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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

No. 57948-1-II

STATE OF WASHINGTON,

Plaintiff/Appellant,

vs.

DWAYNE EARL BARTHOLOMEW,

Defendant/Respondent.

RESPONDENT'S BRIEF

TIMOTHY K. FORD, WSBA #5986
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604

ATTORNEY FOR RESPONDENT
DWAYNE EARL BARTHOLOMEW

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INTRODUCTION

The Washington Supreme Court ordered the resentencing proceedings below to determine if Dwayne Bartholomew's life without parole sentence was constitutional. After an extensive review of the record and a two-day hearing, Pierce County Superior Court Judge Michael Schwartz held that sentence was unconstitutional and entered a new Judgment imposing a sentence of "life with the possibility of release or parole." The State did not appeal from that Judgment.

Just before the appeal time ran, Judge Schwartz received a letter from the Indeterminate Sentence Review Board (ISRB), asking the court to set a minimum term pursuant to RCW 9.95.011 so the ISRB could comply with its Judgment. Two hours before the time for appeal expired, the State responded to the ISRB letter saying the court had no power to do that. See CP 851. But no appeal was filed, so Judge Schwartz entered an additional Order setting a minimum term of 380 months, which was far less time than Mr. Bartholomew had already served.

This appeal seeks to overturn that Order. That would leave Mr. Bartholomew in prison for life without any possibility of parole or release, even though the trial court has determined that sentence is unconstitutional in his case in a final Judgment the State did not appeal. The State makes two arguments in support of that request; neither has any merit.

The first is that the trial court had no authority to fix a minimum term after the Judgment was entered, even if it was required by statute to do so and even if it was necessary to do so to make Mr. Bartholomew eligible for parole, as the Judgment held he should be. But CrR 7.8(a) plainly says errors in "judgments [or] orders" "arising from oversight or omission may be corrected by the court at any time" prior to appeal.

Second, the State says the trial court *never* had authority to set a minimum term in this case. And yet RCW 9.95.011 says "When the court commits a convicted person to the department of corrections … the court shall, at the time of sentencing or revocation of probation, fix the minimum term."

The gyrations Appellant's Brief goes through in its attempt to avoid the unambiguous language of these provisions are unpersuasive, and the State's effort to undermine a final constitutional judgment it did not appeal is unworthy.

This is a frivolous appeal which should be summarily dismissed. It would be an appropriate candidate for a motion on the merits if the Court still entertained such motions.

ISSUES PRESENTED

CrR 7.8(a) says errors in "judgments [or] orders" "arising from oversight or omission may be corrected by the court at any time" before appeal. Is the failure to make a determination that should be made at sentencing and that must be made to give effect to the trial court's sentence such an error? Yes.

RCW 9.95.011 requires trial courts in pre-1984 cases to "fix the minimum term" "[w]hen the court commits a convicted person to the department of corrections." Does that authorize courts to do so whenever they "commit[] a convicted person" to the department? Yes.

COUNTERSTATEMENT OF THE CASE.

On March 11, 2021, the Supreme Court held that the mandatory life without parole sentence Dwayne Bartholomew received for a murder he committed at age 20 violated the State constitution. *Matter of Monschke/Bartholomew*, 197 Wn.2d 305, 482 P.3d 276 (2021). It vacated his sentence and ordered the trial court to hold a new sentencing hearing to consider the extent to which he was subject to the mitigating qualities of youth at the time of the crime. *Id.* at 329. But it didn't specify the source of the trial court's authority to do so.

On December 13, 2021, Bartholomew filed a Motion for Orders Regarding Resentencing Standards and Procedures in the Pierce County Superior Court. CP 5. That Motion argued, *inter alia*, that the trial court's authority to resentence could be found in RCW 10.95.030(1), the 1981 statute which mandated his life without parole sentence, if the portion of the statute which the Supreme Court held was "unconstitutional as applied to [Bartholomew's] conduct," 197 Wn.2d. at 326, were excised.

See CP 9. The State responded that the authority must instead reside in RCW 10.95.030(3), a later enacted statute facially applicable to 16-18 year olds. See CP 778, 789. The defense Motion had proposed that as an alternative source of authority (CP10), and the trial court accepted that position (CP 778, 779).

