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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court lack jurisdiction to rule on defendant's motion to vacate not guilty by reason of insanity plea more than one year later where defendant had actual notice of the one-year time limit and the trial court "extended" the time limit in the absence of a statutory exception?

2. Assuming the trial court had jurisdiction, did it properly exercise its discretion in denying defendant's motion to vacate his NGRI plea when defendant claimed he did not know he could be detained at WSH for up to his maximum term, but where the record shows he was so advised by both counsel and the court?

B. STATEMENT OF THE CASE.

1. Procedure

On February 18, 2003, the State charged Sean Paul Schwab, defendant, with first degree assault – domestic violence with a deadly weapon enhancement for attacking his mother with a knife. CP 1-2.

The next day, the court signed an Order for Examination by Western State Hospital (15 day evaluation). CP 3-6. The resulting Forensic Mental Health Evaluation, dated March 3, 2003, noted that defendant had been hospitalized due to his mental illness on at least two

prior occasions, in 1995 and in 1998. CP 10-22. At the time of the evaluation defendant was preoccupied with his own irrational and bizarre plans for how he would handle his current case. CP 10-22. The evaluating psychiatrist concluded that due to defendant's psychotic symptoms, he lacked the capacity to understand his legal situation or to assist in his own defense. Id. The psychiatrist assessed defendant as posing a highly elevated risk for harm to others and for reoffending. Id. Accordingly, on March 6, 2003, the trial court signed an Order of Commitment for 90 days to restore defendant's competency to proceed to trial. CP 7-9; 3RP 6.<sup>1</sup> On March 24, 2003, defendant was transferred from the Pierce County Jail to Western State Hospital (WSH). 3RP 16.

On June 18, 2003, a WSH mental health professional prepared a Forensic Psychological Report. CP 23-30. The evaluating psychologist reported that defendant's mental illness significantly interfered with his ability to proceed with his criminal case. CP 23-30. Believing defendant could achieve competency with additional hospitalization, WSH professional staff requested judicial authority to treat defendant with psychotropic medication, involuntarily, if necessary. CP 23-30. Consequently, on August 6, 2003, the trial court conducted a Sell hearing<sup>2</sup> to determine whether forced medication was appropriate. 3RP 5-44. Dr.

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<sup>1</sup> Citations to the verbatim report of proceedings will be according to the format set forth in the Brief of Appellant (BOA) on page 5.

<sup>2</sup> Sell v. U.S., 539 U.S. 166, 123 S. Ct. 2174, 156 L.Ed.2d 197 (2003).

Waiblinger, psychiatrist at WSH, testified at the hearing. 3RP6-26. He informed the court that defendant's diagnosis is chronic paranoid schizophrenia with delusions. 3RP 19. In fact, defendant was delusional when he arrived at WSH. 3RP 26. Defendant told mental health staff, "They've been giving me the wrong diagnoses (sic), wrong medications, mishaps, hygiene multiples, rashes, allergies, warts, snorts, passes, wisdom teeth out, screeths ... I ate a screw in traffic really quickly." Defendant's delusion about swallowing the screw was so severe that at one point, trying to flush it out, he drank so much water he gave himself a seizure. 3RP 21. During the Sell hearing, defendant asked counsel to advise the court that he could rid himself of the screw by eating moon pies and drinking Dr. Pepper. 3RP 31.

According to Dr. Waiblinger, defendant had increased risk of criminal and violent behavior and that to date his treatment had not been sufficient to mitigate that risk. 3RP 11. The doctor informed the court that the only treatment is the use of anti-psychotic drugs and, unfortunately, defendant's compliance in taking the drugs was an issue. 3RP 28. The doctor opined that defendant could regain competency and that his condition would improve on medication, which would reduce his paranoia and risk of dangerousness. 3RP 13. The medication would also improve his ability to communicate with his counsel. 3RP 14. WSH highly recommended evaluation for involuntary treatment should defendant be released, because defendant was paranoid and violent at

WSH, he was charged with a violent crime, and he lacked understanding of his mental illness. 3RP 22-23. The trial court signed the Order of Commitment for Ninety Days which provided that defendant be medicated, against his will if necessary, to restore competency. CP 31-33; 3RP 44. Defendant objected “to [the] section which requires him to submit to involuntary medication.” CP 33.

