Supreme Court No. 100395-1
(COA No. 81059-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

AMOS CARMONA-CRUZ,
Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Amos Carmona-Cruz, petitioner here and respondent/cross-appellant below, asks this Court to accept review of the Court of Appeals' opinion. RAP 13.4. The August 9, 2021, opinion, and October 22, 2021, order denying reconsideration, are attached.

B. ISSUES PRESENTED FOR REVIEW

1. In a criminal case, the Rules of Appellate Procedure (RAP) permit the State to file a direct appeal only in limited circumstances and from specific final decisions unambiguously identified in the rules. Although RAP 2.2(b) does not include an order denying a motion for reconsideration among the carefully delineated decisions parties may appeal, the Court of Appeals refused to dismiss the State's unauthorized appeal and further granted the relief the State requested. This Court should accept review because the opinion misinterprets RAP 2.2 and conflicts with this Court's decisions deliberately restricting appealability under RAP 2.2.

2. CrR 7.8 directs a court to grant a motion to vacate a facially invalid judgment and sentence. The trial court found Mr. Carmona-Cruz's judgment was facially invalid because it improperly struck language explaining his right to appeal. Although the prosecution conceded the right to appeal language was improperly stricken from the judgment, the Court of Appeals held the judgment was not flawed. This Court should accept review because the opinion misunderstands the critical role the judgment plays in protecting the constitutional right to appeal.

3. Even if the opinion correctly concludes the court should have transferred the CrR 7.8 motion for consideration as a personal restraint petition (PRP), nothing prevents the Court of Appeals from considering the merits of the fully briefed issues raised in the context of this appeal and cross-appeal. Instead, the Court of Appeals declined to reach the underlying merits of the issues presented and remanded the case with directions that the court transfer the same CrR 7.8 motion to the

same Court of Appeals for consideration as a PRP. This undermines the Court's interest in judicial economy and does not serve the interest of justice when Mr. Carmona-Cruz may not receive counsel on the case when it is transferred as a PRP. This Court should accept review and reach the merits of the issues on review.

C. STATEMENT OF THE CASE

In November of 2012, Mr. Carmona-Cruz was involved in a car accident. CP 299-302. Almost one year later, he appeared in court in response to a summons charging him with vehicular assault. CP 299.

At the arraignment, Mr. Carmona-Cruz appeared without an attorney. CP 57-58. A Spanish interpreter appeared with him because Mr. Carmona-Cruz does not speak English. CP 58. Mr. Carmona-Cruz was screened for a court-appointed attorney, but he did not sign the promissory note required for such representation because he could not afford to pay the amount he was told would be recouped. CP 58-65. The court

offered to continue the matter for Mr. Carmona-Cruz to retain counsel or suggested he could represent himself. CP 59-60. Mr. Carmona-Cruz responded he did not want to delay the proceeding and would represent himself so it would "be over already." CP 60.

The court inquired as to Mr. Carmona-Cruz's education understanding of procedural rules. CP 61-63. Mr. Carmona-Cruz said he had no legal experience and had never represented himself. *Id.* The court explained he would not be allowed to use the court interpreter to access the law library. *Id.*

When the court asked Mr. Carmona-Cruz how he thought he would fare against an experienced prosecutor, he answered, "It doesn't matter if I get accused. I have no money to pay, so." CP 63. The court explained it would not involve itself in the determination he was not eligible for free counsel without a motion. CP 63-64. Mr. Carmona-Cruz responded, "I just want this to be over. I don't care about what's going to happen." CP 64.

Although the court told Mr. Carmona-Cruz the charge "carries the possibility of substantial jail time" and warned him "you may be sent to jail or prison," it did not tell him the statutory maximum or guideline range he faced. CP 62-64, 57-76. When the court again asked Mr. Carmona-Cruz if he wanted to represent himself, Mr. Carmona-Cruz acquiesced, saying, "That's fine. Yes." CP 65. Mr. Carmona-Cruz pleaded guilty to vehicular assault on the next court date. CP 78-93, 213-28. He retained his right to appeal as part of the plea, waiving only the right to appeal a finding of guilt after trial. CP 112.

The court sentenced Mr. Carmona-Cruz at the next appearance. CP 98, 131-32. The section on the judgment advising Mr. Carmona-Cruz of his right to appeal was entirely crossed out. CP 17, 136. No one advised him of his right to appeal at the sentencing hearing. CP 95-104.

In 2019, Mr. Carmona-Cruz filed a CrR 7.8 motion to vacate the judgment. CP 41-138. The court agreed the

judgment and sentence was fatally flawed because the section explaining the right to appeal was crossed out. CP 16-23. The State conceded the section crossing out the advisement of appellate rights was an error and was on the face of the judgment and sentence. CP 11-12, 18, 31; 12/12/19RP 25. The court rejected the State's argument this facial error was not a facial invalidity. CP 17-19.

The court concluded "the trial court effectively memorialized an unconstitutional agreement by the Defendant not to seek direct appellate review." CP 18. Therefore, the court "exceeded its statutory authority in entering the judgment without the mandatory advisement of rights on appeal to the Defendant, and . . . the Judgment and Sentence is invalid on its face." CP 19. The court vacated it and ordered the entry of a new, valid judgment and sentence. CP 23.

