No. 90434-1
COA NO. 45898-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL STOCKWELL,

Petitioner.

PETITION FOR REVIEW/MOTION FOR DISCRETIONARY REVIEW

On Appeal from Pierce County Superior Court
The Hon. Robert H. Peterson, Presiding

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A. IDENTITY OF PETITIONER

Daniel Stockwell, the Petitioner, asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION BELOW

Daniel Stockwell requests review of the unpublished order of the Court of Appeals in *State of Washington v. Daniel Stockwell*, COA No. 45898-5-II, issued on June 3, 2014. A copy of this order is attached in App. A. This order denied a motion to modify a commissioner's Ruling, which dismissed Mr. Stockwell's direct appeal. The Ruling was issued on April 22, 2014, and is attached as App. B.

C. ISSUES PRESENTED FOR REVIEW

1. Does the State have the burden demonstrating that a person convicted of a crime has made a voluntary, knowing, and intelligent waiver of the right to appeal?

2. If there is a silent record about whether the trial court informed a defendant of the right to appeal and the time limits for appealing, and the State fails to supply evidence as to the practices of the court at issue, has the State met its burden of proving a voluntary, knowing and intelligent waiver of the right to appeal?

3. Did the Court of Appeals address in any meaningful way Mr. Stockwell's constitutional right to appeal and did it discuss, let alone distinguish, prior cases from this Court related to the constitutional right to appeal?

D. STATEMENT OF THE CASE

By information filed on April 29, 1986, in Pierce County Superior Court No. 86-1-00878-2, the State charged Mr. Stockwell with the crime of statutory rape in the first degree.[1] Mr. Stockwell pled guilty to that offense on July 29, 1986, and was sentenced on October 3, 1986. As noted by the this Court in its recent decision addressing Mr. Stockwell's Personal Restraint Petition, both the plea statement and the judgment misstated the maximum sentence, erroneously stating the maximum was 20 years in prison, rather than life. *In re Personal Restraint Petition of Daniel J. Stockwell*,179 Wn.2d 588, 316 P.3d 1007 (2014).[2] Nearly two decades later, the conviction in this case was used by the State to justify a life without parole sentence in

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[1] Copies of pertinent documents were attached to Mr. Stockwell's *Motion to Extend Time to File a Notice of Appeal*, filed in the Court of Appeals. Mr. Stockwell did file a designation of clerk's papers, but the appeal was dismissed before the superior court transmitted the clerk's papers to the Court of Appeals.

[2] In 2007, the undersigned counsel attempted to locate the transcripts of the plea and sentencing hearings, but was informed that none of the court reporters' notes from the two hearings were still in existence.

Kitsap County Superior Court No. 03-1-01319-4. *See State v. Stockwell*, 159 Wn.2d 394, 150 P.3d 82 (2007); *In re Stockwell*, 160 Wn. App. 172, 248 P.3d 576 (2011).

Mr. Stockwell did not immediately appeal the conviction or sentence in the instant case. Undersigned counsel is unaware of any document in the court file setting out Mr. Stockwell's appellate rights and the requirement of filing a notice of appeal within 30 days, and the State has never pointed to any such document. At the time that Mr. Stockwell was sentenced, the State was represented by Kathleen Proctor, the same prosecutor who currently represents the State in this proceeding. Ms. Proctor has not submitted a declaration relating either to her memory of this case or to the practices in Pierce County Superior Court at the time of sentencing in 1986.

In 2007, Mr. Stockwell filed the aforementioned Personal Restraint Petition challenging his conviction in this case, arguing that the plea was involuntary and violated the Fifth and Fourteenth Amendments and article I, sections 3 and 9, because of the misinformation about the maximum sentence. This Court held that the petition was timely, because of the lack of notice of the time restrictions under RCW 10.73.090. *In re Stockwell*, 179 Wn.2d at 594-95. However, the Court denied relief on the merits, holding

that, while Mr. Stockwell would have been able to establish a presumption of prejudice had he raised the issue of the wrong maximum on direct appeal, he had not established sufficient prejudice to warrant relief for collateral attack. *In re Stockwell*, 179 Wn.2d at 594-603.