Defendant benefited from the second 90 day commitment period. CP 34-42. Competency was restored. Id. Defendant was assessed for a Not Guilty by Reason of Insanity (NGRI) plea. Id. Finding that defendant (1) has a severe mental illness, (2) had been twice involuntarily detained in the past, (3) exhibited significant psychotic symptoms during competency restoration on this case, and (4) was untreated during the time of his current offense, mental health professionals opined that defendant was unable to perceive the nature and quality of the act with which he is charged. Id. The evaluator also noted that while defendant made significant progress during his 6 months at WSH, defendant still did not believe he has a mental illness and that he would be highly likely to stop taking his medications without supervision. Id.

On February 25, 2004, the trial court signed an order finding defendant competent. 2RP 3; CP 44-45.

On March 9, 2004, the trial court signed an order presented by defense counsel appointing an independent expert, Frederick Wise, PhD, to examine and evaluate defendant. CP 46-47. On April 21, 2004,

defense moved to continue the trial date because the independent expert had concerns regarding defendant's competence. 4RP 3.

On May 4, 2004, defendant presented to the court a Motion and Affidavit for Acquittal by Reason of Insanity and a Plea of Not Guilty by Reason of Insanity<sup>3</sup>. CP 52-53; 54. Defense counsel advised the court that defendant had benefited greatly from his medications. 5RP 5. Counsel explained that the independent defense expert felt the NGRI was the best option for defendant and that defendant originally had concerns about that option because it could result in him being at WSH for the rest of his natural life. 5RP 5. When defendant realized he would not necessarily get life at WSH, he realized that treatment would be better for him than prison. 5RP 10.

The trial court then engaged in a colloquy with defendant and specifically advised him: "What we're doing today does not decide when you get released." 5RP 15. At one point defendant was allowed to confer with counsel to clarify a point. 5RP 7. At another point in the proceeding, a recess was taken for counsel to explain to defendant the ramifications of going to trial. 5RP 13. The court ultimately concluded that defendant

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<sup>3</sup> The plea form has interlineated "firearm enhancement". CP 54. This is a scrivener's error. The information and findings of insanity accurately reflect deadly weapon sentence enhancement (as opposed to a firearm enhancement). CP 1; 49. Defendant acknowledged on the record he understood he was charged with "assault in the first degree domestic violence with a **deadly weapon** sentencing enhancement." 5RP 7 [emphasis added].

understood his options and was making a choice of his own free will. 5RP  
16.

The trial court entered written Findings of Insanity, Judgment of Acquittal, and Order of Conditional Release. CP 48-51. The court specifically found defendant competent to stand trial:

Defendant presently understands the nature of the proceedings against him and is able to assist his attorney in his own defense...

CP 50.

Defendant did not file a direct appeal.

Since being committed to WSH pursuant to his NGRI plea, defendant has petitioned for conditional release on five separate occasions. WSH Center for Forensic Services did not support any of defendant's petitions. CP 55-59, 60-72, 73-77, 107-111. Mental health professionals described defendant as "a very poor candidate for a Conditional Release" based in part on (1) his history suggesting paraphilia, child luring, and potential for rape"; (2) superficial treatment engagement consistent with his psychopathy; and (3) minimization of his mental illness and offense behavior. CP 108.

On July 29, 2005, more than one year after the entry of his plea, defendant filed a letter requesting "a change of plea bargain." CP 80. In that letter defendant acknowledges that attorney Jean O'Loughlin advised him of the one-year time limit for filing a motion. CP 80. Defendant goes

on to blame his lawyer for his lack of timeliness as his lawyer, apparently his trial lawyer, Mike Kawamura, for not telling him “everything.” CP 80-81. Defendant continued to assert he is not mentally ill and that he does not want to take medication. CP 81. He claimed he did not understand “not guilty by reason of insanity meaning it’s a life sentence.” CP 80. Defendant requested a new attorney. Id.

On August 18, 2005, defendant filed a letter with the court asserting that Gene [sic] Ologhlin [sic] told him he had one year to “change his plea bargain”. CP 86. Attorney Jean O’Loughlin met with defendant at least 12 times and spoke to defendant on the phone 30 times between May 2004 and May 2005. CP 1224. She stressed to defendant the importance of bringing any motions prior to May, 2005. Id. She further advised him that her research and review of the case provided no basis upon which to withdraw his plea of NGRI. Id.

