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STATE OF WASHINGTON

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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IN RE THE PERSONAL RESTRAINT

OF

DANIEL MARSHALL AGUIRRE,

Petitioner.

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REPLY BRIEF RE:  
REFERENCE HEARING

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ORIGINAL

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## I. INTRODUCTION

The state's main argument is that the trial court judge's ruling that second-degree rape carries a statutory maximum sentence of the top of the SRA range, rather than life in prison, was insignificant. It thereby seeks to minimize the impact of his misunderstanding. For example, the state argues that the trial court's ruling about the maximum sentence being the SRA range was "merely an aside and nothing in his oral ruling indicated that his understanding of the sentencing law played a significant role in his legal conclusion." State's Supp. Brief, p. 3.

But that ruling was not "merely an aside." It was an actual ruling, and it was a ruling that the maximum sentence was the top of the SRA range, not life. That ruling was legally incorrect. Section II.

And that ruling was not irrelevant. The state tries to minimize the relevance of that erroneous ruling by saying that "It really makes no difference. An attorney has the obligation to convey and explain *any* plea offer made by the State." State's Supp. Brief, p. 3 (emphasis in original). That is, of course, correct. But, given the amount of confusion with determinate-plus sentencing rules – confusion evident in even the learned trial judge's comments – it takes a lot more to explain its statutory maximum sentence than it does to explain, say, a run of the mill determinate sentence maximum. Section III.

The state then argues that the trial court did not abuse its discretion in excluding the proffered expert testimony on the significance of the determinate-plus sentence of life. It argues that the trial court's experience in law was 30 years, which was longer than the proffered expert's law experience of 17 years. State's Supp. Brief, p. 8. That does not capture the relevant period of time, though. The proffered expert testimony was not on the area of law in general, or even sentencing in general; it was about the more recent determinate-plus sentencing law. Exclusion of his testimony on this topic, with which he had greater familiarity than the judge, as evidenced by not just his experience but also the judge's statements in court betraying certain misconceptions about that law, was therefore an abuse of discretion. Section IV.

Finally, the state argues that the evidence did not support Mr. Aguirre's claim of ineffective assistance of counsel. The state bases this argument primarily in its assertion, "The fact remains that he is not facing a 'real sentence of life in prison.'" State's Supp. Brief, at 13. The state and Mr. Aguirre are thus in agreement on a key point: whether Mr. Aguirre was facing a sentence of life in prison is the key, first, question, to resolve before one can determine whether his trial lawyer's advice was effective or ineffective. Section V.

## II. THE TRIAL COURT DID SAY THAT THE MAXIMUM SENTENCE WAS THE TOP OF THE SRA RANGE, NOT LIFE

As discussed above, the state's Supplemental Brief asserts that the judge made no error about the statutory maximum sentence that Mr. Aguirre faced. State's Supp. Brief, p. 3 ("In any event, the court was correct [about the statutory maximum."]).

The transcript of the reference hearing, however, shows something different. It shows that the judge at the reference hearing believed that Mr. Aguirre did not actually face a "mandatory" sentence of life in prison:

I believe there is a potential for a life sentence, *but it is not mandatory.* ...

*... there is nothing set as to a maximum sentence at this point would be my understanding, and that still remains to be seen."*

VRP:263 (emphasis added). That transcript also shows that that judge believed that the judge at the sentencing imposed only a minimum sentence, not a maximum, VRP:264:

I acknowledge that in an indeterminate sentence the standard range is only the minimum term and a judge would have discretion to sentence anywhere within that standard range, and in this particular case, the judge imposed a sentence of 137 months. ....

...That was the standard range minimum sentence for an indeterminate sentence, and it's clearly set forth that the maximum could be up to life, and that's set by the [ISRB].

The reference hearing judge was not "correct" about this, as the state claims. He was wrong in several ways.

First, he was wrong because he said that someone besides the sentencing judge had the responsibility to decide on the maximum sentence. Actually, at Mr. Aguirre's sentencing, the judge set the *mandatory* maximum sentence, directed by RCW 9.94A.507(3)(b), which says "the court *shall* impose a sentence to a maximum term and a minimum term." (emphasis added).

