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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. _____

84891-2

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 25740-1-III
(consolidated with No. 27524-8-III)

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JOEL RODRIGUEZ RAMOS,

Petitioner.

PETITION FOR REVIEW

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ORIGINAL

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I. Identity of Petitioner

Mr. Ramos asks this Court to review the Court of Appeals decision designated in Section B of this petition.

II. Court of Appeals Decision

A copy of the decision remanding to the Superior Court for a limited amendment without resentencing is attached as Appendix A.

III. Issues Presented for Review

Given the rights to presence, counsel, allocution, and due process, guaranteed by the state and U.S. Constitutions and the Court Rules, can the Superior Court impose a sentence with a materially different term concerning community supervision, following partial reversal and remand, without a resentencing hearing, the defendant's presence, and the rights to allocution, due process, and representation by counsel?

IV. Statement of the Case

A. The Charges and the Guilty Plea

Mr. Ramos was charged in Juvenile Court with four counts of aggravated first degree murder. CP:40. After several weeks of pretrial motions, discovery, and investigation, Mr. Ramos – through counsel – waived a decline hearing. 8/23/93 VRP:2, 4-7.

The prosecutor then explained that the adult court

Information (CP:18-21) charged one count of premeditated first-degree murder for the death of Bryan Skelton, and three counts of first-degree felony murder for homicides that occurred during a single first-degree robbery for the deaths of the other three Skelton family members. VRP:8-9.

Mr. Ramos pled guilty to all of those charges. VRP:12-13, 15-20. His Statement of Defendant on Plea of Guilty shows that the elements of each of the three counts of felony murder are virtually identical. Each count states that the underlying crime is "First Degree Robbery" with no further specification. CP:10. The only difference is the name of the person killed during the course of that "Robbery."

B. Sentencing

The state recommended the low end of the sentencing range, that is, 80 years. VRP:26. Defense counsel urged the court to follow that recommendation, adding that there are important differences between Mr. Gaitan, who was the principal in these crimes, and Mr. Ramos, who was the "follower." VRP:27. The court imposed an 80-year sentence.

C. Appeal

Mr. Ramos' right to appeal was reinstated by this Court on

March 7, 2008. On the direct appeal that followed, the Court of Appeals affirmed. *State v. Ramos*, 152 Wash. App. 684, 217 P.3d 384 (2009). A copy of its decision is attached as Appendix B.

This Court reversed in part and remanded to the Court of Appeals for further consideration of a community supervision issue. This Court refused to consider the double jeopardy or rule of lenity issues. *State v. Ramos*, 168 Wn.2d 1025, 230 P.3d 576 (2010). Appendix C.

On remand, the Court of Appeals remanded to the Superior Court to amend the Judgment to specify the length of community supervision – not for a resentencing hearing. *State v. Ramos*, ___ Wash. App. ___, ___ P.3d ___, 2010 Wash. App. LEXIS 1338 (June 22, 2010). Appendix A.

A timely motion for consideration was denied by the Court of Appeals on July 14, 2010. Appendix D.

V. Argument in Favor of Review

When the prior petition for review was filed in this Court in conjunction with Mr. Ramos' appeal, this Court ruled that a portion of Mr. Ramos' sentence – the community supervision portion – was illegal and that it had to be changed. The appellate court's order on remand, however, treats the sentencing correction that must be

performed as something other than a resentencing, but rather a ministerial event to correct a scrivener's error. According to that order, the defendant does not even need to be present and the Judgment could be summarily amended in private.

This approach conflicts with several different lines of authority, and hence, it should be reviewed by this Court.

A. The Appellate Court's Remedy Conflicts With Division II's Approach to Resentencing in *State v. Davenport*¹

The approach taken by Division III in this case highlights a conflict among the Courts of Appeals. Division III's approach is in accord with the approach recently taken by Division I on this issue. See *State v. Valentine*, 2010 Wash. App. LEXIS 1375 (June 28, 2010) (63666-9-I) (unpublished).

But it conflicts with the approach taken by another Division of the Court of Appeals in similar circumstances. In *State v. Davenport*, the appellant's life without parole sentence under the Persistent Offender Accountability ("Three Strikes") Act was reviewed on appeal. The state needed to prove only two prior convictions to obtain the life without parole sentence, but it

¹ *State v. Davenport*, 140 Wn. App. 925, 167 P.3d 1221 (2007), review denied, 163 Wn.2d 1041 (2008).

submitted evidence of three. On Mr. Davenport's first appeal, the court ruled that one of those prior convictions should not have been considered and remanded for resentencing. Since there were still two qualifying prior convictions left, the trial judge conducted only a summary proceeding, without defendant's presence, changed the list of prior convictions, and kept the same sentence. He refused to consider proportionality challenges to the sentence and refused to treat it as a full resentencing.

The appellate court, Division II, reversed. It ruled that when a defendant is returned for resentencing, the defendant has a right to be present and the court must conduct a full resentencing. In fact, that court ruled that the resentencing court can even consider issues that were not raised earlier: "At the resentencing hearing, the trial court had the discretion to consider issues Davenport did not raise at his initial sentencing or in his first appeal." *Davenport*, 140 Wn. App. 925, 932 (citing *State v. Barbiero*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993), and *State v. Suave*, 33 Wn. App. 181, 183 n.2, 652 P.2d 967 (1982), *aff'd*, 100 Wn.2d 84 (1983)).