The trial court conducted a hearing on February 10, 2006. 6RP 3-16. At that time, original counsel for defendant, Michael Kawamura, advised the court that he had referred defendant to the attorney assigned to represent WSH inmates. 6RP 4; CP 123-24. The trial court then appointed new counsel for defendant. 6RP 11.

On April 14, 2006, the court conducted a hearing on defendant’s motion to vacate his NGRI plea. 7RP 3; CP 125-131. Defendant was represented by F. McNamara Jardine. Id. At the hearing, the court indicated that the first issue was whether defendant’s motion was timely.

7RP 5. Defense counsel asserted the court could go beyond the one-year time limit because new counsel had been appointed or to correct an injustice. 7RP 6. The trial court did not address the timeliness issue in its oral ruling until defense counsel asked, “[I]s the Court basically opening the one-year period to reconsider this at this time on his behalf and then denying that request? Because I think Mr. Schwab’s concern is making sure that the one-year isn’t what he’s being punished for.” The court replied, “Absolutely.” 7RP 11. The relevant Findings of Fact stated:

4. The court in granting Defendant’s motion for independent counsel, **impliedly** granted Defendant’s motion to extend the time permitted for relief from the judgment pursuant to CrR 7.8.

...

6. The court **extended** the time for hearing the motion pursuant to CrR 7.8(b)(5).

CP 134 [emphasis added]. The relevant Conclusion of Law stated:

2. The one year time limit for relief of judgment **does not apply**, relief is justified for other reasons under CrR 7.8(b)(5).

CP 135 [emphasis added].

The trial court made a ruling on the merits of defendant’s claim after reviewing transcript of the plea colloquy. The court was satisfied that Mr. Kawamura had fully informed defendant, as had the court, about the ramifications of NGRI. 7RP 10. The trial court’s written Findings of

Fact state that defendant entered the NGRI plea knowingly and voluntarily after being fully advised of his rights and the consequences of his actions. CP 133.

On September 28, 2005, two months before filing his letter requesting “a change of plea bargain,” but seven months before the hearing to vacate NGRI, defendant filed a Personal Restrain Petition in this Court, #34093-3-II. Defendant therein claimed that he did not know what he was doing at the time of the plea. PRP at 4. In his PRP, defendant again acknowledged that he was aware of the one-year time limit: “I want a change of plea bargain and have one year to change my plea bargain that’s the law and what I was told.” PRP at 2. Defendant further claimed “the lawyers made me wait over a year to do this.” PRP at 3. The State filed its Response to Personal Restraint Petition on January 10, 2006.

This Court consolidated this appeal with the Personal Restraint Petition under this case number, #34907-8-II.

Defendant now appeals the Findings of Fact and Conclusions of Law entered by the court on May 26, 2006, denying his motion to vacate NGRI plea, which was heard on April 14, 2006. CP 146-49. The Notice of Appeal was filed within 30 days of the entry of the Findings of Fact and Conclusions of Law.

2. Facts

On February 14, 2003, defendant was walking along 6<sup>th</sup> Avenue with his mother. Defendant asked his mother for money and she said she would give it to him, but that he had to pay her back. Suddenly, defendant pulled a serrated knife with a four inch blade and began stabbing his mother. She fell to the ground and defendant continued his attack. She sustained a six inch laceration to her left cheek, a one inch laceration to her tongue and a one inch laceration in the right side of her neck.

Witnesses stopped their cars to help. Defendant fled, but was chased by a witness who got the knife away from him. A group of people detained defendant until police got there. Defendant told police he stabbed his mother because she was being raped by a guy named "Tom".  
CP 2.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT HAVE JURISDICTION TO RULE ON DEFENDANT'S MOTION TO VACATE BECAUSE THE MOTION WAS BROUGHT MORE THAN ONE YEAR AFTER DEFENDANT'S JUDGMENT BECAME FINAL AND THERE IS NO APPLICABLE EXCEPTION TO THE TIME BAR.

Defendant brought his motion to vacate his plea under Criminal Rule 7.8(b)(5), which provides:

**(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:

...

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and ... 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.* ...

CrR 7.8 [bold italics added]. The trial court lacked jurisdiction to hear defendant's motion for two reasons. First, the court purportedly "extended" the one year time limit under subsection (5) of the rule, which provides for "any other reason justifying relief from the operation of the judgment." However, the trial court did not grant any relief from the judgment. Because relief was obviously not justified, as required by the rule, that section of the rule is inapplicable to defendant's case.

