

No. 96496-3

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

STATE OF WASHINGTON

Appellant,

v.

MARVIN LOFI LEO,

Respondent.

NO. 49863-4

SUPPLEMENTAL BRIEF RE: RCW
10.95.035(3) AND RAP 2.3(b)

I. IDENTITY OF MOVING PARTY:

Appellant State of Washington submits this supplemental brief in response to the Court's November 6, 2017, request for supplemental briefing.

II. STATEMENT OF RELIEF SOUGHT:

The state respectfully requests that the Court accept discretionary review of this case for the reasons stated below.

III. AUTHORITIES AND ARGUMENT:

A. IN 1986 DISCRETIONARY REVIEW WAS AVAILABLE FOR REVIEW OF TRIAL COURT DECISIONS THAT WERE COMPARABLE TO PAROLE BOARD DECISIONS.

RCW 10.95.035(3) provides that, "The court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board

1 before July 1, 1986.” For criminal defendants, review by personal restraint petition was
2 available in 1986 and is available now. RAP 16.4(c), *Petition of Rolston*, 46 Wn. App.
3 622, 623, 732 P.2d 166(1987) (“Prior to July 1, 1986 the Parole Board set minimum terms
4 of incarceration. RCW 9.95.040. Review of such Parole Board decisions was obtained by
5 filing a personal restraint petition.”). For obvious reasons the remedy of a personal
6 restraint petition was not available to the state in 1986 or now.

7 The current appellate rules provide an explicit avenue for the state to seek direct
8 review of a trial court sentencing decision. RAP 2.2(b)(6). That provision was
9 incorporated in the appellate rules in 1990. *Order: Adoptions and Amendments of Rules of*
10 *Court*, Entered May 10, 1990, 115 Wn.2d 1101, 1118-19(1990). Since the amendment
11 was adopted after 1986, it does not provide an avenue for the state to seek appellate review
12 under the controlling statute in this case. But this does not mean that other avenues are not
13 available.

14 Before the Rules of Appellate Procedure were adopted in 1976, review of an agency
15 decision was available via extraordinary writs. Extraordinary writs were adopted in 1895
16 and codified as Special Proceedings. RCW Ch. 7.16. A writ of certiorari, which “may be
17 denominated the writ of review”, was one such writ. RCW 7.16.030. Grounds for
18 issuance of the writ provided that it:

19 shall be granted by any court, except a municipal or district court, when an
20 inferior tribunal, board or officer, exercising judicial functions, has
21 exceeded the jurisdiction of such tribunal, board or officer, or one acting
22 illegally, or to correct any erroneous or void proceeding, or a proceeding not
according to the course of the common law, and there is no appeal, nor in
the judgment of the court, any plain, speedy and adequate remedy at law.

23 RCW 7.16.040. Also available was a writ of mandamus or mandate. RCW 7.16.150. A
24 writ of mandate was available “to compel the performance of an act which the law
25 especially enjoins as a duty. . . .” RCW 7.16.160.

1 Ten years before 1986, the Supreme Court adopted the Rules of Appellate
2 Procedure and in so doing adopted discretionary review which superseded review
3 procedures of "inferior tribunals" that had formerly been available via extraordinary writs.
4 *Order of The Supreme Court*, 86 Wn.2d 1133(1976), RAP 2.1(b). Insofar as the methods
5 of seeking review were concerned, the adoption of the new appellate rules simplified prior
6 modes of appellate review by adopting two and only two methods of seeking appellate
7 review "of decisions of the superior court by the Court of Appeals" RAP 2.1(a). The
8 two methods are both called "review" and the rules made clear that discretionary review
9 "supersedes the review procedure formerly available by extraordinary writs of review,
10 certiorari, mandamus, prohibition, and other writs formerly considered necessary and
11 proper to the complete exercise of appellate and revisory jurisdiction of the Supreme Court
12 and the Court of Appeals." RAP 2.1(b).