The trial court then issued a discovery schedule and set a hearing in February 2022 which was later postponed to March. The parties accordingly exchanged discovery and submitted exhibits and sentencing memoranda. After it filed its Memorandum, the State changed its position and argued that the trial court had no authority to conduct the resentencing, even though the Supreme Court had ordered it. See CP 778-79 and note 2. Then, just days before the scheduled hearing, the State filed a Motion in the Supreme Court to recall the Certificate of Finality in the Personal Restraint proceeding in which the resentencing was ordered, making this newly-hatched argument. *Id.* The resentencing was continued pending consideration of that Motion.

In the briefing that ensued, the State changed positions again, this time agreeing with the original defense argument that resentencing could be authorized by RCW 10.95.030(1). CP 784-85; see CP 790. On May 5, 2022, a Department of the Supreme Court denied the State's Motion to Recall without comment, and the resentencing was rescheduled once again.

The resentencing was held over two days in July 2022. RP 1-210. The trial court then recessed the proceedings in order to complete its review of the lengthy record and numerous exhibits that had been submitted. RP 210.

When court reconvened on August 10, 2022, Judge Schwartz delivered a lengthy oral opinion in which he concluded that the defendant was subject to the mitigating qualities of youth at the time of the crime and so should have the opportunity to be considered for parole by the ISRB. RP 215-35; CP 837-50. He then signed a standard form Judgment and Sentence that made clear—twice—that the sentence was imposed "with the possibility of parole or release." CP 827,

831. In colloquy with counsel, he said that he was attempting to draft a Judgment that would make it clear to the ISRB that the defendant was no longer ineligible for parole. RP 236-37. In this context, Judge Schwartz mentioned noted that in previous similar cases he had received responses from the ISRB regarding the findings and orders it needed to do to carry out the court's judgment. RP 237. At the State's request, the Judgment was left open with regard to possible restitution, and a further hearing on that issue was scheduled. RP 241-42; see CP 830.

On September 7, 2022, Judge Schwartz received a letter from the ISRB asking that the court set a minimum term, which the Board believed was necessary to consider Mr. Bartholomew for parole consistent with RCW 9.95.011. See RP 870; CP 852.[1] On September 9, 2022—two hours before the appeal deadline ran—Deputy Prosecutor Pam Loginsky responded to

[1]The ISRB letter is not in the Clerks Papers and does not appear to have been filed with the trial court.

the ISRB letter on behalf of the State, saying that RCW 9.95.011 did not apply to this case and that the court had no power to set a minimum term. CP 851-3. After the time for appeal expired, defense counsel filed a motion to set a minimum term "pursuant to CrR 7.8(a)" to bring the issue before the court. CP 854. The State filed an objection (CP 858) and another hearing was held. There, Judge Schwartz first confirmed that all parties had understood that the Judgment he issued was intended to make the defendant eligible for parole. RP 261-62. He then addressed the prosecutor's objections to setting a minimum term in order to carry out that intention:

> Ms. Sanchez has conceded, and I think everybody who was present in the courtroom understood, that if the Court were to sentence Mr. Bartholomew to a life sentence, that the actual term of his sentence would be set by the ISRB. That was discussed, I think, rather at length when the Court resentenced Mr. Bartholomew. And so I think it's clear that that was the intention at the time of the sentencing. And therefore, 7.8(a) does apply in these instances.
>
> The next question is whether the Court can actually lawfully impose a minimum term. Here, the State argues that 9.94, or excuse me, 9.95.011 does not apply to Mr.

> Bartholomew's case here because he was sentenced for aggravated murder. The fallacy in that reasoning, though, is that 9.95.011 was enacted after the aggravated murder statute. In other words, the legislature presumably had knowledge that there were people who would fall under that particular statute, and there's nothing within the language of 9.95.011 that excepts people who are positioned like Mr. Bartholomew who got sentenced for murder in the first degree with aggravating circumstances. In fact, Subsection 1 plainly imposes a mandatory duty that the Court shall, at the time of sentencing, fix a minimum term. That persuades this court that that's exactly what this court should do, is set a minimum term for Mr. Bartholomew.

