

No. 30080-3-III

FILED  
June 8, 2012  
Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,

Respondent,

v.

DANA RUEL KLEIN, II,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
Klickitat County, STATE OF WASHINGTON  
Honorable Brian P. Altman, Judge

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Did the trial court err in denying Mr. Klein's procedurally improper motion for an evidentiary hearing which was supported only by Mr. Klein's assertions as to what other people's statements would be?

## **II. PROCEDURAL HISTORY**

Mr. Klein was convicted of Rape of a Child in the First Degree, Child Molestation in the First Degree, Intimidating a Witness, and two counts of Unlawful Imprisonment on June 12, 2006. CP 128. He filed a direct appeal of his conviction and his case is currently stayed in this Court (Court of Appeals Case No. 253821-III). On March 31, 2011, Mr. Klein filed the motion underlying this appeal with this Court. CP 50. Following filing he was directed by letter to file his motion with the Superior Court pursuant to RAP 7.2(e). CP 49. He did so, filing "Defendant's Motion for Evidentiary Hearing Due to Newly Discovered Evidence of Government Misconduct," on April 12, 2011. CP 3. His motion requested that the Court grant him an evidentiary hearing under CrR 8.3(b) due to alleged misconduct by State at his trial. CP 3-51. His motion was supported by a memorandum as well as "Defendant's List of Witnesses," a document in which Mr. Klein identified seven (7)

individuals he wished to call at the requested hearing. CP 140-143. Under each name on the list was a paragraph explaining what Mr. Klein asserted their testimony would be. CP 140-143.

A hearing on the motion was held on May 17, 2011. VRP 3-27. After hearing argument, the trial court denied Mr. Klein's motion on three grounds: first that Mr. Klein's evidence was not sufficient to establish a prima facie case of governmental misconduct (VRP 23-24); second, that the evidence that "item no. 9" was not provided to him prior to trial was not "newly discovered evidence" (VRP at 24); and third, that CrR 8.3 is a pre-conviction remedy. VRP 24-25.

Mr. Klein filed a motion for reconsideration on May 31, 2011. CP 78. In this motion, Mr. Klein argued that the court should "recognize that [his] request under CrR 8.3(b) may have been inartfully plead, consider the substance of [his] motion not the form, and grant [his] requests (CP 79), citing CrR 7.8(b) and CrR 7.8(c)(2) as substitute rules under which he should be entitled to relief. CP 78-84. The State responded to the Motion for Reconsideration on June 2, 2011, noting Mr. Klein's cited "irregularities in the proceedings" were not identified by him and arguing that Mr. Klein's motion was an attempt to get a "second bite at the apple;" a tactic prohibited by CR 59. CP 86-89. Mr. Klein filed a reply to the

State's response on June 13, 2011. CP 90.

The Court denied Mr. Klein's Motion for Reconsideration on July 5, 2011, noting that although Mr. Klein cited "irregularities in the proceedings" as a basis for reconsideration, his motion didn't outline what those irregularities were and finding that Mr. Klein provided "no other demonstrable basis for reconsideration." CP 95-96. Mr. Klein filed this appeal of the court's ruling on July 18, 2011. CP 97-101.

### **III. ARGUMENT**

- A. BECAUSE MR. KLEIN'S CRR 8.3 MOTION WAS NOT PROCEDURALLY PROPER AND, EVEN IF IT HAD BEEN, MR. KLEIN FAILED TO PROVIDE EVIDENCE SUFFICIENT TO WARRANT RELIEF, THE TRIAL COURT'S DENIAL OF HIS MOTION WAS PROPER.

Dismissal of a criminal prosecution due to arbitrary action or governmental misconduct is an extraordinary remedy that is improper except in truly egregious cases of mismanagement or misconduct that materially prejudices the rights of the accused. *State v. Martinez*, 121 Wn. App. 21, 86 P.3d 1210 (2004).

To support a CrR 8.3(b) dismissal, a defendant must show both "arbitrary action or governmental misconduct" and "prejudice affecting [his

or her] right to a fair trial." *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997) (Internal Citations Omitted). A trial court's decision regarding dismissal under CrR 8.3(b) can be reversed only when a trial court has abused its discretion by making a decision that is manifestly unreasonable or based on untenable grounds. *Michielli*, 132 Wn.2d at 240.

1. *Mr. Klein's Motion was Not Procedurally Proper Because CrR 8.3 is a Pre-Conviction Remedy.*

The trial court did not abuse its discretion in denying Mr. Klein's 8.3 motion because a plain reading of CrR 8.3 demonstrates that it is not applicable in post-conviction proceedings.