On February 18, 2014, Mr. Stockwell filed a direct appeal of the 1986 conviction. He then filed a motion, in the Court of Appeals, to extend the time for filing the direct appeal. The Court of Appeals gave the State until April 14, 2014, to file an answer, noting: "The court will not grant respondent any further continuances for filing the answer absent a showing of compelling circumstances." *Ruling*, March 21, 2014. The State did not file its answer/response until April 18, 2014, filing a motion to extend time along with the answer/response.

In its response, the State argued that it is disadvantaged by the time that it has taken for the appeal to be filed, characterizing Mr. Stockwell's actions as "dilatory." *State's Response to Motion to Extend Time to File Notice of Appeal* ("*Response*") at 9-11. On April 22, 2014, the Commissioner of the Court of Appeals issued a Ruling, granting the State's motion to continue its deadline to file a response, but then denying the motion to extend time to file the appeal. Finding that Mr. Stockwell had not shown

any "extraordinary" circumstances" under RAP 18.8(b), the Commissioner dismissed the appeal. The Commissioner did not address the constitutional issues raised by Mr. Stockwell. App. B.

Mr. Stockwell moved to modify the Ruling. On June 3, 2014, without explanation, three judges of the Court of Appeals denied the motion to modify. App. A. Mr. Stockwell now seeks review in this Court.

E. JURISDICTION

It is not apparent whether Mr. Stockwell should file a "Petition for Review" under RAP 13.4 or a "Motion for Discretionary Review" under RAP 13.5. Because of this uncertainty, Mr. Stockwell is filing one document in both the Court of Appeals (with a filing fee) and this Court entitled "Motion for Discretionary Review and/or Petition for Review." Pursuant to RAP 13.3(d), it should not matter which form is used (but if the appropriate pleading is the Motion for Discretionary Review, the Court should return the filing fee).

The Court of Appeals' Order denying the motion to modify the Commissioner's Ruling dismissing the appeal unconditionally terminated review, as that term is defined in RAP 12.3(a). Thus, under RAP 13.3(a) & (b), a Petition for Review is required under RAP 13.4.

On the other hand, RAP 12.3(a) defines a "Decision Terminating Review" as an order or ruling dismissing review if it is filed "after review is accepted by the appellate court." Under RAP 6.1, an appellate court "accepts review" "upon the timely filing in the trial court of a notice of appeal from a decision which is reviewable as a matter of right." Arguably, if Mr. Stockwell's notice of appeal was not timely filed, then the order dismissing the appeal was not a "Decision Terminating Review."

But, this leads to circularity because it is Mr. Stockwell's position that his appeal was not untimely and that the Court of Appeals erred by dismissing it. Accordingly, the Court has jurisdiction either through RAP 13.4 or RAP 13.5 and should accept review under either rule.

Review is appropriate under RAP 13.4(b)(1), (3) & (4). This case raises significant questions of law under the Constitutions of both the State of Washington and the United States. The Court of Appeals' decision also conflicts with decisions of this Court. *See, e.g., Seattle v. Klein*, 161 Wn.2d 554, 166 P.3d 1149 (2007); *State v. Kells*, 134 Wn.2d 309, 949 P.2d 818 (1998); *State v. Tomal*, 133 Wn.2d 985, 948 P.2d 833 (1997); *State v. Sweet*, 90 Wn.2d 282, 581 P.2d 579 (1978). Moreover, this case raises issues of public interest – in a an era where the State routinely incarcerates people for

life based on prior convictions, it is an issue of public importance as to whose burden it is to show a waiver of a right to appeal in an old case used by the State to justify an enhanced sentence.

Alternatively, because the Court of Appeals failed to consider the constitutional issues at stake when dismissing Mr. Stockwell's appeal and the effect of that appeal is to deny Mr. Stockwell access to the courts to review the conviction that is the predicate for the Kitsap life sentence, the Court of Appeals has committed an obvious and probable error that not only renders further proceedings useless, but substantially alters the status quo or limits Mr. Stockwell's ability to act. Review is proper under RAP 13.5(b)(1) & (2).

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. *Mr. Stockwell's Constitutional Rights Trump the 30 Day Time Limit*

a. The State Constitutional Right to Appeal

RAP 5.2 generally provides that an appeal must be filed within 30 days of the entry of the judgment. RAP 18.8(b) limits the extension of time to file a notice of appeal to "extraordinary circumstances and to prevent a gross miscarriage of justice."

