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Supreme Court No.92387-6  
COA No. 26830-6-III (consolidated with No. 26204-9-III)

RECEIVED BY E-MAIL

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Plaintiff/Respondent

v.

DALLIN D. FORT,

Defendant/Petitioner.

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ANSWER TO DEFENDANT'S PETITION FOR REVIEW

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ORIGINAL

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**RULES**

RAP 13.4..... 4

## **I. IDENTITY OF PARTY**

Respondent, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

## **II. STATEMENT OF RELIEF SOUGHT**

Both parties have filed a petition for review. Respondent seeks denial of Defendant Fort's petition for review of the opinion issued by the Court of Appeals on September 15, 2015.

## **III. ISSUE PRESENTED**

Whether the Court of Appeals properly declined to consider on a second appeal issues that could have been presented in a prior appeal but were not?

## **IV. STATEMENT OF THE CASE**

Petitioner Fort was convicted of two counts of first degree rape of a child. He appealed these convictions. His direct appeal raised issues relating to the trial - prosecutorial misconduct, ineffective assistance of counsel, and the sufficiency of the evidence. He also raised in his direct appeal issues regarding the sentencing. *State v. Fort*, 140 Wn. App. 1023, 2007 WL 2476003 (unpublished). In 2007, the Court of Appeals ruled:

Dallin David Fort appeals his two first degree child rape convictions. We agree with Mr. Fort that the court erred in refusing his same criminal conduct argument at sentencing. We reject his other error assignments and his

pro se additional grounds for review. Accordingly, *we affirm and remand for resentencing.*

*Id.*, at \*1 (emphasis added).

The convictions were affirmed. The remand was for *sentencing* purposes only. The opinion was filed September 4, 2007. *State v. Fort*, No. 26830-6-III, 2015 WL 5430243, at \*5-6 (Wash. Ct. App. Sept. 15, 2015). The mandate issued December 4, 2007.

## V. ARGUMENT

Petitioner argues that the relevant criteria supporting his request for review are RAP 13.4(b)(1) and (2), claiming the decision of the Court of Appeals is in conflict with the decisions of the Supreme Court and decisions of the Court of Appeals. Def.'s Pet. for Review, p. 4. He claims the Court of Appeals improperly declined to consider on a second appeal issues that could have been presented in a prior appeal, but were not. Defendant Fort claims that his uncontested failure to raise any issue relating to the alleged open court violation on direct appeal was of no consequence because he could raise it in a second direct appeal after the case was remand for resentencing.<sup>1</sup>

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<sup>1</sup> Mr. Fort does not claim that the open court violation was not identifiable in his original appeal, and in fact claimed in his personal restraint petition that his appellate attorney was ineffective for failing to raise the issue.

There is no conflict here. The Court of Appeals correctly referred to this Court's opinion in *State v. Sauve*, 100 Wn.2d 84, 87, 666 P.2d 894 (1983) in setting forth the general rule:

[A] defendant is prohibited from raising issues on a second appeal that were or could have been raised on the first appeal. RAP 2.5(c); *State v. Sauve*, 100 Wn.2d 84, 87, 666 P.2d 894 (1983); *State v. Mandanas*, 163 Wn. App. 712, 716, 262 P.3d 522 (2011). This rule applies even when the issue is one of constitutional magnitude. *State v. Sauve*, 100 Wn.2d at 87, 666 P.2d 894. The proper vehicle for new issues is a personal restraint petition. *Sauve*, 100 Wn.2d at 87, 666 P.2d 894.

*Fort*, 2015 WL 5430243, at \*14.

This Court reaffirmed this rule in *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993):

In *State v. Sauve*, *supra*, this court declined to consider on a second appeal issues that could have been presented in a prior appeal but were not. It is significant that there the issues were not considered by the trial court on remand. In fact, the Court of Appeals in *Sauve* recognized that RAP 2.5(c)(1) would have applied in that case if the issues had been considered and decided anew on remand. *State v. Sauve*, 33 Wn. App. 181, 183 n. 2, 652 P.2d 967 (1982).

*State v. Barberio*, 121 Wn.2d at 51.

The circumstances underlying *Barberio* are similar to those presented in this case. In *Barberio*, after his conviction for third degree rape was reversed in a previous appeal, the defendant was *resentenced* for his remaining conviction of second degree rape. The court reimposed the same exceptional sentence of 72 months that had been imposed at the first

sentencing. *State v. Barberio*, 66 Wn. App. 902, 903, 833 P.2d 459 (1992) *aff'd*, 121 Wn.2d 48, 846 P.2d 519 (1993). The defendant appealed his resentencing. The State moved to dismiss the appeal because Barberio had not challenged his exceptional sentence in his first appeal. The appellate court agreed with the State:

We grant the State's motion as to those issues which could have been raised in the first appeal, and deny the motion as to those issues which could not have been raised at that time. We affirm the exceptional sentence imposed at the resentencing hearing.

*Barberio*, 66 Wn. App. at 903.

Defendant Barberio sought review. In affirming the appellate court, this Court noted the rationale for the rule:

This case well illustrates the necessity of the rule which denies review at this late stage. The issue presented was a clear and obvious issue which could have been decided in 1990 in the first appeal. Instead of a timely and orderly proceeding to determine the matter on the merits, the State, the Court of Appeals, a department of this Court, and allied staff, have had to deal with a procedural morass, all of which could have been avoided had the matter been raised when it should have been in the first appeal. In the interest of judicial economy, already too much wasted, we hereby affirm the Court of Appeals without further proceedings.

*Barberio*, 121 Wn.2d at 52.

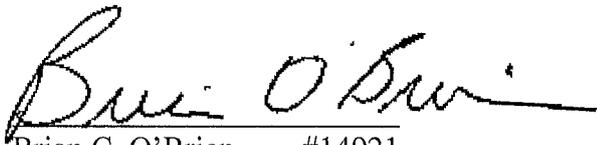
Accordingly, there is no conflict with existing authority. See RAP 13.4(b)(1) and (2). This Court should deny the defendant's petition for review.

## VI. CONCLUSION

For the reasons stated above, Respondent requests the Court deny the petitioner's request for review.

Respectfully submitted this 13<sup>th</sup> day of November, 2015.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921  
Deputy Prosecuting Attorney  
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DALLIN DAVID FORT,

Appellant,

Supreme Court No. 923876  
(COA No. 26830-6-III Consolidated  
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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 13, 2015, I e-mailed a copy of the Answer to Defendant's Petition for Review in this matter, pursuant to the parties' agreement, to:

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11/13/2015  
(Date)

Spokane, WA  
(Place)

*Kim Cornelius*  
(Signature)

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Attached for filing please find the State's Answer to Defendant's Petition for Review. Note the Certificate of Service is attached as the last page.

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