CrR 8.3, titled "Dismissal," provides in relevant part:

(a) On Motion of Prosecution. The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss **an indictment, information or complaint.**

(b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal **prosecution** due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

(c) On Motion of Defendant for Pretrial Dismissal. The defendant may, prior to trial, move to dismiss a **criminal charge due to insufficient evidence establishing a prima facie case of the crime charged.**

CrR 8.3 (emphasis ours).

“Where the language of a statute or rule is plain and unambiguous, the language will be given its full effect.” *City of Seattle v. Guay*, 150 Wn.2d 288, 300, 76 P.3d 231 (2003) (citing *State v. Smith*, 117 Wn.2d 263, 270-71, 814 P.2d 652 (1991)). Language in a statute or rule is not ambiguous unless it is susceptible to more than one reasonable meaning. *Guay*, 150 Wn.2d at 300 (citing *State v. Johnson*, 119 Wash.2d 167, 172, 829 P.2d 1082 (1992)).

It is clear from the language of the rule that CrR 8.3 unambiguously provides a pre-conviction dismissal remedy. *See* CrR 8.3. The statute uses language such as “indictment,” “prosecution,” “information,” “complaint,” and “charge,” all of which indicate a pre-conviction stage of the proceedings. *Id.* The statute is notably bereft of post-conviction terms such as “judgment” or “conviction.” Construing CrR 8.3 as a pre-conviction remedy is also commensurate with an analysis of the Superior Court Criminal Rules as a whole. As Mr. Klein is now evidently aware, CrR 7.8 governs post-conviction relief from a final judgment or order. CrR 7.8.

In this case, Mr. Klein was convicted of all charges following his jury trial. RP (25382-1-III) 427-428. He appealed the Judgment and Sentence filed on July 17, 2006, CP 128-139, and his case is currently stayed in this court pending a decision of the Washington Supreme Court. Clearly, it was not an abuse of discretion for the trial court to deny a CrR 8.3(b) motion at

this stage in the proceedings; Mr. Klein's CrR 8.3 motion was not procedurally proper.

2. *Even if Mr. Klein's Motion had been Procedurally Proper under CrR 8.3, he did not Provide Sufficient Evidence to Warrant Relief.*

Additionally, even if Mr. Klein's CrR 8.3 motion had been procedurally proper, the court did not abuse its discretion in denying his motion because Mr. Klein failed to provide sufficient evidence of governmental misconduct that resulted in prejudice affecting his right to a fair trial.

CrR 8.3(c) states that "the defendant's motion shall be in writing and supported by an affidavit or declaration alleging that there are no material disputed facts and setting out the agreed facts, or by a stipulation to facts by both parties... In determining defendant's motion, the court shall view all evidence in the light most favorable to the prosecuting attorney and the court shall make all reasonable inferences in the light most favorable to the prosecuting attorney. CrR 8.3.

Mr. Klein claims "governmental misconduct," alleging that the State deliberately withheld and concealed "item no. 9" from his attorney and thereby prevented him from using "item no. 9" in his defense at trial. He also

claims that after the trial, the State released “item no. 9” to his ex-wife, who then destroyed it. CP 3-14.

The evidence provided by Mr. Klein in support of his motion simply does not prove whether “item no. 9” was disclosed to his attorney prior to trial or not and certainly does not evidence that there are no materially disputed facts. He provided nothing other than speculation and conjecture to support his arguments. No one supplied the trial court with an affidavit, based on personal knowledge, that the State never provided the contents of “item no. 9” to Mr. Klein. Mr. Klein’s list of witnesses and his assertions about what they would testify to were clearly insufficient to establish a prima facie case of governmental misconduct. No one other than Mr. Klein provided any information at all, and as the trial court stated at the hearing “Mr. Klein’s saying that it means something does not make it so.” RP at 24. In the face of nothing more than a motion supported by the defendant’s assertions about what other people would say, the trial court was not required to schedule or hold an evidentiary hearing and did not abuse its discretion in denying Mr. Klein’s CrR 8.3 motion.

Additionally, even if Mr. Klein’s motion and supporting documents had been sufficient for consideration under CrR 8.3, the fact that the State may have released “item no. 9” to the then-Mrs. Klein following trial is not evidence of misconduct or arbitrary action because there is no requirement to

retain non-admitted evidence. In fact, absent a specific order at sentencing, even admitted evidence has no specific retention time. *See e.g.*, RCW 10.73.170(6). To the contrary, statutes require that the State return evidence to the proper owner as soon as possible. *See e.g.*, RCW 7.69.030(7).