This Court's decision in *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009), does not require a different result. In *Kilgore*, the defendant was originally convicted of three counts of rape of a child

and four counts of child molestation. The Superior Court imposed an exceptional sentence on the defendant on each count, based on five aggravating factors, all to run concurrently. The Court of Appeals reversed two counts, but did not reverse the other counts and did not disturb the exceptional concurrently-running sentences on those counts. In fact, the appellate court did not disturb anything about the sentences on those other counts: the length of incarceration, the length or conditions of supervision, the conditions of supervision, the legal/financial obligations, etc. Given the fact that all of those undisturbed sentences still ran concurrently, there was nothing left for the Superior Court to do in terms of altering any terms of the sentence on remand.

Thus, on remand in the *Kilgore* case, the Superior Court did not hold a full resentencing hearing but instead amended the judgment to reflect the accurate number of counts and the correct offender score. It retained the same concurrent exceptional sentences on the remaining counts that had been imposed before. It kept the length of the incarceration the same, the length of supervision the same, the conditions of supervision the same, and all other conditions the same, also. It changed nothing about the undisturbed counts at all.

This Court affirmed. It ruled that there was no abuse of discretion in the Superior Court's decision to decline to hold a full resentencing hearing since the presumptive sentence range remained the same, the sentences imposed before the appeal remained the same, and there was no change in the length of the sentence, and hence there was no need to exercise independent judgment. *Kilgore*, 167 Wn.2d at 40, 42-43. As this Court stated of that case, "it is the original judgment and sentence entered by the original trial court that controls the defendant's conviction and term of incarceration." *Id.*, at 40-41.

Mr. Ramos' case, however, is different. In his case, the length of his supervision will change because of this Court's remand. The *Kilgore* exception, which was developed in the context of a case where neither the length nor the conditions of the sentence changed, is therefore inapplicable. Instead, the Superior Court will be altering the term of the sentence – the supervised release portion.

In fact, in Mr. Ramos' case the Superior Court will be altering that portion of the sentence in order to exercise discretion that it previously did not exercise. The original Judgment & Sentence mentioned community placement only by reference to a statute,

without a definite term stated. This Court agreed that that sort of sentence conflicted with *State v. Broadaway*, 133 Wn. App. 118, 942 P.2d 363 (1997), and its progeny, which hold that the Superior Court itself and the Judgment itself must specify the length of community supervision.

In sum, in Mr. Ramos' case, the Court of Appeals remanded for the purpose of having the Superior Court exercise discretion that it declined to exercise before and that it had essentially delegated to the Department of Corrections before. In such a situation, the *Kilgore* rationale – applicable where the sentence remains exactly the same and there is no discretion to change it – is inapplicable. Instead, the *Davenport* rationale – applicable where the sentence might remain the same but where the Superior Court does have the discretion – is more apt: “At the resentencing hearing, the trial court had the discretion to consider issues Davenport did not raise at his initial sentencing or in his first appeal.” *Davenport*, 140 Wn. App. 925, 932.

This Court should grant review to resolve this conflict between *Davenport*, on the one hand, and *Valentine* and *Ramos*, on the other hand – a conflict that remains even after *Kilgore*.

**B. The Appellate Court's Proposed Remedy
Conflicts With the Rule that a Resentencing
Judge Must Exercise Discretion**

The appellate court's proposed remedy also conflicts with the rule that a judge must exercise discretion at sentencing (or resentencing). A judge's failure to exercise discretion when discretion is called for constitutes an abuse of that discretion. *Kucera v. State Dept. of Transportation*, 140 Wn.2d 200, 224, 995 P.2d 63 (2000) (reversing due to failure of trial court to exercise discretion; "The court abused its discretion by failing to exercise discretion.") (citation omitted); *State v Pettitt*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980); *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 444-45, 423 P.2d 624 (1967). This is true in every jurisdiction of which we are aware.²

Discretion is certainly called for at resentencing; sentencing

² *E.g.*, *Lewis v. Clarke*, 108 Cal. App. 4th 563, 133 Cal. Rptr.2d 749, 754 (2003), *modified by*, 2003 Cal. App. LEXIS 825 (Cal. App. 2d Dist. June 5, 2003) ("Failure to exercise discretion conferred by law is an abuse of discretion") (citations omitted); *Fields v. Reg'l Med. Ctr.*, 581 S.E.2d 489, 495 (S.C. Ct. App. 2003), *aff'd in relevant part*, 609 S.E.2d 506 (S.C. 2005) ("failure to exercise discretion is itself an abuse of discretion"); *Gutierrez-Chavez v. INS*, 298 F.3d 824, 832 (9th Cir. 2002), *amended*, 337 F.3d 1023 (9th Cir. 2003) ("Failure to exercise any discretion is a manifest abuse of discretion ... "); *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993) (same).

is one of a trial court judge's most important and sensitive tasks. A *fortiori*, remanding without permitting the judge to exercise independent judgment, which is the heart of discretion, at such a proceeding would lead to an abuse of discretion.

