SUPREME COURT NO. 102642-1

NO. 57514-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TANNER BARBER,

Petitioner.

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

The Honorable Bryan Chushcoff, Judge

PETITION FOR REVIEW

MARY T. SWIFT
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121
206-623-2373

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Tanner Barber asks this Court to grant review of the court of appeals' unpublished decision in State v. Barber, No. 57514-1-II, filed November 14, 2023 (attached as an appendix).

B. ISSUE PRESENTED FOR REVIEW

This case involves a state's appeal. Does the court of appeals' application of RAP 18.8(b) to expand the state's time to appeal present an issue of substantial public interest, warranting review under RAP 13.4(b)(4)?

C. STATEMENT OF THE CASE

In March of 2018, when Mr. Barber was 25 years old, he was charged with multiple counts of second degree rape (Counts 1 and 2), child rape, and child molestation of his younger adoptive sisters, E.B. and J.B., and his half-sister, T.B. CP 1-12. The incidents were alleged to have occurred sometime between February 2002 and June 2009, when Mr. Barber would have been only nine or 10 years old to 16 years old. CP 6-11, 54. By the

time of the charges, Mr. Barber had graduated high school, gotten married, started a family, and been working a steady job as a route sales representative. CP 55.

A jury convicted Mr. Barber of most but not all of the charges, and found the aggravating factors of a pattern of abuse and that Counts 1 and 2 were committed against a minor under age 15. CP 54, 127-28.

Mr. Barber had no criminal history whatsoever. CP 24, 54. But the multiple current offenses resulted in a high offender score of "9 or more." CP 24, 134. The highest standard sentence range was 240 to 318 months, along with a 25-year mandatory minimum on Counts 1 and 2. CP 22, 24. Counts 1 and 2 are also subject to indeterminate sentencing, requiring the court to impose a minimum prison term and a maximum prison term of life. RCW 9.94A.507(3).

Despite Mr. Barber's young age at the time of the alleged offenses, the prosecution requested an exceptional sentence above the standard range of "360 months to life imprisonment"

on Counts 1 and 2. CP 93-94. The prosecution further requested "lifetime community custody and ISRB [(Indeterminate Sentence Review Board)] review of release for Counts I and II." CP 94. In its sentencing memorandum, the prosecution explained in a footnote, "Only Counts I and II are indeterminate since the defendant was under 18 when the crimes were committed." CP 94.

The defense requested an exceptional sentence downward of 60 months, based on Mr. Barber's youthfulness at the time of the allegations. CP 54. Defense counsel noted Mr. Barber's difficult and unusual childhood. CP 57. Counsel emphasized Mr. Barber "is a completely different individual than he was over a decade ago," and therefore asked that he "not be sentenced as an adult for behavior he committed as a juvenile." CP 57. The defense submitted 25 letters of support for Mr. Barber, including from Mr. Barber's wife. CP 14, 59-82.

The parties proceeded to sentencing on January 11, 2019 before Judge Bryan Chushcoff, who also presided over Mr.

Barber's trial. CP 95-97, 117 (sentencing RP). The parties reiterated their sentence recommendations, though neither mentioned the indeterminate sentence term. CP 99 ("[T]he State's recommendation is for an exceptional sentence in this case of 360, or 30 years," noting the lifetime community custody.), 104 (prosecution, same), 106-12 (defense).

The trial court agreed with the defense that an exceptional sentence below the standard range was appropriate. CP 121. The court emphasized, since he had moved out of the Barber household, Mr. Barber lived a productive life. CP 118. The court noted Mr. Barber's stable marriage and pro-social connections, CP 118, as well as "no information to suggest that he engaged in any kind of sexual misconduct with respect to anybody else," CP 120. The court reasoned, "I do think that what we would hope for is for juveniles to grow up and not harm other folks. Mr. Barber has done this on his own." CP 119.

The court accordingly sentenced Mr. Barber "to 66 months in the Department of Corrections." CP 121. The court told the

parties, "You can figure that out anyway that you want, but that's the way that it will be." CP 121. The court did not believe a standard range sentence served "the ends of the Sentence Reform Act." CP 121. But the court still acknowledged "66 months is not an unserious period of time." CP 121. The court said nothing about an indeterminate term, but did expressly order "community custody for life or to the statutory maximum in particular, as the case may be for, the individual offenses." CP 122.