The State did not appeal the court's order vacating the judgment and sentence. Instead, the State filed a "motion to reconsider," which Mr. Carmona-Cruz opposed. CP 11-15, 7-

10. The prosecution provided no legal authority permitting a motion for reconsideration from an order in a criminal prosecution. The court denied the State's motion. CP 5-6. The State appealed the court's order denying its motion for reconsideration. CP 1-4.

After the court vacated Mr. Carmona-Cruz's judgment, he filed a motion to withdraw his plea under CrR 4.2(f) to correct a manifest injustice. CP 167-282. Mr. Carmona-Cruz argued because the court required him to represent himself in the absence of an unequivocal request and without a knowing, intelligent, and voluntary waiver, he was denied his right to counsel. CP 167-74. The court denied the motion. CP 159-62. Mr. Carmona-Cruz appealed from that order, and the Court of Appeals consolidated it with the State's appeal. CP 152-56.

The Court of Appeals rejected Mr. Carmona-Cruz's argument the RAP did not authorize the prosecution's appeal from an order deciding a motion for reconsideration. Slip op. at 4. It held Mr. Carmona-Cruz's motion to vacate the judgment

and sentence was time-barred, reversed the order granting the motion, and ordered the motion transferred to the Court of Appeals for consideration as a PRP. Slip op. at 5-7. It declined to address Mr. Carmona-Cruz's appeal from the denial of his motion to withdraw his plea because it reversed the order vacating the judgment. Slip op. at 8.

D. ARGUMENT

1. The Court of Appeals misinterpreted the Rules of Appellate Procedure and this Court's decisions when it permitted the State's unauthorized appeal from an order not identified in RAP 2.2(b).

The State may not appeal from any decision it wishes in a criminal case. Instead, RAP 2.2(b) carefully limits the State's authority to appeal from criminal orders to the narrow category of orders explicitly identified in the rule. Although the State appealed from an order not specified in RAP 2.2(b), the Court of Appeals refused to dismiss the unauthorized appeal or treat it as a motion for discretionary review. Instead, the Court of Appeals considered the State's impermissible appeal and granted the requested relief. This Court should grant review

because the opinion misinterprets the Rules of Appellate Procedure and conflicts with this Court's opinions construing the narrow scope of appeals RAP 2.2(b) authorizes by the State.

a. The Rules of Appellate Procedure limit the State's authority to appeal to orders identified in RAP 2.2(b).

The RAP establish two different mechanisms governing review of a trial court decision: review as a matter of right (appeal) and review by permission (discretionary review). RAP 2.1(a). A party may appeal a decision of the trial court only where RAP 2.2 permits. A party may seek discretionary review of any decision that is not appealable but must meet the stringent considerations governing acceptance of such review. RAP 2.3(a)-(b).

While *defendants* in criminal cases have a broad right to appeal under the constitution and rules, the *prosecution* has a very limited ability to appeal. *Compare* RAP 2.2(a), *with* RAP 2.2(b). "An appeal by the state does not lie from the ruling of a lower court in a criminal case, unless authorized by constitution

or statute." *Spokane County v. Gifford*, 9 Wn. App. 541, 542, 513 P.2d 301 (1973).

"RAP 2.2(b) sets out an exclusive list of orders from which the State may appeal." *State v. Waller*, 197 Wn.2d 218, 225, 481 P.3d 515 (2021). The rule provides:

> The State or a local government may appeal in a criminal case only from the following superior court decisions …:
> (1) Final Decision, Except Not Guilty …
> (2) Pretrial Order Suppressing Evidence …
> (3) Arrest or Vacation of Judgment …
> (4) New Trial …
> (5) Disposition in Juvenile Offense Proceeding …
> (6) Sentence in Criminal Case …

RAP 2.2(b). These are the "only" decisions from which the prosecution may appeal in a criminal case. Because it is absent from this list, the RAP do not authorize a State's appeal from an order deciding a motion for reconsideration.

b. <u>The Court of Appeals erroneously considered the State's unauthorized appeal from an order RAP 2.2(b) does not identify as appealable.</u>

Mr. Carmona-Cruz moved to vacate his facially invalid judgment and sentence under CrR 7.8. CP 41-138; 12/12/19RP

1-28. The court granted his motion. CP 16-23. The prosecution did not appeal the court's order vacating Mr. Carmona-Cruz's judgment but instead appealed a different order denying its motion for reconsideration. CP 1-4. The State's appeal from the order denying its motion for reconsideration is not authorized by the RAP, and the Court of Appeals should have dismissed it.