RP 268-69. Judge Schwartz thus entered an "Order Modifying Judgment and Setting Minimum Term" which said this:

> RCW 9.95.011(1) requires the Court to fix a minimum term "at the time of sentencing" "[w]hen the court commits a convicted person to the department of corrections."
>
> By oversight, the Judgment and Sentence entered August 10, 2022 did not do so. Neither party has appealed from the Judgment and Sentence entered August 10, 2022, and the time for appeal has run.
>
> The Judgment provided that the Defendant's sentence included "the possibility of parole or release." Fixing a minimum term pursuant to statute is necessary to give effect to that aspect of the Judgment and does not alter it. It is therefore permissible pursuant to CrR 7.8(a).

> Consistent with its sentencing decision and for the reasons set forth therein, the Court determines that the minimum sentence in this case should be 380 months.

CP 872. The State then filed this appeal. CP 874.

ARGUMENT

A. THE ENTRY OF THE ORDER SETTING MINIMUM TERM DID NOT VIOLATE CrR 7.8.

CrR 7.8(a) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

An unpublished decision of this Court recently discussed the scope of the authority it gives trial courts after judgment:

> Under CrR 7.8(a), a defendant may obtain relief from clerical errors. Clerical errors are errors "that do not embody the trial court's intention as expressed in the trial record." *State v. Morales*, 196 Wn. App. 106, 117, 383 P.3d 539 (2016). A clerical error is committed "by a clerk or other judicial or ministerial officer in writing or keeping records." *State v. Hendrickson*, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009). Courts may amend "to correct language that did not correctly convey the court's intention" or add language that was unintentionally left out of the original judgment. *Morales*, 196 Wn. App. at 117. If the amended language does not convey the trial

> court's intention, then it is a judicial error and the court cannot amend the judgment and sentence. *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996).

State v. Rouse, No. 55491-7-II, 2022 Wash. App. LEXIS 1002, at *3-4 (Ct. App. May 10, 2022). The Court in *Rouse* held the trial court erred by failing to recognize that amendments were permissible under CrR 7.8 so long as they reflect "the intention of the court as expressed in the trial record." *Id*. at *7.

Appellant's Brief makes the same error. Assuming CrR 7.8(a) governed the scope of the trial court's authority to set a minimum term after it received the ISRB letter,[2] it is undisputed that the intent of the Judgment was to make the defendant eligible for parole by the ISRB, and the minimum term setting

[2] Although the defense motion and the trial court's order cited CrR 7.8(a) as the authority for the minimum term setting, the motion actually did not seek to correct a mistake "in" the Judgment itself and thus may not have implicated that Rule at all. RCW 9.95.011 says the trial court should set a minimum term "at the time of sentencing," but does not require that the term be included in the Judgment itself. See also RCW 9.95.030 (ISRB may "obtain" judges' recommendations regarding "what, in their judgment, should be the duration of the convicted person's imprisonment.")

was necessary to "convey the court's intention." The trial court said that directly in the Judgment, and in its comments when the Judgment was entered it even noted that it was sometimes necessary to have follow up communications with the ISRB to ensure its intentions were clear. RP 237.

It is true that the parties, and the trial court, previously assumed that the State's concession that the resentencing arose under RCW 10.95.030(1) eliminated the requirement of a minimum term. See App. Br. 5-6, 9-10. But the ISRB's letter and citation to RCW 9.95.011 convincingly showed that a minimum term setting was not only permissible but necessary to give the Judgment its intended effect. The Order setting the minimum term stated that the failure to do so at the time of sentencing was an "oversight." CP 872. Judge Schwartz' comments in entering the Order made this clear without doubt. RP 268-69. Appellants' attempt to impeach that statement with out-of-context quotations from arguments and colloquies in earlier proceedings on other subjects can't change that.

The trial court and the parties may have been mistaken in assuming that the minimum term setting fell within CrR 7.8(a) and that the Order which set it actually "modifi[ed]" the Judgment and Sentence. See note 2, above. If so, that labeling error was obviously harmless and trivial. But to the extent the Rule did apply here, the trial court's analysis and application of it was precisely correct and should be affirmed.