13 The comments to RAP 2.1 explained the reasons for the simplification of writ
14 procedures:

15 Section (b) supersedes the various extraordinary writs as procedural
16 mechanisms. Review by way of extraordinary writ under the former rules
17 has been the most confusing of all the appellate procedures, and precedent
18 for almost any arguable position can be found. Feigenbaum, *Interlocutory*
19 *Appellate Review Via Extraordinary Writ*, 36 Wash.L.Rev. 1 (1961).

20 Rule 2.1 simplifies and clarifies review of nonappealable orders or
21 judgments by establishing a single method of seeking review by permission
22 of the appellate court, called discretionary review. Once discretionary
23 review is granted, the remaining procedure is the same as in an ordinary
24 appeal. See Rule 6.2. Similar systems are found in Alaska and Vermont.

25 Teglund, *RAP 2.1. Methods For Seeking Review Of Trial Court Decision—Generally*, 2A
Wash. Prac., Rules Practice (8th ed. 2017)(Author's comment 12).

Prior to the adoption of the rules, and at present, review of certain decisions of state
agencies could be obtained via extraordinary writ. Currently, "Washington recognizes
three methods of judicial review of administrative decisions: (1) direct appeal as

1 authorized by a statute or ordinance, (2) statutory writ of review under RCW 7.16.040
2 (also known as statutory certiorari), and (3) discretionary review pursuant to the court's
3 inherent constitutional power (also known as constitutional or common law certiorari).”
4 *City of Des Moines v. Puget Sound Reg'l Council*, 97 Wn. App. 920, 935, 988 P.2d 993,
5 1001 (1999) (footnote 6), citing *Kreager v. Washington State Univ.*, 76 Wn. App. 661,
6 664, 886 P.2d 1136 (1994).

7 As with other executive branch agencies, extraordinary writs were available for
8 review of parole board decisions. *Wyback v. Bd. of Prison Terms & Paroles*, 32 Wn.2d
9 780, 785, 203 P.2d 1083, 1087 (1949) (“It should be further noted that appellant cannot
10 come to this court in this case except by writ of certiorari.”), citing *State ex rel. Wilson v.*
11 *Kay*, 164 Wash. 685, 4 P.2d 498 (1931). There is nothing in the grounds for issuing
12 extraordinary writs that discriminates between the prosecution and defense in a criminal
13 case as to the availability of the writ. *See* RCW 7.16.040. It should also be noted that in
14 the case of most state agencies the Administrative Procedure Act provides procedures and
15 an avenue for appellate review of agency decisions. *See* RCW 34.05.518. However such
16 review is not available for decisions of the “department of corrections or the indeterminate
17 sentencing review board” which are excluded from the act. RCW 34.05.030(1)(c).

18 The reference to the availability of “review” in RCW 10.95.035(3) includes a date
19 reference but not a limitation as to method. Review of the trial court’s minimum term
20 order is available “to the same extent as a minimum term decision by the parole board
21 before July 1, 1986.” *Id.* In 1986 a defendant seeking review of a parole board decision
22 could file a personal restraint petition rather than a writ of habeas corpus. RAP 16.3 and
23 16.4. As to the state, in light of the appellate rules having superseded extraordinary writs,
24 the proper avenue for review was and is discretionary review. RAP 2.1.

1 B. THE CONSIDERATIONS GOVERNING ACCEPTANCE OF
2 DISCRETIONARY REVIEW WARRANT ACCEPTANCE OF
3 REVIEW IN THIS CASE.

4 Since discretionary review was available as a means of review in 1986 and at
5 present, it is necessary to discuss the considerations governing acceptance of discretionary
6 review. RAP 2.3(b). The enumerated considerations include:

7 (1) The superior court has committed an obvious error which would render
8 further proceedings useless;

9 (2) The superior court has committed probable error and the decision of the
10 superior court substantially alters the status quo or substantially limits the
11 freedom of a party to act;

12 (3) The superior court has so far departed from the accepted and usual
13 course of judicial proceedings, or so far sanctioned such a departure by an
14 inferior court or administrative agency, as to call for review by the appellate
15 court. . . .

16 RAP 2.3(b)(1) - (3).

17 These considerations should be interpreted in light of the historical circumstance
18 that discretionary review “supersedes the review procedure formerly available by
19 extraordinary writs of review, certiorari, mandamus, prohibition, and other writs. . . .”