Secondly, the trial court ignored the portion of the rule, in bold italics above, that subjects the rule to various provisions of RCW 10.73. RCW 10.73.090(1) provides that "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent

jurisdiction.” RCW 10.73.090(1). When there has been no appeal, judgment becomes final on “the date it is filed with the clerk of the court.” RCW 10.73.090(3)(a). Defendant’s case became final on May 4, 2004.<sup>4</sup>

In addition to the exceptions listed within the statute, there are other specific exceptions to the one-year time limit for collateral attack: The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant’s conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the State Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court’s jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the

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<sup>4</sup> The State’s Response to Personal Restraint Petition states that “Petitioner’s [defendant’s] case became final on May 4, 2005.” Response to PRP at 3. This is in error. His case became final on May 4, 2004. He had until May 4, 2005 to file his collateral attack.

conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100.

In the instant case, defendant's judgment became final on May 4, 2004, the day the judgment of acquittal was filed with the clerk. RCW 10.73.090(3)(a). A timely personal restraint petition or motion to vacate plea had to be filed by May 4, 2005. Defendant filed his personal restraint petition on September 28, 2005, over four months too late. He filed his motion to vacate plea on April 6, 2006, almost two years too late.

Defendant bears the burden of proving that his petition and/or motion falls within an exception to the one-year time limit. Shumway v. Payne, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998); see RCW 10.73.100 (listing the six exceptions). To meet that burden of proof, defendant must state the applicable exception within the petition. In re Stoudmire, 145 Wn.2d 258, 36 P.2d 1005 (2001) ("Stoudmire II").

Here, defendant was not provided written notice advising him of the time bar on collateral attack pursuant to RCW 10.73.110. Defendant cannot demonstrate that he was not verbally advised of the time bar. In

fact, he acknowledges that he had actual notice of the time limit in his PRP. Defendant states, “I want a change of plea bargain and have **one year** to change my plea bargain **that’s the law and what I was told.**” PRP at 2 [emphasis added]. Similarly, in a letter to the court dated August 19, 2005, defendant again acknowledged that Ms. O’Loughlin advised him of the time limit: “I have the right to change my plea bargain that’s what my lawyer gene [sic] Oloughlin [sic] told me she said you have **a year** to change your plea bargain...” CP 86-87 [emphasis added]. This demonstrates that defendant was aware of the one year time limit. Simultaneous with litigation of his motion to vacate below, defendant filed a declaration stating that he had not been advised of the time limits. CP 132. This is contrary to his two prior acknowledgements, cited above. Additionally, attorney Jean O’Loughlin filed a declaration with the court swearing that she advised defendant of the one year time limit and that this occurred during her tenure at WSH Legal Services, which was from May 2004 through mid-2005. CP 123. During that time, she met or spoke weekly with defendant. Id. When they initially met, defendant wanted to explore the consequences of a motion to vacate the court’s judgment of acquittal by reason of insanity. Id. Ms. O’Loughlin reviewed defendant’s case and leading case law. She again met with defendant and told him that she saw no legal basis for vacating the judgment. She stressed the

importance of bringing any motions before May 4, 2005. Id. It seems implicit in this declaration that defendant was advised of his legal position, including the time bar, early on in his contact with Ms. O'Loughlin. The fact that she stressed the importance of this date with him indicates that the advisement took place prior to that date. It makes no sense that she advised him to bring his motion by a certain date if that date had expired.

Defendant cites no authority for a trial court to "extend" the one-year time limit. Defendant states in his brief that the trial "court held that the one-year time limit for filing the request was waived by previous counsel's conduct. 7RP 11." BOA at 19. However, the court never stated that the time limit was waived by counsel's conduct. The trial court responded to defense counsel's question when she asked, "[I]s the Court basically opening the one-year period to reconsider this at this time on his behalf and then denying that request? Because I think Mr. Schwab's concern is making sure that the one-year isn't what he's being punished for." The court replied, "Absolutely." 7RP 11. There was no reference to counsel's conduct, nor did the trial court use the term "waived". 7RP 11. Even if the court had made such a determination as asserted by defendant, such a finding would not confer jurisdiction upon the trial court because that is not an appropriate exception under RCW 10.73.100.

