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State of Washington  
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No. 49863-4-II

No. 96496-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Appellant,

v.

MARVIN LEO,

Respondent.

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

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ANSWER TO MOTION FOR  
DISCRETIONARY REVIEW

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A. INTRODUCTION

Marvin Leo was sentenced to die in prison for crimes he committed as a child.

Fourteen years after Marvin's crimes, the United States Supreme Court found mandatory life sentences, such as the one Marvin received, violated the Eighth Amendment. The Washington Legislature responded by ordering new sentencing hearings for juveniles sentenced to life in prison. The statutory amendment requires the trial court to consider the mitigating qualities of youth and to set a minimum term of no less than 25 years, at which point the juvenile becomes eligible for parole.

Here, the trial court conducted the required hearing. The court carefully considered, and entered detailed findings regarding, the mitigating qualities of Marvin's youthfulness at the time of his offenses. The court set a minimum term of 40 years.

The State initially appealed, contending the court was required to again sentence Marvin to die in prison for the crimes he committed as a child.

Marvin responded in part by noting that RCW 10.95.030 prohibits the State from seeking review of the trial court's minimum

term decision. The State now concedes it is not permitted to appeal as a matter of right, but contends it is entitled to seek discretionary review.

Because the State did not have the ability to challenge, in any manner, a minimum term decision of the parole board prior to 1986, RCW 10.95.035 does not permit the State to seek discretionary review in this case.

**B. ISSUES PRESENTED**

1. RCW 10.95.035 requires a trial court to resentence children previously sentenced to life without parole. That statute provides “[t]he court’s order setting a minimum term [under RCW 10.95.035] is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986.” Prior to July 1986, the State was not a party to and did not have the ability seek review, by any means, of the minimum term decision of the parole board. The State cannot seek discretionary review of the trial court’s decision in this case.

2. Even if it were not statutorily barred from seeking discretionary review, the State is entitled to discretionary review only if can satisfy the criteria of RAP 2.3. The State has not demonstrated the trial court committed any error in this case and is not entitled to discretionary review.

C. ARGUMENT

**1. RCW 10.95.035 prohibits the State from seeking discretionary review of the trial court's order.**

Prior to July 1, 1986, the effective date of the Sentencing Reform Act (SRA), a court set the maximum term and left setting the minimum term to the parole board. "Such decisions were not reviewable by appeal or by discretionary review as they did not meet the criteria of RAP 2.2 or RAP 2.3." *In re the Personal Restraint of Rolston*, 46 Wn. App. 622, 623, 732 P.2d 166 (1987). *Rolston* has clearly settled the question posed here. Rather than acknowledge this Court's prior holding or offer any basis to distinguish it, the State simply ignores it.<sup>1</sup>

A simple examination of the pre-1986 language of RAP 2.3 demonstrates *Rolston* is correct. As enacted in 1976, that rule provided:

**Decision of the Trial Court Which May be Reviewed by Discretionary Review**

**(a) Decision of the Superior Court.** A party may seek discretionary review of an act of the superior court not appealable as a matter of right.

**(b) Considerations Governing Acceptance of Review.** Discretionary review will be accepted only:

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<sup>1</sup>The State does cite *Rolston* for the proposition that a defendant could challenge such decisions by way of Personal Restraint Petition. Of course that was necessary because they were not subject review by any other means.

(1) If the superior court has committed and obvious error which would render further proceedings useless, or

(2) If the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act, or

(3) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.

**(c) Effect of Denial of Review.** The denial of discretionary review of a decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision.

As the plain and original language of the rule makes clear RAP 2.3 only pertained to review of Superior Court decisions. That remained the case at all times prior to July 1, 1986, as RAP 2.3 never permitted discretionary review in the Court of Appeals of anything other than decisions of the superior court. *See* 86 Wn.2d 1147-48 (1976); 94 Wn.2d 1132 (1980); 104 Wn.2d 1140 (1985).<sup>2</sup> Indeed, that remains the case today. RAP 2.3. RAP 2.3 has never authorized discretionary review of administrative agency decisions. Prior to 1986, the setting of a minimum term was done by an administrative agency, the parole board.

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<sup>2</sup> The citations are to the Supreme Court reporters wherein the rule, and subsequent amendments were adopted. The reporters set for the full text of both the rule as adopted and the subsequent amendments.

Under the indeterminate sentencing scheme that predated the SRA, the Superior Court did not set the minimum term, but instead only set a maximum term. Following the defendant's transfer to the Department of Corrections, the parole board administratively set a minimum term. Laws 1986, ch 223, §9 (former RCW 9.95.040). The parole board was an administrative agency. D. Boerner, *Sentencing in Washington*, 1-1 (1985). The administrative setting of a minimum term was not a part of the criminal proceeding. *In re the Matter of Bonds*, 26 Wn. App. 526, 530, 613 P.2d 1196 (1980). Because review under RAP 2.3 has always been limited to decisions of the Superior Court, and has never authorized review of administrative agency decisions, a minimum term decision by the parole board has never been reviewable under RAP 2.3. As such, RCW 10.95.035 does not permit the State to seek discretionary review in this case.

