

SUPREME COURT OF THE  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE EARL  
BARTHOLOMEW,

Petitioner.

NO. 102651-0

STATE’S MOTION TO  
STRIKE PORTIONS OF THE  
REPLY ON PETITION FOR  
REVIEW AND ITS  
ANSWER TO THE  
CLERK’S MOTION TO  
STRIKE THE REPLY

I. IDENTITY OF MOVING/ANSWERING PARTY:

Respondent, State of Washington, requests the relief  
designated in Part II.

II. STATEMENT OF RELIEF SOUGHT:

The State respectfully requests that the Court grant the  
Clerk’s motion to strike the entire “Reply on Petition for  
Review” as violative of RAP 13.4(d).

Alternatively, the State requests that the Court strike appendices D, E, and F, to Bartholomew's reply and all references to these documents and argument predicated on those documents contained within the reply.

### III. FACTS RELEVANT TO THIS MOTION/ANSWER

Dwayne Earl Bartholomew received the exact sentence he requested during his resentencing hearing. Unhappy that his more lenient sentence did not result in his immediate release from prison, Bartholomew filed a CrR 7.8(a) motion. His requested modification, however, exceeded the relief available pursuant to that rule.

After conceding in his court of appeals brief that CrR 7.8(a) did not allow a trial court to make substantive changes to a final judgment and sentence,<sup>1</sup> Bartholomew requested, during oral argument, that the court treat his "motion as having been

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<sup>1</sup> See Respondent's Brief at 13 (he was "mistaken" in believing that "the minimum term setting fell within CrR 7.8(a)," and the amendment actually "'modifi[ed]' the Judgment and Sentence").

pled under CrR 7.8(b).” *State v. Bartholomew*, 28 Wn. App. 2d 811, 819 n.2, 539 P.3d 22 (2023). The court of appeals declined this untimely request. *Id.*

Post oral argument, Bartholomew submitted a motion for leave pursuant to RAP 7.2(e)(2) to seek an order in the trial court setting a minimum term pursuant to CrR 7.8(b). *See* Reply appendix D. The court of appeals denied this motion in a written order issued on September 18, 2023. *See* Reply appendix E. Bartholomew did not file a motion for discretionary review from the denial of his motion.

The court of appeals issued a published opinion granting the State’s appeal from the CrR 7.8(a) order on November 28, 2023. *State v. Bartholomew*, 28 Wn. App. 2d 811, 539 P.3d 22 (2023). Bartholomew filed a timely petition for review from the decision. The petition did not seek review of the court of appeals’ denial of his post-argument motion for leave to seek a minimum term pursuant to CrR 7.8(b). The petition did, however, request a determinate sentence or an order from this

Court authorizing the setting of a minimum term. *See* Petition for Review at 16-17.

The State's response to Bartholomew's petition for review did not raise additional grounds for review. The State's response was strictly limited to the record before the court of appeals and to reasons why Bartholomew's petition for review should not be granted. A reply to the State's response is not authorized by the Rules of Appellate Procedure as the State did not seek review of issues not raised in Bartholomew's petition for review. RAP 13.4(d).

On May 15, 2024, Bartholomew filed a reply. The reply contains an appendix of Bartholomew's post-oral argument motion for leave to file a superior court CrR 7.8(b) motion, the order denying that motion, and a pleading from an entirely

different appellate case of Bartholomew's<sup>2</sup> that is not part of the record on review.<sup>3</sup>

The Clerk filed a motion to strike the reply. Counsel for the State was on a vacation and was given an extension to file an answer to the motion until May 22, 2024. Because Bartholomew is resisting the motion to strike,<sup>4</sup> the State's answer is

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<sup>2</sup> Reply Appendix F is a "Motion to Correct Case Caption" that was filed in *In re the Pers. Restraint of Dwayne Earl Bartholomew*, Cause No. 58992-3-II on December 21, 2023. Bartholomew voluntarily dismissed this action in the court of appeals before adjudication of the merits. The certificate of finality issued on March 27, 2024.

<sup>3</sup> The record on review is limited to clerk's papers, a report of proceedings, and exhibits from the trial court. RAP 9.1(a). Matters outside the record cannot be considered. *State v. Tolias*, 135 Wn.2d 133, 140-41, 954 P.2d 907 (1998). This prohibition extends to records in other court proceedings, even those involving the same parties as the appellate court case. *In re the Adoption of B.T.*, 150 Wn.2d 409, 414-16, 78 P.3d 634 (2003) (an appellate court may not take judicial notice of the record of another independent and separate judicial proceeding; rule applies even when the separate proceedings involve the same parties).