This Court should grant review to address the conflict between these controlling decisions holding that failure to exercise discretion constitutes an abuse of discretion, on the one hand, and the *Ramos* decision, on the other hand.

F. The Appellate Court's Proposed Remedy Conflicts With the Constitutional and Statutory Rules that a Defendant has a Right to Presence, Representation, Allocution, and Due Process at Sentencing

Finally, the appellate court's proposed remedy will effect a change in a material term of the sentence without a hearing; without the defendant's presence; without the presence of counsel; without allocution; and without minimal due process.

All of these rights, however, are guaranteed to the defendant at sentencing or resentencing.

A criminal defendant has a state and federal constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Cuyler v. Sullivan*, 466 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *State*

v. *Tinkham*, 74 Wn.App. 102, 109, 871 P.2d 1127 (1994). This right to effective assistance of counsel applies to sentencing. *State v. Tinkham*, 74 Wn. App. 102, 109. See *In re Morris*, 34 Wn. App. 23, 658 P.2d 1279 (1983).

A criminal defendant has a right to allocution at sentencing that is protected by both state law, *In re the Personal Restraint of Echeverria*, 141 Wn.2d 323, 332, 6 P.3d 573, 578 (2000), and federal constitutional law. *Boardman v. Estelle*, 957 F.2d 1523, 1530 (9th Cir. 1992), *cert. denied*, 506 U.S. 904 (1992) (due process clause of U.S. Constitution protects right of criminal defendant to allocution at sentencing).

A defendant also has a state and federal constitutional and court-rule right to presence and to due process at sentencing. CrR 7.1(a)(2) (defendant's presence), CrR 3.4 (right to presence at arraignment and all proceedings following); *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061 (1988) (defendant has constitutional right to presence at sentencing and at resentencing); *State v. Cannon*, 130 Wn.2d 313, 331-32, 922 P.2d 1293 (1996) (right to due process at sentencing).

In addition, the court is obligated to "state the precise terms of the sentence" and take other steps at sentencing. CrR 7.2(a). The

court must give certain advice to the defendant, himself or herself, concerning the right to appeal and any post-conviction challenges. CrR 7.2(b). "A verbatim record of the sentencing proceedings shall be made." CrR 7.2(c).

None of these rights are protected without an adversary hearing including the defendant and his or her counsel, the court's inquiry of the defendant for allocution, the court's advice to the defendant, and an actual sentencing hearing. The appellate court's decision deprives Mr. Ramos of all these rights by treating the change in the community supervision term as a mere scrivener's error.

This Court should grant review to address the conflict between the decisions guaranteeing these rights at sentencing, on the one hand, and the *Ramos* decision, on the other hand.

VI. CONCLUSION

For all these reasons, the appellate court's decision to remand for a ministerial recalculation when that calculation actually results in a substantive change in one of the key terms of the sentence, that is, the length of community supervision (which is a form of custody or restraint), should be reviewed. It conflicts with the decision of the *Davenport* court, from Division II, and it conflicts with the

constitutional, statutory, and Court Rule mandates that the Superior Court must exercise discretion at sentencing, and that a defendant has the rights to presence, counsel, allocution, specific advisements, and due process, at that proceeding.

DATED this 26th day of July, 2010.

Respectfully submitted,



Sheryl Gordon McCloud, WSBA # 16709
Attorney for Petitioner,
Joel R. Ramos

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of July, 2010, a copy of the PETITION FOR REVIEW was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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Sheryl Gordon McCloud

APPENDIX A



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LEXSEE 2010 WASH. APP. LEXIS 1338

THE STATE OF WASHINGTON, Respondent, v. JOEL R. RAMOS, Appellant. In the Matter of the Personal Restraint Petition of JOEL RAMOS, Petitioner.

No. 25740-1-III, (consolidated with No. 27524-8-III)

COURT OF APPEALS OF WASHINGTON, DIVISION THREE

2010 Wash. App. LEXIS 1338

September 9, 2009, Oral Argument
June 22, 2010, Filed

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

PRIOR HISTORY: [*1]

Appeal from Yakima Superior Court. Docket No: 93-1-01281-6. Judgment or order under review. Date filed: 08/23/1993. Judge signing: Honorable Robert N Hackett Jr.

State v. Ramos, 168 Wn.2d 1025, 230 P.3d 576, 2010 Wash. LEXIS 330 (2010)

COUNSEL: Sheryl Gordon McCloud, Law Offices of Sheryl Gordon McCloud, Seattle, WA, for Appellant(s).

Kenneth L. Ramm Jr., Yakima, WA, for Respondent(s).

JUDGES: AUTHOR: Kevin M. Korsmo, J. WE CONCUR: Teresa C. Kulik, C.J., Stephen M. Brown, J.

OPINION BY: Kevin M. Korsmo

OPINION

¶1 KORSMO, J. -- This matter comes before us on remand from the Washington Supreme Court to consider an issue presented in the *pro se* statement of additional grounds. We previously affirmed the convictions and now remand for the trial court to enter an order clarifying the term of community placement.