20 RAP 2.1(b). “The discretionary review system was designed to absorb the prior
21 extraordinary writ practice, as well as some categories that were previously appealable as
22 of right.” Teglund, *RAP 2.3. Decisions of the Trial Court Which May Be Reviewed By*
23 *Discretionary Review*, 2A Wash. Prac., Rules Practice (8th ed. 2017) (Author’s Comment

24 1). Thus where as here a trial court decision is contrary to a statute in earlier times a writ
25 of review would have provided a method of review. *See* RCW 7.16.040. Since that
method is superseded by the appellate rules, review should nevertheless be available via
discretionary review.

Setting aside for the moment discussion of the specific enumerated considerations
governing acceptance of discretionary review, it is worth noting that the rules explicitly

1 call for liberal interpretation or even waiver in favor of deciding cases on the merits. RAP
2 1.2 provides:

3 These rules will be liberally interpreted to promote justice and facilitate the
4 decision of cases on the merits. Cases and issues will not be determined on
5 the basis of compliance or noncompliance with these rules except in
6 compelling circumstances where justice demands, subject to the restrictions
7 in [the extension of time rules].

8 * * * *

9 The appellate court may waive or alter the provisions of any of these rules in
10 order to serve the ends of justice. . . .

11 RAP 1.2(a) and (c). There could hardly be a more compelling statement calling for a
12 decision on the merits in most cases. In this case liberal interpretation of the appellate
13 rules to permit discretionary review of a trial court, aggravated murder sentencing decision
14 is surely called for where the trial court decision is both probably and obviously (1)
15 contrary to the applicable governing statutes and controlling decisions, and (2) which arose
16 from the worst mass shooting in Pierce County's history. *See* Opening Brief, § D. 1-4.

17 A recent decision of the Supreme Court that in effect constituted a waiver of strict
18 interpretation of the appellate rules is *Blazina. State v. Blazina*, 182 Wn.2d 827, 834–35,
19 344 P.3d 680 (2015). The court in *Blazina* accepted review and stated:

20 Although the Court of Appeals properly declined discretionary review, RAP
21 2.5(a) governs the review of issues not raised in the trial court for all
22 appellate courts, including this one. While appellate courts normally decline
23 to review issues raised for the first time on appeal . . . RAP 2.5(a) grants
24 appellate courts discretion to accept review of claimed errors not appealed
25 as a matter of right. . . Each appellate court must make its own decision to
26 accept discretionary review. National and local cries for reform of broken
27 LFO systems demand that this court exercise its RAP 2.5(a) discretion and
28 reach the merits of this case. (citations omitted)

29 *Id.*

30 If the cries for reform of legal financial obligations in *Blazina* constitute a valid
31 basis for acceptance of review, how much more should the improper sentencing of an
32 aggravated murder defendant warrant acceptance of review? As has been demonstrated in

1 the state's opening brief, the sentencing in this case was contrary to the requirements of the
2 applicable aggravated murder sentencing statute. The trial court applied a separate statute,
3 the Sentencing Reform Act, that had no application to aggravated murder cases in order to
4 arrive at a minimum term that is decades below the statutory mandatory minimum. Where
5 this sentence was not compelled by the Eighth Amendment or Washington's cruel
6 punishments clauses, this Court has every reason to accept review.

7 As to the correct interpretation of discretionary review criteria, prior decisions that
8 have considered the types of issues appropriate for discretionary review include a wide
9 variety of procedural, substantive and evidentiary trial court decisions. For example where
10 a trial court abused its discretion by improperly permitting the withdrawal of a guilty plea,
11 discretionary review was deemed appropriate in *State v. Haydel*, 122 Wn. App. 365, 369–
12 70, 95 P.3d 760(2004). Construing RAP 2.3(b(2), the court in *Haydel* stated:

13 As we discuss more thoroughly later in this opinion, the trial court
14 committed probable error. As of the time of the taking of the plea, [the
15 defendant] had presented no evidence of self-defense. No case holds that
16 either the plea form or colloquy must cover self-defense when there is no
17 evidence of self-defense.

