Supreme Court Number:

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

FAULOLUA FAAGATA, JR.

Appellant.

MOTION FOR DISCRETIONARY REVIEW(R.A.P. 13.5)

Court of Appeals Number: 58828-5-II

Treated as a PETITION FOR REVIEW

Faulolua Faagata, Jr. DOC# 306380
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA. 98520

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TABLE OF AUTHORITIES

State Cases

Federal Cases

Rules and Regulations

I. IDENTITY OF APPELLANT

Comes now Faulolua Faagata, Jr., the Appellant, requesting this Court accept review of the decision or parts of the decision designated in Part II.

II. COURT OF APPEALS DECISION

The Court of Appeals' June 25, 2024 decision "vacate[d] the trial court's order denying the C.r.R. 7.5 motion, convert[ed] [Appellant's] notice of appeal to a personal restraint petition, and dismiss[ed] the petition as untimely." Appellant sought reconsideration, and the Court of Appeals denied the motion for reconsideration July 22, 2024. A copy of the decisions are attached hereto.

III. ISSUES PRESENTED FOR REVIEW

A.)Is it a manifest injustice to vacate the trial court's order denying Appellant's C.r.R. 7.5 motion, and convert His notice appeal to a Personal Restraint Petition? If so, was it error to dismiss this cause of action as untimely?

IV. STATEMENT OF THE CASE

Appellant was convicted of First Degree Murder. In April 2023, Appellant filed a C.r.R. 7.5 motion for new trial in the trial court, arguing that the

trial court failed to orally read the jury instructions at His trial. The trial court exercised its independent judgement, denying the motion on the merits.

Appellant appealed the trial court's denial of His C.r.R, 7.5 motion for new trial. On appeal, after briefing by both parties, the Court of Appeals Division Two vacated the trial court's order denying Appellant's C.r.R. 7.5 motion, and converted His notice of appeal to a Personal Restraint Petiiton. The appellate court then dismissed the action as untimely.

Appellant filed a motion to reconsider the June 25, 2024 unpublished opinion, urging that it was error to vacate the trial court order, convert His notice of appeal to a Personal Restraint Petition, and dismiss the action as untimely. On July 22, 2024 the Court of Appeals Division Two denied the motion to reconsider.

The Court of Appeals' unpublished opinion offends Appellant's constitutional right to due process of law, conflicts with court rule, and violates stare decisis. It so far departs from the accepted and usual court of proceedings, as to call for the exercise of revisory jurisdiction by the Supreme Court. It is also an issue of substantial public interest where the deprivation of a criminal

defendants right to appeal is so easily silenced, in avoidance of a meritorious ground for relief of constitutional magnitude. Should discretionary review be denied, the status quo will be altered, limiting the freedom of Appellant to act. Appellant requests the Court of Appeals be directed to issue a merits determination in the properly filed direct appeal.

V. ARGUMENT

A. It is a manifest injustice to vacate the trial court's order denying Appellant's C.r.R. 7.5 motion, and convert His notice of appeal to a Personal Restraint Petition. The resulting dismissal as untimely was prejudicial. R.A.P. 13.4(b)(1), (3), (4); R.A.P. 13.4A(b).

The Court of Appeals' unpublished opinion conflicts with State v. Barberio, 121 Wn.2d 48(1993), In re Ruiz-Sanabria, 184 Wn.2d 632(2015), R.A.P. 2.2(a)(10), (13), and W.S.C. Art. I, §22. Because the trial court "exercised it independent judgement, reviewed and ruled on such issue [] it became an appealable question." State v. Barberio, 121 Wn.2d 48(1993). The Court of Appeals did not question the issue of appealability at any stage of the appeal process, and it is permissible to grant

the right to appeal on whatever terms a state deems proper. See: McKane v. Durston, 153 U.S. 684(1894). Consequently, the unpublished opinion effectively denied Appellant the right to present briefing in support of this right, effectively denying procedural due process. U.S.C. Amend. V.