The prosecution prepared the judgment and sentence. CP 123. On it, the prosecution wrote "66 months to life" for Counts 1 and 2, specifying a minimum term of 66 months and a maximum term of life imprisonment, subject to the ISRB. CP 138. However, the prosecution told the court at sentencing only, "I put 66 months on all of the counts. I assume that I have that number correct." CP 123. The prosecution did not mention that it had included a lifetime maximum term for Counts 1 and 2. CP 123. The court signed the judgment and sentence. CP 146.

The trial court entered extensive written findings of fact and conclusions of law justifying the mitigated sentence. CP 23-28. The court explained, if Mr. Barber had been tried and convicted as a juvenile, "he would likely have been held at most until the age of 21," in contrast to the 30-year sentence sought by the prosecution. CP 25. The court went on to find:

> 3. It is to the defendant's credit that he has so many people that have written letters on his behalf.
>
> 4. Before the allegations, Mr. Barber was financially stable, showed pro-social connections, a healthy marriage and not harmed anyone. This is everything the court could have hoped the defendant would have done had he been sentenced as a juvenile and he did them on his own.
>
> 5. The defendant committed these crimes at a time when he would be growing into his sexuality and all of the emotions that goes along with them. There is no evidence that the defendant has committed new sexual crimes. Whatever youthful urges the defendant may have been dealing with as a young adult, he has managed to cope with them since.
>
> 6. The defendant's youth must have had something to do with his lustful dispositions since

> he committed the acts while he was entering puberty and he has not had any new incidents since that date.

CP 26.

The trial court concluded Mr. Barber's youthfulness at the time of the offenses justified an exceptional sentence "below the mandatory minimum sentence of 25 years on Counts I and II." CP 27. The court further concluded, "[t]he just sentence for the defendant is an exceptional downward sentence of 66 months on each count followed by lifetime community custody on counts 1 and 2, and 36 months of community custody on each other count." CP 27. The court did not include a maximum prison term of life. See CP 27.

Mr. Barber's direct appeal mandated on January 7, 2021, with the court of appeals affirming his convictions and sentence, but remanding for correction of two clerical errors in the judgment and sentence. CP 168; State v. Barber, No. 53131-3-II, 2020 WL 4784640 (Aug. 28, 2020).

Over a year later, on March 28, 2022, the defense filed a motion for relief from judgment pursuant to CrR 7.8(b). CP 33-35. The defense sought resentencing on the alleged basis that the court failed to consider Mr. Barber's youthfulness in deciding whether to impose an indeterminate sentence. CP 34-36. The defense cited the court of appeals' decision in In re Personal Restraint of Forcha-Williams, 18 Wn. App. 2d 167, 490 P.3d 255 (2021), rev'd, 200 Wn.2d 581, 520 P.3d 939 (2022), which held trial courts have "discretion to impose an exceptional sentence below the SRA's indeterminate maximum term." CP 36.

The prosecution opposed the CrR 7.8(b) motion, contending Mr. Barber failed to establish an exception to the one-year time bar and so his motion should be transferred to the court of appeals as a personal restraint petition. CP 45-49. The prosecution further asserted the record made clear the trial court did consider Mr. Barber's youthfulness and imposed "an exceptionally lenient sentence of 66 months." CP 50.

On October 3, 2022, the trial issued an "Order on Motion for Relief from Judgment." CP 160, 165. The court did not adopt either party's argument. CP 161. The court instead found the indeterminate sentence imposed in the judgment and sentence—"66 months to life"—was a clerical error that did not reflect the court's intent at sentencing. CP 162-64. The court explained:

> This is a scrivener's error because when determining to sentence the defendant below the mandatory minimum, this Court only manifested its intention to impose a determinate sentence of 66 months rather than an indeterminate sentence of "66 months to life." As in the instance of the prior appeal in this case, the inclusion of this language by the State in filling out the J&S at the hearing was a scrivener's error this Judge should have spotted.

CP 164 (emphasis in original). "And," the court reasoned, Mr. Barber "could not legally receive an indeterminate sentence once the court determined to depart from the standard sentencing range," citing RCW 9.94A.535. CP 164.

The court therefore concluded correction of the clerical error was warranted under both CrR 7.8(a) *and* as a fundamental defect that resulted in a complete miscarriage of justice. CP 163-

64. The court ordered the judgment and sentence "should be corrected in conformity with this Order." CP 165. The prosecution filed a notice of appeal from the trial court's order. CP 166.

