Supreme Court No. 96481-5
COA No. 35628-1-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

RUSSELL PAUL KASSNER,

Petitioner.

ANSWER TO DEFENDANT'S PETITION FOR REVIEW

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I. IDENTITY OF PARTY

Respondent, State of Washington, was the respondent to Mr. Russell Kassner's 2016 CrR 7.8 motion in the trial court to vacate his 21-year-old guilty plea entered in adult court in Spokane County on March 15, 1996. The State of Washington was also the respondent in Kassner's direct appeal to Division Three of the superior court's denial of the CrR 7.8 motion.

II. STATEMENT OF RELIEF SOUGHT

Defendant filed a petition for review. On February 6, 2019, this Court directed the State to file an answer.

Respondent seeks denial of Kassner's petition for review of the opinion issued by the Court of Appeals on October 2, 2018. Additionally, the State would request that if this Court accepts review of this case, this Court also accept review of the additional issues that were raised, but not decided, in the Court of Appeals. RAP 13.4(d).

III. FIRST ISSUE PRESENTED

Whether the Court of Appeals properly determined that the trial court had jurisdiction to enter a judgment and sentence on an 18-year-old defendant, for a juvenile offense, without entering a written finding that he had the statutory capacity to commit a crime at the time of his offense.

IV. ADDITIONAL ISSUES RAISED, BUT NOT DECIDED BELOW.

1. Did the superior court abuse its discretion in concluding that the defendant had failed to produce the requested supporting evidence – available transcripts of the 1996 plea and sentencing hearings – to establish that the 1996 trial court failed to consider his capacity?

2. Has the defendant failed to establish a basis for escaping the one-year time-bar on his plea entered 22 years ago?

3. Has the defendant failed in this collateral attack to establish he was prejudiced, *i.e.*, has he failed to show that a rational person in his situation would have rejected the plea deal and proceeded to trial as required under *State v. Buckman*, 190 Wn.2d 51, 71, 409 P.3d 193 (2018)?

V. STATEMENT OF THE CASE

Russell Kassner allegedly began sexually abusing one of his adopted sisters when he was age 10 and she was age 4.[1] The sexual abuse continued

[1] Because Kassner requested a Special Sexual Offender Sentencing Alternative (SSOSA), the 1996 trial court was required to have an examination, by a certified sex offender treatment provider, to determine the defendant's amenability to treatment. RCW 9.94A.120(8)(a)(i). The report was required to include "the defendant's version of the facts and the official version of the facts." *Id*. The trial court was required to review this report for determining whether the defendant and public would benefit from the use of this sentencing option. RCW 9.94A.120(8)(a)(ii) (1996). A report was ordered by the trial court, as required, and the court presumptively considered the report before ordering the special sentencing alternative. *See* CP 59-61. However, such evaluation reports were considered confidential and were not filed as regular public documents. "The report contains an

until Kassner was age 17 and his adopted sister was age 11. While law enforcement investigated, Kassner turned 18. Law enforcement referred the case to the Spokane County Prosecutor's Office on October 17, 1995 – after the defendant's 18th birthday – and the State charged the defendant with rape in the second degree for his conduct as a 17-year-old, and with molestation in the first degree for his conduct *on or about* the time he was 10 or 11-years-old. CP 1. The charging document was filed on November 28, 1995.

The defendant sought an agreed SSOSA (Special Sexual Offender Sentencing Alternative) sentence pursuant to a plea agreement.

On March 15, 1996, Kassner entered a guilty plea to the child molestation count in exchange for dismissal of the more serious rape charge, accompanied by an agreement from the State not to charge further related charges, and a recommendation by the State that the defendant receive a Special Sexual Offender Sentencing Alternative sentence. CP 54 (Guilty

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admission by 18-year-old Kassner that he had begun molesting his adopted sister when he was 14 or 15, and she was 7 or 8." *State v. Kassner*, 5 Wn. App. 2d 536, 538, 427 P.3d 659 (2018). Because this presentence investigation report was not necessary to the appellate court's decision, the Court granted Kassner's motion to modify the ruling admitting a copy of the report used by the trial court. However, because of the unaddressed issues raised in the appellate court, the admission of this report will be necessary for a complete review.

Plea, at 4). In his guilty plea statement, he admitted that he touched B.K. for sexual gratification. CP 57.

Although his sentencing range was 51 to 68 months, Kassner was ordered to serve just three months of confinement under the SOSSA option. CP 8. However, the court revoked the SOSSA on August 8, 1997, because Kassner failed to comply with his sex offender treatment, drug monitoring, and polygraph requirements. He was ordered to serve the remainder of his 51-month sentence. CP 63-65 (Order Modifying Sentence).

