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Supreme Court No. 96709-1
Court of Appeals No. 49792-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CRISTIAN DELBOSQUE,

Respondent.

SECOND SUPPLEMENTAL BRIEF OF
PETITIONER – STATE OF WASHINGTON
(Regarding Wash. Const. art. I, § 22)

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I. STATEMENT OF THE ISSUE

Does RCW 10.95.035(3) violate the right to appeal in criminal cases guaranteed by Article I, section 22 of the Washington Constitution?

II. STATEMENT OF FACTS RELEVANT TO ISSUE

The facts are set forth in the State's other briefs to the Court. To avoid redundancy, the State respectfully refers the Court to the State's other briefs for a recitation of the facts.

III. ARGUMENT

RCW 10.95.035(3) does not violate Article I, section 22 of the Washington Constitution because, as this Court has consistently held, a post-conviction hearing to set a minimum term is not a *criminal prosecution*.

Article I, section 22 of the Washington Constitution states, in relevant part, that "[i]n *criminal prosecutions* the accused shall have the right to... have a speedy public trial by an impartial jury of the county in

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which the offense is charged to have been committed and the right to appeal in all cases....” (emphasis added). The rights included in Art. I, section 22, including the right to appeal, only apply to criminal prosecutions. *State ex rel. Gray v. Webster*, 122 Wash. 526, 530, 211 P. 274 (1992); *State v. King (In re King)*, 130 Wn.2d 517, 525, 925 P.2d 606 (1996).

RCW 10.95.035(3) requires that “[t]he court’s order setting a minimum term [pursuant to RCW 10.95.030] is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986.” This same language appears in a separate section of the Revised Code of Washington, at RCW 9.95.011(1), which directs sentencing courts (rather than the ISRB) to set the minimum terms in pre-SRA cases where sentencing occurs after enactment of the SRA. Although the instant case does not predate enactment of the SRA, it nevertheless is not an SRA case.

This Court has consistently held that “the setting of a minimum term is not part of a criminal prosecution” and that it does not violate Article I, section 22 to disallow appeal of the minimum term decision. *In*

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re Sinka, 92 Wn.2d 555, 566, 599 P.2d 1275 (1979); *In re Whitesel*, 111 Wn.2d 621, 635, 763 P.2d 199 (1988); *In re Powell*, 117 Wn.2d 175, 814 P.2d 635 (1991); *State v. King (In re King)*, 130 Wn.2d 517, 525, 925 P.2d 606 (1996).

Nevertheless, Delbosque and others for whom a minimum term is set pursuant to RCW 10.95.035(3) have a meaningful and effective opportunity to have their cases reviewed by an appellate court. Review of parole board decisions prior to July 1, 1986, is available by personal restraint petition. *See, e.g., In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 866 P.2d 8 (1994). Because the petitioner will have “had no previous or alternative avenue for obtaining state judicial review” in such cases, the reviewing court must evaluate the petition only under RAP 16.4 rather than the more strict standard required by *In re Cook*, 114 Wn.2d 802, 792 P.2d 506 (1990). *Cashaw* at 148-49. Under the applicable standard, petitioners challenging proceedings under RCW 10.95.035 need only show that they are restrained under RAP 16.4(b) and that the restraint is unlawful for one of the reasons specified in RAP 16.4(c). *Id.*

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The quality of judicial review provided by the personal restraint petition procedure is very similar in effect to that of a direct appeal. Article I, section 22 guarantees the right to appeal in criminal prosecutions, but it does not define the term “appeal” or set forth any particular rules or requirements for implementation of the right. Thus, even though a direct appeal is not guaranteed in the instant case because the setting of the minimum term is not a *criminal prosecution* as the term is defined for the purposes of the Article I, section 22 right to appeal, the applicable personal restraint petition nevertheless provides a fair opportunity for review.

IV. CONCLUSION

The resentencing hearing for setting the minimum term under RCW 10.95.030(3) is not a criminal prosecution as the term is applied to Washington Constitution article I, section 22. Therefore, just as a criminal defendant does not have a right under Article I, section 22 to have a jury trial on the issue of sentencing or the minimum term, the defendant also does not have a right to a direct appeal of the minimum term decision.

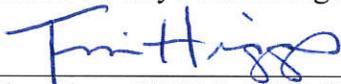
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Nevertheless, a meaningful and fair opportunity for review is available to the defendant through the personal restraint petition procedures set forth in *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 866 P.2d 8 (1994).

DATED: August 30, 2019.

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