FACTS

¶2 Mr. Ramos was convicted in Yakima County Superior Court of four counts of first degree murder for his

participation, as a young teenager, in the brutal slayings of Michael and Lynn Skelton and their young sons, Jason and Bryan. Mr. Ramos received permission to file a belated appeal and counsel appeared on his behalf. Proceeding *pro se*, he also filed a personal restraint petition (PRP). The two matters were consolidated.

¶3 Mr. Ramos also filed a *pro se* statement of additional grounds in the appeal. [*2] This court affirmed the convictions and dismissed the PRP. *State v. Ramos*, 152 Wn. App. 684, 217 P.3d 384 (2009). In the course of the opinion, we noted that we had considered and rejected the issues presented in the statement of additional grounds. *Id.* at 696 n.13.

¶4 Counsel filed a petition for review with the Washington State Supreme Court. That court denied review on all issues except a claim raised in the statement of additional grounds. That issue was remanded to this court for consideration in light of *State v. Broadaway*.¹ See Order noted at 168 Wn.2d 1025, 230 P.3d 576 (2010). We have now reconsidered that *pro se* claim.

¹ 133 Wn.2d 118, 942 P.2d 363 (1997).

ANALYSIS

¶5 The judgment and sentence in this case includes the following provision: "Defendant shall comply with all the mandatory provisions of RCW 9.94A.120(8)(b) and as many of those in RCW 9.94A.120(8)(c) as deemed appropriate by his/her Community Corrections Officer." Clerk's Papers 8. At the time of sentencing, the noted provisions of the Sentencing Reform Act of 1981 (SRA) governed community custody and community placement for offenders released from prison. See LAWS OF 1990, ch. 3, § 705. Specifically, subsection 120(8)(b) required

[*3] a court to "sentence the offender to community placement for two years or up to the period of earned early release ... whichever is longer." *Id.* Subsection 120(8)(c) set various "special conditions" of community placement that could be imposed. *Id.*

¶6 In *Broadaway*, the trial court had imposed a sentence of community placement "for the period of time provided by law" and also imposed the "standard mandatory conditions." 133 *Wn.2d* at 122. The trial court orally informed the defendant that the term of community placement would be two years. *Id.* The Washington Supreme Court reversed the community placement provision because the statute required a mandatory one-year period of community placement. *Id.* at 135. The court concluded that the trial judge had an obligation to expressly state the term of community placement in the judgment and sentence. *Id.*

¶7 The community placement term in this judgment and sentence suffers from similar defects as those in *Broadaway*. It does not state with specificity the term of community placement. Instead, it refers Mr. Ramos to the (now former) statute for information. As in *Broadaway*, we conclude that the lack of specificity requires further action by the trial [*4] court.

¶8 "Where a sentence is insufficiently specific about the period of community placement required by law, remand for amendment of the judgment and sentence to

expressly provide for the correct period of community placement is the proper course." *Broadaway*, 133 *Wn.2d* at 136; accord *State v. Sloan*, 121 *Wn. App.* 220, 224, 87 *P.3d* 1214 (2004). Where the trial court erred in setting the term of community placement, resentencing is required because a correct understanding of the community placement might affect the court's sentence of incarceration. *Broadaway*, 133 *Wn.2d* at 136. However, when the term is merely insufficiently specific, remand for clarification is all that is required. *Sloan*, 121 *Wn. App.* at 224; *State v. Nelson*, 100 *Wn. App.* 226, 231-232, 996 *P.2d* 651 (2000). The clarification should include both the length of the community placement and the "special terms" of the placement. *Id.*

¶9 In accordance with our earlier opinion, the convictions and sentence are affirmed. We remand the case for the trial court to enter an order clarifying or amending the judgment and sentence to specifically state the term of community placement consistent with *Broadaway* and its progeny.

¶10 Affirmed and [*5] Remanded.

¶11 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to *RCW 2.06.040*.

KULIK, C.J., and BROWN, J., concur.

APPENDIX B



THE STATE OF WASHINGTON, *Respondent*, v. JOEL R. RAMOS, *Appellant*. *In the Matter of the Personal Restraint of JOEL RAMOS, Petitioner.*

No. 25740-1-III consolidated with No. 27524-8-III

COURT OF APPEALS OF WASHINGTON, DIVISION THREE

2009 Wash. App. LEXIS 2592

September 9, 2009, Oral Argument
October 13, 2009, Filed

PRIOR HISTORY: [*1]

Appeal from Yakima Superior Court. Docket No: 93-1-01281-6. Judgment or order under review. Date filed: August 23, 1993. Judge signing: Honorable Blaine G Gibson.

COUNSEL: Counsel for Appellant(s): *Sheryl Gordon McCloud*, Law Offices of Sheryl Gordon McCloud, Seattle, WA.

Counsel for Respondent(s): *Kenneth L. Ramm Jr.*, Yakima County Courthouse, Yakima, WA.

JUDGES: Authored by Kevin M. Korsmo. Concurring: Stephen M. Brown, Teresa C. Kulik.