Yet, the seeming restrictiveness of RAP 5.2 and RAP 18.8(b) must be viewed against the backdrop of constitutional right to an appeal in article I, section 22 of the Washington Constitution, which provides in part:

> In criminal prosecutions the accused shall have . . . the right to appeal in all cases . . . .

The mere presence of this provision in the state constitution requires giving the right "the highest respect." *State v. Sweet*, 90 Wn.2d at 286. The use of the word "shall" is clear intent as to the importance of the right in Washington,[3] as compared to under the federal constitution, where "it is permissible to grant the right to appeal on whatever terms a state deems proper." *Id.*

In contrast, "the United States constitution is silent upon the right of appeal," *In re Woods v. Rhay*, 54 Wn.2d 36, 42, 338 P.2d 332 (1959), and "under the Federal constitution, appellate review is a privilege." *State v. Schoel*, 54 Wn.2d 388, 392, 341 P.2d 481 (1959). In *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000), the United States Supreme Court explained:

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[3] "The general rule is that the word 'shall' is presumptively imperative and operates to create a duty rather than conferring discretion." *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985).

> Appeals as of right in federal courts were nonexistent for the first century of our Nation, and appellate review of any sort was "rarely allowed." [Citation omitted] The States, also, did not generally recognize an appeal as of right *until Washington became the first to constitutionalize the right explicitly in 1889.* [Footnote omitted] There was similarly no right to appeal in criminal cases at common law, and appellate review of any sort was "limited" and "rarely used."

528 U.S. at 159 (emphasis added).[4]

Because of Washington's unique role of having been the first American jurisdiction to adopt a constitutional right to appeal in criminal cases, this Court has repeatedly held that there is a presumption against finding a waiver of the right to appeal:

> [T]here can be no presumption in favor of the waiver of the right to appeal in a criminal case. Rather, the State carries the burden of demonstrating that a convicted defendant has made a voluntary, knowing, and intelligent waiver of the right to appeal.

State v. Tomal, 133 Wn.2d at 989 (citations omitted). *See also State v. Sweet*, 90 Wn.2d at 287; *State v. Kells*, 134 Wn.2d at 314-15.

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[4] In *Martinez*, the United States Supreme Court held that there was no right to self-representation on appeal. In contrast, this Court reached an opposite conclusion under article I, section 22. *State v. Rafay*, 167 Wn.2d 644, 222 P.3d 86 (2009). This holding was predicated on the fact that Washington was the first state to provide for a constitutional right to an appeal -- "Article I, section 22 also contains an express right to appeal among the rights of the accused. Ours was the first state constitution to include such language." 167 Wn.2d at 650.

In *Kells*, the defendant waited 15 months to file a notice of appeal of a juvenile declination order, an appeal not filed until after the defendant had pled guilty and had been sentenced. His attorney filed the late appeal, stating that he had been unaware that his client could appeal a declination order after a guilty plea. 134 Wn.2d at 311. The Court held that "an involuntary forfeiture of the right to a criminal appeal is never valid." *Id.* at 313. "[A] criminal appeal may not be dismissed as untimely unless the State demonstrates that the defendant voluntarily, knowingly, and intelligently abandoned his appeal right." *Id.*

The Court reiterated this concept in a case where the City of Seattle sought to dismiss RALJ appeals because of the pendency of bench warrants for the arrest of the defendants in municipal court. *Seattle v. Klein, supra.* In rejecting Seattle's arguments, the Court reaffirmed the concept that an appeal right was "fundamental" and that "a constitutional right to appeal can be waived only voluntarily, knowingly, and intelligently. *See, e.g., Sweet*, 90 Wn.2d at 287. It follows that we do not embrace an inadvertent waiver without notice." *Klein*, 161 Wn.2d at 560.