The court held a presentation hearing on November 10, 2022. RP 1. The court reiterated its reasoning that there was both substantive error and a scrivener's error in the judgment and sentence, because "I don't think I ever said or implied that it would be 68 months [sic] to life, but merely 68 months." RP 3-4. The court emphasized, "it was supposed to just be 68 months [sic]." RP 3; see also RP 6 (reiterating, "that was the intent of this Court."). The prosecution highlighted the fact that the defense had not requested relief under CrR 7.8(a), to which the court responded, "[m]y understanding is it can be done by the Court itself at any time." RP 5, 7. The court concluded, "So

that's simply my view is that we should correct this thing, correct the Scribner's [sic] error[.]"[1] RP 7.

The court entered a written "Order Correcting Judgment and Sentence" to reflect its original intent to impose a determinate sentence. CP 175. The court noted "the judgment and sentence erroneously indicates that the defendant is sentenced to 66 months to life on Counts I and II (rape in the second degree), an indeterminate sentence[.]" CP 175. The court corrected the judgment and sentence to be "66 months" on Counts 1 and 2. CP 176.

The prosecution filed an amended notice of appeal from the order correcting the judgment and sentence. CP 178.

[1] Defense counsel concurred with the court's order, effectively withdrawing the CrR 7.8(b) motion. RP 6; see also Opinion, 10 n.5 ("[T]he record supports the conclusion that the sentencing court sua sponte issued its order under CrR 7.8(a) and Barber withdrew his CrR 7.8(b) motion.").

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Whether the court of appeals correctly applied RAP 18.8(b) to expand the time for the state to appeal in a criminal matter is question that warrants this Court's guidance under RAP 13.4(b)(4).

The trial court found two bases for relief. First, the court found there was "substantive error" in the judgment and sentence, believing Mr. Barber's exceptional mitigated sentence based on youthfulness precluded an indeterminate sentence. RP 3-4. Mr. Barber acknowledged this was legally incorrect under this Court's intervening decision in Forcha-Williams. Br. of Resp't, 14-15. After the trial court's correction of Mr. Barber's judgment and sentence, the Forcha-Williams court held a trial court "does not have discretion to replace an indeterminate sentence with a determinate sentence." 200 Wn.2d at 606.

However, Mr. Barber argued the trial court's second articulated basis for relief was correct. Br. of Resp't, 15-16. That is, the "66 months to life" ordered in Mr. Barber's judgment and sentence did not reflect the court's original intent, expressed at

sentencing, to impose a determinate sentence. The court was therefore entitled to correct this clerical error at any time under CrR 7.8(a). The mere correction of a judgment and sentence is not an appealable order under RAP 2.2(b). Nor does correction of a clerical error create a new final judgment. Consequently, the 30 days for the prosecution to appeal from the judgment and sentence had long passed. RAP 5.2(a).

CrR 7.8(b) motions for relief from a final judgment are considered collateral attacks and are therefore subject to the usual one-year time bar. State v. Molnar, 198 Wn.2d 500, 508, 497 P.3d 858 (2021). However, clerical mistakes may be corrected "at any time" under CrR 7.8(a). That provision provides, in relevant part: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." CrR 7.8(a).

Whether a trial court properly exercises its authority under CrR 7.8(a) turns on whether the correction is clerical or judicial. "Errors that are not clerical are characterized as judicial errors, and trial courts may not amend a judgment under CrR 7.8 for judicial errors." State v. Morales, 196 Wn. App. 106, 118, 383 P.3d 539 (2016).

"In deciding whether an error is 'judicial' or 'clerical,' a reviewing court must ask itself whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial." Presidential Estates Apartment Assoc. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). If the answer is yes, the error is clerical because "the amended judgment merely corrects language that did not correctly convey the intention of the court, or supplies language that was inadvertently omitted from the original judgment." Id. If the answer is no, the error is judicial "and the court cannot amend the judgment and sentence." State v. Davis, 160 Wn. App. 471, 478, 248 P.3d 121 (2011).

The record from Mr. Barber's sentencing demonstrates the "66 months to life" ordered in his judgment and sentence did not reflect the trial court's intent and, therefore, could be corrected as a clerical error. The court concluded Mr. Barber's youthfulness at the time of the alleged offenses mitigated his culpability, especially considering his stable family life and upstanding behavior since then. CP 115-21. The court ordered, "I will sentence Mr. Barber to 66 months in the Department of Corrections." CP 121. Although the court expressly ordered lifetime community custody, it did *not* order a lifetime indeterminate term. CP 121-22. As the prosecution pointed out below, its sentencing memorandum put the court on notice of the indeterminate term for Counts 1 and 2. Br. of Appellant, 5. But the court at no point expressed its intent to impose an indeterminate term.