OPINION BY: Kevin M. Korsmo

OPINION

¶1 KORSMO, J. -- Joel Ramos challenges his 1993 convictions for four counts of first degree murder, arguing that the juvenile court lacked authority to grant his request to decline jurisdiction to the Yakima County Superior Court. We disagree. He also argues that the three counts of first degree felony murder should be reduced to one count because they occurred in the course of the same robbery. We also disagree with that argument and affirm the convictions. His accompanying personal restraint petition (PRP) is dismissed.

FACTS¹

¹ Some of the historical facts about the murders and Mr. Gaitan's case come from our unpublished opinion in Mr. Gaitan's appeal, *State v. Gaitan*, noted at 80 Wn. App. 1077 (1996).

¶2 Mr. Ramos and his friend, Miguel Gaitan, both 14, broke [*2] into the Skelton family home on March 24, 1993. They were armed with knives. Mr. Michael Skelton, who was disabled, confronted the burglars and was stabbed and beaten to death by the two young men.² Mr. Gaitan then attacked and killed Mrs. Lynn Skelton in the bathroom shower. He stabbed her 51 times and also beat her with a baseball bat. Twelve-year-old Jason Skelton went to his mother's aid. Gaitan killed him as well; Jason's body was found near his mother's.

² Michael Skelton was knocked unconscious in the initial assault. He revived before the attackers left the house and attempted to defend himself with a mop handle before the two attackers clubbed him to death. The base of a cordless telephone containing Mr. Skelton's blood was recovered from an outbuilding at the Ramos residence, along with bloody clothing and shoes belonging to Mr. Gaitan and Mr. Ramos.

¶3 The two young men searched the house for items to steal. They found six-year-old Bryan Skelton in his bedroom and told the youngster to go to sleep. They pulled the bedcovers over his head and Mr. Ramos then hit Bryan in the head with a piece of firewood, fracturing his skull. Bryan was also stabbed in the heart. Mr. Ramos later [*3] told the court that he killed Bryan in order to prevent him from identifying the two assailants.

¶4 The police investigation ultimately led to Mr. Ramos and Mr. Gaitan. Each was charged in the juvenile court with four counts of aggravated first degree murder; the prosecution filed a request for each young man to be declined to superior court. Mr. Gaitan was declined to adult court. A jury ultimately convicted him as charged and the trial court sentenced him to four consecutive terms of life in prison without possibility of parole.³ This

court upheld the declination ruling and affirmed the convictions.⁴

¶3 For each of the four victims the jury found three aggravating factors existed: (1) the murder was to conceal the identity of the killer(s); (2) the multiple victims were part of a common scheme; and (3) the killings were committed in furtherance of the crime of first degree burglary.

¶4 *State v. Gaitan*, noted at 80 Wn. App. 1077 (1996).

¶5 Counsel for Mr. Ramos reached a plea agreement with the prosecution while the Gaitan case was pending trial. Mr. Ramos agreed to waive juvenile court jurisdiction and plead guilty in superior court. His counsel presented a waiver form to the judge and explained [¶4] the efforts made to prepare for the declination hearing. They also told the court how Mr. Ramos had been consulted at each step of the process. He had discussed the proposed plea agreement with his mother. The family had also sought a "second opinion" about the offer--presumably from another attorney.

¶6 The juvenile court judge considered the waiver and questioned Mr. Ramos about it at some length. Mr. Ramos confirmed that he had worked with his attorneys and consulted with his mother on the decision. After reviewing the stipulation and considering the *Kent*⁵ factors, the court accepted the waiver and declined jurisdiction to the superior court.

¶5 *Kent v. United States*, 383 U.S. 541, 16 L. Ed. 2d 84, 86 S. Ct. 1045 (1966).

¶7 The case then immediately proceeded to arraignment in adult court. The prosecution filed four counts of first degree murder. Count I alleged that Mr. Ramos committed premeditated intentional murder in the killing of Bryan Skelton. Counts II, III, and IV alleged that Mr. Ramos was guilty of first degree felony murder of the other three members of the Skelton family, each of whom was killed in the course of a first degree robbery. Count II specifically indicated that Mr. [¶5] Ramos and Mr. Gaitan both killed Mr. Michael Skelton. Counts III and IV alleged that Mr. Gaitan had actually killed Mrs. Lynn Skelton and Jason Skelton in the course of a robbery in which Mr. Ramos was also participating.

¶8 Mr. Ramos pleaded guilty to the four counts of first degree murder. After another colloquy with Mr. Ramos, the court accepted the guilty pleas. Both parties recommended that the court impose the minimum possible sentence--consecutive 240 month terms on each count. The trial court stated that the crimes "have no parallel in Yakima County history for violence" and had resulted in "the entire destruction of one family."⁶ Not-

ing that the murder of Bryan Skelton deserved more than 240 months, the court nonetheless imposed the requested sentence.

¶6 Report of Proceedings 31.

¶9 Thirteen years later, in December 2006, Mr. Ramos *pro se* filed a notice of appeal challenging the declination decision. This court dismissed the appeal as untimely. The Washington Supreme Court subsequently ordered that the matter "proceed as a timely filed notice of appeal."⁷ The appeal was reinstated and counsel appeared for Mr. Ramos. While the appellate record was being perfected, Mr. Ramos *pro se* [¶6] filed a PRP. This court consolidated the two matters.