A claim of governmental misconduct based on failure to preserve a case requires that the defendant prove not only bad faith on the part of the State but also requires that he provide evidence that the returned item was clearly exculpatory and its exculpatory value was readily apparent. *See e.g. State v. Wittenbarger*, 124 Wn.2d 467, 479-481, 880 P.2d 517 (1994). As recognized by the trial court, Mr. Klein's motion and supporting documents clearly do not warrant relief; his motion was properly denied.

B. BECAUSE MR. KLEIN DID NOT PROVIDE ANY DEMONSTRABLE BASIS FOR RECONSIDERATION, THE COURT ACTED WITHIN ITS DISCRETION IN DENYING HIS MOTION.

CR 59 requires that a motion for reconsideration identify the specific reasons in fact and law as to each ground on which the motion is based. CR 59. The trial court's decision on a motion for reconsideration is discretionary. *Bringle v. Lloyd*, 13 Wn. App. 844, 848, 537 P.2d 1060, 1063 (1975).

Mr. Klein's Motion for Reconsideration appears to be based on two grounds: 1) that there were irregularities in the proceedings, and 2) his

initial motion was inartfully pled and should have been considered a CrR 7.8 motion. CP 78-85. The court did not abuse its discretion in denying the motion because neither ground warranted relief.

The first ground for reconsideration that Mr. Klein cited was “irregularity of the proceedings.” While CR 59 does provide that irregularity in the proceedings can warrant reconsideration, it also requires that the moving party identify the specific reasons in fact and law as to each ground. Mr. Klein failed to identify any irregularities or explain why they warranted reconsideration. His “Supplemental Declaration” and “Memorandum” were very nearly duplicative to his initial CrR 8.3(b) motion.

Arguing that his initial motion was “inartfully pled,” Mr. Klein also asked the court to “consider the substance of [his] motion not the form” and to “grant his requests” under CrR 7.8. CR 59 does not permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case. *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004), *review denied*, 153 Wn.2d 1012 (2005). Mr. Klein’s Motion for Reconsideration was merely an attempt to get a second bite at the apple. CR 59 does not allow for second bites; litigants will not be permitted to re-argue issues already addressed. *See Sligar v. Odell*, 156

Wn. App. 720, 233 P.3d 914 (2010), *review denied*, 170 Wn.2d 1019, 245 P.3d 772 (2011). Additionally, courts may decline to consider new arguments or new evidence on reconsideration where those arguments or evidence were available earlier. *See e.g., August v. U.S. Bancorp*, 146 Wn. App. 328, 190 P.3d 86 (2008), *as amended and review denied*, 165 Wn.2d 1034, 203 P.3d 380 (2009). CrR 7.8 was available to Mr. Klein at the time he made his initial motion and his failure to raise it does not permit him a second bite at the apple after his initial motion was denied. The trial court did not abuse its discretion in denying Mr. Klein's motion; he provided no demonstrable basis for reconsideration.

C. THIS COURT SHOULD NOT DETERMINE THAT THE TRIAL COURT SHOULD HAVE CONSIDERED MR. KLEIN'S MOTIONS UNDER CRR 7.8 BECAUSE THAT ARGUMENT WAS NEVER PROPERLY MADE TO THE TRIAL COURT.

Mr. Klein made his initial motion under CrR 8.3. He then moved for reconsideration under CrR 7.8. Part of his reasoning for that request was his claim that his initial motion was "inartfully drafted." Now Mr. Klein's attorney argues, on that same basis, that this Court should ignore the form of Mr. Klein's initial motion and declare him entitled to relief under CrR 7.8(b)(5).

This Court should not determine that the trial court should have considered Mr. Klein's motions under CrR 7.8 for two reasons: 1) because pro se defendants are held to the same standard as attorneys, and 2) because doing so would force this Court to consider whether the trial court abused its discretion in denying a motion that was never properly made.

Pro se defendants are held to the same standard as that of an attorney. *See e.g., State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985) (citing *State v. Fritz*, 21 Wn. App. 354, 363, 585 P.2d 173 (1978)); *State v. Bebb*, 44 Wn. App. 803, 813, 723 P.2d 512 (1986), (self-representation is not a license to avoid compliance with court rules), *aff'd*, 108 Wn.2d 515, 740 P.2d 829 (1987).