As evidenced by the record, Appellant explicitly initiated a collateral attack under C.r.R. 7.5, and it creates a manifest injustice to recharacterize His collateral attack, articulating otherwise. "Due process requires [Appellant] be given notice prior to deprivation of a substantial right." City of Seattle v. Klein, 161 Wn.2d 554, 566(2007). "The presence of the right to appeal in our state constitution convinces us it is to be accorded the highest respect by this court." State v. Sweet, 90 Wn.2d 282, 286(1978). "The legislature broadly defines collateral attack as "any form of post conviction relief other than a direct appeal." R.C.W. 10.73.090(2). This includes 'a personal restraint petition, a habeas corpus petition, a motion to vacate judgement, a motion to withdraw guilty plea, a motion for new trial, and a motion for arrest of judgement." In re Skylstad, 160 Wn.2d 944, 954(2007). The avenues by which such relief may be sought are distinctively governed under C.r.R. 4.2, 7.5, 7.8, and 8.3. Had the legislature

intended collateral attacks to be pursued under one court rule, and one court rule only, it would have expressly stated so. The rules by which to seek relief through are circumstantial, and Appellant vividly sought relief under C.r.R. 7.5. In any event, "statutory construction like all questions of law, is ruled De Novo." Cockle v. Labor & Indust., 142 Wn.2d 801, 807(2001).

It wasn't until after the appeal was perfected that the issue of appealability was questioned/determined by the Court - time had lapsed for making statement of arrangements (R.A.P. 9.2), designating the record (R.A.P. 9.6), and all briefing was submitted by the parties (R.A.P. 10.2). The unpublished opinion works a manifest injustice: 1.)it vacates the trial court's order denying Appellant's C.r.R. 7.5 motion (although neither party requested such relief), 2.)it converts Appellant's direct appeal to a Personal Restraint Petition, and 3.)it dismisses the action as untimely. Appellant reasserts His objection to the conversion/recharacterization of His direct appeal and subject matter encompassed therein. Castro v. United States, 540 U.S. 375(2003). Justice shall always be administered equally and in the instant case it has not been. "Society wins not only when the guilty are convicted but when

criminal [appeals] are fair; our system of the administration of justice suffers when any accused is treated unfairly." Brady v. Maryland, 373 U.S. 83, 87(1963).

The issue squarely presented to the Court of Appeals was not whether the action was timely, but whether the trial court abused its discretion, warranting remand. "If the superior court retains a post conviction motion and denies it on the merits, the defendant has a right to direct appeal." In re Ruiz-Sanabria, 184 Wn.2d 632, 638(2015). All issues raised in this direct appeal are thus timely presented to the court, as R.C.W. 10.73.090 does not apply on direct appeal. See: In re Skylstad, 160 Wn.2d 944(2004); State v. Siglea, 196 Wash. 283(1938)("a prerequisite to an appeal in a case, thee must be a final judgement terminating the prosecution of the accused and disposing of all matters submitted to the court for its consideration and determination"): United States v. Colvin, 204 F.3d 1221, 1224(9th cir. 2000)("the key inquiry is whether the district's entry of the amended judgement could have been appealed").

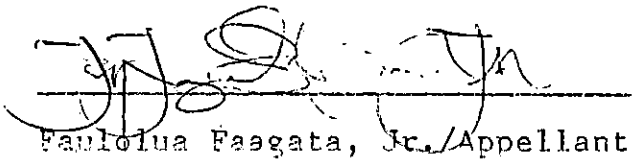
VI. CONCLUSION

Appellant requests the unpublished opinion be reversed and the Court of Appeals be required to

reach a merits determination on the appeal.

SIGNED and DATED this 14th day of August, 2024.

Respectfully Submitted,



Faulolua Faagata, Jr./Appellant

APPENDIX 1

June 25, 2024 Unpublisned Opinion

APPENDIX 2

July 22, 2024 Order Denying Motion To Reconsider

Filed
Washington State
Court of Appeals
Division Two

July 22, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FAULOLUA FAAGATA, JR., Appellant.	No. 58828-5-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Faulolua Faagata, Jr., filed a motion for reconsideration of the court's June 25, 2024 unpublished opinion. After consideration, the court denies the motion for reconsideration. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Cruser, Che

FOR THE COURT:

Che, J.

Filed
Washington State
Court of Appeals
Division Two

June 25, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FAULOLUA FAAGATA, JR., Appellant.	No. 58828-5-II UNPUBLISHED OPINION

CHE, J. – Faulolua Faagata, Jr. appeals the trial court's denial of his CrR 7.5 motion for a new trial. Sixteen years after his jury trial, and thirteen years after his direct appeal mandated, Faagata filed a CrR 7.5 motion for a new trial arguing that the trial court committed structural error by failing to orally read the jury instructions to the jury. The trial court denied the motion.