¶7 *State v. Ramos*, No. 80365-0 (Wash., Order filed March 7, 2008).

ANALYSIS

Appeal

¶10 The appeal presents two claims. First, Mr. Ramos contends that the trial court lacked statutory authority to decline jurisdiction over any youth under the age of 15. Second, he argues that the unit of prosecution for felony murder is the underlying felony rather than the murder victim. We will address the two challenges in the order stated.

¶11 Both of these issues present questions of law, which we review *de novo*. *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 298, 149 P.3d 666 (2006) ("Statutory interpretation is a question of law, subject to *de novo* review."); *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006) ("Claims of double jeopardy, which are questions of law, are reviewed *de novo*.");

Declination of Jurisdiction

¶12 Several well understood principles govern appellate court construction of legislation. The purpose of statutory construction is to give effect to the meaning of legislation. *Roberts v. Johnson*, 137 Wn.2d 84, 91, 969 P.2d 446 (1999). Construction is only necessary when a statute is unclear or ambiguous. A statute [¶7] that is clear need not be construed. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

¶13 Former *RCW 13.40.110* (1993) governs declination of juvenile court jurisdiction in favor of superior (adult) court jurisdiction.⁸ As it existed at the time of

these crimes in 1993, the statute provided in relevant part:

(1) The prosecutor, respondent, or the court on its own motion may, before a hearing on the information on its merits, file a motion requesting the court to transfer the respondent for adult criminal prosecution and the matter shall be set for a hearing on the question of declining jurisdiction. Unless waived by the court, the parties, and their counsel, a decline hearing shall be held when:

(a) The respondent is fifteen, sixteen, or seventeen years of age and the information alleges a class A felony or an attempt, solicitation, or conspiracy to commit a class A felony;

...

(2) The court after a decline hearing may order the case transferred for adult criminal [*8] prosecution upon a finding

...

Former *RCW 13.40.110*.

8 The statute was amended earlier this year to remove fifteen-year-olds from the mandatory decline hearing provisions. See LAWS OF 2009, ch. 454, § 3.

¶14 This statute involves the discretionary decision to decline juvenile court jurisdiction.⁹ Appellant presents two arguments concerning it. First, he argues that because the waiver language of the second sentence addresses cases involving youths aged fifteen to seventeen, there is no authority for juvenile courts to decline jurisdiction for anyone under the age of fifteen. Second, he contends that even if there is permissive authority to decline jurisdiction for youths younger than fifteen, there is no authority to waive the declination hearing. We disagree with both arguments.

9 This provision is not to be confused with the so-called "auto decline" statute which exempts serious violent crimes by sixteen- and seventeen-year-olds from juvenile court jurisdiction. See *RCW 13.04.030(1)(e)(iv)*, enacted by LAWS OF 1994, 1st Spec. Sess., ch. 7, § 519. See generally, *In the Matter of Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996).

¶15 There is only one natural reading of this statute. The first sentence [*9] permits declination of juvenile

court jurisdiction by motion and the second sentence mandates, regardless of the desires of the parties, when the juvenile court must consider declination because of the nature of the crime and the age of the offender. Nothing in the first sentence restricts, by age or variety of crime, the types of cases that are subject to a motion to decline jurisdiction. It is a grant of authority to transfer cases to adult court.

¶16 If this statute was intended to allow only certain cases to be declined, it is very peculiarly written. Under appellant's construction of the statute, the first sentence should say simply: "The juvenile court must hold a hearing, unless waived by the parties, concerning whether or not to decline jurisdiction in the following cases." By reading the statute as he does, Mr. Ramos essentially reads the first sentence out of the statute in contravention of a court's obligation to give effect to all language used in a statute. *Whatcom County*, 128 Wn.2d at 546. His reading also severely restricts the scope of the declination power to certain serious crimes involving older youths, contrary to three decades of practice under the Juvenile Justice [*10] Act.¹⁰ There is no authority for such a reading. We conclude that any case can be the subject of a motion to decline jurisdiction.

10 There are many instances of youths under the age of fifteen being declined to adult court. E.g., *State v. H.O.*, 119 Wn. App. 549, 81 P.3d 883 (2003) (thirteen-year-old charged with first degree murder), *review denied*, 152 Wn.2d 1019 (2004); *State v. M.A.*, 106 Wn. App. 493, 23 P.3d 508 (2001) (fourteen-year-old charged with first degree assault); *State v. Pritchard*, 79 Wn. App. 14, 900 P.2d 560 (1995) (fourteen-year-old charged with first degree assault and attempted first degree murder), *review denied*, 128 Wn.2d 1017 (1996); *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1990), (thirteen-year-old charged with aggravated first degree murder), *cert. denied*, 499 U.S. 960 (1991).

¶17 Mr. Ramos also contends that there is no authority to permit waiver of a declination hearing except in the circumstances where the Legislature has mandated a hearing. There are two problems with this argument. First, the language he seizes upon from the second sentence ("Unless waived ... a decline hearing shall be held") is not a grant of the right to waive a hearing. It is a [*11] listing of the cases in which the juvenile court must consider the possibility of declining jurisdiction. The waiver language simply reflects that while the Legislature is mandating consideration of declination, it is not prohibiting the parties from waiving the hearing. The second problem with the argument is *RCW 13.40.140(9)*. That statute states:

Waiver of any right which a juvenile has under this chapter must be an express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived.