Rather than address this Court's plain holding in *Rolston*, or even the plain language of former versions of RAP 2.3, the State instead offers a broad survey of pre-1986 appellate procedure. The State then pyramids several assumptions to reach the conclusion that the State was in fact able to seek discretionary review of minimum term decisions of the parole board prior to 1986 under RAP 2.3 even though

that rule has never applied to anything other than decisions of a court. It bears repeating that the State reaches this conclusion without once addressing the actual language of that rule.

Without citing a **single** case in which the State was actually permitted to seek review of a parole board decision, by any means, the State nonetheless insists it could. The State begins building its pyramid by noting that with the adoption of the Rules of Appellate Procedure the Supreme Court intended to simplify the appellate process, eliminating reliance on various extraordinary writs. Supplemental Brief at 3. Next, the State contends the State was permitted to file extraordinary writs prior to adoption of the RAP in 1976. Brief at 4. The State then notes that individuals could file extraordinary writs involving administrative agencies. *Id.* Ergo, the State insists it was entitled to file extraordinary writs against the parole board, although the State does not bother to provide citation to any case in which this actually occurred. The State next surmises that because the RAP superseded the use of extraordinary writs, RAP 2.3 must have permitted the State to seek review of parole board decisions. Supplemental Brief at 4.

The mere fact that the Rules of Appellate sought to eliminate reliance on extraordinary writs does not lead to or support the conclusion that every avenue of review formerly available by writ is now available pursuant to the rules. Moreover, it cannot support the conclusion that former RAP 2.3 applied to review of agency decisions despite its plain language limiting its application to court decisions.

In addition, the conclusion that the State could seek review of a parole board decision begs the question of how the State could do so when it was not even a party to the parole decision. While the State was, of course, a party at the sentencing hearing at which the court set the maximum term, the State was not a party to the minimum term decision. Again, that was an administrative decision independent of the criminal proceeding. *Bonds*, 26 Wn. App. at 530. This explains why such decisions were not challengeable by appeal of right by the inmate, as Article I, section 22 guarantees for criminal cases. Moreover, this explains why they were reviewable by Personal Restraint Petition wherein the board, and not the prosecutor, was the opposing party.

When it directed resentencing of children sentenced to life without parole, the Legislature carefully limited review of those decisions. The Legislature specifically mandated review was only

available to the extent available prior to July 1986. As this Court concluded in *Rolston*, the parole board's minimum term determination was not reviewable under RAP 2.3 prior to July 1986. Because the State has never been able to seek review of a minimum term decision, RCW 10.95.035 bars the State's effort to seek discretionary review here.

This Court should deny the State's motion.

**2. Even if RCW 10.95.035 permitted the State to seek discretionary review, the State has not satisfied the criteria of RAP 2.3.**

The State has provided no basis under RAP 2.3 which warrants discretionary review. That rule provides in relevant part:

(b) Considerations Governing Acceptance of Review. Except as provided in section (d) [pertaining appeals of decisions of courts of limited jurisdiction], discretionary review **may be accepted only** in the following circumstances:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a

controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

(Emphasis added.)

As in its prior brief, the State repeats its mantra that the trial court misapplied the provisions of RCW 10.95.030. Supplemental Brief at 7-8. Despite any language requiring it, the State insists the court was required to impose five consecutive sentences totaling 125 years. As Marvin has noted in his own briefing: (1) the statute does not require consecutive sentences; and (2) if the statute did mandate a 125 years sentence, the statute is unconstitutional. Brief of Respondent. The trial court properly applied the statute. There is simply no error to be corrected.

In addition, as no further proceedings exist, the State cannot establish that even an obvious error has rendered these nonexistent proceedings useless. Too, even a probable error does not substantially alter the status quo of the State's freedom to act. Further, the State's has not identified a significant departure from the usual course of judicial proceedings. Finally, the trial court has not certified any issue to this Court and the parties have not entered a stipulation as contemplated by RAP 2.3(b)(4).

The State has not established any basis for discretionary review.

D. CONCLUSION

The trial court properly applied the provisions of RCW 10.9.030 and the State may not appeal Mr. Leo's minimum sentence. This Court should affirm the trial court.

Respectfully submitted this 5<sup>th</sup> day of December, 2017.



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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 49863-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered by other court-approved means to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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# WASHINGTON APPELLATE PROJECT

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