SUPREME COURT NO. 102678-1
COA NO. 84538-1-I

IN THE SUPREME COURT OF THE STATE WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON SULLIVAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Marshall Ferguson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Brandon Sullivan asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court's decision in State v. Brandon Sullivan, COA No. 84538-1-I, filed on November 27, 2023, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the sentencing court erred in failing to grant Sullivan credit for time served between December 5, 2017, and July 11, 2019, where he was serving an Oregon sentence, but it was undisputed he was also being held on a warrant for the Washington charges for which he was subsequently convicted and sentenced?

2. Whether the court's denial of credit conflicts with this Court's decision in State v. Enriquez-Martinez,

198 Wn.2d 98, 103, 492 P.3d 162 (2021), where this Court held: "a defendant is entitled to credit for all the time they were confined on charges prior to sentencing on those charges, regardless of how many charges they were held on?"

3. Whether this Court should accept review under RAP 13.4(b)(1)?

4. In upholding the denial of credit at resentencing following State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021), Division One held the resentencing court declined to reconsider the credit issue and therefore the denial of credit was not an appealable issue. Appendix at 2. Does Division One's decision in Sullivan's case conflict with Division Three's decision in State v. Dunbar, 27 Wn. App.2d 238, 532 P.3d 652 (2023), which holds that any resentencing should be de novo?

5. Should this Court accept review to resolve this dispute among the divisions of the court of appeals? RAP 13.4(b)(2).

D. STATEMENT OF THE CASE[1]

Brandon Sullivan was convicted of first degree robbery and unlawful possession of a firearm for events occurring at the Skyway Park Bowl on August 18, 2017. CP 39-61.

Shortly after the Skyway Park Bowl events, a warrant was issued for Sullivan and he was held on that warrant when he was arrested in Oregon on August 29, 2017, for different charges. CP 234-86.

At Sullivan's original sentencing, the state agreed Sullivan was entitled to credit for the period of time he

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[1] "RP" refers to the transcripts from Sullivan's jury trial in September-October, 2019, and sentencing in February 2020. A motion to transfer the record in Sullivan's appeal in COA No. 81254-8-I was granted. "1RP" refers to the transcript from resentencing in 2022 on remand from Sullivan's direct appeal, based on State v. Blake, 197 Wn.2d 170 (2021).

was awaiting trial simultaneously on the Washington and Oregon charges. Id. However, Sullivan went to trial on the Oregon charges in November 2017, was convicted, and sentenced on December 5, 2017. Id. The state argued that from December 5, 2017, until the end of his Oregon sentence on July 11, 2019, Sullivan should not receive credit. Id.

The defense countered that Sullivan was booked into the King County Jail on the current robbery and firearm charges on April 20, 2018, and therefore "he was held solely on this particular charge by this jurisdiction." RP 2871. The prosecutor confirmed Oregon allowed Sullivan to finish his prison sentence while waiting for trial here. RP 2872. The defense argued Sullivan was held solely with regard to this charge – as far as Washington was concerned – and therefore should receive credit for all time held on these charges. RP 2873.

The court disagreed and ruled Sullivan was not entitled to credit for time served during the period of time when he was serving his sentence on the Oregon convictions between December 5, 2017, and July 11, 2019. RP 2882.

Division One upheld Sullivan's convictions on appeal. However, the court remanded for resentencing in light of State v. Blake, 197 Wn.2d 170 (2021), because two simple possession convictions were used in calculating his offender score. CP 39-61, 106-108.

Resentencing occurred on October 14, 2022. 1RP 186. Defense counsel asked the court to revisit the question of granting Sullivan credit for time he served while held by both Washington and Oregon. 1RP 252-57.

Defense counsel asked why – under RCW 9.94A.589(3) – the court could not run the sentences concurrently and thereby grant credit for time served. RP 254-55. Counsel noted a homicide case he recently

handled where the defendant was apprehended in New Jersey and the court here in Washington granted him credit for time in New Jersey on the Washington offense. Counsel asked the court to do the same for Sullivan:

> I -- I saw in your judgment and sentence, that you specifically excluded, for purposes of credit for time served, periods of time that Mr. Sullivan served in the State of Oregon. I don't understand, and I don't have a basis for understanding why you did so. But in the Brown case, my client had committed crimes here, and before apprehension, went to New Jersey and committed crimes there, and was apprehended in New Jersey. And was convicted in New Jersey and receive a -- beside a number of significant, lengthy sentences, also received a sentence of life without parole. He was brought back to the State of Washington, and we had to address the triple homicide cases. We -- we came to a resolution on that. I wrote the sentencing memorandum issues on whether the court had discretion to run the time in Washington concurrent with the time in New Jersey. And since he was not under sentence at the time he committed crimes in Seattle with the crimes in New Jersey, the court had discretion to run the time concurrent and grant credit for time served. And that was under 9.94A.589 subsection 3. I think subsection 2 deals with when you're under-sentenced and commit a