The opinion acknowledges RAP 2.2(b) "limits the State's authority to appeal in criminal cases." Slip op. at 4. But it nonetheless excuses the State's failure to appeal from an order delineated in that rule. *Id.* Instead, the opinion cites to RAP 2.2(b)(3), which permits an appeal from an order vacating judgment, as authorizing the State's appeal. *Id.*

Had the prosecution filed a timely appeal from the court's order vacating the judgment, Mr. Carmona-Cruz agrees it would present a proper appeal. RAP 2.2(b)(3); *Waller*, 197 Wn.2d at 225. But it did not. Instead, the State designated only the order denying its motion for reconsideration as the decision

it was appealing. CP 1-4. RAP 2.2(b)'s deliberate identification of decisions the State may appeal in criminal cases does not include orders deciding motions for reconsideration. That is most likely because the Criminal Rules do not provide for a motion to reconsider in criminal cases.

Appellate courts review only decisions designated in the notice. RAP 2.4(a). The order the State designated for review in its notice of appeal is not appealable. CP 1-4. The Court of Appeals should have dismissed the State's appeal as Mr. Carmona-Cruz requested.

Rather than hold the State to the confines of RAP 2.2(b), the opinion relies on RAP 2.4(b) to consider the State's appeal. Slip op. at 4. RAP 2.4(b) permits a court to review an order not designated in the notice of appeal if the order prejudicially affects the designated decision and is made before the appellate court accepts review. That rule is inapplicable here.

An underlying substantive order does not "prejudicially affect" the subsequent order denying its reconsideration. And

RAP 2.4 presupposes the party had the right to appeal the challenged order in the first place. Otherwise there would be no need for the rule to carefully delineate specific appealable orders if this catchall will permit an appeal of countless other orders. Moreover, nothing in RAP 2.4(b) permits appeal from a motion to reconsider in a criminal matter, nor does it expand a notice of appeal to include an order not designated that was entered before a motion to reconsider in a criminal case.

The opinion misconstrues RAP 2.4 and uses it to avoid Mr. Carmona-Cruz's argument that the *Criminal* Rules, as opposed to the Civil Rules, do not provide for a motion for reconsideration. A motion for reconsideration is not a permissible motion in a criminal case in superior court. *State v. Keller*, 32 Wn. App. 135, 139, 647 P.2d 35 (1982). The Criminal Rules do not provide for such a motion. *Id.*

That the Civil Rules permit such a motion creates no right to a comparable motion under the Criminal Rules. CR 1. "[T]he civil rules by their very terms apply only to civil cases."

State v. Gonzalez, 110 Wn.2d 738, 744, 757 P.2d 925 (1988). The Civil Rules may apply where the Criminal Rules are silent. *State v. Hackett*, 122 Wn.2d 165, 170, 857 P.2d 1026 (1993). Here, however, the Criminal Rules are not silent. The counterpart to CR 59 is CrR 7.4, and the counterpart to CR 60 is CrR 7.8. *Keller*, 32 Wn. App. at 139. Therefore, CR 59 does not apply in criminal cases.

The opinion improperly applies RAP 2.4(b) to expand the narrow grant of appealable orders under RAP 2.2(b) and to avoid dismissing the State's improper appeal from an order deciding an unauthorized motion. Slip op. at 4. A proper and timely motion for reconsideration in a civil case can extend the time for filing a notice of appeal of the *underlying* order of which the party seeks reconsideration. RAP 5.2(a), (e). But, even if CR 59 were to apply, the State never appealed the underlying order itself. It appealed only the order denying reconsideration. CP 1-4. The appeal from this unappealable

order does not bring the merits of the underlying order before an appellate court's review as of right.

Finally, if the Court were to construe the State's appeal as an appeal from the underlying order, it would be untimely. RAP 5.2(a). While RAP 5.2(e) makes an appeal timely if filed within thirty days from the entry of an order deciding a motion for reconsideration of the underlying order as permitted under CR 59, but that rule does not apply to criminal matters. The State's notice of appeal filed more than thirty days after the order granting the motion to vacate the judgment is both untimely and an appeal from the wrong order.

c. <u>The opinion conflicts with this Court's precedent and with the plain language of the rules.</u>

The Court of Appeals erred in considering the State's unauthorized appeal, rather than dismissing it. The opinion conflicts with this Court's decision in *Waller*, which recognized "RAP 2.2(b) sets out an exclusive list of orders from which the State may appeal." 197 Wn.2d at 225. It also conflicts with *In re Det. McHatton*, which acknowledged "the limited number of

orders appealable as of right" under RAP 2.2 does not include orders "not specifically listed as an appealable decision" in that rule. 197 Wn.2d 565, 569, 485 P.3d 322 (2021); *In re Dependency of Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989) ("Failure to mention a particular proceeding in RAP 2.2(a) indicates this court's intent that the matter be reviewable solely under the discretionary review guidelines of RAP 2.3.").

Rather than follow *Waller*'s clear interpretation of RAP 2.2, the Court of Appeals engages in a convoluted application of other RAP to excuse the State's error, consider its appeal, and grant it relief. Slip op. at 4. The Court of Appeals also ignores the plain language of the rule. This was error.

