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NO. 96496-3

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

MARVIN LOFI LEO, RESPONDENT

Court of Appeals Cause No. 49863-4-II
Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 98-1-03161-3

REPLY ON MOTION FOR DISCRETIONARY REVIEW

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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3. Did the Court of Appeals err when it found the State was not a proper party to challenge the underlying decision from the Pierce County Superior Court and not a decision of the Parole Board as stated in the Order and does such an error result in discretionary review being appropriate under RAP 13.5?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On July 4, 1998, Marvin Lofi Leo, hereinafter “defendant,” participated in a mass shooting at the Trang Dai Cafe in Tacoma’s International District. CP 429-30. Defendant’s role in the shooting was to accompany the primary perpetrator to the front door of the cafe where they fired indiscriminately at random patrons. In total, the shooting left five people dead and five injured. CP 430. He pleaded guilty to five counts of aggravated first degree murder and five counts of first degree assault in January 2000. Appendix B. Defendant was sentenced to five life without parole sentences for the aggravated murders. *Id.*

2. FACTS

Following the United States Supreme Court’s decision in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), defendant received a resentencing hearing as required. At the hearing, the State argued that under the provisions of RCW 10.95.030(3) consecutive sentences were mandated. Appendix E at 5-8.¹ The court rejected this argument and found it had the discretion under the Sentencing Reform Act (SRA) to sentence defendant to concurrent sentences only on the aggravated

¹ The referenced appendices are included in the State’s Motion for Discretionary Review filed with this Court.

murder convictions. Appendix B; Appendix E at 36, et. seq. Written findings of fact and conclusions of law were issued the following month. Appendix B.

The State filed a timely notice of appeal with the Court of Appeals, Division II. Appendix G. The State subsequently moved to re-designate the notice of appeal as a motion for discretionary review. Appendix H. The Court *sua sponte* stayed the motion for discretionary review pending the outcome of a matter before this Court (*State v. Bassett*, review granted, 189 Wn.2d 1008 (2017), decided October 18, 2018, – Wn.2d –, 428 P.3d 343 (2018)) and a matter before Division II (*State v. Phet*, No. 488779-1-II, consolidated with *In re Phet*, No. 49508-2-II). Appendix I. Defendant made a motion to modify the ruling. Appendix J. The Court granted the motion to modify and also ordered that because the State was not a proper party the State’s attempt to appeal was denied. Appendix A.

C. ARGUMENT.

1. THE STATE HAS CONTINUOUSLY ASSERTED IT CAN SEEK DISCRETIONARY REVIEW FOR THE ALLEGED ERROR OF LAW COMMITTED BY THE SENTENCING COURT.

Defendant claims the State has conceded this matter is not appealable. *See* Response to Motion for Discretionary Review at 6-7. The State has never conceded this matter is not appealable. Rather, the State noted how this matter is not appealable as a matter of right. *See* Appendix

H. The State has made clear throughout the pendency of this matter how it may seek discretionary review. *Id.* The State provided supplemental briefing to the Court of Appeals arguing why it had the statutory authority to seek discretionary review in this case and why such should be accepted. *See* Supplemental Brief Re: RCW 10.95.035(3) and RAP 2.3(b) (filed November 27, 2017). Defense misrepresents the State’s argument. The State has continuously asserted it can seek discretionary review for the alleged error of law committed by the sentencing court. As the State has not conceded this matter is appealable, defendant’s argument how this “Court should accept that concession” should be rejected by this Court.

2. THE STATE IS APPEALING AN ALLEGED ERROR OF LAW COMMITTED BY THE SENTENCING COURT, NOT THE MINIMUM TERM SET BY THE SENTENCING COURT, AND DISCRETIONARY REVIEW WAS AVAILABLE TO THE STATE PRIOR TO 1986.

Defendant claims the State may not appeal his sentence as the State may not appeal the minimum term of an indeterminate sentence and lacks the authority to appeal. *See* Response to Motion for Discretionary Review at 7-8. He is mistaken as to what the State is appealing and errs as to the State’s ability to seek discretionary review prior to 1986.

- a. The State may appeal an error of law arising during sentencing.

The State is appealing an alleged error of law by the sentencing court, not the minimum term set by the court. It is true that a sentence which is within the standard range is not appealable. *See* RCW 9.94A.585(1).

However, this Court has made clear

...this prohibition does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision. Thus, it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies.

State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003) (internal citation omitted). Further, the provisions of RCW 9.94A.585 apply to standard range sentences under the SRA. Aggravated murder is not codified within the SRA under RCW 9.94A, but rather is its own chapter under RCW 10.95. While RCW 9.94A.585 itself does not apply to this case, the quoted principle in *Williams* regarding legal errors in sentencing being appealable should apply to both SRA and non-SRA sentences, including aggravated murder sentences imposed under RCW 10.95.030.