18 Moreover, discretionary review is proper because the trial court's ruling
19 altered the status quo. The trial court's ruling means that [the defendant]
20 must go to trial. If he is convicted, the issues regarding the guilty plea
21 would be moot. If he is acquitted, double jeopardy would bar reinstatement
22 of his guilty plea.

23 *Id.*

24 As in *Haydel* the decision of the trial court in this case without question altered the
25 status quo. Prior to the minimum term hearing the defendant faced twenty-five years to
26 life for each of the five lives that he participated in taking as part of the Trang Dai
27 shooting. After the hearing the defendant faces a minimum of only 40 years in prison, far
28 less than the mandatory minimum. As is more fully argued in the state's opening brief, the
29 trial court altered the status quo by wrongly applying the exceptional sentence provisions

1 of the Sentencing Reform Act. Discretionary review should be accepted in order to correct
2 these errors.

3 Mere “well intentioned . . . remarks” at a sentencing hearing have also been held to
4 justify discretionary review. *State v. Lee*, 158 Wn. App. 513, 517, 243 P.3d 929 (2010).
5 The *Lee* court accepted review of oral remarks at a sentencing hearing stating, “Because an
6 oral advisement is not a final judgment appealable as a matter of right under RAP
7 2.2(a)(1), relief, if any, may only be granted pursuant to discretionary review. [The
8 defendant] maintains that discretionary review is warranted under RAP 2.3(b)(2). We
9 agree that the court's remarks involve probable error implicating [the defendant's]
10 constitutional freedoms and grant discretionary review.” *Id.* at 516 (footnotes omitted).

11 Just as procedural and substantive errors can warrant discretionary review, so too
12 can mere evidentiary errors. *Young v. Key Pharm., Inc.*, 63 Wn. App. 427, 431, 819 P.2d
13 814 (1991). The error in *Young* was the exclusion of former testimony from an
14 unavailable witness. The court held that the evidentiary ruling satisfied the required
15 showing that “superior court has so far departed from the accepted and usual course of
16 judicial proceedings . . . as to call for review by the appellate court” and therefore held that
17 the appellant “has met the criteria of RAP 2.3(b)(3).” *Id.* at 816.

18 Needless to say the grounds for accepting discretionary review in this case are
19 orders of magnitude more compelling than any of the foregoing decisions. This was not a
20 mere pre-trial evidentiary ruling. This was a final decision as to the length of an
21 aggravated murder defendant's minimum term of incarceration. Because this was a final
22 decision, there can be no question that the decision “would render further proceedings
23 useless.” RAP 2.3(b)(1). Likewise, the decision without question “alters the status quo or
24 substantially limits the freedom of a party to act.” RAP 2.3(b)(2). And finally because (as
25 is fully discussed in the state's opening brief) the decision is contrary to law, it can be said

1 that the court “has so far departed from the accepted and usual course of judicial
2 proceedings . . . as to call for review by the appellate court.” RAP 2.3(b)(3). All three of
3 the first three enumerated considerations apply and discretionary review should be
4 accepted.

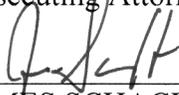
5 This case involves questions of interpretation of a recently adopted statute that
6 applies to Washington’s most serious criminal offenses. It also involves constitutional
7 questions arising from the Eighth Amendment and Washington’s cruel punishments clause.
8 As has been thoroughly argued in the state’s opening brief, the trial court improperly
9 applied an inapplicable and separate sentencing statute in order to arrive at an unlawful
10 sentence. Thus this case satisfies the obvious and probable error standards. Under these
11 circumstances the state has satisfied the requirements of RAP 2.3(b)(1) – (3). The trial
12 court here committed “obvious” and “probable” error and “so far departed from the
13 accepted and usual course of judicial proceedings” that review by this Court should be
14 granted.

15 IV. CONCLUSION:

16 For the foregoing reasons the state respectfully requests that the Court accept
17 discretionary review of this case.
18

19 DATED: Monday, November 27, 2017.

20 MARK LINDQUIST
21 Pierce County
22 Prosecuting Attorney

23 
24 _____
25 JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

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