<sup>4</sup> Bartholomew's "Answer to Clerk's Motion to Strike His Reply to the State's Answer to His Petition for Review" requests that this Court accept review of yet another new claim—one of

accompanied by its own motion to strike the unauthorized appendices and Bartholomew's arguments that appear to request review of the denial of his motion to seek a minimum term pursuant to CrR 7.8(b).

IV. GROUND FOR RELIEF AND ARGUMENT:

A party seeking review of a ruling or decision from the court of appeals must comply with rules governing the timing of the petition or motion and the contents of the motion or petition. These rules balance finality with the due process rights of both petitioners and respondents.

Bartholomew's reply violates these rules. First, the entire reply is improper because the State's response to the petition for review did not seek review of any issue by the Supreme Court.

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ineffective assistance of counsel. *See* Answer at 6-7. This claim may not be asserted for the first time in this Court as it depends on facts not in the record. *See, e.g., State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (if facts necessary to adjudicate claimed error are not in the record on appeal the error is not "manifest").

For this reason, alone, the Clerk's RAP 13.4(d) motion should be granted.

Bartholomew's reply also improperly asserts two new arguments. And, at the very least, those portions of Bartholomew's reply should be stricken. *See, e.g., Chevron U.S.A., Inc. v. Puget Sound Growth Management Hearings Bd.*, 156 Wn.2d 131, 139-40, 124 P.3d 640 (2005) (striking pursuant to RAP 13.4(d) striking the portions of the reply unrelated to the new issue raised for review in the answer).

Specifically, Bartholomew claims that he brought a "timely" motion to have the authority under which the order setting the minimum term was granted expanded to include CrR 7.8(b). Second, he claims that the court of appeals' rejection of his post-oral argument motion was improper. But neither of these claims appear in Bartholomew's original petition for review.

Bartholomew may not raise new issues for the first time in a reply and he may not support his new claims with extra-record

materials. See RAP 13.4(e) (the “reply should comply with the requirements as to form for a brief as provided in rules 10.3, 10.4, and 18.17, except as otherwise provided in this rule”); RAP 10.3(c) (a reply brief “shall be limited to a response to the issues in the brief to which the reply brief is directed”); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (stating that an issue raised and argued for the first time in a reply brief is too late to warrant consideration); RAP 10.3(8) (extra-record materials may not be included in an appendix without leave of court).

Bartholomew, moreover, may not challenge interlocutory rulings of the court of appeals more than 30 days after they were issued. RAP 13.5(a) (party seeking review of an interlocutory decision of the court of appeals must file a motion for discretionary review within 30 days after the decision is filed); RAP 18.8(b) (time for filing a motion for discretionary review will be extended “only in extraordinary circumstances and to prevent a gross miscarriage of justice”).



V. CONCLUSION:

The State requests that Bartholomew's entire May 15, 2024, reply be stricken. Alternatively, the State requests that this Court strike appendices D, E, and F, and all references to these appendices and arguments predicated on these appendices from the reply.

This document contains 1,028 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 22nd day of May, 2024.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney

*s/ Pamela B. Loginsky*  
PAMELA B. LOGINSKY  
Deputy Prosecuting Attorney  
WSB # 18096 / OID #91121  
Pierce County Prosecutor's Office  
930 Tacoma Avenue South, Rm. 946  
Tacoma WA 98402-2171  
Telephone: (253) 798-2913  
pamela.loginsky@piercecountywa.gov

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file to the attorney of record for the petitioner and counsel for proposed amicus curia true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

5/22/2024

*s/Kimberly Hale*

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

# APPENDIX



# Washington State Court of Appeals

## Division Two

909 A Street, Suite 200, Tacoma, Washington 98402

Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> **OFFICE HOURS:** 9-12, 1-4.