> new felony. By operation of the statute, the new sentence has to run consecutive. And subsection 1 is, of course, when you have the first sentencing and you have two counts, they have to run concurrent with each other if they're sentenced at the same time. So the point I'm asking is when you do impose sentence based on this Blake issue, that if you felt you had no discretion and now you feel that you may have discretion, I'm asking that you grant, at sentencing today, if he was not under sentenced of the Oregon conviction that counted when these alleged acts occurred, the robbery and the VUFA, that you allow Mr. Sullivan credit for the time he spent in Oregon to be credited to the time he spent here, and run those concurrent with each other, even though the Oregon statute -- or the Oregon convictions have already run, I believe. But that's the request from the defense and the statutory basis for the Court to be able to consider that.

1RP 254-55.

The court indicated little memory of why it denied the request for credit and asked for the prosecutor's input. 1RP 256. The prosecutor pulled up his original sentencing memorandum, went through the facts and the basis for the court's ruling. 1RP 256-57. The prosecutor

explained the court denied the credit request because Sullivan was not being held "solely" on this offense. 1RP 257. The prosecutor stated: "I stand by the argument I made at the time and believe the Court made the correct ruling[.]" 1RP 257.

The court resolved to not "revise that portion of the JNS today." RP 257 (emphasis added). The court indicated it did not see a legal basis to change its ruling:

> And whether Mr. Sullivan has a remedy for addressing that, for example, if the law has changed and I have do discretion and I could have gone a different way, then he'll have to find that remedy after today.

1RP 257 (emphasis added).

Sullivan filed a notice of appeal from resentencing. CP 230. On appeal, he argued the resentencing court's decision refusing to grant him credit for all the time he spent held on these charges pretrial, whether he was incarcerated in Oregon or in King County, conflicted with this Court's decision in State v. Enriquez-Martinez, 198

Wn.2d 98, 103, 492 P.3d 162 (2021). Brief of Appellant (BOA) at 23-29.

The state argued the resentencing court "expressly declined to consider this issue at resentencing" and the issue therefore was not appealable. Brief of Respondent (BOR) at 10. Sullivan disagreed and argued the resentencing court considered the issue but saw no legal basis to change its ruling. Reply Brief of Appellant (RBOA) at 4. Rather, absent a change in the law, the court reiterated its belief it could not grant credit. This was a substantive ruling. RBOA at 4. Sullivan argued the issue was squarely before the appellate court. RBOA at 4 (citing State v. Barberio, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993); State v. Dunbar, 27 Wn. App.2d 238, 532 P.3d 652 (2023)).

Division One sided with the state: "Because the court did not, on remand, exercise independent judgment regarding the issue of credit for time served, that issue is

not an appealable question." Appendix at 7 (citing Barberio, 121 Wn.2d at 50)).

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

DIVISION ONE'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN ENRIQUEZ-MARTINEZ AND DIVISION THREE'S DECISION IN DUNBAR.

Contrary to Division One's opinion, the resentencing court made a substantive decision. The resentencing court found no legal basis to grant Sullivan credit for the time he was held on the Washington warrant while also serving the Oregon sentence. The court was wrong at the original sentencing and the court was wrong at resentencing. Under this Court's opinion in Enriquez-Martinez, Sullivan was entitled to that credit. This Court should accept review. RAP 13.4(b)(1).

This Court should also grant review because under Division Three's opinion in Dunbar, any resentencing is supposed to be de novo. Dunbar, 27 Wn. App.2d at 244-

49. In the interest of truth and fair sentencing, a court on a sentence remand should be able to take new matters into account on behalf of either the government or the defendant. Dunbar, at 244-45 (citing United States v. Kinder, 980 F.2d 961 (5th Cir. 1992)). Thus, to the extent the resentencing court refused to consider the issue, it also erred. The appellate court's affirmance of this refusal conflicts with Dunbar and should be reviewed by this Court. RAP 13.4(b)(2).