In *Sweet*, the Court held: "Waiver could most clearly be shown by a demonstration in the record that the trial judge questioned the defendant

about his understanding of the appeal procedure and his intentions with regard to an appeal." 90 Wn.2d at 287. *See also Seattle v. Braggs*, 41 Wn. App. 646, 651, 705 P.2d 303 (1985) (where record does not clearly indicate that trial court advised defendant of time and method for commencing an appeal, "compelling circumstances will be found to necessitate extending the appeal notice filing period so that the defendant is not unjustly deprived of the right of appeal."). Here, there is no evidence that the State has provided to show that the trial court questioned Mr. Stockwell about an appeal or informed him of the deadline for filing an appeal.

b. The Right of Prisoners to Access the Courts

Historically, prisoners have always been able to access the courts to attack old convictions that are used to increase current sentences, sometimes decades after the original conviction. *See, e.g., United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972) (decision in early 1970s that vacated 1953 sentence based on invalid prior convictions from 1938 and 1946). *See also Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (granting coram nobis relief 40 years after conviction). In fact, although Mr. Stockwell lost the recent PRP, the fact that this Court considered his PRP *on*

its merits, 28 years after conviction, is itself testament to the proposition that mere passage of time is not a barrier to relief. *See In re Stockwell*, *supra*.

The State's entire response below centered on the fact that Mr. Stockwell only filed this appeal because of the imposition of the life sentence in the Kitsap County case in 2004. The State portrayed itself as an aggrieved party because of the amount of time that has passed, arguing that, had Mr. Stockwell appealed earlier, it would have been easier for the State to obtain information about what took place in court in 1986: "[T]he State had long considered this case to be final." *Response* at 9.

However, when Mr. Stockwell was convicted in 1986 and received his discharge in 1989, he too was entitled to believe that the case was over and it would have made no sense for him to challenge the conviction at that time. There was no concept that the State would later create a punitive system that would impose a life without parole sentence – a sentence previously reserved for aggravated murder – in an intra-familial sex abuse case based upon a conviction from decades before. If the State creates such

a punitive sentencing regimen, it is the State's burden to preserve records of the old cases. The State must take the bitter with the sweet.[5]

Justice Souter once explained:

> None of this is to say that the Court is wrong to recognize that collateral review of old state convictions can be very cumbersome. *See ante*, at 4. But that is not the only practical consideration in the real world we confront (or ought to confront) here. A defendant under the ACCA ["Armed Career Criminal Act of 1984"] has generally paid whatever penalty the old conviction entailed; he may well have forgone direct challenge because the penalty was not practically worth challenging, and may well have passed up collateral attack because he had no counsel to speak for him. But when faced with the ACCA's 15-year mandatory minimum the old conviction is suddenly well worth challenging and counsel may be available under 18 U.S.C. § 3006A(a)(2)(B). *In denying him any right to attack convictions later when attacks are worth the trouble, the Court adopts a policy of promoting challenges earlier when they may not justify the effort and perhaps never will.* That is a very odd incentive for a court to create, and the eccentricity is hardly softened by the likelihood that most defendants will not notice before it is too late.

Daniels v. United States, 532 U.S. 374, 391, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001) (Souter, J., dissenting) (emphasis added).

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[5] *See United States v. Vea-Gonzales*, 986 F.2d 321, 328 (9th Cir. 1993) ("[A]s the motto of an ancient English house reads, 'No thorns, no roses.' If enforcement of constitutional rights sometimes undermines efficiency, it is the price we all pay for having a constitution."), *implicitly overruled on other grounds by Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).

Daniels is one of a trilogy of U.S. Supreme Court cases that restrict a prisoner's ability to challenge the validity of an old conviction used to increase a current sentence. *See also Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994); *Lackawanna County Dist. Atty. v. Coss*, 532 U.S. 394, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001). State courts, though, are not bound to follow the U.S. Supreme Court's jurisprudence on this issue, and are free to adopt a different test under state law.[6]

Given the constitutional right to access to the courts, protected by the right to petition for redress of grievances and the Due Process Clauses, under the First and Fourteenth Amendments and article I, sections 3, 4, & 10,[7] Justice Souter's comments make sense and should be adopted when construing article I, section 22. This is even more the case given the

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[6] *See, e.g., State v. Maine*, 360 Mont. 182, 255 P.3d 64 (2011) (rejecting federal test and allowing for challenges to prior convictions in context of current sentencing proceeding); *Paschall v. State*, 116 Nev. 911, 913 n.2, 8 P.3d 851 (2000) (declining to bar collateral attack because *Custis* "merely established the floor for federal constitutional purposes").