Courts apply principles of statutory construction to interpret rules. *State v. Felix*, __Wn.2d__, 493 P.3d 1170, 1172 (2021). Basic rules of statutory construction require courts to rely on the plain language of a statute to interpret its meaning. *In re Pers. Restraint of Brooks*, 197 Wn.2d 94, 100, 480 P.3d 399 (2021). The plain language of RAP 2.2 prevented the

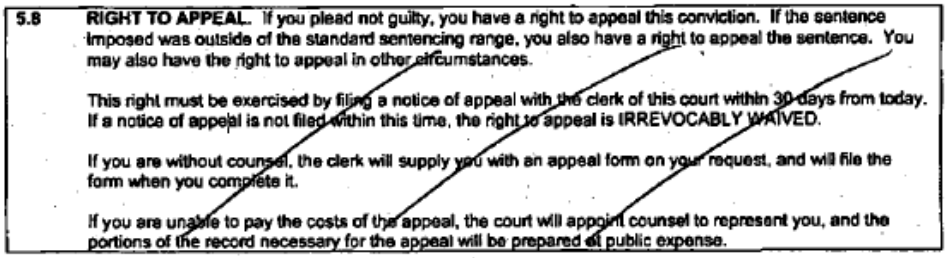
State's appeal. Such issues of interpretation present matters of substantial public interest meriting this Court's review. *State v. Conover*, 183 Wn.2d 706, 710-11, 355 P.3d 1093 (2015).

A motion for reconsideration is not permitted by the Criminal Rules. Unsurprisingly, a superior court order denying a prosecution's motion for reconsideration is not an appealable order. The Court of Appeals permitted this State's appeal from an order denying reconsideration, even though RAP 2.2(b)'s careful delineation of decisions the government may appeal does not include such an order. It misinterpreted the controlling RAP and this Court's cases on appealability. This Court should accept review to address the opinion that conflicts with this Court's cases and the plain language of RAP 2.2.

2. The unconstitutional denial of Mr. Carmona-Cruz's right to appeal in the judgment and sentence rendered it invalid on its face.

When Mr. Carmona-Cruz entered a plea of guilty, he retained his right to appeal everything but "a finding of guilt

after trial." CP 112. However, the judgment informed him he had no right to appeal.



5.8 **RIGHT TO APPEAL.** If you plead not guilty, you have a right to appeal this conviction. If the sentence imposed was outside of the standard sentencing range, you also have a right to appeal the sentence. You may also have the right to appeal in other circumstances.

This right must be exercised by filing a notice of appeal with the clerk of this court within 30 days from today. If a notice of appeal is not filed within this time, the right to appeal is IRREVOCABLY WAIVED.

If you are without counsel, the clerk will supply you with an appeal form on your request, and will file the form when you complete it.

If you are unable to pay the costs of the appeal, the court will appoint counsel to represent you, and the portions of the record necessary for the appeal will be prepared at public expense.

CP 136. The State conceded in the trial and appellate courts the stricken notice of the right to appeal from the judgment was erroneous and contrary to his plea. Brief of Appellant at 1, 4, 10, 12, 16; CP 112.

The time bar in RCW 10.73.090(1) applies only where the judgment and sentence is "valid on its face." When the court entered this judgment, it imposed a judgment including an unconstitutional provision on its face: the striking of Mr. Carmona-Cruz's right to appeal even though he retained that right. Therefore, the court exceeded its authority in entering the judgment, and it was facially invalid. The lack of notice on his

judgment violated Mr. Carmona-Cruz's constitutional rights to appeal and due process.

The trial court engaged in a meaningful analysis and properly found the judgment was invalid on its face and not barred by RCW 10.73.090 and that Mr. Carmona-Cruz made a substantial showing he was entitled to relief. CP 16-23. The court did not abuse its discretion in deciding the motion instead of transferring it to the Court of Appeals. *In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 638, 362 P.3d 758 (2015); CrR 7.8(c). Moreover, the court properly granted the motion to vacate the judgment under CrR 7.8(b). This Court should accept review to restore the trial court's order vacating Mr. Carmona-Cruz's facially invalid judgment and sentence.

a. Article I, section 22 guarantees all criminal defendants the right to appeal.

The judgment and sentence was facially invalid because it told Mr. Carmona-Cruz he did not have the right to appeal. CP 136. However, Mr. Carmona-Cruz did not waive his right

to appeal. CP 111-26, 213-28. He retained his right to appeal everything except a finding of guilt after trial. CP 112.

"In all criminal prosecutions the accused shall have . . . the right to appeal in all cases." Const. art. I, § 22. The rules enforce this constitutional mandate by requiring courts to advise defendants of this right to appeal at sentence. CrR 7.2(b).

The right to appeal is a fundamental right that attaches to all criminal cases under article I, section 22. *City of Seattle v. Klein*, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007). A person never forfeits the bedrock right to appeal certain due process violations even when he agrees to waive his right to appeal. *State v. Cross*, 156 Wn.2d 580, 618, 132 P.3d 80 (2006). People may always appeal the "validity of the statute, sufficiency of the evidence, jurisdiction of the court, [and] circumstances surrounding the plea." *Id.* at 621.

b. The trial court properly concluded the judgment and sentence was facially invalid because it erroneously informed Mr. Carmona-Cruz he had no right to appeal.