Mr. Klein's request that this court impose judgment against the trial court for denying a motion that was never made cannot be granted because Mr. Klein must be held to the same standard as an attorney. In fact, the trial court's consideration of Mr. Klein's motion under a different rule than he put forth in his initial motion could result in reversible error. *Edwards v. Le Duc*, 157 Wn. App. 455, 460, 462-63, 238 P.3d 1187 (2010) (A trial court must hold pro se parties to the same standards to which it holds attorneys; trial court's assistance to pro se litigant in phrasing questions, laying a proper foundation, etc., was reversible error),

*review denied*, 170 Wn.2d 1024, 249 P.3d 623 (2011). The fact that Mr. Klein chose to proceed pro se does not give him license to put forth never-ending legal arguments to replace those that are unsuccessful.

Additionally, this Court should decline Mr. Klein's request to ignore to form of his motion and find that the trial court should have considered them under CrR 7.8 because Mr. Klein is not entitled to another bite at the apple.

Rule of Appellate Procedure (RAP) 2.5(a) permits this Court to "refuse to review any claim of error which was not raised in the trial court." RAP 2.5. This includes arguments or theories. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992).

Mr. Klein's initial motion did not raise CrR 7.8 as a theory under which he was entitled to relief. Though he did raise CrR 7.8 in his "Motion for Consideration" that theory was not properly before the court as he was merely putting forth a new rule under which to make the same arguments. This Court can, and should, decline to decide whether Mr. Klein's motion should have been considered under CrR 7.8 because that argument was not properly raised with the trial court. Mr. Klein is not entitled to a third bite at the apple.

D. IN THE ALTERNATIVE, IF THIS COURT FINDS THAT THE TRIAL COURT SHOULD HAVE CONSIDERED MR. KLEIN'S MOTIONS UNDER CRR 7.8; REMAND IS NECESSARY TO ENABLE THE TRIAL COURT TO TRANSFER THE MOTION FOR CONSIDERATION AS A PERSONAL RESTRAIN PETITION.

If this Court does find that the trial court should have considered Mr. Klein's motion under CrR 7.8, remand is required because the trial court, after properly denying Mr. Klein's non-meritorious motion, was required to transfer the motion to this Court for consideration as a personal restraint petition.

*1. The Trial Court Appropriately Determined that Mr. Klein's Motion did Not Warrant Consideration Under CrR 7.8.*

A motion to vacate a judgment or conviction shall state the grounds on which the requested relief is based and be supported by affidavits that set forth the statement of facts or error on which the motion is based. CrR 7.8(c)(1). Black's Law Dictionary defines "affidavit" as a "voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." BLACK'S LAW DICTIONARY 66 (9th ed. 2009). RCW 9A.72.085(1) provides that instead of a sworn affidavit, a defendant may provide an unsworn

statement so long as it is made under penalty of perjury. RCW 9A.72.085(1).

“[D]efendants seeking postconviction relief face a heavy burden and are in a significantly different situation than a person facing trial.” *State v. Riofta*, 166 Wn.2d 358, 369-370, 209 P.3d 467 (2009) (citing *Schlup v. Delo*, 513 U.S. 298, 326, 130 L.Ed.2d 808 (1995)). “[W]hen supporting affidavits do not establish sufficient grounds to justify relief under CrR 7.8(b), a trial court may summarily deny relief without a hearing.” *State v. Dallman*, 112 Wn. App. 578, 582, 50 P.3d 274 (2002), *review denied*, 148 Wn.2d 102, 266 P.3d 637 (2003).

Finally, we take this opportunity to explain more fully the showing petitioners must make to support a request for a reference hearing... If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, **he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence.** The affidavits, in turn, must contain matters to which the affiants may competently testify... In our view, these principles apply to post-trial motions as well as to personal restraint petitions... the Supreme Court's rule on post-trial motions expressly requires that facts outside the record be shown by affidavit. CrR 7.6(a).

*State v. Bandura*, 85 Wn. App. 87, 93-94, 931 P.2d 174 (1997) (citing *In re Rice*, 118 Wn.2d 876, 885-86, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 121 L.Ed.2d 344 (1992)).

Mr. Klein's motion was not supported by affidavits as required by the rule, but rather by "Defendant's List of Witnesses," a document in which Mr. Klein identified seven (7) individuals he wished to call at the requested hearing and detailed what he asserted their testimony would be. CP 140-143. Because this "evidence" is not sufficient to warrant consideration under the rule, the trial court properly denied his motion.