[7] *See Whitney v. Buckner*, 107 Wn.2d 861, 865, 734 P.2d 485 (1987) ("It is well established that prisoners have a constitutional right of access to the courts. [Citation omitted] That right is founded in the due process clause of the Fourteenth Amendment."); *In re Addleman*, 139 Wn.2d 751, 753-54, 991 P.2d 1123 (2000) ("The right of access to the courts is rooted in the petition clause of the First Amendment to the United States Constitution."); *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.").

importance to federal review of giving prisoners a full and fair opportunity in state court to challenge a prior conviction used to increase a current sentence. *See Dubrin v. State of California*, 720 F.3d 1095 (9th Cir. 2013) (allowing prisoner to contest 2000 conviction in context of 2008 sentencing because of denial by state of opportunity to context conviction).

Accordingly, the Court should liberally construe the rules to allow for an appeal where the State is unable to meet its burden of showing a knowing and intelligent waiver of the right to appeal.

2. *The Court of Appeals Failed to Consider Any Constitutional Arguments and Erroneously Placed the Burden on Mr. Stockwell, Rather than the State*

The only substantive ruling from the Court of Appeals was that Mr. Stockwell did not "show any 'extraordinary circumstances' required under RAP 18. 8(b) for a extension of the time to file a notice of appeal." *Ruling* at 1. This *Ruling* fails to consider the above-noted constitutional principles that clearly places the burden *on the State* to show a knowing and intelligent waiver of a constitutional right. *See State v. Kells*, 134 Wn.2d at 313-14.

In the absence of a knowing and voluntary waiver of the right to appeal, there is no barrier to a criminal appeal being filed years after conviction. *See, e.g., State v. Chetty*, 167 Wn. App. 432, 272 P.3d 918

(2012) (appeal filed in 2011 of 2004 conviction where defendant not advised of immigration consequences of not appealing conviction). This is in contrast to non-criminal cases where the burden is on the moving party to show extraordinary circumstances. *See State v. Hand*, 173 Wn. App. 903, 906-11, 295 P.3d 828, *rev. denied* 308 P.3d 588 (2013) (applying RAP 18.8(b)'s stringent requirements to non-criminal appeal, not covered by article I, section 22).

"Waiver of a constitutional right must be voluntary, knowing, and intelligent." *State v. Humphries*, 170 Wn. App. 777, 789, 285 P.3d 917 (2012)), *rev. granted* 177 Wn.2d 1007, 300 P.3d 416 (2013). A "waiver" is "an intentional relinquishment or abandonment of a known right or privilege." *State v. Harris*, 154 Wn. App. 87, 95, 224 P.3d 830 (2010) (internal quotations omitted). Here, the State has provided no evidence to show that Mr. Stockwell was even made aware of his right to appeal, let alone that he voluntarily relinquished the right.[8] A court cannot presume a waiver of constitutional rights from a silent record. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

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[8] In contrast is *State v. Moon*, 130 Wn. App. 256, 122 P.3d 192 (2005), relied upon by the State, where there was no dispute that the trial court told the defendant he had 30 days to file an appeal. 130 Wn. App. at 259.

While the State pointed out below that Mr. Stockwell did not submit a declaration as to his memory of what took place in 1986, it was not his burden to do so. This Court's prior cases clearly impose the burden of proof on the State.

In fact, if Mr. Stockwell was actually told of his right to appeal, the State was not without recourse to provide such proof. Apart from maintaining records (which is minimally burdensome), it turns out that the deputy prosecutor who handled Mr. Stockwell's sentencing hearing in 1986 – Ms. Proctor – is the same deputy prosecutor handling the current matter. She was in court in 1986 and could either have submitted a declaration that she recalled the Court telling Mr. Stockwell of his right to appeal or a declaration about the usual procedures in that court at that time. The failure to submit such a declaration is telling and should be viewed as a concession by the State that in fact Mr. Stockwell was never told of his right to appeal at the time of sentencing, and thus did not knowingly and voluntarily waive the right to appeal and to have access to the courts.

3. *An Appeal Waiver in the Guilty Plea Form is Inconsequential*

Citing *State v. Smith*, 134 Wn.2d 849, 953 P.2d 810 (1998), the State also argued that language in the guilty plea form included a provision that Mr.

Stockwell gave up the "right to appeal a determination of guilt after trial." *Response* at 5. The State argued that because Mr. Stockwell signed the guilty plea form, there is a strong presumption that the plea was voluntary. *Response* at 3-5, 9. The State is mistaken.

