NO. 101004-4
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

JEREMY DUSTIN HUBBARD,
Respondent.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 55584-1-II
Kitsap County Superior Court No. 05-1-00252-1

REPLY TO RESPONSE TO PETITION FOR REVIEW

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SERVICE	Thomas E. Weaver Po Box 1056 Bremerton, Wa 98337 Email: admin@tomweaverlaw.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 29, 2022, Port Orchard, WA _____ **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. REPLY

The State relies upon the argument set forth in its petition for review. The State notes, however, that Hubbard has failed to meaningfully address the standards set forth in RAP 13.4(b).

Hubbard rejects the State's reliance on *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989), arguing it has been limited to its facts. Yet he offers no proof of this proposition.

Instead, he offers three cases that discuss *Shove* in contexts not relevant here. *State v. Hayden*, 72 Wn. App. 27, 31, 863 P.2d 129, 131 (1993) (distinguishing *Shove* because "[m]ore importantly, the juvenile in this case received a SSODA disposition, not a determinate sentence under the SRA."); *State v. Dana*, 59 Wn. App. 667, 670, 800 P.2d 836, 838 (1990) ("The order falls directly within the provisions of the quoted statute" and was thus permissible under the holding

of *Shove*).[1] He fails to show that the holding of the Court of Appeals is not in conflict with this Court's precedent. Review should be accepted.

Moreover, Hubbard does not offer any serious response to the State's primary argument, that the Court of Appeals departed from precedent in concluding that the exception for newly discovered evidence applied to sentencing issues. Indeed, he essentially concedes the point:

> While Mr. Hubbard believes review should be denied, he does concede that this is an area of the law where further clarification would be of assistance to trial courts.

Response, at 11.

Finally, Hubbard responds that if review is granted, the Court should also consider his novel contention that RCW

[1] Nor is *State v. Richard*, 58 Wn. App. 357, 360, 792 P.2d 1279 (1990), relevant. In that case, the Court held that a condition of community supervision in a juvenile case that was imposed by the parole officer was not enforceable because the court had not authorized the officer to impose the condition).

10.73.090 does not apply to motions brought under CrR 7.8(b)(5). Because such an interpretation is contrary to the plain language of the rule, this Court should decline to review that issue.

A CrR 7.8 motion is subject to the one-year time limit on collateral attack under RCW 10.73.090(1). *State v. Gudgel*, 170 Wn.2d 656, 658, 244 P.3d 938, 939 (2010). This is because the one-year limitation of RCW 10.73.090(1) applies generally to all collateral attacks on judgments that are valid on their faces and jurisdictionally competent. *State v. Olivera-Avila*, 89 Wn. App. 313, 320, 949 P.2d 824 (1997).

Hubbard's argument ignores the well-settled precedent of both this Court and the Court of Appeals that holds that CrR 7.8 motions are also subject to RCW 10.73.090. *See* CrR 7.8(b); *Gudgel*; *Olivera-Avila.* Indeed, while the Court below distinguished the substantive holding of *State v. Hoch*, 13 Wn. App. 2d 1073, 2020 WL 2850977 (2020), Opinion, at 4, it did

not address the that case's discussion on the time bar, which the Court held applied:

> Here, Hoch has not shown, or even argued, that any of the enumerated exceptions to the one-year time bar apply. Therefore, because Hoch has failed to show that the judgment and sentence is facially invalid or that his claim fits into one of the enumerated exceptions in RCW 10.73.100, we hold that Hoch's case is time-barred.

Hoch, 2020 WL 2850977 at *5-6.

Here, like in *Hoch*, Hubbard did not argue below that any exception to the time bar applied or that his judgment was facially invalid. Instead Hubbard argued that principles of statutory construction should only apply CrR 7.8(b)'s "further subject to RCW 10.73.090" language to subparagraphs (1) and (2). His logic was and is flawed however.

This Court reviews questions of statutory construction de novo. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). Court rules are subject to the same rules of interpretation as statutes. *State v. Waller*, 197 Wn.2d 218, 225,

481 P.3d 515 (2021). Statutory construction begins by reading the text. *Id.* If the language is unambiguous, a reviewing court is to rely solely on the statutory language. *Id*

Hubbard asserted that there is a choice here between competing rules of statutory construction:

> On the one hand, the seriesqualifier rule says that a modifying phrase that comes at the end of the list modifies all subjects on the list. On the other hand, the last antecedent rule says that the modifying phrase modifies only the last subject of the list.

Response, at 14. But, as noted, rules of statutory construction only come into play when a statute or court rule is ambiguous.

CrR 7.8(b) is not ambiguous. The rule provides:

> The motion shall be made within a reasonable time and for reasons (1) and (2) 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. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

"[A]nd is further subject to" can only be grammatically applied to "[t]he motion." Hubbard's proposed antecedent, "reasons (1)

and (2)," is plural and would take the verb "are." The plain language of the rule dictates that the entire list in paragraph (b) is subject to RCW 10.73.090.

Additionally, CrR 7.8(c)(2), also provides that the "court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the *motion* is not barred by RCW 10.73.090." (Emphasis supplied). This language also does not make sense unless it is any motion that RCW 10.73.090 applies to, rather than just those under certain subparagraphs.

Finally, Hubbard's policy arguments are also unavailing. He argues that cases of fraud, new evidence, and the like should not logically be subject the time bar. While this might be a persuasive policy argument, it is also a strawman. The Legislature has specifically provided for such exemptions in RCW 10.73.100. As noted, however, Hubbard did not argue below that any of those exceptions apply to his case.

II. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant review of the decision of the Court of Appeals, and decline to entertain the issue he raises.

III. CERTIFICATION

This document contains 1030 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED June 29, 2022.

Respectfully submitted,
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