Even if this Court determines that, by its form, Mr. Klein's motion did warrant consideration under CrR 7.8, the trial court would undoubtedly still have denied his motion because Mr. Klein cannot justify his request for relief under either the newly discovered evidence standard, CrR 7.8(b)(2), or under CrR 7.8(b)(5), "any other reason justifying relief."

Mr. Klein's intent seems to be that the Court consider his motion under CrR 7.8(b)(2) as he continually argues that the fact that either the State or his attorney withheld evidence from him is "newly discovered evidence." CP 3, 10. Because Mr. Klein failed to establish that the alleged evidence was "newly discovered," his motion would still have been denied.

Newly discovered evidence requires satisfaction of a five-part test: "that the new evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before

trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a “new” proceeding. *In re Personal Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (quoting *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)).

Mr. Klein cannot satisfy factors two and three because he knew of the existence of “Item No. 9,” and whether or not it was provided to him, prior to trial. “Item No. 9” was a binder of business receipts that belonged to Mr. Klein. CP 4. He certainly was aware that “Item No. 9” existed as it was his property. Consequently, he must have been aware at the time of his trial that he did not have it. He also cannot and did not establish that “Item No. 9” would probably have changed the result of his trial and that it would not have been merely cumulative.

Mr. Klein was convicted of all counts after the jury heard overwhelming evidence of his guilt, which included direct testimony from his twelve year-old step-daughter describing how Mr. Klein sexually molested and assaulted her using the various sex toys that were introduced into evidence by the State. RP (25382-1-III) 42, 49-59. Mr. Klein also admitted to engaging in “mutual masturbation” with the victim. RP (25382-1-III) at 385.

As a defense to the charges against him, Mr. Klein presented alibi testimony that he was home a mere thirty-four (34) days during the six month period in which the charged acts were alleged to have occurred. RP (25382-1-III) 342-343. To corroborate this testimony, Mr. Klein referred to various calendars he had drafted using information from “satellite records” and “business receipts.” RP (25382-1-III) 294-299, 330-343. Despite detailed testimony referencing these calendars that elicited over State objections, the jury found him guilty as charged. RP (25382-1-III) 427-428. “Item No. 9,” if even allowed into evidence, would have been merely cumulative to this testimony and therefore Mr. Klein cannot demonstrate that its admission would likely have changed the result of his trial. As a matter of law, Mr. Klein cannot satisfy all five factors granting review of newly discovered evidence.

CrR 7.8(b)(5) grants relief under “[a]ny other reason justifying relief from the operation of the judgment.” Relief under this section is limited to extraordinary circumstances not covered by any other section of the rule. *State v. Brand*, 120 Wn.2d 365, 369, 842 P.2d 470 (1992). “[E]xtraordinary circumstances must relate to fundamental, substantial irregularities in the court’s proceedings or to irregularities extraneous to the court’s action.” *State v. Olivera-Avila*, 89 Wn. App. 313, 319, 949 P.2d

824 (1997). CrR 7.8(b)(5) “does not apply when the circumstances allegedly justifying the relief existed at the time the judgment was entered.” *State v. Gomez-Florencio*, 88 Wn.App. 254, 259, 945 P.2d 228 (1997).

Applying these rules of law to the facts of this case, it is clear the trial court did not abuse its discretion when it denied Mr. Klein's motion. First, Mr. Klein failed to provide sufficient evidence of any extraordinary circumstances that occurred during the prosecution of his case or at his trial. Even if this Court determines his evidence was sufficient, (b)(5) doesn't apply because the alleged Brady violation as well as any ineffective assistance claim clearly existed at the time Mr. Klein's judgment was entered.

2. *Remand is Necessary to Enable the Trial Court to Transfer the Motion to This Court for Consideration as a Personal Restraint Petition.*

Despite the fact that the trial court was correct in determining that Mr. Klein's motion did not warrant consideration, remand is necessary as CrR 7.8(c) required the court to transfer the motion to this Court for consideration as a personal restraint petition.

CrR 7.8(c), titled “Procedure on Vacation of Judgment, provides:

(1) Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by

affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) Transfer to Court of Appeals. 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 (i) 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.

