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SUPREME COURT
STATE OF WASHINGTON
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NO. 102651-0
(COURT OF APPEALS NO. 57948-1-II)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Appellant

v.

DWAYNE EARL BARTHOLOMEW,

Defendant/Respondent.

PETITIONER'S ANSWER TO CLERK'S MOTION TO
STRIKE HIS REPLY TO THE STATE'S ANSWER TO
HIS PETITION FOR REVIEW

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Petitioner Dwayne Bartholomew respectfully asks the Court to deny the Clerk's Motion to Strike his Reply to the Answer to his Petition for Review.

FACTS UNDERLYING MOTION

Because the Clerk noted this Motion for consideration along with the Petition for Review in this case, Petitioner assumes the Justices reviewing it are familiar with its facts and background and won't recount those here.

As the Court also is aware, this Petition seeks review of two issues presented by a Court of Appeals decision that reversed a trial court's Order which was issued to give effect to its judgment that Petitioner was constitutionally entitled to be eligible for parole. The two issues are: Whether RCW Chapter 9.95 applies to sentences imposed on youthful offenders who are constitutionally ineligible for life without parole; and whether issuance of a separate order which implements and is consistent with the terms of a previously-entered criminal judgment is subject to the limitations of CrR 7.8.

The State initially said it would not be filing an Answer to this Petition, but the Court called for one and reset the case for this later consideration. The State then filed its Answer, which raised two new and different issues: Whether Petitioner waived his right to object to a sentence of life imprisonment without possibility of parole by not appealing the trial court's judgment sentencing him to life *with* the possibility of parole (St. Answer 12-16); and whether Petitioner adequately invoked CrR 7.8(b) as well as CrR 7.8(a) in seeking and defending the trial court's minimum term Order (St. Answer 18-20).

These issues are obviously different from those the Petition seeks to have reviewed. The State is asking this Court to consider those issues and its supporting arguments and resolve the case based on them. Since the State was thus "seek[ing] review of issues not raised in the petition for review" (RAP 13.4(d)), Petitioner's counsel filed a Reply which was "limited to addressing only the new issues raised in the answer," as that Rule requires.

The Clerk responded with a Motion to Strike on the ground that the Reply did not comply with the Rule. Petitioner asks that the Court deny that Motion.

ARGUMENT SUPPORTING OPPOSITION

The Rules of Appellate Procedure are designed to be “liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). RAP 13.4(d) says a Reply to an Answer to a Petition for Review can be filed only where the Answer “seeks review of issues not raised in the petition for review.” The Clerk apparently reads the phrase “seeks review” to mean that the party wishes for the Court to take review of the case, but on (or including) a different issue. But a party who seeks to interject a new issue into the case and thereby obtain an order that terminates the case also “seeks review” of those arguments in avoidance. In fact, they are asking for more than just “review;” they are asking the Court to review their issues *and* to render a dispositive order denying the Petition based on those issues and their supporting arguments.

The Clerk's apparent interpretation of the Rule to preclude Petitioner's from responding to newly raised and dispositive procedural objections like those made here certainly does not "facilitate the decision of cases on the merits." RAP 1.2(a). It does just the opposite—at least where, as here, the issues raised in the Answer would end the case and prevent the Court from ever reaching the merits.

Reading this Rule to preclude Petitioner from replying to these objections also would not "promote justice." RAP 1.2(a). As the Petition shows, this case presents an extraordinary situation. It is now more than three years since this Court vacated Petitioner's mandatory life without parole sentence and almost two years since the trial court held that he was constitutionally entitled to be considered for parole, and should be paroled. Yet he remains in prison and—according to the Court of Appeals decision the State wants to keep from this Court's review—he has no legal way to obtain parole.

This anomalous situation has occurred in large part because the State has raised procedural objections to efforts by Petitioner's counsel and by the trial court to give effect to the sentence of life with parole that was imposed on remand from this Court's decision in *In re Matter of Monschke/Bartholomew*, 197 Wn.2d 305, 482 P.3d 276 (2021). The State's Answer to the Petition throws up two more such objections, one of which has never been made before and one of which has no bearing on the reviewability of the issue the Petition presents. See (Proposed) Reply to Answer to Petition at 3-7.

In both of these objections, the State's Answer contends that Petitioner's counsel made errors which waived his client's rights. It says counsel waived Petitioner's constitutional right to be free from life without parole by not appealing from the trial courts' sentence of life *with* parole (see St. Answer at 14); and it says counsel waived his right to have the trial court set a minimum term by invoking CrR 7.8(a) instead of CrR 7.8(b) (see *id.* at 18-20). Since those alleged errors occurred during a

stage of the proceedings covered by the Sixth Amendment, if the State is correct, Petitioner's counsel has rendered ineffective assistance. So if review is denied on the basis of the State's objections, this seemingly unending case will be set off on another round of postconviction proceedings to address that new constitutional claim. Indeed, on the present record, that will occur even if the Court simply denies review without comment, as the State is asking it to do.

Even if the Clerk's interpretation of RAP 13.4(d) is correct, the Court has authority and discretion to "waive or alter" the Rules of Appellate Procedure "in order to serve the ends of justice." RAP 1.2(c); see also RAP 18.8(a). If the Court holds that the State is not "seek[ing] review" of the new issues on which its Answer asks the Court to resolve this case within the meaning of RAP 13.4(d), the ends of justice would be served by waiving or altering the restrictions of that Rule so it can at least consider what Petitioner's brief Reply has to say about those new issues.

Petitioner recognizes the Court's Rules are designed to promote judicial efficiency in the initial evaluation of the many petitions it receives. However, allowing Petitioner to file this brief Reply would not be unduly disruptive. This is not a mine-run case. The Court has exhibited interest in it by calling for an Answer and setting it over to a second departmental calendar. The Court has at least two other pending cases in which the State has made the same argument about the unavailability of parole in aggravated murder cases that it persuaded the Court of Appeals to accept in this case. *See State of Washington v. Kimonti Dennis Carter and Shawn Dee Reite*, No. 101777-4. The Clerk's Motion places the Reply before the Department to be reviewed however the Clerk's Motion is resolved. Nothing would be gained by declining to consider the substance of the Reply in ruling on the Petition as well as on the Clerk's Motion itself; and a serious injustice could be averted.

CONCLUSION

The Clerk's Motion should be denied, and the Reply should be allowed and considered by the Court in connection with the Petition for Review.

RESPECTFULLY SUBMITTED May 20, 2024.

This document was word processed and consists of 1238 words. RAP 18.17(c).

Tim Ford

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 20th day of May 2024, I electronically filed the foregoing with the Clerk of Court using the Washington State Appellate Courts' Portal.

I certify that all participants in the case are registered Washington State Appellate Courts' Portal users, and that service will be accomplished by the Washington State Appellate Courts Portal system.

/s/ *Chris Bascom*
Legal Assistant

MACDONALD HOAGUE & BAYLESS

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