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STATE OF WASHINGTON
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NO. 102470-3

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

MARCUS BENNETT THORNTON,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Philip K. Sorenson

No. 14-1-03813-7

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Marcus Thornton was originally sentenced to 244 months. When his offender score changed, a different judge imposed a different sentence of 229 months. Thornton argues that because both sentences were mid-range standard range sentences, the second judge must not have recognized his discretion to impose the low-end standard range sentence that Thornton requested. The court of appeals found “the record belies this assertion.”

Thornton’s maintenance of a factual dispute does not meet a RAP 13.4(b) consideration necessary for discretionary review.

II. RESTATEMENT OF THE ISSUES

- A. Where the court of appeals’ opinion is not in conflict with any published opinion, whether Thornton’s factual dispute over the court’s interpretation of the record involves an issue of substantial public interest?
- B. Whether State v. Vasquez, Case No. 102045-7 or State v. Kelly, Cases No. 102002-3 & 102003-1 provide a rational basis to stay consideration of this petition?

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III. STATEMENT OF THE CASE

A. Thornton hunted down an unarmed man, threw him to ground, climbed on top of him, and stabbed him to death while demanding the victim beg for his life.

A jury convicted Marcus Thornton of second degree murder with a deadly weapon enhancement. CP 10; *State v. Thornton*, 198 Wn. App. 1026, 2017 WL 1164652 (2017) (unpublished, cited for historical facts of offense).

On the day of the killing, Thornton was hunting for his victim John Ware. *Thornton*, 2017 WL 1164652 at *1. He came upon Ware's girlfriend Rayneisha Gardner who asked whether he had pulled a knife on Ware a few days earlier. *Id.* When Thornton said he had, she asked why he did not put the knife down and just fight him. *Id.* Thornton said he "wouldn't have pulled a knife if he wanted to fight." *Id.*

Gardner knew Ware had borrowed a Bluetooth speaker from Thornton but never returned it. *Id.* When she offered to pay for it, Thornton responded, the dispute was about "more than just a speaker." *Id.* The way Thornton said he could "feel" Ware

in the area and would run into him gave Gardner a chill. *Id.* She told Thornton not to hurt Ware. *Id.* He laughed and said, “Oh, I’m not going to hurt him.” *Id.* Gardner wanted to warn Ware but did not have a cell phone. *Id.*

Witnesses followed Thornton as he spied Ware. *Id.* They watched Thornton ride up on an unarmed Ware, slam him to the ground, get on top of him and then stab him repeatedly while demanding that Ware beg for his life. *Id.* A witness stepped in too late. *Id.* at *2. Ware was dead within minutes; one of the multiple wounds went through his lung and heart. *Id.* Thornton himself was uninjured and was later heard to brag about the stabbing. *Id.*

At trial, Thornton claimed he had acted in self-defense. *Id.* The jury did not agree. *Id.* at *4.

B. The judge who presided over the trial imposed a standard range sentence of 244 months.

Thornton’s standard range was 178-278 months based on an offender score that relied in part upon a prior conviction for unlawful possession of a controlled substance (UPCS). CP 11.

The Honorable Judge Jerry Costello imposed a mid-range sentence of 244 months. CP 11, 14, 18. The mandate on Thornton's appeal issued in August of 2017. CP 27.

C. At his *Blake* resentencing, Thornton asked for a low-end sentence claiming that it had been “a mutual fight.”

Some years later, Thornton was resentenced following the retirement of the original trial judge and as a result of *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) (holding unconstitutional convictions for UPCS). CP 22; RP 5.

The prosecutor advised the court that the new standard range was 168-268 months. RP 6. The State had originally recommended the high end of the range. RP 7. Out of respect for the trial judge's mid-range sentence, the State did not maintain its high-end recommendation but asked for the original 244-month sentence. RP 6.

Defense counsel noted that the jury had acquitted on first-degree murder and that a proportional reduction from the original sentence would be 234 months. RP 7-8. The defense asked for

a low-end sentence of 168 months. RP 7. Thornton then claimed he accepted full responsibility while at the same time both blaming the victim and minimizing his own actions by describing the murder as “a mutual fight.” RP 8-9.

D. A different judge imposed a standard range sentence of 229 months which fit his “way of thinking about things.”

The judge rejected the prosecutor’s remark that the resentencing was “just an adjustment.” RP 6, 9. “I don’t necessarily disagree with the notion that this is a different sort of sentencing. It is a sentencing, nonetheless.” RP 9.