Faagata's motion constituted an untimely collateral attack subject to the procedures of CrR 7.8. Faagata did not allege that his judgment and sentence is facially invalid, that it was not rendered by a court of competent jurisdiction, or that an exception to the time bar applied that would allow his collateral attack to be considered. As such, the trial court was required to transfer Faagata's motion, without reaching the merits, for this court to consider as a personal restraint petition. Although the trial court erred in not transferring Faagata's motion to this court, in the interest of judicial economy we convert Faagata's appeal to a personal restraint petition rather than remand to the trial court. We hold that Faagata's converted petition is untimely and dismiss it.

FACTS

Faagata was convicted of first degree murder in May 2007. He filed a direct appeal, and the mandate in that appeal was filed on September 14, 2010.

In April 2023, Faagata filed a CrR 7.5 motion for a new trial arguing that the trial court failed to orally read the jury instructions at his trial 16 years prior.

The transcript from the 2007 trial provides:

> THE COURT: So I'll ask [my judicial assistant] to pass out the instructions. In this case there are a total of 26 instructions and there are about five possible verdict forms for various alternatives that the jury can find. Some of the instructions are given in just about every criminal case and then there are some specifically for this case. No one instruction is the key. They're all equally important.
>
> The attorneys and I, again, have a copy of them. They've reviewed them and may discuss instructions during closing argument. I think I'll start now. Again, we have about 26 altogether.
>
> *(The Court read the instructions.)*
> * * * * *
>
> THE COURT: So there are, ladies and gentleman, a total of 26 instructions. There are verdict forms for Count I, a lesser verdict form for Count I, a verdict form for Count II, and then there are special verdict forms for Counts I and II. You'll have those verdict forms there. They're actually fairly straightforward. There's a question, basically that you have to answer.
>
> So, we're now ready for closing argument by the State.

Clerk's Papers at 18-19 (emphasis added).

The trial court denied the CrR 7.5 without a response from the State. Faagata appeals.

ANALYSIS

Faagata argues that the superior court erred by denying his CrR 7.5 motion for a new trial based on his contention that the trial court did not orally read the jury instructions to the jury. Faagata's motion is a collateral attack on his judgment and sentence, and it is therefore governed

by CrR 7.8. Because Faagata did not identify any exception to the time bar that would have allowed the trial court to consider his collateral attack, Faagata's motion should have been transferred to this court for consideration as a personal restraint petition.

A collateral attack is defined as: "any form of postconviction relief other than a direct appeal" and includes a motion for a new trial. RCW 10.73.090(2). Most collateral attacks must be brought within "one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." RCW 10.73.090(1). Collateral attacks filed in superior court are governed by CrR 7.8. *State v. Molnar*, 198 Wn.2d 500, 508, 497 P.3d 858 (2021). CrR 7.8(c)(2) requires the trial court to transfer untimely motions to this court. *State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666 (2008). "[I]f the superior court determines that the collateral attack is untimely, then the court must transfer it to the Court of Appeals without reaching the merits." *Molnar*, 198 Wn.2d at 509.

Faagata's judgment and sentence became final on September 14, 2010, when the Supreme Court issued the mandate following his direct appeal. RCW 10.73.090(3)(b). Faagata did not file his motion for a new trial until April 17, 2023, well over one year later. Therefore, unless Faagata's motion alleged that his judgment and sentence was facially invalid, was not rendered by a court of competent jurisdiction, or was exempt from the time bar under one of grounds identified in RCW 10.73.100, the trial court should have transferred Faagata's motion to this court for consideration as a personal restraint petition under CrR 7.8(c)(2) rather than deny

the motion. *See* RCW 10.73.090(1), .100. Accordingly, we treat Faagata's appeal as a personal restraint petition.[1]

Faagata's sole contention is that the trial court did not orally read the jury instructions to the jury. This does not constitute a facial invalidity in the judgment and sentence, implicate the court's jurisdiction, nor implicate any of the statutory exceptions to the one-year time bar for collateral relief.

Accordingly, we vacate the trial court's order denying the CrR 7.5 motion, convert Faagata's notice of appeal to a personal restraint petition, and dismiss the petition as untimely.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Maxa, J.

Cruser, C.J.

[1] In *State v. Smith*, 144 Wn. App. 860, 864, 184 P.3d 666 (2008), we declined to convert a notice of appeal to a personal restraint petition, holding that converting the wrongly-decided CrR 7.8 motion to a personal restraint petition could infringe on Smith's right to choose whether he wanted to pursue a personal restraint petition and trigger the successive petition rule in RCW 10.73.140. Here, there is no such concern. Faagata has previously filed two personal restraint petitions that were dismissed by this court, thus he is already subject to the successive petition rule.