(3) Order to Show Cause. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

CrR 7.8(c). The trial court has limited authority to decide a CrR 7.8 motion on the merits as the rule mandates transfer to the Court of Appeals unless the two conditions in (C)(2) are met. Not only must the trial court find that the motion is timely under RCW 10.73.090, it must also find that the motion either requires a factual hearing or makes a substantial showing that defendant is entitled to relief. If the motion is untimely, the trial court has no authority to decide the motion on the merits - it must transfer the motion to the Court of Appeals. *State v. Smith*, 144 Wn.App. 860, 863, 184 P.3d 666 (2008).

A petition or motion for collateral attack is timely if it is filed within one year after the judgment becomes final. RCW 10.73.090(1). A case becomes "final" on the last of the following dates: "(a) The date it is filed with the clerk of the trial court; (b) The date that an appellate court

issues its mandate disposing of a timely direct appeal from the conviction; or (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal." RCW 10.73.090(3).

Mr. Klein's collateral attack was timely under RCW 10.73.090. Mr. Klein was sentenced on July 17, 2006 and filed a timely notice of appeal. RP (25382-1-III) 432-456. No mandate has been issued as the case is currently stayed in this Court. If the trial court finds that a CrR 7.8 motion is timely, it must determine that either the defendant has made a substantial showing that he is entitled to relief or the motion requires a factual hearing in order to keep the motion for consideration. CrR 7.8(c)(2).

The court's reasons for denying Mr. Klein's motion demonstrate that the defendant's motion failed to provide a sufficient legal basis to allow the court to retain the motion for determination under CrR 7.8. The record before this court makes it clear that the trial court was correct in finding defendant's motion to be non-meritorious; the evidence provided was clearly insufficient to warrant relief under the rule. Nowhere in the written materials submitted with Mr. Klein's motion was there a sworn statement, or any evidence from anyone other than Mr. Klein to support

his claims. In order for a defendant to make a substantial showing that he was entitled to relief, he had to provide this supporting evidence with his motion.

Pursuant to CrR 7.8(c), the court was required to send Mr. Klein's non-meritorious motion to this Court; entry of an order denying the motion was error. Remand is appropriate so that the court can enter an order consistent with CrR 7.8(c).

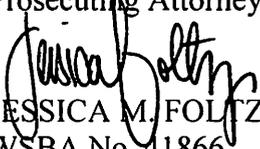
#### IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the denial of Mr. Klein's CrR 8.3 motion be affirmed or, in the alternative and if this Court finds the motion should have been considered under CrR 7.8, that this Court remand the matter to the trial court for entry of an order transferring Mr. Klein's motion to this Court for consideration as a personal restraint petition.

DATED June 8, 2012.

Respectfully submitted,

LORI LYNN HOCTOR  
Prosecuting Attorney

  
JESSICA M. FOLTZ  
WSBA No. 41866  
Deputy Prosecuting Attorney

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COURT OF APPEALS OF WASHINGTON  
DIVISION III

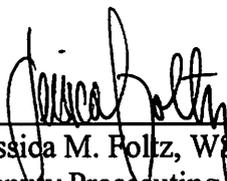
STATE OF WASHINGTON,  
  
Plaintiff,  
  
v.  
  
DANA RUEL KLEIN, II,  
  
Defendant.

COURT OF APPEALS NO. 30080-3-III  
  
DECLARATION OF MAILING

I, Jessica M. Foltz, state that on June 8, 2012, I sent a copy of the Brief of Respondent in this case to: Marie Jean Trombley at [marietrombley@comcast.net](mailto:marietrombley@comcast.net). Email service was per agreement.

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

DATED this 8 day of June, 2012.

  
\_\_\_\_\_  
Jessica M. Foltz, WSBA No.41866  
Deputy Prosecuting Attorney

**FILED**

JUN 18 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

DANA RUEL KLEIN, II,

Appellant.

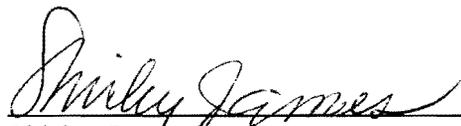
COURT OF APPEALS NO. 30080-3-III

DECLARATION OF MAILING

I, Shirley James, state that on June 14, 2012, I deposited in the United States mails by first class mail, proper postage affixed a copy of the State's Brief of Respondent to: Dana R. Klein, DOC # 895508, Airway Heights Correction Center, LB-47, PO Box 2049, Airway Heights, WA 99001-2049.

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

DATED this 14 day of June, 2012.

  
\_\_\_\_\_  
Shirley James  
Administrative Assistant to  
Jessica M. Foltz, Deputy Prosecuting Attorney