RCW 10.73.090(1) authorizes a person to challenge a judgment at any time if it is not "valid on its face." A judgment is invalid on its face where the judgment's infirmities are evident "without further elaboration." *State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719 (1986).

Where a court exercised authority it did not have, a judgment is facially invalid. *In re Pers. Restraint of Scott*, 173 Wn.2d 911, 916-17, 271 P.3d 218 (2012). A handwritten alteration to a judgment renders it facially invalid when it purports to authorize something the court lacks the power to authorize. *In re Pers. Restraint of West*, 154 Wn.2d 204, 110 P.3d 1122 (2005). A notation on a judgment becomes "part of the judgment and sentence" and carries "the imprimatur of the trial court." *Id.* at 207. It is "part of the sentencing order." *Id.* at 210.

In *West*, the court wrote on the judgment that the defendant agreed to serve the sentence without earning early release time. *Id.* at 208. Because courts have no authority to restrict early release time, the notation was beyond the court's authority. *Id.* at 213. This Court held that facial invalidity provided an exception to the one-year limit on collateral attacks. *Id.* at 209-13.

Here, by striking the information concerning the right to appeal, the face of the judgment informed Mr. Carmona-Cruz he had no right to appeal. CP 136. This was unconstitutional on its face. Like in *West*, the trial court found the altered judgment exceeded the court's authority. CP 18.

In granting the motion to vacate, the court concluded, "By deleting the mandatory advisement of the Defendant's rights to appeal, the trial court effectively memorialized an unconstitutional agreement by the Defendant not to seek direct appellate review," when he never waived that right. CP 18. The error did not merely "invite[] the court to exceed its

authority." *In re Pers. Restraint of Coats*, 173 Wn.2d 132, 136, 267 P.3d 324 (2011). The court actually exceeded its authority. CP 18-19. The judgment itself displays the invalidity. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 865-67, 50 P.3d 618 (2002).

c. The Court of Appeals erred in holding the judgment was facially valid, reversing the order vacating it, and ordering the motion transferred to the Court of Appeals for consideration as a PRP.

The Court of Appeals held because CrR 7.2 does not require a judgment contain written notification of the right to appeal, striking the language from the judgment did not render it invalid. This improperly minimizes the scope and import of the right to appeal.

Whether CrR 7.2 requires written notice of the right to appeal is a different issue. Here, the judgment *did* notify Mr. Carmona-Cruz of this right, but then it struck this notice. CP 136. Such a judgment can only be understood as telling someone they do *not* have the right to appeal.

The trial court recognized its mistake and acknowledged by affirmatively striking the language notifying Mr. Carmona-Cruz of his right to appeal from the judgment when Mr. Carmona-Cruz, in fact, retained that right, the judgment denied Mr. Carmona-Cruz the right to appeal itself. The court accepted responsibility for the error and properly concluded that by deleting "the mandatory advisement" of the rights to appeal, which he retained, "the trial court effectively memorialized an unconstitutional agreement … not to seek direct appellate review." CP 18.

It was this affirmative denial of the right to appeal that led the court to conclude the trial court exceeded its authority and rendered the judgment facially invalid. CP 19. The judgment did not merely fail to mention appellate rights at all; it included a section on appellate rights, but affirmatively struck it.

RCW 10.73.090 permits challenges to a facially invalid judgment and sentences at any time. The trial court did not

abuse its discretion in finding the motion timely and deciding it. The Court of Appeals erred when it reversed the order vacating Mr. Carmona-Cruz's judgment and remanded for the motion to be transferred.

3. The opinion remanding for transfer of the already briefed and argued CrR 7.8 motions defies judicial economy and compromises Mr. Carmona-Cruz's ability to be represented by counsel.

Even if the opinion were correct in holding the CrR 7.8 motion was untimely because the error in the judgment did not render it facially invalid, the Court of Appeals should have reviewed the merits of the trial court's orders. Mr. Carmon-Cruz and the prosecution fully briefed the merits of the order granting his motion to vacate the judgment and sentence and the order denying his motion to withdraw his guilty plea. Rather than consider the claims, the Court of Appeals avoided the issues by reversing the order vacating his judgment and sentence and holding the trial court must transfer the motion to the same court for consideration as a PRP.

The opinion undermines the court's interest in judicial economy and the priority placed on resolving issues on the merits. RAP 1.2(a). Judicial economy supports resolving the fully-briefed matter. Requiring Mr. Carmona-Cruz, a non-English speaker unversed in the law, to raise his claims again in a collateral proceeding where he is not guaranteed counsel also exacerbates the very right to counsel violation that forms the basis of his motion to withdraw his plea. Rather than address the merits of the CrR 7.8 motion, the court requires Mr. Carmona-Cruz to make the identical arguments in a PRP, which has a far more circumscribed right to counsel.

Mr. Carmona-Cruz is a non-English speaker with no experience in the criminal justice system. CP 57-58, 299-302. Navigating the process through an interpreter, he misunderstood his right of access to counsel as a poor person. CP 57-76. When questions arose, rather than ensure he was properly screened for the appointment of counsel, the court sua sponte suggested Mr. Carmona-Cruz represent himself. CP 58-

60. Then, the court deemed him pro se after an insufficient colloquy at which it never informed him of the sentence consequences. CP 60-65.