The trial court's written findings justifying the exceptional sentence further support the conclusion that its intent was to impose a determinate term. There, again, the court ordered "an exceptional downward sentence of 66 months on each count

followed by lifetime community custody on counts 1 and 2," but did *not* order a lifetime indeterminate term. CP 27. The inclusion of lifetime community custody and simultaneous exclusion of a lifetime indeterminate prison sentence illuminates the court's original intent.

The prosecution below emphasized the trial court signed the judgment and sentence ordering "66 months to life." Br. of Appellant, 18. However, the record makes clear the prosecution prepared the judgment and sentence. CP 123, 164. The court admitted it "should have spotted" the error. CP 164. The court's mistake was understandable because the prosecution represented at sentencing, "I put 66 months on all of the counts," without mentioning it included "66 months to life" on Counts 1 and 2. CP 123. As the court recognized, and as the record bears out, the court never manifested any intent to impose an indeterminate sentence of "66 months to life." CP 164.

The court's subsequent clarification of its intent is also relevant. In re Marriage of Getz, 57 Wn. App. 602, 604, 789 P.2d

331 (1990). When the court was alerted to the error, the court expressed its view that the judgment and sentence, as filled out by the prosecution, did not reflect its intent to impose a determinate sentence. CP 164. The court explained, "I don't think I ever said or implied that it would be 68 months [sic] to life, but merely 68 months," stressing, "it was supposed to just be 68 months." RP 3-4. The court could appropriately correct the clerical error on its own initiative "at any time" under CrR 7.8(a).

Correction of a clerical error "does not result in a new final judgment and sentence and, accordingly, the court's action to correct the error is not appealable as a matter of right." State v. Amos, 147 Wn. App. 217, 224 n.1, 195 P.3d 564 (2008), overruled on other grounds by State v. Martin, 149 Wn. App. 689, 205 P.3d 931 (2009); see also Leuluaialii v. Dep't of Labor & Indus., 169 Wn. App. 672, 681, 279 P.3d 515 (2012) ("This [clerical] correction did not create a new final order from which Leuluaialii could appeal, and it did not restart the time for Leuluaialii to appeal."). For instance, in State v. Kilgore, 167 Wn.2d 28, 41-42,

216 P.3d 393 (2009), this Court held that mere correction of an original judgment and sentence does not impact its finality.

Criminal defendants may appeal only from *amendment*, not correction, of a judgment and sentence. RAP 2.2(a)(9); Amos, 147 Wn. App. at 224 n.1. The prosecution's right to appeal is even more limited. "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). RAP 2.2(b) nowhere provides for a state's appeal from the amendment of a judgment and sentence, let alone the mere correction.

Mr. Barber's judgment and sentence was entered on January 11, 2019 and became final on January 7, 2021 when his appeal mandated. CP 132, 158. The prosecution's appealed well more than 30 days later. RAP 5.2(a) (specifying a notice of appeal must be filed within 30 days); CP 166 (notice of appeal filed October 27, 2022), 178 (amended notice of appeal filed November 16, 2022). Mr. Barber established the trial court properly exercised its authority under CrR 7.8(a) to correct a clerical error—the only

appealable issue. Because this did not create a new final judgment, no other issues remain. The prosecution's appeal was therefore improper under RAP 2.2(b) and untimely under RAP 5.2(a).

The court of appeals correctly summarized the procedural posture of the case, as well as the parties' arguments. The court nevertheless declined to decide whether the trial court properly corrected a clerical error under CrR 7.8(a) and, further, declined to decide whether such action closed the prosecution's window for appealing. Opinion, 9. Instead, the court of appeals invoked RAP 18.8 and held "this case clearly presents extraordinary circumstances that require us to extend the time for the State's appeal." Opinion, 9; see also RAP 18.8(b) ("The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal[.]").

The court of appeals acknowledged, "[w]ithout question, RAP 18.8 should be used rarely, cautiously, and only in extraordinary circumstances." Opinion, 10. "But," the court

concluded, "this is such a circumstance." Opinion, 10. The court reasoned, "Unless we exercise our discretion under RAP 18.8 to extend the State's time to appeal, Barber's invalid and unauthorized determinate term will stand without *ever* having been appealable." Opinion, 9. The court of appeals therefore ordered the trial court to "reinstate Barber's original 66-month-to-life sentence." Opinion, 11. The court of appeals' application of RAP 18.8(b) to these circumstances warrants this Court's review under RAP 13.4(b)(4) as an issue of substantial public interest.