Second, he was wrong because he was confused about the different roles of the sentencing judge and the ISRB. He believed the ISRB would set the maximum sentence for Mr. Aguirre at a hearing "somewhere down the line." VRP:264. But in reality, that maximum was set by the court at sentencing, as the Judgment plainly shows.

Third, he was wrong in stating that Aguirre did not receive a true life sentence because input would be solicited from the prosecutor and the judge first.<sup>1</sup> As discussed in our initial Supplemental Brief, this was true of duration of confinement hearings under old RCW 9.95.116, in which the ISRB reset minimum terms for old indeterminate sentence offenders

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<sup>1</sup> VRP:264 ("I don't know whether the State would make a recommendation or not. I've been asked when I was a prosecutor to make some recommendations, and on one occasion, I did.").

But it is not true of RCW 9.94A.570(3)(b) determinate-plus sentences.

The maximum in determinate-plus cases is imposed at sentencing.

The state's entire response to this information, also provided in Mr. Aguirre's initial Supplemental Brief, is a lengthy quote about how the indeterminate sentence law works. State's Supp. Brief, p. 4. If the quote is read carefully, though, it supports Mr. Aguirre's position, not the state's. It shows that the state Supreme Court actually ruled that the sentence for second-degree rape under the indeterminate sentence law has both "a minimum and maximum term." *Id.* Not just a minimum term, with a maximum to be decided at some later date. That quote further shows that at the end of the "minimum" term, a release hearing is held – but release need not follow. The inmate can still be retained until his "maximum term." That maximum term, in Mr. Aguirre's case, is life. In fact, that quote shows that the only thing that must be reset at those release hearings, if the defendant is not released, is the "new minimum term." *Id.* The "maximum term" always remains the same. That maximum term, for Aguirre, is life.

The state continues that the possibility of Aguirre serving that life sentence can't really be that serious, or else the Supreme Court would have granted defendants the right to counsel at release hearings. The State's Supp. Brief argues, at, p. 5: "His sentence simply is not as dire as

he portrays it, and the Supreme Court did not find it sufficiently serious to conclude that offenders are entitled to counsel at the review hearings.”

Actually, the lack of seriousness of the sentence had nothing to do with the state Supreme Court’s decision that the offender is not entitled to counsel at ISRB review hearings. Instead, it was the lack of seriousness of the possibility of release which animated that decision! That Court specifically ruled that the incarcerated offender subject to an indeterminate sentence has only a “conditional” liberty interest at stake at a “release” hearing – and, since his interest is only “conditional,” he is not entitled to counsel at this hearing even though he would be entitled to counsel where he had a more full liberty interest, such as at a parole revocation hearing. *In re McCarthy*, 161 Wn.2d 234, 241-42, 164 P.3d 1283 (2007). That Court explained that it is only the defendants who have “more significant liberty interest[s] at stake” who would be entitled to counsel at the hearing on whether to incarcerate or free him – and defendants like Mr. Aguirre who are serving indeterminate sentences do not fit into that category.

The state’s single argument about how insignificant Mr. Aguirre’s life sentence maximum is therefore fails – it is not the insignificance of that sentence, but the significance of it, that convinced the state Supreme Court that it need not supply counsel at indeterminate offender minimum term hearings. *See, e.g., McCarthy*, 161 Wn.2d at 245 (“The unique

statutory language and structure of RCW 9.95.420 give offenders *only a limited liberty interest* in .420 hearings-an interest more limited than the interest at stake during parole revocation decisions. To protect offenders' limited liberty interest in .420 hearings, due process requires that offenders have minimum procedural protections. ... these protections do not include the right to counsel.”) (emphasis added).

### **III. THE STATE ERRS IN ASSERTING THAT THE DIFFERENCE DOESN'T MATTER**

The state's fallback argument is that even if the trial judge erred in his understanding of what the maximum sentence was, it doesn't matter – “An attorney has the obligation to convey and explain any plea offer made by the State,” no matter what the maximum. State's Supp. Brief, p. 3.