As a matter of constitutional law, defendants are entitled to credit for all time served in confinement on a criminal charge, whether that time is served before or after sentencing. State v. Enriquez-Martinez, 198 Wn.2d 98, 101, 492 P.3d 162 (2021). The legislature has attempted to capture this principle in RCW 9.94A.505(6), which says, "The sentencing court shall give the offender credit for all confinement time served before the

sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced."

The decision in Enriquez-Martinez is applicable to the present case. The state alleged Enriquez-Martinez abused his wife's young cousin for many years. The state alleged the abuse occurred at family events in both Washington and Oregon. In April 2014, Enriquez-Martinez was arrested in Oregon on charges related to that abuse. While Enriquez-Martinez was in custody in Oregon, Klickitat also filed charges based on that abuse, and a judge issued a warrant for his arrest. That arrest warrant directed that Enriquez-Martinez be held without bail until he was presented before the Klickitat County court. Enriquez-Martinez, at 100.

Enriquez-Martinez was held on both charges in the Oregon jail for months until the Oregon prosecutor proposed a global plea offer to resolve all charges. Under that proposal, Enriquez-Martinez would plead guilty to first

degree sexual abuse in Oregon and first degree child molestation in Washington and would receive concurrent 75 month sentences on each with credit for time served. A few months later, Enriquez-Martinez agreed to the deal. Id.

For reasons unknown, Enriquez-Martinez remained in jail in Oregon nearly 7 more months. In January 2016, 20 months after he was first arrested, he was transferred to Washington, pled guilty to first degree child molestation, and was sentenced to the top of the range. As part of the boilerplate language of the judgment and sentence, he received "credit for time served prior to sentencing if that confinement was solely under this cause number." Id. at 101 (citation to record omitted). Later in 2016, he was returned to Oregon where he pled guilty to first degree child abuse. Id.

After Enriquez-Martinez was returned to Washington state to serve his sentence, the Washington

Department of Corrections declined to give him credit for time he served in Oregon. Enriquez-Martinez filed a CrR 7.8 motion asking for credit for time he had served after the Washington warrant was served. By the time his challenge was heard, his trial judge had retired and a new judge denied the motion. The Court of Appeals affirmed, but this Court reversed, stating simply: "a defendant is entitled to credit for all the time they were confined on charges prior to sentencing on those charges, regardless of how many charges they were held on." Enriquez-Martinez, at 103.

Thus, it did not matter that Enriquez-Martinez was being held on Oregon charges in addition to the Washington charge for which he was being sentenced. He was still entitled to credit for the time since the Washington warrant was served. The same should be true here. Applying this rationale, Sullivan is entitled to credit for the entirety of the time he spent in Oregon, even

while serving his Oregon sentence before being brought to King County Jail.

Just as the "solely" language of RCW 9.94A.505(6) cannot be applied strictly to deny offenders credit for time held in custody prior to trial on multiple charges, it likewise should not be applied to deny Sullivan credit here, even though Sullivan was simultaneously serving an Oregon sentence for part of the time while being held on these offenses.

Whether it is constitutionally required, the legislature has indicated its preference to grant credit under such circumstances:

> (3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that the

> confinement terms be served consecutively to each other.

RCW 9.94A.589.

Had Sullivan been brought to trial quicker on the Washington charges, the presumption would have been that the Washington sentence run concurrently with the Oregon sentence and therefore Sullivan would have been entitled to the credit served on the Oregon sentence. Under the lower court's reading of RCW 9.94A.505(6), however, Sullivan gets no credit for time incarcerated pre-trial in Washington even though he was entitled to the presumption of innocence during that period of time. That seems an absurd result. Under the rule of lenity, the statute should be construed in Sullivan's favor.

The rule of lenity applies where two possible constructions of a criminal statute are permissible. State v. Gore, 101 Wash.2d 481, 485–86, 681 P.2d 227 (1984). This rule requires the court to construe the statute strictly

against the State and in favor of the accused. Gore, 101 Wash.2d at 486.

The statute RCW 9.94A.505(6) clearly is capable of more than one construction, as the word "solely" basically is read out of the statute in other contexts. The court was incorrect when it ruled Sullivan was not entitled to credit for time served during the period of time when he was serving his sentence on the Oregon convictions between December 5, 2017, and July 11, 2019. The court was wrong at the initial sentencing and was wrong at resentencing when it ruled there was no legal basis for it to grant credit.

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(1), (2).

This document contains 2,653 words in 14-point font, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 26th day of December, 2023.