Mr. Carmona-Cruz pleaded guilty as charged. CP 78-93, 213-28. However, the language in the judgment and sentence misinformed Mr. Carmona-Cruz that he could not appeal. CP 136.

Mr. Carmona-Cruz later challenged the validity of the judgment and sentence and his guilty plea. He argued the judgment misinformed him of his right to appeal and the trial court violated his right to counsel. CP 16-23, 167-282. Rather than address these claim, the Court of Appeals returns the matter to the trial court so that it can be transferred to the court as a PRP because it ruled the trial court improperly considered the motion to vacate. Slip op. at 1-2, 8.

In doing so, the court ensures Mr. Carmona-Cruz will again be without counsel. He will instead be required to navigate the complex collateral attack process as a non-English

speaker unversed in the law. In short, the opinion recreates precisely the circumstance that led to the original error.

CrR 7.8 does not require the Court of Appeals to forgo consideration of the legal error the parties already litigated. While CrR 7.8 requires courts to transfer motions for consideration as PRPs where motions fails to satisfy the rule, it does not compel the Court of Appeals to ignore the arguments presented where the court erroneously addressed a motion. Even if the court should have transferred it in the first instance, CrR 7.8 does not identify what remedy should apply when a trial court erroneously decides a CrR 7.8 motion. It surely does not specify the circular and inefficient remedy the opinion imagines here.

The Court of Appeals should have exercised its discretion to consider the arguments on the merits. To require Mr. Carmona-Cruz to litigate these constitutional violations as a PRP continues the right to counsel violation of which he complains. Courts are required to appoint counsel to indigent

parties in nonfrivolous petitions. RAP 16.15(h); RCW 10.73.150. However, this mandate is too often ignored.

Considered as a petition, as opposed to a CrR 7.8 motion, it is possible Mr. Carmona-Cruz will be forced to litigate without the assistance of counsel. While any pro se individual may struggle to navigate the complicated procedural rules that govern PRPs, additional impediments hinder access to courts for non-English speakers. Interview by Hon. Mansfield with Chief Justice González, *Working Toward a Just Court*, Wash. State Bar News, June 2021, at 38-41; *King v. King*, 162 Wn.2d 378, 417-19, 174 P.3d 659 (2007) (Madsen, J., dissenting); Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503 (1998).

Requiring litigants not fluent in English to litigate pro se complicates already complex collateral matters. *Mendoza v. Carey*, 449 F.3d 1065, 1069-70 (9th Cir. 2006) (inaccessibility of Spanish-language materials is "extraordinary circumstance" justifying equitable tolling of deadlines); Megan Grandinetti,

Ensuring Access to Justice for Non-English Speaking Criminal Defendants, 38 Seton Hall L. Rev. 1479 (2008). The Court of Appeals has recognized this in other contexts. *State v. Cruz-Yon*, __P.3d__, 2021WL5295070 (Wash. Ct. App. 2021) (non-English speakers to translated transcripts and briefs).

Rather than create additional barriers for non-English speakers to access the courts without the assistance of counsel, courts should remove them. Rather than require Mr. Carmona-Cruz to negotiate the courts without the assistance of counsel and impede consideration of his claims, the Court of Appeals should have addressed the merits of the direct appeal where he enjoys the assistance of counsel. Given the more circumscribed right to counsel in collateral proceedings, and because the parties already litigated the issues, the Court of Appeals should have reviewed Mr. Carmona-Cruz's claims on the merits.

E. CONCLUSION

For all these reasons, this Court should accept review. RAP 13.4(b)(1)-(4).

In compliance with RAP 18.17(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 4,962 words.

DATED this 18th day of November, 2021.

Respectfully submitted,

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APPENDIX A

August 9, 2021, Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant/Cross-Respondent, v. AMOS CARMONA CRUZ, Respondent/Cross-Appellant.	)	No. 81059-6-I (consolidated with No. 81193-2-I) DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Amos Carmona Cruz was charged in 2018 with driving under the influence (DUI). The charge was elevated to a class B felony based on Carmona Cruz's prior 2013 conviction for vehicular assault involving alcohol. In response, Carmona Cruz moved to vacate the 2013 judgment and sentence. The trial court vacated the judgment and sentence finding it invalid on its face. The State appeals the trial court's order vacating Carmona Cruz's 2013 judgment and sentence. Carmona Cruz cross-appeals the trial court's subsequent findings and conclusions denying his motion to withdraw his 2013 guilty plea.

Because Carmona Cruz's motion to vacate the 2013 judgment and sentence should have been transferred to this court as a personal restraint petition (PRP), we

reverse the trial court's order vacating the judgment and sentence and remand for the trial court to transfer the motion to this court as a PRP. In addition, because Carmona Cruz's motion to withdraw his guilty plea was not properly before the trial court, we vacate the trial court's findings and conclusions. We reverse and remand.