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January 2, 2024

Prosecuting Attorney Pierce County  
Pierce County Prosecuting Attorney  
930 Tacoma Avenue S. Room 946  
Tacoma, WA 98402  
[pcpatcecf@piercecountywa.gov](mailto:pcpatcecf@piercecountywa.gov)

Pamela Beth Loginsky  
Pierce County Prosecuting Attorneys Off  
930 Tacoma Ave S Rm 946  
Tacoma, WA 98402-2171  
[pamela.loginsky@piercecountywa.gov](mailto:pamela.loginsky@piercecountywa.gov)

Timothy Kent Ford  
Attorney at Law  
705 2nd Ave Ste 1500  
Seattle, WA 98104-1796  
[TimF@mhb.com](mailto:TimF@mhb.com)

**CASE #: 58992-3-II/In re the Personal Restraint Petition of Dwayne Earl Bartholomew**

Counsel:

On the above date, this court entered the following notation ruling:

### **A RULING BY COMMISSIONER BEARSE:**

On December 29, 2023, petitioner filed a reply to the State's response to his motion to transfer in which petitioner claims that this case should be dismissed. It appears that the petitioner is seeking voluntary dismissal of this petition. Accordingly, this petition will be dismissed without further notice to the parties unless the petitioner informs this court it was not his intent to seek voluntary dismissal of the petition within 10 days of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to be "Derek M. Byrne", with a long horizontal stroke extending to the right.

Derek M. Byrne  
Court Clerk



# Washington State Court of Appeals

## Division Two

909 A Street, Suite 200, Tacoma, Washington 98402

Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> **OFFICE HOURS:** 9-12, 1-4

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February 15, 2024

Prosecuting Attorney Pierce County  
Pierce County Prosecuting Attorney  
930 Tacoma Avenue S. Room 946  
Tacoma, WA 98402  
pcpatcecf@piercecountywa.gov

Pamela Beth Loginsky  
Pierce County Prosecuting Attorneys Off  
930 Tacoma Ave S Rm 946  
Tacoma, WA 98402-2171  
pamela.loginsky@piercecountywa.gov

Timothy Kent Ford  
Attorney at Law  
705 2nd Ave Ste 1500  
Seattle, WA 98104-1796  
TimF@mhb.com

**CASE #: 58992-3-II/In re the Personal Restraint Petition of Dwayne Earl Bartholomew**

Counsel:

On the above date, this court entered the following notation ruling:

### **A RULING BY THE CLERK:**

A review of the file indicates that dismissal is warranted based off the January 30, 2024 Commissioner's ruling. Accordingly, this petition is dismissed.

Sincerely,

A handwritten signature in black ink, appearing to be "Derek M. Byrne", with a long horizontal flourish extending to the right.

Derek M. Byrne  
Court Clerk

DMB:a

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

IN RE THE PERSONAL RESTRAINT  
PETITION OF:

DWAYNE EARL BARTHOLOMEW,  
  
Petitioner.

No. 58992-3

CERTIFICATE OF FINALITY

Pierce County Cause No.  
81-1-00579-1

**The State of Washington to:** The Superior Court of the State of Washington  
in and for Pierce County

This is to certify that the decision of the Court of Appeals of the State of  
Washington, Division II, filed on February 15, 2024, became final on March 19, 2024.



IN TESTIMONY WHEREOF, I have  
hereunto set my hand and affixed the  
seal of said Court at Tacoma.

\_\_\_\_\_  
Derek M. Byrne  
Clerk of the Court of Appeals,  
State of Washington, Div. II

Timothy Kent Ford  
Attorney at Law  
705 2nd Ave Ste 1500  
Seattle, WA 98104-1796  
TimF@mhb.com

Pamela Beth Loginsky  
Pierce County Prosecuting Attorneys Offi  
930 Tacoma Ave S Rm 946  
Tacoma, WA 98402-2171  
pamela.loginsky@piercecountywa.gov

Prosecuting Attorney Pierce County  
Pierce County Prosecuting Attorney  
930 Tacoma Avenue S. Room 946  
Tacoma, WA 98402  
pcpatcecf@piercecounitywa.gov

# PIERCE COUNTY PROSECUTING ATTORNEY

May 22, 2024 - 9:43 AM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 102,651-0  
**Appellate Court Case Title:** State of Washington v. Dwayne Earl Bartholomew  
**Superior Court Case Number:** 81-1-00579-1

### The following documents have been uploaded:

- 1026510\_Motion\_20240522094248SC541583\_0648.pdf  
This File Contains:  
Motion 1 - Strike  
*The Original File Name was States Motion to Strike Portions of the Reply on Petition for Review and Its Answer to the Clerks Motion to Strike the Reply.pdf*

### A copy of the uploaded files will be sent to:

- TimF@mhb.com
- chrisb@mhb.com
- kristie.barham@piercecountywa.gov
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- pcpatvecf@piercecountywa.gov

### Comments:

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Sender Name: Kimberly Hale - Email: kimberly.hale@piercecountywa.gov

**Filing on Behalf of:** Pamela Beth Loginsky - Email: pamela.loginsky@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

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