B. THE TRIAL COURT HAD THE POWER TO SET A MINIMUM TERM IN THIS PRE-1984 CASE.

Appellant's alternative argument—that the trial court never had the power to enter a minimum term—is even more easily dispatched. If accepted it would mean that, by ordering the resentencing in this case, the Supreme Court sent the trial court on a fool's errand: determining if a defendant should be eligible for parole when, in fact, parole was legally impossible. The Supreme Court did not do that; the trial court had ample statutory authority to set a minimum term in this case.

RCW 9.95.115 expressly makes pre-SRA defendants like Mr. Bartholomew who are sentenced to "life imprisonment" eligible for parole or release through the ISRB. RCW 9.95.011 requires trial courts to "fix the minimum term" from which the ISRB's process proceeds "[w]hen the court commits a convicted person to the department of corrections …." RCW 9.95.030 allows the ISRB to "obtain" judges' recommendations regarding "what, in their judgment, should be the duration of the convicted person's imprisonment," after a "convicted person is transported to the custody of the department of corrections,"

The trial court here was "commit[ing] a convicted person to the department of corrections." When the defendant was transported to the Department of Corrections, the ISRB wrote to "obtain" a minimum term statement from the trial court, in order properly effectuate its judgment. Neither of these statutes say "unless the convicted person was sentenced under RCW Chapter 10.95." They provided more than ample predicates for the trial court's Order.

Moreover, RCW Chapter 10.95 did not provide the sole basis for Mr. Bartholomew's sentence. Because his crime occurred before the enactment of the Sentence Reform Act in 1984, his "life sentence" made him eligible for parole by the ISRB under RCW 9.95.115. The latter statute provides:

> The indeterminate sentence review board is hereby granted authority to parole any person sentenced to the custody of the department of corrections, under a mandatory life sentence for a crime committed before July 1, 1984, except those persons sentenced to life without the possibility of parole.

This provided part of the basis for the defendant's argument, which the State and the trial court ultimately accepted, that RCW 10.95.030(1) was the appropriate sentencing authority in this pre-SRA case. See CP 158-59 (citing RCW 9.95.011); CP 789-795, 822 (citing RCW 9.95.115); see also RP 269-70.

Appellants' brush these statutes aside, baldly declaring that they can have no application to sentences imposed under RCW Chapter 10.95 despite their crystal-clear language, because that Chapter is "complete and specific, leaving no room

for the application of general sentencing statutes." App. Br. 24. As authority for this sweeping statement, Appellants cite *State v. Rogers*, 17 Wn. App. 2d 466, 487 P.3d 177 (2021), which held that discretion-limiting provisions of the Sentence Reform Act do not apply to sentencing under RCW 10.95—a holding of no apparent significance in this pre-SRA case. *Rogers* said nothing about whether RCW 10.95 was "complete" or if it left any "room for the application of general sentencing statutes." App. 24.

Even if it could be said that RCW 10.95 was "complete" before it was partly invalidated in *Monschke/Bartholomew*, that is no longer so. The fact the legislature found it useful to reference and incorporate sentencing provisions outside that Chapter in responding to the Supreme Court's decision invalidating its mandatory provisions for persons under 18 (App. Br. 24-25) only underscores why it is necessary to do so with regard to those in the *Monschke* class as well. And Appellant's argument borders on the absurd when it claims that

the legislature's failure to similarly incorporate such provisions for life with parole sentences in cases involving defendants who were over 18 signals an intent to exclude them. Until *Monshcke/Bartholomew,* aggravated murder defendants who were over 18 could never be considered for sentences of life with parole, so any such legislative action would have been meaningless.

Appellant's legerdemain cannot erase the simple fact that two statutes expressly authorized the trial court to set a minimum term, none prevented it, and it was necessary to do so to give effect to the court's Judgment. It was not error.

CONCLUSION

The trial court's Order should be affirmed.

DATED this March 27, 2022.

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Tim Ford
Timothy K. Ford, WSBA #5986
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 27th day of March 2023, 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