In *Williams*, the State appealed a standard range sentence based upon the sentencing court's determination of defendant's eligibility for a drug offender sentencing alternative. *Williams*, 149 Wn.2d at 144-145. This Court held that the State had the ability to seek appellate review of the

sentence as the State was not appealing the standard range sentence defendant received, but rather was appealing an error of law. *Williams*, 149 Wn.2d at 147.

The same principle as articulated in *Williams* applies to this case. The State is not claiming the sentencing court erred in setting the minimum term per conviction. Rather the State is appealing an incorrect application of RCW 10.95.030 as it relates to consecutive and concurrent sentences for juveniles convicted of multiple counts of aggravated murder. This is an asserted error of law by the sentencing court. If this were a situation where, for example, defendant had been convicted of one count of aggravated murder and the State had asked for a sentence of 50 years to life and the sentencing court had imposed a sentence of 25 years to life, such would not be appealable. But such is not the situation present here. The issue here is whether the sentencing court incorrectly applied RCW 10.95.030 by imposing concurrent sentences on five counts of aggravated murder instead of imposing consecutive sentences on each of the five counts as required by statute. It is this alleged error of law by the sentencing court which the State is appealing.

Under defendant's logic, any error of law made by the sentencing court would not be appealable by the State. For instance, if the court had set a minimum term of 20 years, in clear contradiction to RCW

10.95.030(3)(a)(ii), and defendant's argument is accepted, then the State could not appeal an error in clear contradiction of the statute. This is exactly the type of legal error which is allowed to be appealed by the State as articulated by *Williams*. The State here is only appealing an alleged error of law by the sentencing court. Thus, the State may appeal the issue in this case regarding consecutive or concurrent sentencing under RCW 10.95.030.

b. Discretionary review was available to the State prior to 1986.

RCW 10.95.035(3) provides, "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 before July 1, 1986." For criminal defendants, review by personal restraint petition was available in 1986 and is available now. RAP 16.4(c); *Petition of Rolston*, 46 Wn. App. 622, 623, 732 P.2d 166 (1987) ("Prior to July 1, 1986 the Parole Board set minimum terms of incarceration. RCW 9.95.040. Review of such Parole Board decisions was obtained by filing a personal restraint petition."). For obvious reasons the remedy of a personal restraint petition has never been available to the State.

The current appellate rules provide an explicit avenue for the State to seek direct review of a trial court's sentencing decision. RAP 2.2(b)(6). That provision was incorporated in the appellate rules in 1990. *Order: Adoptions and Amendments of Rules of Court*, Entered May 10, 1990, 115 Wn.2d 1101, 1118-119 (1990). Since the amendment was adopted after

1986, it does not provide an avenue for the State to seek appellate review under the controlling statute in this case. But this does not mean other avenues are unavailable.

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

shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting 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.

RCW 7.16.040.² Also available was a writ of mandamus or mandate. RCW 7.16.150. A writ of mandate was available “to compel the performance of an act which the law especially enjoins as a duty. . . .” RCW 7.16.160. For instance, in *State v. Pringle*, 83 Wn.2d 188, 517 P.2d 192 (1973), this Court found that even if the State does not have an adequate remedy at law under

² The 1987 amendment to RCW 7.16.040 did not cause any significant change in the writ procedure. It merely changed the names of “police” and “justice” court to “municipal” and “district” court respectively. *See* Laws of 1987 Ch. 202, sec. 130.

the then-existing court rules, it could still file a writ of mandamus as an alternative remedy to challenge a sentencing court's ruling. *Pringle*, 83 Wn.2d at 194-195. *Pringle*, like here, dealt with an alleged error of law by the sentencing court as to its imposition of defendant's sentence. *Pringle* 83 Wn.2d at 190-191.

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

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

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

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

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

As with other executive branch agencies, extraordinary writs were available for review of parole board decisions. *Wyback v. Bd. of Prison Terms & Paroles*, 32 Wn.2d 780, 785, 203 P.2d 1083, 1087 (1949) (“It should be further noted that appellant cannot come to this court in this case except by writ of certiorari.”) (citing *State ex rel. Wilson v. Kay*, 164 Wash. 685, 4 P.2d 498 (1931)). There is nothing in the grounds for issuing extraordinary writs which discriminates between the prosecution and defense in a criminal case as to the availability of the writ. See RCW 7.16.040. It should also be noted that the Administrative Procedure Act precludes review of decisions of the “department of corrections or the indeterminate sentence review board.” RCW 34.05.030(1)(c). But such a limitation is only for purposes of the Administrative Procedure Act under RCW Chapter 34.05 for administrative procedures and decision making, not necessarily sentencing issues as relevant for this appeal. See RCW 34.05.001.