The provision recognizes that any right can be waived if the juvenile is properly informed. There is no exclusion for the right to a declination hearing.

¶18 The juvenile court was permitted to decline jurisdiction of this case. Mr. Ramos had the authority to waive his right to a declination hearing. The trial court did not err by transferring this case to the adult court at the joint request of the parties.

Unit of Prosecution

¶19 Mr. Ramos also argues that the unit of prosecution for a felony murder case should focus on the underlying felony rather than on the number of victims. He contends that there was one robbery and, hence, only one felony murder. We believe [*12] that focus is inconsistent with both legislative intent and precedent.

¶20 Double jeopardy can arise in three different circumstances. As relevant here, double jeopardy prohibits multiple criminal convictions for one crime, absent evidence that the Legislature intended multiple convictions. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). When there are multiple violations of the same statute, courts must determine the "unit of prosecution" intended by the Legislature. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). This is analytically different than the related double jeopardy problem of determining if the Legislature intended multiple punishments for conduct that violates multiple statutes. *Id.* at 633.

¶21 To determine the unit of prosecution, courts must first analyze the criminal statute to see what conduct the Legislature is proscribing. *Id.* at 634-635. Factors analyzed in past cases include demarcation lines drawn in the legislation (*Adel*), and the use of definite or indefinite articles and adjectives in describing the criminal conduct. See *State v. Ose*, 156 Wn.2d 140, 146, 124 P.3d 635 (2005); *State v. Westling*, 145 Wn.2d 607, 611-612, 40 P.3d 669 (2002); [*13] *State v. Root*, 141 Wn.2d 701, 710, 9 P.3d 214 (2000).

¶22 Here, the plain language of the felony murder statute shows that the focus of the statute is upon the killing of a human being rather than simply being another attempt to deter the underlying felony. *RCW*

9A.32.030 defines the crime of first degree murder. In relevant part, the statute provides:

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent ...

(b) Under circumstances manifesting an extreme indifference ...

(c) He or she commits or attempts to commit the crime of ...

[degrees of five different felony offenses], and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants.

¶23 The very first sentence states the crime being defined--first degree murder. There is no attempt to define any of the enumerated felony crimes. Those definitions are found in other chapters of the criminal code, while felony murder is found in the homicide chapter, *chapter 9A.32 RCW*. "Murder is a form of homicide. *RCW 9A.32.010*. "Homicide is the killing of a human being by ... another." *Id.* [*14] Placement of this crime in the homicide chapter is a strong indication that the legislative focus is on deterring and punishing murder rather than merely increasing the punishment for robbers or burglars who kill in the course of their crimes.

11 While it arose in the context of a multiple statute double jeopardy challenge, the Supreme Court did consider the location of the statute in the criminal code as a sign of legislative intent to permit multiple prosecutions in *In re Personal Restraint of Percer*, 150 Wn.2d 41, 75 P.3d 488 (2003).

¶24 The language of the statute also indicates that the unit of prosecution is each person killed rather than the number of felonies being committed. The crime becomes felony murder when, in the course of committing the felony, the offender causes the death of a person. The article "a" is normally read as "each" in this context. *Ose*, 156 Wn.2d at 146-148.

¶25 The reckless endangerment statute, *RCW 9A.36.050(1)*, prohibits reckless conduct that "creates a substantial risk ... to another person." (Emphasis added.) The language of that statute was analyzed for unit of prosecution purposes in *State v. Graham*, 153 *Wn.2d* 400, 103 *P.3d* 1238 (2005). There the defendant [*15] had been convicted of three counts of reckless endangerment arising out of one car accident that injured three passengers. *Id.* at 402-403. The court noted that the word "another" is a compound of the words "an" and "other." *Id.* at 406 n.2. The indefinite article "an" means "a." *Id.* The court concluded that the language showed legislative intent to punish for each person endangered by the reckless conduct. *Id.* at 408.

¶26 The Court of Appeals had reached a similar result earlier when construing the vehicular assault statute in *State v. Clark*, 117 *Wn. App.* 281, 71 *P.3d* 224 (2003), *aff'd*, 153 *Wn.2d* 614, 106 *P.3d* 196 (2005). There the defendant had injured three people when he collided with another car. *Id.* at 283. The vehicular assault statute penalized driving in a reckless manner that caused "substantial bodily harm to another." *RCW 46.61.522(1)(a)* (emphasis added). Focusing on the language "to another," the court found clear legislative purpose to punish by the number of victims rather than the number of accidents. *Clark*, 117 *Wn. App.* at 285. The unit of prosecution was determined to be each victim. *Id.* at 285-286.