Respectfully submitted,

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APPENDIX

FILED
11/27/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRANDON RASHAD SULLIVAN, Appellant.	DIVISION ONE No. 84538-1-I (consol. with No. 85050-4-I) UNPUBLISHED OPINION

DWYER, J. — Brandon Sullivan appeals from the judgment and sentence entered on resentencing following his convictions of robbery in the first degree and unlawful possession of a firearm in the first degree. Previously, on direct review of Sullivan's initial judgment and sentence, we affirmed Sullivan's convictions but remanded to the superior court to conduct resentencing in a manner consistent with our Supreme Court's decision in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). Sullivan now asserts that the superior court erred on resentencing by denying him credit for time served in custody while he was also serving a sentence for convictions committed in Oregon. He further asserts that the superior court erred by denying his postconviction "request for discovery" regarding a detective who testified at his trial.

Because neither of these assertions of error raises an appealable question, we hold that Sullivan shows no entitlement to appellate relief. Only when a trial court, on remand, exercised its independent judgment to revisit an earlier ruling does the issue become an appealable question. Here, the resentencing court declined to exercise its judgment to again rule on the issue of credit for time served; thus, we decline to review Sullivan's claim of error on this question. In addition, Sullivan fails to demonstrate that he is entitled to discretionary review of the superior court's denial of his "request for discovery." Accordingly, we similarly decline to review that assertion of error.

Sullivan also raises two claims of error in a statement of additional grounds. However, because these claims do not flow from the resentencing proceeding, they are not properly raised here. Accordingly, we also decline to review these claims. Because Sullivan has asserted no meritorious claim of error with regard to the pertinent proceeding, we affirm the judgment and sentence entered on resentencing.

I

In February 2020, Brandon Sullivan was convicted of robbery in the first degree and unlawful possession of a firearm in the first degree resulting from an incident that occurred at the Skyway Park Bowl.[1] Within days of his commission of those offenses, Sullivan had committed additional offenses of which he was subsequently convicted in the state of Oregon. At sentencing for the Washington

[1] Additional facts are set forth in our opinion on direct review of Sullivan's initial judgment and sentence. See State v. Sullivan, 18 Wn. App. 2d 225, 491 P.3d 176 (2021), review denied, 198 Wn.2d 1037 (2022).

convictions, the superior court ruled that Sullivan was entitled to credit for time served with the exception of the time period when he was serving a sentence for the Oregon convictions. Sullivan thereafter appealed from the judgment and sentence.

On appeal, Sullivan assigned error to the superior court's admission of certain evidence tending to prove that he had participated in a shooting approximately 25 minutes subsequent to the robbery with which he was charged. State v. Sullivan, 18 Wn. App. 2d 225, 233, 491 P.3d 176 (2021), review denied, 198 Wn.2d 1037 (2022). He additionally asserted that sufficient evidence did not support a finding that he or another individual involved in the incident was armed with a deadly weapon during the robbery. Sullivan, 18 Wn. App. 2d at 240. Sullivan contended, too, that sufficient evidence did not support a jury determination that he had committed robbery in the first degree as either a principal or an accomplice. Sullivan, 18 Wn. App. 2d at 243. He further asserted, in a statement of additional grounds, that the trial judge had violated "the appearance of fairness doctrine." Sullivan, 18 Wn. App. 2d at 244-45. Finally, Sullivan sought resentencing pursuant to our Supreme Court's decision in Blake. Sullivan, 18 Wn. App. 2d at 247. In an opinion filed on July 6, 2021, we affirmed Sullivan's convictions but remanded for resentencing consistent with the Blake decision. Sullivan, 18 Wn. App. 2d at 247.

Prior to resentencing, Sullivan filed multiple pro se postconviction motions in the superior court. Among those motions was a CrR 7.8 motion for relief from judgment, filed by Sullivan on January 14, 2022. Sullivan therein asserted that

the State had committed a Brady[2] violation by allegedly failing to turn over "impeachment evidence" relating to a detective who had testified at Sullivan's trial. On February 9, 2022, Sullivan filed a postconviction "request for discovery" aimed at supporting his motion for relief from judgment.

At an August 19, 2022 hearing, the superior court addressed Sullivan's "request for discovery." The court determined that Sullivan had neither demonstrated how the detective's testimony had affected the outcome of the trial nor shown good cause to believe that the requested discovery would entitle Sullivan to relief. Accordingly, the court denied Sullivan's request for postconviction discovery "without prejudice to [bring] another [such] motion" if Sullivan obtained further information suggesting that he may be entitled to relief.