As this Court has recognized, the state's right of appeal is strictly limited to the list of orders set forth in RAP 2.2(b). Waller, 197 Wn.2d at 225. Unlike criminal defendants, the state has no constitutional right to appeal—only a rule-based right. See WASH. CONST. art. I, § 22; State v. Chetty, 184 Wn. App. 607, 613, 338 P.3d 298 (2014) ("[I]n a criminal case, we must balance strict application of that filing deadline with the defendant's state constitutional right to an appeal."). Washington courts are hesitant to allow untimely rule-based appeal to proceed, sometimes with

harsh results where significant rights are at stake. See, e.g., In re Dependency of A.L.F., 192 Wn. App. 512, 525, 371 P.3d 537 (2016) (refusing to apply RAP 18.8(b) to enlarge time for parent to appeal dependency and disposition order, where parent had no constitutional right to appeal).

It does not appear that RAP 18.8(b) has previously been applied to expand the *state's* time to appeal in a criminal matter. This Court's guidance is warranted. See Beckman ex rel. Beckman v. Dep't of Soc. & Health Servs., 102 Wn. App. 687, 693, 11 P.3d 313 (2000) ("In contrast to the liberal application we generally give the Rules of Appellate Procedure (RAP), RAP 18.8 expressly requires a narrow application[.]").

E. CONCLUSION

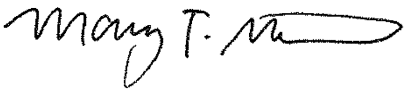
For the reasons discussed above, this Court should grant review and reverse the court of appeals.

DATED this 13th day of December, 2023.

I certify this document contains 3,640 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



MARY T. SWIFT, WSBA No. 45668
Attorney for Petitioner

Appendix

Filed
Washington State
Court of Appeals
Division Two

November 14, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. TANNER DAVID BARBER, Respondent.	No. 57514-1-II UNPUBLISHED OPINION

PRICE, J. — In 2019, Tanner D. Barber was sentenced to an indeterminate term of 66 months to life in prison for two convictions of second degree rape.

Several years later, following changes in the case law, Barber brought a CrR 7.8(b) motion to urge the sentencing court to remove the indeterminate component of his sentence. Rather than address the motion under CrR 7.8(b), the sentencing court, on its own, utilized CrR 7.8(a) for correction of a scrivener's error. According to the sentencing court, it had originally intended Barber's sentence to be determinate, so the indeterminate term reflected in the judgment and sentence was a mistake. Thus, the sentencing court corrected the judgment and sentence pursuant to CrR 7.8(a) to impose a determinate term of 66 months and signed an order purportedly effective back to 2019. The State appealed.

Soon thereafter, our Supreme Court decided *In re Personal Restraint of Forcha-Williams*, 200 Wn.2d 581, 598-99, 520 P.3d 939 (2022) (*Forcha-Williams* II), holding that sentencing courts lack the discretion to impose a determinate term in Barber's circumstances.

Barber now acknowledges the invalidity of his sentence following *Forcha-Williams* II, but he claims that the time for the State to appeal the sentence has passed. We exercise our discretion to extend the time allowed for the State to appeal. We further invalidate Barber's determinate sentence and order reinstatement of Barber's original indeterminate sentence.

FACTS

I. BACKGROUND

In 2018, based on events occurring 10 to 16 years prior, Barber was convicted of numerous sexual-assault crimes, including two counts of second degree rape, four counts of first degree rape of a child, and five counts of first degree child molestation. All of the crimes were committed while Barber was under the age of 17.

II. BARBER'S SENTENCING

Barber did not have any previous criminal history, but because of his multiple offenses, his standard range sentence was between 240 to 318 months. Barber's second degree rape convictions were subject to indeterminate sentencing, requiring the sentencing court to impose a minimum and maximum term, with the applicable maximum term of life in prison. *See* RCW 9.94A.507(3)(a), (b); RCW 9A.44.050(2); RCW 9A.20.021(1)(a).[1]

At his sentencing hearing, the sentencing court considered factors related to Barber's youth and imposed an exceptional minimum term below the standard range. The sentencing court stated that Barber's sentence would be "66 months in the Department of Corrections," explaining that

[1] At the time of Barber's crimes, various versions of former RCW 9.94A.712 were in effect. The statute has since been recodified as RCW 9.94A.507. Because the language relevant to this case has not substantially changed, we cite to the current version of the statute.

the State and Barber "[could] figure that out anyway that you want, but that's the way that it will be." Clerk's Papers (CP) at 121. The sentencing court did not explicitly state whether the 66-month term was the minimum term for an indeterminate sentence.[2]

The State prepared the judgment and sentence. Consistent with the predecessor to RCW 9.94A.507, the second degree rape convictions were depicted on the judgment and sentence as indeterminate terms of 66 months to life. The State did not expressly state on the record during the hearing that the second degree rape convictions were depicted as indeterminate sentences on the form; it merely explained that it had "put 66 months on all of the counts. I assume that I have that number correct." CP at 123.