That, of course, is true – the defense attorney has an obligation to adequately explain any plea offer.<sup>2</sup> But it's harder to explain a really difficult concept than it is to explain an easy one. And apparently the concept of a real statutory maximum of life in prison is a difficult concept, as the reference hearing judge's comments show. Despite his belief that

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<sup>2</sup> This was re-confirmed most recently just yesterday, in two Supreme Court cases: *Missouri v. Frye*, \_\_ U.S. \_\_, 2012 U.S. LEXIS 2321 (March 21, 2012) (No. 10-444); and *Lafler v. Cooper*, \_\_ U.S. \_\_, 2012 U.S. LEXIS 2322 (March 21, 2012) (No. 10-209).

“there is nothing set as to a maximum sentence at this point,” VRP:264, in fact, there was. It was life in prison.

The judge’s conclusion on this legal point was wrong. And if it was difficult for him to grasp the actual statutory maximum sentence based on the information available to him, it would certainly have been difficult for Mr. Aguirre to be able to grasp the significance of that sentence, based on the information available to him.

**IV. THE STATE ARGUES THERE WAS NO ABUSE OF DISCRETION IN EXCLUDING THE EXPERT BECAUSE THE JUDGE HAD 30 YEARS OF EXPERIENCE COMPARED TO THE EXPERT’S 17; BUT THE RELEVANT COMPARISON IS FAMILIARITY WITH DETERMINATE-PLUS SENTENCING, NOT LAW IN GENERAL**

The state then argues that the trial court did not abuse its discretion in excluding the proffered expert testimony on the significance of the indeterminate-plus sentence of life. It argues that the trial court’s experience in law was 30 years, which was longer than the proffered expert’s – which was 17 years. State’s Supp. Brief, p. 8.

The state is talking about the wrong period of time here, though. The proffered expert testimony was not on the area of law in general, or even sentencing in general. It was on the topic of the determinate-plus sentencing law; the meaning of the statutory maximum sentence; and what is necessary to adequately convey both the implications of a determinate-

plus sentence of life and of a plea bargain offer of 14 months. The determinate-plus sentence law was enacted only recently. The judge certainly did not have 30 years worth of experience with that law. And the determinate-plus sentence law does not apply in every case – only in certain sex cases, which is the area of law in which Mr. Meryhew, the proffered expert, specialized.

Thus the judge did not have experience greater than or even equal to Mr. Meryhew's in that field. Nor did the judge have the other relevant experience that the proffered expert had with this law: participation in state-wide commissions, authorship of articles, teaching other attorneys, and appearing as an expert on that law. Finally, the expert did not have the same misunderstandings about the determinate-plus sentencing law that the judge had. The expert understood that the statutory maximum applicable to second-degree rape was life, not the SRA range; the expert understood that this maximum was statutorily required, imposed at sentencing not thereafter, and not subject to change based on prosecutorial or judicial input – all misconceptions held by the judge.

The fact that the judge was experienced does not alone justify exclusion of the expert. The fact that the expert was well-informed on this particular topic, and that the reference hearing judge was not, actually shows that exclusion constituted an abuse of discretion.

**VI. THE STATE IS CORRECT THAT THE EVIDENCE MIGHT BE INSUFFICIENT TO SUPPORT AGUIRRE'S ALLEGATIONS IF HE FACED ONLY A MAXIMUM SRA RANGE; BUT HE DID NOT**

Finally, the state argues that the evidence did not support Mr. Aguirre's claim of ineffective assistance of counsel. The state bases this argument primarily on its assertion, "The fact remains that he is not facing a 'real sentence of life in prison.'" State's Supp. Brief, at 13.

The state and Mr. Aguirre are in agreement on a key point: whether Mr. Aguirre was facing a sentence of life in prison is the key, first, question, to resolve before one can determine whether his trial lawyer's advice was effective or ineffective. That makes the current claim a little different from the usual ineffective assistance of counsel claim, which depends primarily on a factual assessment of what the trial lawyer did and said. In this case, the starting point for the ineffective assistance claim must be to make a legal determination about what sentence Mr. Aguirre actually faced if he were convicted. That makes the legal questions discussed above critical for the sufficiency of the evidence claim, also.

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**VII. CONCLUSION**

For the foregoing reasons, this Court should grant Mr. Aguirre's

PRP.

DATED this 22<sup>nd</sup> day of March, 2012.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 22<sup>nd</sup> day of March, 2012, a copy of the REPLY BRIEF RE: REFERENCE HEARING was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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\_\_\_\_\_  
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