To begin with, in *Smith*, the issue was whether after losing a suppression motion, and then pleading guilty, the defendant waived his right to appeal the adverse suppression ruling. The Court actually reversed the conviction because it was apparent that Mr. Smith was misled about his right to appeal: " Under these circumstances, it is clear that Smith voluntarily relinquished certain rights, but it is not clear that he knowingly, voluntarily, and intelligently relinquished the right to appeal the suppression ruling." 134 Wn.2d at 853. In this regard, *Smith* supports Mr. Stockwell, rather than the State.

Here, Mr. Stockwell may have waived his right to appeal a determination of guilt after trial, but he never waived the right to attack the voluntariness of the guilty plea. The plain terms of the waiver in the plea form do not preclude this appeal which goes to the voluntariness of the plea itself, an legal recourse that has always been allowed in Washington, despite

a guilty plea. *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980); *State v. Rose*, 42 Wn.2d 509, 514-15, 256 P.2d 493 (1953).

More importantly, the "strong presumption" that the plea (and thus an arguable appeal waiver) in this case was voluntary is overcome in this instance by the stronger and conclusive presumption that the plea in this case was involuntary under the Fourteenth Amendment and article I, section 3, because the plea form indisputably contained misinformation about the maximum sentence. *In re Stockwell*, 179 Wn.2d at 594-96.

Thus, whatever appeal waiver Mr. Stockwell may have signed is presumed to be involuntary because of the misinformation about the maximum sentence. This portion of *In re Stockwell* is binding, and the State should not be allowed to relitigate this issue in the context of this appeal. There is no evidence of a valid appeal waiver in this case.

G. CONCLUSION

Mr. Stockwell has a constitutional right to appeal under article I, section 22, and a constitutional right to access to the courts to challenge a prior conviction under the First and Fourteenth Amendments and article I, sections 3, 4 & 10. There is no evidence of a knowing, intelligent and voluntary waiver of this right, even though it was within the State's power to

provide such evidence if it existed. Because the State has incarcerated Mr. Stockwell for life in the Kitsap case, reaching back into history to use a 1986 conviction, it is incumbent on the State to preserve records from the old case.

The Court of Appeals failed to apply this Court's long-standing jurisprudence that places the burden of proof of an appeal waiver on the State, mistakenly placing the burden on Mr. Stockwell, committing obvious or probable error. Because of the conflict with this Court's decisions, because of the constitutional issues, because of issues of public importance, and because of limitations on Mr. Stockwell's freedom, review should be granted under either RAP 13.4(b) or RAP 13.5(b).

Dated this 26 day of June 2014.

Respectfully submitted,

NEIL M. FOX, WSBA NO. 15277
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL STOCKWELL, Appellant.	No. 45898-5-II ORDER DENYING MOTION TO MODIFY

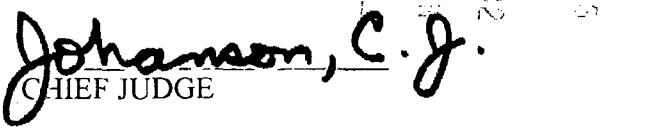
APPELLANT filed a motion to modify a Commissioner's ruling dated April 22, 2014, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 3rd day of June, 2014.

PANEL: Jj. Johanson, Lee, Melnick

FOR THE COURT:



CHIEF JUDGE

Neil Martin Fox
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Kathleen Proctor
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APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DANIEL STOCKWELL,

Appellant.

No. 45898-5-II

RULING GRANTING MOTION FOR EXTENSION TO FILE RESPONSE AND DISMISSING APPEAL

APPELLANT moves for permission to file a notice of appeal in the above-referenced matter after the deadline set forth in RAP 5.2. **RESPONDENT** moves for an extension to file the response to the motion. Upon consideration, the court denies the motion to file the late notice of appeal. Appellant does not show any "extraordinary circumstances" required under RAP 18.8(b) for a extension of the time to file a notice of appeal. Accordingly, it is

ORDERED that the motion for extension to file the response is granted and the above-entitled appeal is dismissed.

DATED this 22nd day of April, 2014.

E B Schaar
COURT COMMISSIONER

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STATUTORY APPENDIX

RAP 5.2 provides in part:

> Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).

RAP 6.1 provides:

> The appellate court "accepts review" of a trial court decision upon the timely filing in the trial court of a notice of appeal from a decision which is reviewable as a matter of right.