On January 11, 2019, the sentencing court signed the State's prepared judgment and sentence.

III. BARBER'S CRR 7.8(b) MOTION FOR RESENTENCING

Within the next couple years, several cases were published addressing sentencing for crimes committed by juveniles. *See, e.g., In re Pers. Restraint of Forcha-Williams*, 18 Wn. App. 2d 167, 490 P.3d 255 (2021) (*Forcha-Williams* I), *rev'd*, 200 Wn.2d 581, 520 P.3d 939 (2022). In one of these cases, *Forcha-Williams* I, Division One of this court addressed whether sentencing courts had the discretion when sentencing juvenile offenders to impose an exceptional sentence with a determinate term when the Sentencing Reform Act[3] otherwise required an indeterminate

[2] Although the sentencing court did not address whether the sentences for the second degree rape convictions were determinate or indeterminate, the State had previously explained in its sentencing memorandum to the court that "only [the second degree rape] Counts . . . are indeterminate since [Barber] was under 18 when the crimes were committed." CP at 94 n.1.

[3] Ch. 9.94A RCW.

sentence. *Id.* at 181-82. Division One held that the sentencing court's discretion included the ability to issue such a sentence. *Id.* at 182.

Following Division One's decision, Barber filed a motion in March 2022 under CrR 7.8(b), arguing he should be resentenced due to a mistake or " 'any other reason and reason justifying relief.' " CP at 35 (quoting CrR 7.8(b)). Citing *Forcha-Williams* I, Barber argued he could receive a maximum term less than life imprisonment and he would no longer be under the direction of the Indeterminate Sentence Review Board (ISRB). Barber argued that the sentencing court specifically sentenced him to an exceptional minimum sentence and would likely have sentenced him to a determinate term if it had known it had that option.

IV. COURT'S ORDERS AND STATE'S APPEAL

In October 2022, without holding a hearing or otherwise taking action on Barber's CrR 7.8(b) motion, the sentencing court issued an order under CrR 7.8(a) related to Barber's judgment and sentence. In an "Order on Motion for Relief from Judgment," the sentencing court explained that it believed Barber's indeterminate sentence was a scrivener's error because the sentencing court "only manifested its intention to impose a determinate sentence of 66 months rather than an indeterminate sentence of '66 months to life.' " CP at 164 (underscore omitted).

The sentencing court also explained that the indeterminate aspect of the sentence was a "fundamental defect." CP at 164. To support its conclusion that the sentence was defective, the sentencing court quoted RCW 9.94A.535, which is a general statute governing exceptional sentences. The statute requires that "[a] sentence outside the standard range shall be a determinate sentence." RCW 9.94A.535. The sentencing court explained it believed, due to RCW 9.94A.535, "[Barber] could not legally receive an indeterminate sentence once the court determined to depart

from the standard sentencing range." CP at 164. A hearing was set for a few weeks later. The sentencing court directed that "[a]t that time, [Barber] should be prepared to advise the [c]ourt if, given [the] ruling, he still wants to be re[]sentenced[,]" and if so, the sentencing court would transfer Barber's CrR 7.8(b) motion to this court for consideration as a personal restraint petition. CP at 165.

In between the sentencing court's order and the hearing date set for correction of the sentence, the State appealed the sentencing court's Order on Motion for Relief from Judgment.

The hearing occurred in November 2022. At the hearing, the sentencing court explained again that it had originally intended to impose a 66-month determinate sentence. The sentencing court stated, "I don't think I ever said or implied that it would be 6[6] months to life, but merely 6[6] months," and reiterated that "that was the intent of this[c]ourt." VRP at 4, 6. The sentencing court explained that it was correcting the judgment pursuant to CrR 7.8(a), which "can be done *by the* [*c*]*ourt itself at any time*." VRP at 7 (emphasis added). Once again, the sentencing court characterized its actions as "correct[ing]" the judgment and sentence for a scrivener's error. VRP at 7.

The sentencing court made it clear it was not granting Barber's CrR 7.8(b) motion; it was only correcting the scrivener's error of its own accord under CrR 7.8(a). The sentencing court asked whether Barber wished to withdraw his CrR 7.8(b) motion. The sentencing court again explained that it would transfer the motion to this court for consideration as a personal restraint petition if Barber wished to maintain his motion. Barber responded that he believed the court accurately corrected his sentence based on the scrivener's error and considered the sentencing issue

resolved. Thus, the sentencing court considered the CrR 7.8(b) motion withdrawn and did not transfer it for consideration as a personal restrain petition.

