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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____

No. 34521-8-II
No. 35644-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

No. 34521-8

STATE OF WASHINGTON,

Plaintiff/Appellee,

v.

WALTER JESSE BARBEE,

Defendant/Appellant.

CONSOLIDATED WITH

No. 35644-9

In re the Personal Restraint of:

WALTER JESSE BARBEE,

Petitioner.

PETITIONER'S/APPELLANT'S REPLY BRIEF

By:

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I. INTRODUCTION

This Court has consolidated Mr. Barbee’s Personal Restraint Petition (PRP) with his direct appeal. Nevertheless, the State responds only to the PRP. This reply will be limited to the arguments raised by the State.

Mr. Barbee’s initial briefing is set out in Appellant’s Opening Brief and in the Personal Restraint Petition with Legal Argument and Authorities.

II. ARGUMENT

A. THE PRP IS TIMELY

The State argues that the PRP has been filed beyond the one-year time limit because the year begins to run following conclusion of a “timely” direct appeal. Brief of Respondent at 4, citing RCW 10.73.090(3)(b). Apparently, the prosecutor interprets the word “timely” to mean “filed within the 30-day limit set out in RAP 5.2(a).” It cites no authority for that proposition and there is none. A more natural reading of the statute is that a “timely” appeal simply means one that has been accepted for filing by the appellate Courts—either because it has been filed with the 30-day deadline or because the Courts have found good reason to excuse compliance with that deadline. In either case, the same legislative purpose is fulfilled: the defendant has a fair opportunity to exercise his state constitutional right to appeal before he must file a PRP.

In this case, the Washington Supreme Court found that Barbee must be excused from the 30-day time limit. As Barbee argued in the Supreme Court, he was misled by the trial court into believing that he had no appeal issue. Just as it was unfair to deprive Barbee of an appeal under these circumstances, it would be equally unfair to deprive him of his right to file a PRP after the appeal concludes.¹

Barbee's arguments regarding the statutory exception for "newly discovered evidence" are fully set out in his PRP at p. 14.

Barbee's arguments regarding equitable tolling are set out in the PRP at pp. 11-14. The State argues that Barbee cannot rely on equitable tolling because he never received an "assurance" that he would receive good time credit on the first 20 years of his murder sentence. In fact, the superior court judge himself specifically assured Mr. Barbee of that on the record in open court. See PRP at 4. Mr. Barbee's lawyer, Robert Quillian, confirmed that understanding on the record. Id. Contrary to the State's brief, Mr. Quillian's statements on this issue have not been at all "equivocal." Although Mr. Quillian does not recall exactly what he said to Mr. Barbee prior to entry of the plea, he states that he "certainly would not have told [Barbee] one thing prior to the plea and then said something different during the plea hearing or sentencing hearing." See PRP at p. 4.

B. MR. BARBEE IS ENTITLED TO RELIEF ON THE MERITS.

¹ Although Barbee's PRP would be timely even if filed a year after the appeal concludes, he has chosen to file it simultaneously with the appeal.

The State relies exclusively on State v. Conley, 121 Wn. App. 280, 87 P.3d 1221 (2004). In that case, the Court of Appeals found that the right to earn good time credit was a “direct consequence” of the defendant’s guilty plea. It believed, however, that the defendant must prove that this direct consequence was a material factor in his decision to plead guilty. As Mr. Barbee explained in the PRP, the second of these propositions is no longer a correct statement of the law. See PRP at p. 8. In Personal Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004), the Washington Supreme Court held that a defendant who has been misinformed of a direct consequence of his guilty plea is automatically entitled to relief without any proof that the misinformation affected his plea decision. The State does not mention Isadore at all in its brief.²

DATED this 16th day of May, 2007.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Walter J. Barbee

² The State contends that Mr. Barbee’s plea was not an Alford plea as Barbee suggested in his opening pleadings. The plea does differ from the one in North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), in that Mr. Barbee did not expressly deny guilt. On the other hand, it is similar to the one in Alford in that there is no admission of guilt. In any event, the only point that Barbee was making in his opening pleadings was that the impetus for the plea was the State’s agreement to reduce charges and the resulting effect on the standard range. There is no dispute that the precise sentencing calculations were the driving factor in Barbee’s acceptance of the plea offer.

CERTIFICATE OF SERVICE

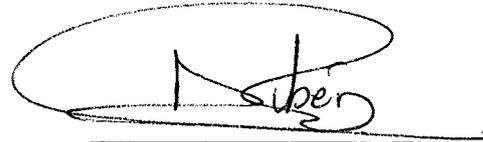
I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing Reply on Personal Restraint Petition on the following:

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PO Box 639
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Shelton, Washington 98584

Mr. Walter J. Barbee #753733
Clallam Bay Corrections Center
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05/16/07

Date



Rubén García Fernández

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