FACTS

On September 9, 2013, Carmona Cruz pleaded guilty to one count of vehicular assault. The charge arose from a November 2012 incident where Carmona Cruz admitted to driving a vehicle under the influence of alcohol and causing substantial bodily injury to his passenger. As part of the plea, Carmona Cruz was informed that he was giving up his right to appeal a guilty verdict, but that he could appeal an exceptional sentence. Carmona Cruz was sentenced to three months in jail on September 9, 2013. The following preprinted language was stricken from the Snohomish County Superior Court form judgment and sentence:

> **RIGHT TO APPEAL.** If you plead not guilty, you have a right to appeal this conviction. If the sentence was imposed outside of the standard sentencing range, you also have the right to appeal the sentence. You have also have the right to appeal in other circumstances.

Approximately five years later, Carmona Cruz was charged with a DUI. Because of his 2013 conviction for vehicular assault, the DUI was elevated to a class B felony under RCW 46.61.502(6)(b)(ii).

On November 14, 2019, Carmona Cruz moved to vacate the 2013 judgment and sentence and withdraw his guilty plea. The motion to vacate asserted three reasons for vacating the judgment and sentence: (1) that Carmona Cruz's request to proceed pro se was improperly accepted; (2) that Carmona Cruz's guilty plea was improperly accepted;

and (3) that Carmona Cruz was improperly advised of his right to appeal. The State responded that Carmona Cruz's motion to vacate was a time-barred collateral attack under RCW 10.73.090 (one-year time limit for collateral attack) and should be transferred to the Court of Appeals as a PRP under CrR 7.8(c)(2).

On December 13, 2019, the trial court issued its order on the motion to vacate. The court first determined that the 2013 judgment and sentence was invalid on its face due to the stricken "right to appeal" language. And because it was invalid, the court found that the one-year time bar for collateral attack under RCW 10.73.090 did not apply. The court vacated the 2013 judgment and sentenced and ordered that Carmona Cruz appear for entry of a new judgment and sentence, to advise him of his rights to direct appeal, and to afford him the time to file a direct appeal.

On the two remaining issues—waiver of right to counsel and entry of guilty plea—the trial court determined that the one-year time bar in RCW 10.73.090 applied, and that Carmona Cruz had not made a substantial showing that he was entitled to relief. Consequently, under CrR 7.8(c)(2), the trial court determined those two issues should be transferred to the Court of Appeals as a PRP. The PRP was filed with this court on February 28, 2020, and assigned Case Number 81162-2-I.[1] After unsuccessfully moving for reconsideration, on January 30, 2020, the State appealed.

Meanwhile, because the trial court's order invalidated the 2013 judgment and sentence, on January 30, 2020, Carmona Cruz moved the trial court to withdraw his

[1] The petition was subsequently dismissed after Carmona Cruz failed to pay the appeal fee or provide a statement of finances.

2013 guilty plea. On February 27, 2020, the trial court entered findings of fact and conclusions of law denying Carmona Cruz's motion to withdraw his guilty plea in the 2013 matter. Carmona Cruz appealed and the appeals were consolidated.

ANALYSIS

A. Authority for Appeal

Carmona Cruz first contends that we should not consider the State's appeal because RAP 2.2 does not permit the State to appeal the order denying its motion for reconsideration. We disagree.

While RAP 2.2(b) limits the State's authority to appeal in criminal cases, there is no dispute that RAP 2.2(b)(3) authorizes the State to appeal "an order arresting or vacating a judgment." Thus, the State was authorized to appeal the trial court's decision vacating the 2013 judgment. There is also no dispute that the time to file an appeal is 30 days from the decision to be appealed or 30 days from a motion to reconsider. RAP 5.2(a), (e). Consequently, the State's appeal was timely.

Carmona Cruz is correct that the State's notice of appeal designated the trial court's order denying its motion for reconsideration and not the underlying order vacating the judgment and sentence. But this does not preclude our review. RAP 2.4(b) provides:

> The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

Under RAP 2.4(b), we will consider the trial court's order vacating the 2013 judgment and sentence.

B. Trial Court Order Vacating 2013 Judgment and Sentence

The State argues that the trial court erred when it found that Carmona Cruz's motion to vacate the 2013 judgment and sentence was not time barred by the one-year limit for collateral attacks under RCW 10.73.090. We agree.

We review the trial court's CrR 7.8 ruling to vacate a judgment for an abuse of discretion. State v. Zavala-Reynoso, 127 Wn. App. 119, 122, 110 P.3d 827 (2005). "A trial court abuses its discretion when it bases its decision on untenable grounds or reasons." Zavala-Reynoso, 127 Wn. App. at 122.

Carmona Cruz's motion to vacate was based on CrR 7.8(b)(1) and (5). CrR 7.8(b)(1) allows relief from a final judgment if there was "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." CrR 7.8(b)(5) allows relief from final judgment when "[t]he judgment is void." Because Carmona Cruz was asserting that the 2013 judgment and sentence was mistaken or void, a motion under CrR 7.8(b)(1) was appropriate. But even if the motion was appropriate, the trial court's authority to decide a motion for relief from judgment is limited. Under CrR 7.8(c)(2):

> The [trial] court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the [trial] court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

Under this rule, the trial court must determine first whether the motion is time barred under RCW 10.73.090, and if not, whether the defendant has either made a substantial showing that they are entitled to relief or resolution requires a factual

hearing. If the motion is time barred by RCW 10.73.090, it must be transferred directly to the Court of Appeals.

