

62978-6

62978-6

No. 62978-6-I

DIVISION I OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Respondent,  
vs.  
JAMES THOMAS BAIRD,  
Appellant.

2009 SEP 10 11:29:38  
COURT OF APPEALS  
DIVISION I  
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR WHATCOM COUNTY

Cause No. 93-1-00095-5

ORIGINAL

REPLY BRIEF

BRETT A. PURTZER  
WSB #17283

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STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in his opening brief.

ARGUMENT

**I. Respondent has not addressed the substantive merits of the motion.**

The Respondent has failed to address State v. Carreno-Moldenado and the Court's holding that a prosecutor does not have "the right to speak for the victims when they have decided not to speak." State v. Carreno-Moldenado, 135 Wn.App. 77, 86, 143 P.3d 343 (2006). Respondent states only that "Carreno-Moldenado is a breach of plea bargain case and did not express a significant change in the law that is either material or would be retroactively applied to Baird's sentence." Brief of Respondent (BOR) at 8. Respondent does not challenge the holding in Carreno-Moldenado or acknowledge the Court's statements regarding the fact that it is improper for a prosecutor to serve as a victim's proxy. While the facts in Carreno-Moldenado were specific to a plea case, the ruling from that case is clearly applicable to what occurred at Mr. Baird's sentencing. Because

Carreno-Moldenado was not decided until 2006, its analysis was unavailable to Mr. Baird until recently, and because it speaks directly to a relevant issue in Mr. Baird's case, his case must be remanded.

**II. Mr. Baird's CrR 7.8 motion should not be converted to a personal restraint petition.**

The Respondent argues that the trial court failed to follow CrR 7.8 and transfer "Mr. Baird's untimely motion" to this Court for consideration as a personal restraint petition. BOR at 3. While Mr. Baird agrees that the trial court was without jurisdiction to deny the motion as untimely, because the motion was not barred by RCW 10.73.090, and because Mr. Baird has made a substantial showing that he is entitled to relief on the merits, this Court must remand Mr. Baird's case for proper re-sentencing.

CrR 7.8 states 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 and either (1) 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. However, RCW 10.73.100(6) states that RCW 10.73.090 does not apply to petitions or motions based on a substantive or procedural change in the law which is material to a conviction or sentence entered in a criminal proceeding.

Respondent correctly points out that "the remedy when the trial court acts without jurisdiction to deny a CrR 7.8 motion is to remand the case back to the trial court for consideration anew pursuant to the procedure set forth in CrR 7.8. See BOR at 4 (citing State v. Smith, 144 Wn.App. 860, 184 P.3d 666 (2008)).

Here, as articulated in Appellant's opening brief, there has been a substantive change in the law: prosecutors cannot serve as a victim's proxy. In Mr. Baird's case, the prosecutor did serve as the victim's proxy while requesting an exceptional sentence, and because this was improper, his case should be remanded. Additionally, because the trial court acted without jurisdiction when it denied Mr. Baird's CrR 7.8 motion as untimely,

respectfully, this Court must remand this case back to the trial court for proper consideration.

**III. Even if Mr. Baird's case is considered a "successive petition," it should still be evaluated on the merits.**

Mr. Baird agrees that if this motion is converted to a personal restraint petition, that it would qualify as a successive petition. However, because he has shown "good cause," this Court should still decide his case "on the merits."

As stated in his original brief, Mr. Baird never raised the issue of whether the prosecutor improperly acted as the victim's proxy in his previous petitions because the Court had not yet decided Carreno-Moldenado - a 2006 case. Had Mr. Baird or his counsel been aware that it was improper for a prosecutor to speak on behalf of a victim who had chosen not to speak, surely this issue would have been raised before. Because Mr. Baird has based his entire motion upon the holding of Carreno-Moldenado - which was decided in 2006 - and because his previous petitions were filed before 2006, he has surely not filed a previous petition on similar grounds, and good cause exists

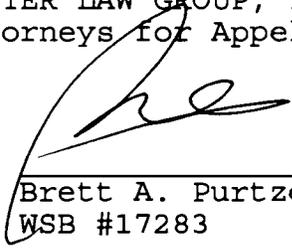
for this Court to evaluate his case on the merits.

CONCLUSION

Accordingly, and based upon the  
aforementioned, because the State does not serve  
as Ms. Baird's proxy, Mr. Baird respectfully  
requests that this court vacate his sentence and  
remand this matter for re-sentencing.

RESPECTFULLY SUBMITTED this 10th day of  
September, 2009.

HESTER LAW GROUP, INC. P.S.  
Attorneys for Appellant

By: 

\_\_\_\_\_  
Brett A. Purtzer  
WSB #17283

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Mac Setter  
Whatcom County Prosecuting Attorney's Office  
311 Grand Avenue  
Bellingham, WA 98225

James Thomas Baird  
DOC #722806  
Stafford Creek Correctional Center  
191 Constantine Way  
Aberdeen, WA 98520

Signed at Tacoma, Washington this 10th day  
of September, 2009.

  
Lee Ann Mathews

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IN THE WASHINGTON STATE COURT OF APPEALS

DIVISION I

STATE OF WASHINGTON, )  
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 Respondent, )  
 )  
 vs. )  
 )  
 JAMES THOMAS BAIRD, )  
 )  
 Appellant. )

NO. 62978-6-1

DECLARATION OF  
BRETT A. PURTZER

2009 SEP 10 PM 2:38  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I  
FILED

I, Brett A. Purtzer, hereby declare as follows:

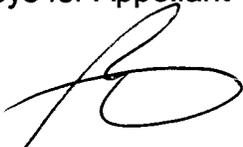
That I am the attorney for Mr. Baird and have represented him at all times pertinent hereto and with respect to his personal restraint petition.

That Mr. Baird has never raised the issue of objecting to the prosecutor speaking as the victim's proxy at sentencing.

I hereby declare, under penalty of perjury, under the laws of the State of Washington that the foregoing is true and correct.

Signed at Tacoma, Washington this 9th day of September, 2009.

HESTER LAW GROUP, INC., P.S.  
Attorneys for Appellant



By: Brett A. Purtzer, WSB #17283

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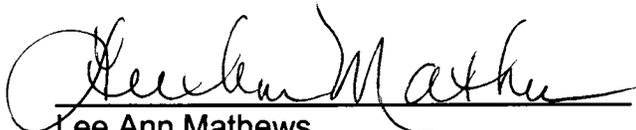
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day below set forth, I delivered true and correct copies of Declaration of Brett A. Purtzer of time to which this certificate is attached, by United States Mail or by ABC-Legal Messengers, Inc., to the following:

Mac Setter  
Deputy Prosecuting Attorney  
311 Grand Avenue, Suite 201  
Bellingham, WA 98225

James Thomas Baird  
DOC #722806  
Stafford Creek Correctional Center  
191 Constantine Way  
Aberdeen, WA 98520

Signed at Tacoma, Washington this 10<sup>th</sup> day of September, 2009.

  
\_\_\_\_\_  
Lee Ann Mathews