The same day, the sentencing court entered an "Order Correcting Judgment and Sentence," altering Barber's term from his judgment and sentence to a 66-month determinate term. Although it was signed on November 10, 2022, the order reflected it was nunc pro tunc to the original sentencing date of January 11, 2019.

The State filed an amended notice of appeal from the Order Correcting Judgment and Sentence.

One month later, in December 2022, our Supreme Court reversed Division One's decision in *Forcha-Williams* I, and clarified that sentencing courts *do not* have the discretion to convert indeterminate terms carrying maximum sentences of life in prison to determinate terms, even for juvenile offenders. *Forcha-Williams* II, 200 Wn.2d at 598-99.

ANALYSIS

The State argues the sentencing court lacked authority to impose a determinate sentence on Barber and asks us to remand for reinstatement of Barber's original 66-months-to-life indeterminate sentence.

Barber argues the time for the State's appeal has run. According to Barber, the only question presented for appeal is whether the sentencing court was fixing a scrivener's error when it clarified its original intention to impose the determinate term. If so, then the CrR 7.8(a) order was valid as a correction of a clerical error, which would make the determinate term effective as of the time of the original judgment and sentence in 2019. And if the determinate term was

effective in 2019, then the State's 2022 appeal of the judgment and sentence was too late—Barber's sentence cannot be appealed.

The State disagrees with the characterization of the sentencing court's error as clerical. But regardless of the characterization of the error, the State replies that Barber's sentence is appealable under RAP 2.2(b) because it includes a provision unauthorized by law (the determinate sentence) and omits a provision required by law (the indeterminate sentence with a maximum term of life). To the extent the deadline for appeal has run, among the State's arguments is that we should exercise our discretion under RAP 18.8 to extend the deadline. We agree with the State.

We first consider whether the substance of Barber's sentence warrants an appeal under the RAPs. RAP 2.2(b) governs the State's ability to appeal the superior court's actions in criminal cases. Subsection (b)(6) describes the circumstances when the State may appeal the defendant's sentence:

> Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions . . .
>
> (6) *Sentence in Criminal Case.* A sentence in a criminal case that (A) is outside the standard range for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) *includes provisions that are unauthorized by law*, or (D) *omits a provision that is required by law.*

RAP 2.2(b) (second and third emphasis added).

Barber's sentence fits within this rule. Barber's resulting determinate sentences for his second degree rape convictions are unlawful under our Supreme Court's decision in *Forcha-Williams* II (holding trial courts lack the discretion to convert indeterminate terms carrying maximum sentences of life in prison to determinate terms). And Barber concedes as much.

Br. of Resp't at 14-15 ("Barber agrees [the sentencing court's preclusion of an indeterminate sentence] is legally incorrect under the Washington Supreme Court's intervening decision in *Forcha-Williams* [II]."). Barber's sentence is required to be indeterminate with a maximum of life, but instead includes an unlawful determinate sentence. Thus, Barber's judgment and sentence is appealable under RAP 2.2(b)(6)(C) and (D) because it both "includes [a] provision[] that [is] unauthorized by law" *and* "omits a provision that is required by law."

But even if RAP 2.2 makes Barber's sentence appealable, Barber asserts that the 30-day time period to appeal still applies and, thus, the State's time to appeal under this rule has run. *See* RAP 5.2(a). This argument is rooted in Barber's characterization of the sentencing court's action as correcting a clerical error which resulted in his determinate term being effective nunc pro tunc to the original sentencing date in 2019. Barber argues because the correction's effective date was backdated to 2019, the State's 30-day deadline to appeal ran in 2019.

But even if the sentencing court was correcting a clerical error, the State reasonably points out that it had no incentive to appeal Barber's sentence until this supposed correction created an unauthorized sentence. If necessary, the State steers us to RAP 18.8, which allows us to extend the time for a party to appeal under certain circumstances. The rule states,

> The appellate court will only *in extraordinary circumstances* and *to prevent a gross miscarriage of justice* extend the time within which a party must file a notice of appeal . . . . The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

RAP 18.8(b) (emphasis added). Depending on how one characterizes the actions of the sentencing court, the State argues that the series of events leading to Barber's invalid sentence could fall within the scope of this rule.