On October 14, 2022, the court held a Blake resentencing hearing pursuant to our remand.[3] Defense counsel asserted at the hearing that the resentencing court could properly grant to Sullivan credit for time served for the time period during which he was serving the Oregon sentence. The court, noting that this issue had been highly litigated at the initial sentencing and had not been raised on appeal, ruled that it was "not going to revise that portion of" the judgment and sentence. Accordingly, consistent with Sullivan's initial judgment and sentence, the court ruled that he "shall have credit for time served as determined by the Department of Corrections and the King County Jail. The

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[2] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[3] At the hearing, the court, in addition to resentencing Sullivan, addressed Sullivan's six outstanding pro se postconviction motions. With regard to Sullivan's CrR 7.8 motion pertaining to the purported Brady violation, the court ruled that the motion would be transferred to this court as a personal restraint petition. No such petition has been consolidated with this case.

provision concerning the credit for time served between 2017 and 2019 in Oregon shall remain the same as in the original judgment and sentence." The court imposed a sentence consistent with Sullivan's original sentence given the modified applicable standard ranges.

In this court, Sullivan filed a "notice of appeal" of the superior court's denial of his postconviction "request for discovery." This court notified Sullivan that "the order being appealed from is not a final judgment but is reviewable by discretionary review, pursuant to RAP 2.3," and ordered that Sullivan file a motion for discretionary review. Sullivan additionally appealed from the judgment and sentence entered on resentencing. This court thereafter notified the parties that the notice of discretionary review would be considered with the pending appeal from the judgment and sentence.[4]

II

Sullivan asserts that the resentencing court erred by denying him credit for time served in custody during the period in which he was serving a sentence for the Oregon convictions. We disagree. Sullivan did not, in his first appeal, assign error to the superior court's denial of credit for time served during that period. On resentencing, the superior court exercised its discretion to decline to reconsider its prior ruling. Because the resentencing court declined to exercise its

[4] Sullivan additionally filed in this court a "notice of appeal" of the superior court's order denying petitioner's motion to clarify, filed on January 10, 2023. In his "motion to clarify," Sullivan had requested that the superior court hold a postconviction hearing to "clarify the record" to ensure that a juror at his trial was able to hear the proceedings. Our commissioner consolidated the matter with Sullivan's appeal from the judgment and sentence entered on resentencing. However, on appeal, Sullivan neither assigns error to the superior court's order nor provides any argument regarding the propriety of that order. Accordingly, he has forfeited any such argument.

independent judgment on remand with regard to this issue, the issue is not an appealable question. Accordingly, we decline to review this claim of error.

Pursuant to RAP 2.5(c)(1),

> [i]f a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

As our Supreme Court has explained,

> [t]his rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.

State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). Similarly, "[i]t is discretionary for the trial court to decide whether to revisit an issue which was not the subject of appeal." Barberio, 121 Wn.2d at 51. If the court exercises its discretion to do so, then we "*may* review such issue." Barberio, 121 Wn.2d at 51. This rule is "permissive for both the trial court and the appellate court." Barberio, 121 Wn.2d at 51.

Here, the superior court ruled at Sullivan's initial sentencing that he was not entitled to credit for time served for the period in which he was serving a sentence for the Oregon convictions. Sullivan did not assign error to this ruling in his first appeal. See Sullivan, 18 Wn. App. 2d 225. On resentencing, the court recognized that this issue had been highly litigated at Sullivan's initial sentencing. The court declined to reconsider its prior ruling, stating that it was "not going to revise that portion of" the judgment and sentence. Instead, the court addressed

solely the issue for which we had remanded the matter—resentencing consistent with our Supreme Court's decision in Blake.

The resentencing court acted within its discretion in so doing. Barberio, 121 Wn.2d at 50 (recognizing that "'[t]he trial court may exercise its independent judgment as to decisions to which error was not assigned in the prior review'" (quoting 2 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: RULES OF PRACTICE at 481 (4th ed. 1991))). Because the court did not, on remand, exercise independent judgment regarding the issue of credit for time served, that issue is not an appealable question. Barberio, 121 Wn.2d at 50. Accordingly, we exercise our discretion to decline to review it. RAP 2.5(c)(1).

III

Sullivan additionally asserts that the superior court erred by denying his postconviction "request for discovery." We again disagree. Sullivan, again, fails to raise an appealable issue. The superior court denied Sullivan's "request for discovery" without prejudice and, thus, did not enter a final order on the motion. For this reason, Sullivan is not entitled to review as a matter of right. Because Sullivan makes no attempt to demonstrate that discretionary review of the order is warranted, we deny review of this claim of error.