On July 21, 2015, the State charged Kassner with failure to register as a sex offender. He pleaded guilty to that charge on August 5, 2015, and was sentenced the same day. The Judgment and Sentence was filed the following day. CP 38.

On October 26, 2016, Kassner filed a motion to withdraw his plea to the *original* 1996 sex offense *more than twenty years* after he had entered the plea. CP 13-16. For various reasons, that motion was not heard until July 13, 2017. At that time, the court reserved judgment on the motion and directed the parties to supplement the briefing. CP 35-36. The superior court also **directed the defendant** to provide a transcript of the 1996 guilty plea hearing. *"Should the Defendant wish the Court decide this motion, the Defendant will need to supplement the record with a certified transcript*

from the guilty plea hearing conducted on May 21, 1996." CP 35 (emphasis added). The State responded to the trial court's request and filed its response on August 22, 2017. CP 37-43. Defendant failed to file a response and failed to obtain a transcript of the 1996 guilty plea hearing as ordered by the trial court.

On August 25, 2017, the superior court denied Kassner's motion to withdraw his guilty plea, emphatically noting that while the defendant had claimed the record was not available, the trial court *on its own* was able to discover that the reporter's notes were available for the production of a transcript.[2] CP 44-46. The trial court also noted that the defendant unreasonably delayed bringing the CrR 7.8 motion and that an injustice would be imposed upon the State in having to prosecute a dismissed second-degree rape charge that occurred 21 years earlier. *Id*. The trial court also

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[2] In denying the CrR 7.8 motion the trial court stated:

> First, this Court is unable to make a determination as to whether a capacity hearing was held as the transcripts from previous hearings have never been provided to this Court. On July 17, 2017, this Court requested defense counsel obtain a copy of the transcripts from previous hearings. Defense counsel responded that the transcripts are no longer in existence. A brief check through the Superior Court Administrator's Office revealed the court reporter notes from 1996 have been preserved. The burden is on the Defendant, not this Court, to offer support for his motion.

noted that Kassner was an adult and assisted by competent counsel at the time he voluntarily entered his plea to first degree child molestation and received a negotiated benefit thereby. *Id*.; *see also*, CP 47-50 (Findings of Fact and Conclusions of Law).

The defendant appealed the denial of his motion for collateral relief to the Court of Appeals, Division Three, relying heavily on *State v. Golden*, 112 Wn. App. 68, 47 P.3d 587 (2002), for his claim that the 1996 adult court was without jurisdiction to accept a guilty plea or to enter a judgment. Division Three issued an opinion denying Kassner's appeal. In doing so, the appellate court noted that Kassner relied on *Golden*, which relied on *State v. Werner*, 129 Wn.2d 485, 493, 918 P.2d 916 (1996), for the proposition that jurisdiction required an additional "element" of the power or authority to render the particular judgment.[3] The appellate court determined that

[3] The Court of Appeals noted:

> Kassner argues that the trial court's jurisdiction was limited to determining whether, at 10 years of age, he had the capacity to commit a crime; and, until that question was answered, the trial court lacked jurisdiction to convict him of the crime. Kassner's argument is predicated on our decision in *State v. Golden*, 112 Wn. App. 68, 47 P.3d 587 (2002).
>
> …
>
> When we decided *Golden*, Washington law recognized three elements for every valid judgment: jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment. *See State v. Werner*,

Mr. Kassner's reliance on *Golden* was unavailing because that precise holding in *Werner* had been overruled in 2012 by this Court's decision in *State v. Posey*, 174 Wn.2d 131, 140, 272 P.3d 840 (2012).

VI. ARGUMENT

A. APPELLANT HAS NOT SHOWN HE IS ENTITLED TO REVIEW.

Petitioner has failed to satisfy his heavy burden under RAP 13.4(b) to demonstrate that the Court of Appeals' unanimous opinion conflicts with any appellate decision. This opinion cannot be in conflict with *Golden* because this Court, in *Posey*, overruled *Golden sub silencio* when it overruled *Werner*. It was *Golden* that was in conflict with *Posey*, and that situation has now been remedied by Division Three's pronouncement that *Golden* is no longer good law. RAP 13.4(b)(1), (2).

