanner David Barber
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