Nor can the failure of the State to raise a time bar issue below confer jurisdiction upon the trial court after the one year has elapsed. Further, the State can raise lack of trial court jurisdiction for the first time on appeal. RAP 2.5(1).

Defendant's claim of equitable tolling of the time limit is not warranted in this case. The equitable tolling doctrine "permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed." In re Carlstad, 150 Wn.2d 583, 593, 80 P.3d 587 (2003) (*quoting* State v. Duvall, 86 Wn. App. 871, 874, 940 P.2d 671 (1997)) (emphasis added). The remedy is "generally used . . . when the plaintiff exercises diligence and there is evidence of bad faith, deception, or false assurances by the defendant." Carlstad, 150 Wn.2d at 593. Courts typically permit equitable tolling only sparingly and do not extend it to "a 'garden variety claim of excusable neglect.'" State v. Littlefair, 112 Wn. App. 749, 759-60, 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020, 72 P.3d 761 (2003) (citations omitted). RCW 10.73.090 can be subject to equitable tolling in a proper case. Littlefair, 112 Wn. App. at 759.

In Littlefair, the court identified a proper case. There, an immigrant defendant pleaded to a deportable offense. Two years after the judgment and sentence was entered, the Immigration and Naturalization

Service (INS) notified Littlefair that it would seek to deport him because of his conviction. Littlefair, 112 Wn. App. at 755. Littlefair was not aware of his possible deportation when he pleaded guilty. Littlefair, 112 Wn. App. at 763. Because this was not his fault and because he would not have pleaded guilty if he had known he could be deported, the court concluded that the one-year time period in RCW 10.73.090 should be equitably tolled. Littlefair, 112 Wn. App. at 763.

In contrast, in State v. Robinson, 104 Wn.App. 657, 661, 17 P.3d 653 (2001), justice did not require equitable tolling. In that case, almost a year after a defendant pleaded guilty, she mailed a motion to withdraw her plea to the trial court clerk. Id. However, the clerk did not receive her motion until three days after the one-year time-bar had passed. Id. Robinson claimed that the time limit should be equitably tolled because she "diligently pursued her cause and but for either the lateness of the mail or the failure of the clerk to stamp the motion as filed, she would have filed the motion before the expiration date." Robinson, at 667. Division One held that justice did not require equitable tolling because postal delay was the most likely explanation for Robinson's tardiness and "postal delay is such a common experience that any litigant who has a statute of limitations looming, as this one was . . . should probably either file by

facsimile transmission where permitted . . . or mail the document . . . early enough to account for all but the most egregious postal delay." Id. at 668-69.

Similar to Robinson, defendant has not shown a need for equitable tolling. Rather, he demonstrates he was advised of the time limit by Ms. O'Loughlin. The fact that he may have been exploring the possibility of withdrawing his plea within the year does not toll the one year time limit.

The personal restraint petition should be dismissed as time-barred under RCW 10.73.090(1). This Court should likewise find that the trial court did not have jurisdiction to hear defendant's motion to vacate his plea, and hold that direct review of his plea is similarly time-barred.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO VACATE HIS NGRI PLEA WHEN DEFENDANT CLAIMED HE DID NOT KNOW THAT HE COULD BE DETAINED AT WSH FOR UP TO HIS MAXIMUM TERM, BUT WHERE THE RECORD CLEARLY SHOWS HE WAS SO ADVISED BY BOTH COUNSEL AND THE COURT.

a. Defendant understood commitment at WSH was potentially for life.

A trial court's decision under CrR 7.8(b) is reviewed for abuse of discretion. State v. Robinson, 104 Wn. App. at 662 (*citing State v. Olivera-Avila*, 89 Wn. App. 313, 317, 949 P.2d 824 (1997)). A CrR 7.8(b) motion is subject to the time limitations set out in RCW 10.73.090.

Olivera-Avila, 89 Wn. App. at 317 (*citing* CrR 7.8(b)).