RAP 12.3 provides in part:

> (a) Decision Terminating Review. A "decision terminating review" is an opinion, order, or judgment of the appellate court or a ruling of a commissioner or clerk of an appellate court if it:
>
> (1) Is filed after review is accepted by the appellate court filing the decision; and
>
> (2) Terminates review unconditionally; and
>
> (3) Is (i) a decision on the merits, or (ii) a decision by the judges dismissing review, or (iii) a ruling by a commissioner or clerk dismissing review, or (iv) an order refusing to modify a ruling by the commissioner or clerk dismissing review.
>
> (b) Interlocutory Decision. An "interlocutory decision" is any opinion, order, or judgment of the appellate court or ruling of a commissioner or clerk which is not a decision terminating review.

(c) Ruling. A "ruling" is any determination of a commissioner or clerk of an appellate court. The ruling may be a decision terminating review or an interlocutory decision.

RAP 13.3 provides in part:

(a) What May Be Reviewed. A party may seek discretionary review by the Supreme Court of any decision of the Court of Appeals which is not a ruling including:

(1) Decision Terminating Review. Any decision terminating review.

(2) Interlocutory Decision. Subject to the restrictions imposed by rule 13.5(b), any interlocutory decision, including but not limited to (i) a decision denying a motion to modify a ruling of the commissioner or clerk which denies a motion for discretionary review, and (ii) if the clerk refers a motion for discretionary review to the court, a decision by the court which denies a motion for discretionary review.

(b) Decision Terminating Review. A party seeking review of a Court of Appeals decision terminating review may first file a motion for reconsideration under rule 12.4 and must file a "petition for review" or an "answer" to a petition for review as provided in rule 13.4.

(c) Interlocutory Decision. A party seeking review of an interlocutory decision of the Court of Appeals must file a "motion for discretionary review" as provided in rule 13.5.

(d) Incorrect Designation of Motion or Petition. A motion for discretionary review of a decision terminating review will be given the same effect as a petition for review. A petition for review of an interlocutory decision

will be given the same effect as a motion for discretionary review.

RAP 13.4(b) provides:

> **(b) Considerations Governing Acceptance of Review**. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.5(b) provides:

> (b) Considerations Governing Acceptance of Review. Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:
>
> (1) If the Court of Appeals has committed an obvious error which would render further proceedings useless; or
>
> (2) If the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
>
> (3) If the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

RAP 18.8 provides in part:

> (b) Restriction on Extension of Time. The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.

U.S. Const. amend. 1 provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. 14, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 4 provides:

> The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

Wash. Const. art. I, § 10 provides:

> Justice in all cases shall be administered openly, and without unnecessary delay.

Wash. Const. art. I, § 22 provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DANIEL J. STOCKWELL, Petitioner.	NO. _____ COA NO. 45898-5-II CERTIFICATE OF SERVICE

I, Neil M. Fox, certify and declare, that on this 26th day of June 2014, I deposited a copy of the "PETITION FOR REVIEW/MOTION FOR DISCRETIONARY REVIEW" into the United States Mail with proper first-class postage attached, addressed to:

Mark Lindquist
Pierce County Prosecuting Attorney's Office
Attn: Kathleen Proctor
930 Tacoma Ave. South, Room 946
Tacoma WA 98402-2171

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

6/24/14 Seattle WA
DATE AND PLACE

NEIL M. FOX

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CRIMINAL DEFENSE

June 26, 2014

David Ponzoha, Clerk
Court of Appeals, Division Two
950 Broadway, Ste 300, MS TB-06
Tacoma, WA 98402-4454

Re: *State v. Daniel Stockwell*, COA No. 45898-5-II

Dear Mr. Ponzoha:

Please find enclosed and accept for filing the enclosed PETITION FOR REVIEW/MOTION FOR DISCRETIONARY REVIEW in this matter. I am enclosing a check for the filing fee. Another copy is being filed with the Supreme Court.

As I explained in the pleading, it is not clear to me whether this matter should be considered as a Petition for Review or a Motion for Discretionary Review, so I am filing one document arguing that both RAP 13.4 and RAP 13.5 apply. In the event that this matter is truly a Motion for Discretionary Review, please return the filing fee.

Please return to me a conformed copy of the front page in the enclosed envelope.

Sincerely,

Neil M. Fox
Attorney for Appellant/Petitioner

cc: Kathleen Proctor, Pierce County Prosecutor