The judge did not impose either the original 244-month sentence or a 234-month sentence which would have represented a proportional reduction of the original sentence. The court decided to “stay with the mid-range” “[i]n keeping with my, essentially, way of thinking about things” and imposed “the new sentence” of 229 months, i.e., 15 months less than the previous judge had imposed. RP 9.

E. The court of appeals found Thornton’s representation of the record was counterfactual.

On appeal, Thornton argued inter alia that the new judge had “merely replicated” the previous sentence. Br. of Ap. at 9.

The court of appeals disagreed:

[T]he record belies this assertion. The superior court clearly stated that it recognized that this was an independent sentencing hearing. VRP (Jul. 20, 2021) at 9 (“It is a sentencing, nonetheless.”). Further, the superior court imposed a sentence consistent with its “way of thinking about things,” rather than deferring to the previous sentence. VRP (Jul. 20, 2021) at 9.

....

Therefore, contrary to Thornton’s assertion, the superior court committed no legal error at the resentencing hearing. Accordingly, Thornton’s standard range sentence is not appealable.

Slip Op. at 3.

Thornton seeks discretionary review of this factual interpretation.

IV. ARGUMENT

A. A disagreement over facts is not a basis for discretionary review.

Thornton claims that the court of appeals’ decision is in conflict with other published cases. Pet. Rev. at 2 (citing RAP

13.4(b)(1) and (2)). This is manifestly untrue. Thornton and the court of appeals do not disagree on the law. They disagree on the facts.

Thornton argues he was entitled to a full resentencing—a legal question. Pet. Rev. at 7. The court of appeals agreed. Slip Op. at 3; Pet. Rev. at 12. It found he received that full resentencing. Slip Op. at 3.

Thornton argues that the sentencing judge did not understand he had authority to provide that full resentencing, believing instead that he could only impose a mid-range sentence—a factual question. Pet. Rev. at 9, 10. The court of appeals disagreed. It found the court did not refuse to consider any argument Thornton presented and did not feel bound by the previous judge's choices. Slip Op. at 3.

Thornton argues the court of appeals “ignores the trial court’s refusal to consider Mr. Thornton’s arguments.” Pet. Rev. at 12. The record belies this assertion. The court found there

was no refusal. Slip Op. at 3 (“the superior court did not refuse to consider any specific sentencing request made by Thornton”).

Thornton asserts the opinion conflicts with *State v. Dunbar*, --Wn. App. 3d --, 532 P.3d 652, 656 (2023) (holding there is a presumption of a de novo resentencing hearing). Pet. Rev. at 13-14. This argument relies upon the false premise that the court refused to hear Thornton. The court of appeals found Thornton received a de novo sentencing hearing. Slip Op. at 3. Thornton’s disagreement with this factual determination (Pet. Rev. at 15) does not demonstrate a conflict with *Dunbar*. Nor does it demonstrate an issue of substantial public interest.

B. *Vasquez* and *Kelly* are not material to Thornton’s petition and therefore do not provide a basis for a stay.

Thornton requests a stay of his petition pending this Court’s resolution of *State v. Vasquez*, Case No. 102045-7, and *State v. Kelly*, Cases No. 102002-3 & 102003-1. Pet. Rev. at 2, 16. Thornton does not discuss what these cases are about or how they are material to his own case. They are not a basis for stay.

In *State v. Vasquez*, 26 Wn. App. 2d 1032, 2023 WL 3197346 at *5 (2023), as in *Dunbar*, the court held that resentencing is presumptively de novo. “During the resentencing, the resentencing judge may consider rulings by another judge during the sentencing of the offender, but the resentencing judge should exercise independent discretion.” *Id.* The Slip Op. agrees with both *Vasquez* and *Dunbar* on the law. They apply the law to different facts. This is not a basis for a stay.

Timothy Kelly has two cases which have been consolidated for discretionary review. The first case regards the timeliness of a petition and the mandatory nature of consecutive firearm enhancements—issues which do not exist in Thornton’s case. *State v. Kelly*, 25 Wn. App. 2d 879, 526 P.3d 39 (2023). The second case regards timeliness and mootness—again issues which do not exist in Thornton’s case. *State v. Kelly*, 26 Wn. App. 2d 1005 (2023).

The two cases do not present a valid basis to stay resolution of Thornton's petition.

V. CONCLUSION

The State requests this Court deny review where Thornton's complaint is with the court's interpretation of the record, not the law.

This document is in 14-point font and contains 1,569 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 9th day of November, 2023.

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant 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 Gig Harbor, Washington on the date below.

11/9/2023
Date

s/ Kimberly Hale
Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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