The constitutional constraints for entry of a NGRI plea are similar to those on the acceptance of a guilty plea. State v. Brasel, 28 Wn. App. 303, 312, 623 P.2d 696 (1981). However, CrR 4.2 does not apply to NGRI pleas. Id. Due process requires that a defendant entering an NGRI plea understand:

(1) the essential elements of the offense charged; (2) that by making the motion he admitted to committing the acts charged and that, if acquitted, he might not later contest the validity of his detention on the ground that he did not commit the acts charged; (3) that by making the motion he waived his rights to remain silent, to confront his accusers, and to be tried by a jury; and **(4) that, if acquitted, he could be committed to a state hospital for the criminally insane for a term up to the maximum possible penal sentence for the offense charged.**

Brasel, 28 Wn. App. at 313 [emphasis added]. Unlike a guilty plea, a defendant who enters a NGRI plea has many of the benefits of an acquittal, for example, he avoids a criminal record of the offense, he is free from punishment by imprisonment, and is relieved from the burden of proving insanity. State v. Autrey, 58 Wn. App. 554, 558 n.2, 794 P.2d 81 (1990).

Here, defendant claimed in his written motion to vacate his NGRI plea that his original counsel was deficient for failure “to advise him of a potentially longer period of confinement at WSH.” CP 129. This claim pertains to the fourth requirement set forth in Brasel, above. Defendant made no claims in the trial court alleging infirmities in other areas. CP

125-131. Similarly, in his declaration filed in the trial court, on April 14, 2006, defendant claimed as his sole ground for relief: “I was under the belief that I would be committed to Western State Hospital for the duration of the standard range sentence of the crime charged.” CP 132.

The same issue was addressed at the hearing:

THE COURT: . . . the only issue remaining is whether [original defense counsel] had advised Mr. Schwab with respect to the consequences, and as far as I understand Mr. Schwab, is really the length of stay at Western State Hospital versus a prison sentence; is that a fair –

. . .

MS. JARDINE: . . . That is, Your Honor.

7RP 7. After the court ruled, defendant asserted that original counsel “didn’t tell me that if I took a prison sentence that it would get me out sooner than an NGRI.” 7RP 15.

In deciding defendant’s motion, the court considered the transcript from the plea. 7RP 8. That transcript revealed that defense counsel had an independent examination of defendant performed by Dr. Weise. 5RP 5. Defense counsel informed the court of the following: (1) Dr. Weise believed that a NGRI plea would be best for defendant. *Id.* Counsel agreed. (2) Dr. Weise advised counsel that with medication and treatment, defendant *could* regain normal function and he was hopeful that would occur. 5RP 5. (3) Counsel spoke with defendant regarding Dr. Weise’s opinions. *Id.* (5) **Defendant had been reluctant to pursue an NGRI**

**plea because he was afraid it would mean him being at WSH for the rest of his natural life.** Id. (6) Counsel informed defendant that he could be held at WSH for the statutory period of the offense, which is **life imprisonment**, but that the mental health professionals did not think that defendant would be there for life because he is someone who is capable of being treated. 5RP 6. (7) Counsel advised the court that he had discussed with defendant that this offense would be defendant's second "strike" offense which could put him at peril for a life sentence should he commit such another offense. Id. (8) After reviewing the case with defendant, counsel felt defendant understood what the plea would mean for him, that he needed to go to WSH, and that counsel and defendant were hopeful that such a plea would ultimately result in a conditional release for defendant. Id.

The court made inquiry of defendant: (1) Defendant stated counsel had reviewed the paperwork with him and that counsel had answered all of his questions. 5RP 8. (2) Defendant stated he understood that by entering the plea, he would be waiving his right to a jury trial and that he would be committed for treatment and medication. Id. (3) Defendant agreed with the court that counsel had advised him that he "could be committed for the statutory period which would be **up to life in prison**, but that the doctors and the evaluators have indicated that it's quite possible that with proper medication and treatment that you **might** not, in fact, be committed for the rest of your life." 5RP 9 [emphasis added].

Clearly, defendant was informed that he could potentially be detained for life at WSH. It is equally clear that he understood this important aspect of his plea. In fact, he considered this factor heavily in making his decision. His claim that he was not advised of a possible life sentence at WSH is not supported by the record.

There was no evidence in the record that defendant did not understand. His responses were not disjointed and incoherent. Nor did he make references to his delusions as he had in the past. When he did not understand, he asked questions. He was allowed to confer with counsel at one point and recess was taken at another for counsel to answer questions about the ramifications of a trial. Defendant was represented by counsel who presumably acted with defendant's rights and best interests in mind, even having obtained independent mental health professional's opinion.

Defendant now concedes that his position below is completely unsupported by the record. BOA at 38.

b. Ineffective assistance of counsel.