RAP 2.2(a) sets forth the decisions of the superior court that are reviewable as a matter of right. As pertinent in this criminal proceeding, those decisions include "[t]he final judgment entered in any action or proceeding," "[a]n order granting or denying a motion for new trial or amendment of judgment," "[a]n order granting or denying a motion to vacate a judgment," "[a]n order arresting or

denying arrest of a judgment in a criminal case," and "[a]ny final order made after judgment that affects a substantial right." RAP 2.2(a)(1), (9), (10), (11), (13). The order denying Sullivan's "request for discovery," however, was not a final judgment or an order for a new trial, amendment of judgment, vacation of judgment, or arrest of judgment. Nor was it a "final order made after judgment that affects a substantial right." RAP 2.2(a)(13). Indeed, the superior court's order was not a final order at all. Rather, the superior court denied Sullivan's motion without prejudice to bring another such motion if Sullivan were able to show good cause that he may be entitled to relief. Because the superior court's order is not a final order, Sullivan is not entitled to review of the order as a matter of right.[5]

Nevertheless, Sullivan nowhere attempts to demonstrate that discretionary review of the order is warranted. We grant discretionary review only in the circumstances set forth in RAP 2.3(b), which include, as relevant here, "an obvious error [by the superior court] that would render further proceedings useless," "probable error" by the court when its decision "substantially alters the status quo or substantially limits the freedom of a party to act," and such departure by the superior court "from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court." RAP 2.3(b)(1)-(3). Because Sullivan is not entitled to review of the superior court's order as a matter of right, we will review the court's decision only if discretionary review is

[5] Indeed, this court informed Sullivan after he filed a "notice of appeal" of the superior court's order that the order, not being a final judgment, is reviewable only as a matter of discretionary review.

warranted. Because Sullivan has made no attempt to demonstrate that this is so, we decline to grant such review.

Notwithstanding that Sullivan fashioned his filing in this court as a "notice of appeal," the superior court order of which he seeks review is not a final order. Thus, Sullivan is not entitled to review as a matter of right. Rather, in order to obtain appellate review, Sullivan was required to demonstrate that discretionary review of the order is warranted. As he has made no attempt to do so, we decline to review the superior court's order denying Sullivan's postconviction "request for discovery."

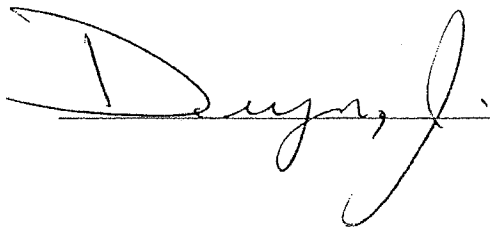
IV

Sullivan also asserts two assignments of error in a statement of additional grounds. He contends therein that a detective who testified at his trial "committed a Brady violation" by not obtaining all of the available video footage from the scene.[6] He further contends that the trial judge violated the statutory duty to excuse from jury service a purportedly unfit juror, thus denying Sullivan's right to due process. Although each of these claims assert error that purportedly occurred during Sullivan's trial, neither issue was raised by Sullivan in his initial appeal. Because these assertions of error do not flow from the Blake resentencing proceeding at issue here, they are not properly raised on appeal from the judgment and sentence resulting from that proceeding. The appropriate

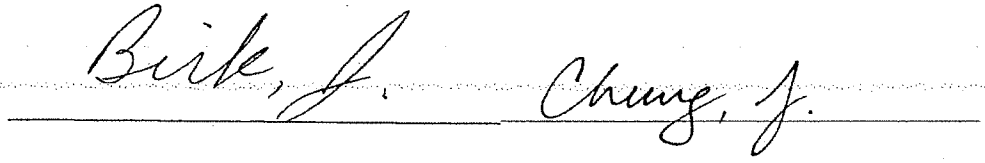
[6] We note that this is the same claim of error asserted in Sullivan's CrR 7.8 motion for relief from judgment in the superior court. The appropriate means to obtain such postconviction relief is through a CrR 7.8 motion or a personal restraint petition. Sullivan cannot evade the requirements for collateral attack by attempting to append such claims of error to his appeal from a separate proceeding.

means to challenge such purported errors is through collateral attack on the initial judgment and sentence. Accordingly, we decline to review the assertions raised in Sullivan's statement of additional grounds.

Affirmed.



We concur:



NIELSEN KOCH & GRANNIS P.L.L.C.

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