We agree. Assuming, without deciding, that the sentencing court was correcting a clerical error under CrR 7.8(a), and further assuming that this means the State's window for appealing this unauthorized sentence under RAP 2.2 has past, this case clearly presents extraordinary circumstances that require us to extend the time for the State's appeal. Barber's original judgment and sentence in 2019 imposed an indeterminate term of 66 months to life—a lawful sentence both at the time and now. The sentence was in place for years, and the State had no reason to appeal it.

Then, Barber moved under CrR 7.8(b) for a determinate term based on a reasonable reading of new case law from the Court of Appeals. As a result, the sentencing court ordered the determinate term under CrR 7.8(a)—again, not an untenable decision given the then-current state of the law. Still, the State immediately appealed both orders stemming from that decision. Then, merely one month later, our Supreme Court clarified that the sentencing court had no discretion to impose a determinate term, making Barber's sentence unauthorized. Unless we exercise our discretion under RAP 18.8 to extend the State's time to appeal, Barber's invalid and unauthorized determinate term will stand without *ever* having been appealable.[4]

Moreover, unless RAP 18.8 is used here, the intent of the legislature would be frustrated. The legislature has specifically prescribed that defendants convicted of second degree rape *must* receive an indeterminate term with a maximum term of life. RCW 9.94A.507 (requiring an indeterminate term with the maximum term being the statutory maximum sentence for the

[4] At oral argument, Barber contended that RAP 18.8 should not apply to the State's appeal because the State's right to appeal is more limited than a defendant's right to appeal. Wash. Court of Appeals oral argument, *State v. Barber*, No. 57514-1-II (Oct. 24, 2023), at 22 min., 13 sec. through 22 min., 42 sec. (on file with court). We disagree. The plain language of RAP 18.8 does not differentiate between parties in its application, only neutrally stating that it can apply to "a party."

offense); *see also Forcha-Williams* II, 200 Wn.2d at 590-92. Any other sentence for this crime violates this legislatively-imposed structure. *See* RCW 9.94A.507; *Forcha-Williams* II, 200 Wn.2d at 598 ("[W]e hold where the legislature has chosen an indeterminate sentencing scheme, *Houston-Sconiers* gives judges the discretion to impose a minimum term below the statutory minimum to protect juveniles who lack adult culpability from disproportionate punishment. But *Houston-Sconiers* does not give judges the discretion to lower the maximum punishment or impose a determinate sentence."). Without question, RAP 18.8 should be used rarely, cautiously, and only in extraordinary circumstances. But this is such a circumstance. We decline to adopt strained procedural positions that would insulate Barber's sentence from appropriate correction.[5]

Once the State is permitted to appeal Barber's judgment and sentence under RAPs 2.2 and 18.8, the substantive result is clear. As conceded by Barber, his determinate term is invalid. We order the sentencing court to reinstate Barber's lawful, valid indeterminate term of 66 months to life.

[5] The State also argues the sentencing court erred when it did not transfer Barber's CrR 7.8(b) motion to this court for consideration as a personal restraint petition. The State asks us to convert Barber's CrR 7.8(b) motion to a personal restraint petition and consider the merits under that procedure.

But we view the facts differently from the State. As noted above, the record supports the conclusion that the sentencing court sua sponte issued its order under CrR 7.8(a) and Barber withdrew his CrR 7.8(b) motion. If Barber had not withdrawn his CrR 7.8(b) motion, the appropriate procedure would have been to remand the case to the sentencing court with instructions to transfer Barber's motion to this court for consideration as a personal restraint petition, per CrR 7.8(c)(2).

CONCLUSION

We exercise our discretion under RAP 18.8 to extend the time for the State to appeal Barber's judgment and sentence and determine the 66-month determinate term is unlawful. Thus, we order the sentencing court to reinstate Barber's original 66-month-to-life sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:

GLASGOW, C.J.

VELJACIC, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

December 13, 2023 - 11:43 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57514-1
Appellate Court Case Title:	State of Washington, Appellant v. Tanner David Barber, Respondent
Superior Court Case Number:	18-1-00995-4

The following documents have been uploaded:

- 575141_Petition_for_Review_20231213114255D2197540_5737.pdf
  This File Contains:
  Petition for Review
  The Original File Name was BarbTan575141IIpet.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- Sloanej@nwattorney.net
- pamela.loginsky@piercecountywa.gov
- pcpatcecf@piercecountywa.gov
- pcpatvecf@piercecountywa.gov

Comments:

Sender Name: Mary Swift - Email: swiftm@nwattorney.net
Address:
2200 6TH AVE STE 1250
SEATTLE, WA, 98121-1820
Phone: 206-623-2373

Note: The Filing Id is 20231213114255D2197540