A motion pursuant to CrR 7.8 is a form of collateral attack. State v. Robinson, 53 Wn.2d 689, 695-96, 1-7 P.3d 90 (2005). A criminal defendant does not have a right to counsel in a CrR 7.8 motion for relief from judgment until the trial court makes a determination that the petition or motion established grounds for relief. Id. at 696.

The rule provides in pertinent part:

**(c) Procedure on Vacation of Judgment.**

(1) *Motion.* Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) *Initial consideration.* The court may deny the motion without a hearing if the facts alleged in the affidavits do not establish grounds for relief. . . .

CrR 7.8(c). This rule demonstrates that it is the defendant, prior to the appointment of counsel, who raises the issue to be determined by the trial court. The trial court may then appoint counsel if it determines that there is an issue to be decided. Counsel then represents the defendant on the issues already raised. There is no provision for appointed counsel to raise new claims; the issues are framed by the defendant in a collateral attack. To allow such litigation would, in effect re-open all issues for direct review. Here, defendant realizing he will not prevail on appeal, attempts to introduce new issues by claiming ineffective assistance of counsel below. BOA at 36.

In Robinson, the trial court summarily denied Robinson's motions, including his motion to appoint counsel, determining that he did not establish grounds for relief. State v. Robinson, 53 Wn.2d at 696-97. The Supreme Court noted that if Robinson were entitled to counsel at all, it would not have been until *after* the motion to withdraw was already prepared and initially presented. Id. at 697. This demonstrates that it is the defendant who drives the issues to be addressed by the court, not

counsel. Appointed counsel must proceed on the issues already framed by the defendant. Therefore, any conflict of interest is immaterial to both time limit issues as well as the substance of defendant's claim. In a collateral attack, the defendant raises the issue of ineffective assistance of counsel on his own. There is no requirement that counsel be appointed to raise this claim.

To the extent a defendant seeking collateral relief is entitled to counsel, which is to represent the defendant on the claim already raised, Ms. Jardine was effective. She pursued the claim as defendant asserted it. That it was of very little merit does not amount to ineffective representation. Simply because the trial court did not act within the limits of the rule and did not follow the proper procedure does not confer upon defendant any rights that he would not otherwise have.

Defendant's reliance on Strickland v. Washington and its progeny is misplaced. The Strickland analysis pertains to ineffective assistance of counsel when constitutionally guaranteed. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant in a collateral attack does not have a constitutional right to counsel, as defendant concedes. BOA at 36.

c. Other claims.

If not time-barred, defendant may only seek review of issues raised in the trial court on April 14, 2006, and May 26, 2006. Defendant may not now seek review of unchallenged issues pertaining to the underlying

judgment in his case. Defendant did not file a direct appeal after the entry of his judgment on May 4, 2004. Therefore, that judgment became final on that date. RCW 10.73.090(3)(a); CP 133-35. RAP 2.4(c) provides, in part:

. . . the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding a timely post trial motion based on . . . (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.6 (new trial).

Here, defendant appeals only the Findings of Fact and Conclusions of Law entered on May 26, 2004, arising out of the hearing on April 14, 2006. CP 146-49 (Notice of Appeal). Because defendant's motion in the trial court was pursuant to CrR 7.8, the underlying judgment is not subject to review. RAP 2.4(c). Therefore, the remainder of defendant's challenges, those not made in the trial court, are not properly before this court for review and should not be considered.

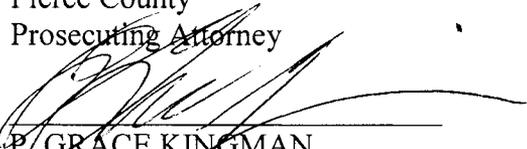
D. CONCLUSION.

The State respectfully requests that this Court dismiss defendant's appeal because defendant is appealing an order the Superior Court lacked jurisdiction to enter. Similarly, the Personal Restraint Petition should be dismissed as time-barred. Should this Court find that the one-year time

limit did not apply to defendant's case, the State respectfully requests that this Court affirm the trial court's denial of defendant's motion to vacate his NGRI plea.

DATED: March 20, 2007

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
P. GRACE KINGMAN  
Deputy Prosecuting Attorney  
WSB # 16717

Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

*Sell*

3-20-07 *Melzak*  
Date Signature

FILED  
COUNTY OF PIERCE  
07 MAR 21 PM 1:41  
STATE OF WASHINGTON  
BY *Melzak*