The reference to the availability of “review” in RCW 10.95.035(3) includes a date reference but not a limitation as to method. Review of a sentencing court’s decision is available “to the same extent as a minimum term decision by the parole board before July 1, 1986.” *Id.* In 1986 a defendant seeking review of a parole board decision could file a personal restraint petition rather than a writ of habeas corpus. RAP 16.3 and 16.4. As

to the State, in light of the appellate rules having superseded extraordinary writs, the proper avenue for review was, and is, discretionary review. RAP 2.1. Hence, in this case discretionary review is available to the State.

3. THE COURT OF APPEALS ERRED WHEN IT FOUND THE STATE WAS NOT THE PROPER PARTY ON APPEAL AND REVIEW IS APPROPRIATE UNDER RAP 13.5.

Defendant argues the State cannot meet the criteria of RAP 13.5 in seeking review. *See* Response to Motion for Discretionary Review at 10. RAP 13.5(b) provides three different Considerations Governing Acceptance of Review. The State has previously demonstrated how it meets two of the three criteria for acceptance of review without explicitly citing to the rule. Subsections (1) and (2) are the relevant subsections for this case. The consideration for review under these subsections are:

- (1) if the Court of Appeals has committed an obvious error which would render further proceedings useless; or
- (2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act;

RAP 13.5(b)(1)-(2).

As argued in its Motion for Discretionary Review, it is the prosecuting attorney for each county which shall prosecute all criminal actions in which the state or a county may be a party. RCW 36.27.020(4). Superior Courts have original jurisdiction over all felony criminal cases.

RCW 2.08.010. It is well-known that a sentencing hearing is part of a criminal action.

The underlying action here is a *Miller* resentencing hearing. *See* Appendix D-F. The original case arose from a criminal case before the Pierce County Superior Court in cause number 98-1-03161-3. Appendix B. At all times during the pendency of the underlying action, the Pierce County Prosecuting Attorney's Office (PCPAO) was the State representative. *Id.* The PCPAO was also the State representative at the resentencing hearing. *Id.* The resentencing hearing was held before a Pierce County Superior Court judge. *Id.* At no time was the Parole Board or the Indeterminate Sentencing Review Board (ISRB) involved in the proceedings nor were they a party to the action.

The State was not, and is not, attempting to appeal a decision of the Parole Board or the ISRB. If the Court of Appeals Order was to be affirmed, the State would not have a possible recourse to appeal an alleged error of law from Superior Court in similar resentencing cases. If the matter being appealed was a decision of the ISRB, the Attorney General, not the PCPAO, would be the proper State representative. RCW 43.10.040. But the ISRB had nothing to do with this matter. Appendix B.

The Court of Appeals committed an obvious error in finding the PCPAO was not the proper state representative. This rendered further

proceedings useless as it left no governmental authority which could appeal the alleged error of law by the sentencing court. This meets the criteria for acceptance under RAP 13.5(b)(1).

Further, this decision is probable error and substantially altered the status quo by essentially terminating any possible review in this matter. This ruling limited the freedom of the State to act as it limited its ability to challenge an alleged error of law by the sentencing court in a case where the PCPAO had been the only state actor. Thus, the criteria for RAP 13.5(b)(2) are met. These issues related to the State's original argument in its Motion for Discretionary Review on why review should be accepted, regardless of if there were any citations to RAP 13.5. As such, the State has demonstrated why this matter meets the criteria of RAP 13.5. This Court should accept this case for discretionary review.

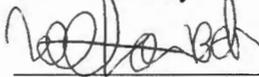
D. CONCLUSION.

The State has continuously asserted this matter is appealable and should be accepted for discretionary review. Further, the State is appealing an alleged error of law by the sentencing court, not the minimum term set by the court. The State also has the right to do such historically and under current statutory authority. Finally, the State presented valid grounds for acceptance for discretionary review in its initial Motion for Discretionary

Review before this Court. For the aforementioned reasons, the State urges this Court to accept discretionary review.

DATED: December 14, 2018.

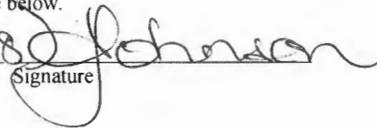
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12/17/18 
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PIERCE COUNTY PROSECUTING ATTORNEY

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