¶27 We believe that the same result follows here. The unit of prosecution for [*16] felony murder is each person killed. The language used by the Legislature, as construed by our courts in earlier cases, compels the result. The focus of this legislation is on the murder victim, not the crime that led to the murder. If the focus were, as Mr. Ramos argues, on the underlying felony instead of the persons killed, it would be possible for multiple felony murder prosecutions to result from one death. It is not uncommon for felony murder to be based on multiple predicate crimes. *See, e.g., State v. Frawley*, 140 *Wn. App.* 713, 167 *P.3d* 593 (2007) (defendant convicted of first degree felony murder based on both kidnapping and rape theories).¹² Under the appellant's theory, a prosecutor could multiply the number of murder convictions by proving multiple felonies underlying the killing. In Mr. Ramos' case, for instance, the prosecutor could also have charged felony murder under a first degree burglary theory as well as under the first degree robbery theory. This would be contrary to the results reached in cases involving killings alleged to have violated multiple homicide statutes. Those courts determined that in homicide cases, the Legislature intended that there be only one [*17] conviction for each killing. *State v. Womac*, 160 *Wn.2d* 643, 655-656, 160 *P.3d* 40 (2007) (citing *State v. Schwab*, 98 *Wn. App.* 179, 988 *P.2d* 1045 (1999)).

12 A petition for review is pending in *State v. Frawley*, No. 80727-2.

¶28 Mr. Ramos was properly convicted of three counts of first degree felony murder for the killings of Michael, Lynn, and Jason Skelton.

Personal Restraint Petition

¶29 Mr. Ramos, proceeding *pro se*, filed a motion in the Yakima County Superior Court to dismiss the case pursuant to *CrR 8.3(b)*.¹³ He alleged that the delay in permitting his direct appeal prejudiced his ability to defend the charges against him. Finding no apparent merit to the action, the trial court transferred the matter to this court for consideration as a personal restraint petition. *CrR 7.8(c)(2)*. Due to the reinstatement of the appeal, this court accepted the transfer and consolidated the matters. *RAP 7.2(e)*.

13 Mr. Ramos has also filed a statement of additional grounds for review in support of his appeal. We have considered his arguments and find that they are without merit and will not further address them.

¶30 The burdens imposed on a petitioner in a PRP are significant. Because of the significant societal costs [*18] of collateral litigation often brought years after a conviction and the need for finality, relief will only be granted in a PRP if there is constitutional error that caused substantial actual prejudice or if a nonconstitutional error resulted in a fundamental defect constituting a complete miscarriage of justice. *In re Pers. Restraint of Woods*, 154 *Wn.2d* 400, 409, 114 *P.3d* 607 (2005). It is the petitioner's burden to establish this "threshold requirement." *Id.* To do so, a PRP must present competent evidence in support of its claims. *In re Pers. Restraint of Rice*, 118 *Wn.2d* 876, 885-886, 828 *P.2d* 1086, *cert. denied*, 506 *U.S.* 958 (1992). If the facts alleged would potentially entitle the petitioner to relief, a reference hearing may be ordered to resolve the factual allegations. *Id.* at 886-887.

¶31 There are several shortcomings with this petition, which does not come close to meeting its burdens. The most obvious one is that since his convictions are being affirmed, there will be no retrial and, hence, no need for Mr. Ramos to again attempt to defend against the charges. Accordingly, the petition is dismissed.

CONCLUSION

¶32 The convictions are affirmed. The petition is dismissed.

[*19] KULIK, A.C.J., and BROWN, J., concur.

APPENDIX C

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

NO. 83819-4

Respondent,

ORDER

v.

C/A NO. 25740-1-III & 27524-8-III
(consolidated)

JOEL RODRIGUEZ RAMOS,

Petitioner.

Personal Restraint Petition of:

JOEL RODRIGUEZ RAMOS,

Petitioner.

Department II of the Court, composed of Chief Justice Madsen and Justices Alexander, Chambers, Fairhurst and Stephens, considered the petition for review at its March 2, 2010, Motion Calendar, and the matter was continued for consideration on the April 1, 2010, En Banc Conference. After further consideration of the petition, the Department has now unanimously voted in favor of the following result:

IT IS ORDERED:

That the Petition for Review is granted only on the community placement issue and this case is remanded to the Court of Appeals for reconsideration in light of *State v. Broadaway*, 133 Wn.2d 118 (1997).

DATED at Olympia, Washington this 1st day of April, 2010.

For the Court

Madsen, C.J.
CHIEF JUSTICE

583/136

APPENDIX D

JUL 14 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 25740-1-III
)	(consolidated with
Respondent,)	No. 27524-8-III)
)	
v.)	
)	
JOEL R. RAMOS,)	
)	ORDER DENYING MOTION
Appellant.)	FOR RECONSIDERATION
)	
<hr/> In re Personal Restraint Petition of:)	
)	
JOEL RAMOS,)	
)	
Petitioner.)	

THE COURT has considered appellant/petitioner's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of June 22, 2010 is hereby denied.

No. 25740-1-III *State v. Ramos*
No. 27524-8-III *In re Pers. Restraint of Ramos*

PANEL: Kulik, C.J., Brown, J., Korsmo, J.

DATED: July 14, 2010

FOR THE COURT:

A handwritten signature in cursive script, appearing to read "Teresa C. Kulik", written in black ink.

TERESA C. KULIK
CHIEF JUDGE