RCW 10.73.090(1) prohibits collateral attacks on valid judgments unless the attack is filed within one year:

> No 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.[2]

Because Carmona Cruz's motion to vacate was filed approximately five years after entry of the 2013 judgment and sentence, the motion was untimely under the plain language of RCW 10.73.090(1), unless the 2013 judgment and sentence was not "valid on its face."

As our Supreme Court has explained, "for the petitioner to avoid the one-year time bar, he or she must show that the judgment and sentence is 'facially invalid.'" In re Pers. Restraint of Coats, 173 Wn.2d 123, 138, 267 P.3d 324 (2011) (quoting In re Pers. Restraint of LaChapelle, 153 Wn.2d. 1, 6, 100 P.3d 805 (2004)). While review is not limited to the four corners of the document, review is limited to "documents that reveal some fact that shows the judgment and sentence is invalid on its face because of legal error." Coats, 173 Wn.2d at 138-39. Carmona Cruz argues, and the trial court agreed, that the 2013 judgment and sentence was invalid on its face because the paragraph in

[2] A collateral attack is defined to mean: "any form of postconviction relief other than a direct appeal." "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment." RCW 10.73.090(2). There is no dispute that Carmona Cruz's motion to vacate was a collateral attack on the judgment.

Snohomish County's form judgment and sentence addressing the right to appeal was stricken. We disagree.

Article I, section 22 of the Washington Constitution provides: "In all criminal prosecutions the accused shall have . . . the right to appeal in all cases." CrR 7.2(b) enforces this right by requiring trial courts, after sentencing, to inform the defendant of their appellate right. The rule provides, in relevant part:

> The court shall, immediately after sentencing, advise the defendant: (1) of the right to appeal the conviction; (2) of the right to appeal a sentence outside the standard sentence range.

But contrary to Carmona Cruz's argument, nothing in CrR 7.2(b) requires a written notification of the right to appeal in the judgment and sentence itself. Thus, while Snohomish County's form judgment and sentence includes a section addressing the defendant's right to appeal, it was not required to do so.[3] Striking the form language, therefore, does not render the judgment and sentence void on its face.[4]

Because the judgment and sentence was not invalid on its face, the trial court erred in determining that under CrR 7.8(c), it was not required to transfer the motion to vacate to this court. More than a year had passed and the judgment was not invalid on its face. The trial court was required to transfer Carmona Cruz's motion to vacate to this court as a PRP. We vacate the trial court's decision vacating the 2013 judgment and sentence and remand for the trial court to transfer Carmona Cruz's motion to vacate to this court as a PRP.

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[3] We note that the Washington standard felony judgment and sentence does not include language about the defendant's right to appeal. See WPF CR 84.0400 J.

[4] Moreover, the form language in Snohomish County's form states: "If you plead not guilty, you have a right to appeal this conviction." Because Carmona Cruz did not plead not guilty, the form language was inapplicable and was correctly stricken.

C. Cross Appeal — Motion to Withdraw Guilty Plea

We do not address Carmona Cruz's appeal of the trial court's order denying his motion to withdraw his guilty plea. Because we reverse the trial court's order vacating the 2013 judgment and sentence, the judgment and sentence remains in effect. Carmona Cruz's motion to withdraw his guilty plea is therefore untimely under RCW 10.73.090 and may only be considered as a PRP before the Court of Appeals. CrR 7.8(c)(2).[5]

We reverse the trial court's order vacating the 2013 judgment and sentence and remand for the trial court to transfer Carmona Cruz's motion to vacate to this court as a PRP. We vacate the trial court's findings and conclusions denying Carmona Cruz's motion to withdraw his guilty plea.

Reversed, remanded, and vacated.

Mann, C.J.

WE CONCUR:

Brennan, J.

Chun, J.

[5] Moreover, even if the 2013 judgment and sentence is invalid on its face, an order denying a motion to withdraw a guilty plea is not an appealable order. RAP 2.2(a). Instead, the order may potentially become appealable once a new judgment and sentence is entered, but not before. State v. Amstead, 13 Wn. App. 59, 61-62, 533 P.2d 147 (1975).

APPENDIX B

October 22, 2021, Order Denying Motion for Reconsideration

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant/Cross-Respondent, v. AMOS CARMONA CRUZ, Respondent/Cross-Appellant.	)	No. 81059-6-I (consolidated with No. 81193-2-I) DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Respondent/Cross-Appellant Amos Carmona Cruz moved to reconsider the court's opinion filed on August 9, 2021. Appellant/Cross-Respondent the State of Washington filed an answer.[1] The panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, C.J.

[1] The State's motion to extend time to file an answer is granted.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81059-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: November 18, 2021

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