> 129 Wn.2d 485, 493, 918 P.2d 916 (1996). *Werner* was overruled six years ago by *Posey*, 174 Wn.2d at 138-40, 272 P.3d 840.
>
> In *Posey*, the court noted that *Werner's* distinction between "subject matter jurisdiction" and "the power or authority to render the particular judgment" rested on "an antiquated understanding of subject matter jurisdiction." *Id*. at 138, 272 P.3d 840. To the extent *Golden* holds that RCW 9A.04.050 is a statute that deprives the court of jurisdictional "authority to act," it is overruled by *Posey*.

Kassner, 5 Wn. App. 2d at 540-41.

In *Posey*, this Court considered the constitutional grant of subject matter jurisdiction to the superior courts, and accorded it the centrality that it deserves. Article IV, section 6 is dispositive and *Posey* has overruled precedents that erroneously classify the superior court's jurisdiction as statutory. The legislature cannot, by statute, alter the constitutional jurisdiction of the superior courts. Contrary to Kassner's claims, RCW 9A.04.050 is not a jurisdictional statute.

Because the unique facts of this case are controlled by extant law, no significant questions of constitutional law or substantial public interest are presented. RAP 13.4(b)(4).

B. ISSUES LEFT UNADDRESSED BY THE COURT OF APPEALS DECISION.

1. The one-year time limit bars any collateral relief.

The State raised the timeliness of Kassner's CrR 7.8 motion in both the trial court and in the court of appeals. Br. of Respondent at 5-6. Defendant relied solely on *Golden,* for his position that there was no one-year time limit applicable to CrR 7.8 motions for collateral relief based on the competency statute RCW 9A.04.050. *See* Br. of Appellant 11-12 ("court lacks statutory authority to enter the judgment. See, *Golden*, 112 Wn. App. at 79"). This notion is without support.

In *Golden*, the court of appeals determined the defendant *had never been advised of his one-year time limit on seeking collateral relief* and the

State conceded that Mr. Golden received no notice of his right to collateral review and the time restrictions. 112 Wn. App. at 77-78.

> Here, there is no record of Mr. Golden having been informed about the rights and restrictions of chapter 10.73 RCW. The record does contain a form entitled "Notice of Rights." Clerk's Papers at 11. But this list does not mention collateral review.

Id. at 78. The court then noted the time-bar in RCW 10.73.090(1) is *conditioned on compliance* with RCW 10.73.110. *Golden*, 112 Wn. App. at 78 (citing *In re Vega*, 118 Wn.2d 449, 451, 823 P.2d 1111 (1992)).

Here, unlike in *Golden*, it is beyond peradventure that Kassner was advised of the one-year time-bar to filing for collateral relief. Indeed, the trial court complied with RCW 10.73.110; it gave Kassner the appropriate notice of the one-year time limit on seeking collateral relief, which he acknowledged, as an adult, by his signature. CP 10-11; RCW 10.73.090. Kassner provides no exception to the time-bar as set forth in RCW 10.73.100. Therefore, Kassner's motion for collateral relief is time-barred, and has been time-barred for twenty years.

2. <u>Kassner did not provide the basic factual support of his claim that there was no discussion of his competency at the time of the entry of his plea or at the time of his sentencing.</u>

This issue was raised in the appellate court. Br. of Respondent at 7-9. On July 17, 2017, the superior court informed the defendant that it was *his* burden to produce the transcript of the guilty plea hearing conducted on

May 21, 1996. CP 35. The superior court also cautioned the defendant: "Once the requested supplementations are made, the Court will decide this matter. Should the Defendant choose not to supplement the record, the Court would then deny the motion as the burden is on the Defendant to show the invalidity of the conviction." CP 36. Apparently, the defendant claimed the transcripts were unavailable. Five weeks later, and apparently not trusting Kassner's representation that the transcripts were no longer in existence, the superior court informed the parties

> [T]his Court is unable to make a determination as to whether a capacity hearing was held as the transcripts from previous hearings have never been provided to this Court. On July 17, 2017, this Court requested defense counsel obtain a copy of the transcripts from previous hearings. Defense counsel responded that the transcripts are no longer in existence. A brief check through the Superior Court Administrator's Office revealed the court reporter notes from 1996 have been preserved. The burden is on the Defendant, not this Court, to offer support for his motion.

CP 44.

The trial court[4] denied the motion to withdraw the plea, and held the defendant had failed to provide a "sufficient record to determine whether

[4] This was a direct appeal from the trial court's decision, not a personal restraint petition that was transferred to the appellate court. Therefore, the appellate court was limited to deciding whether the trial court abused its discretion in finding Kassner had failed to provide a sufficient record when one was available. Kassner was represented by counsel at all times in the superior court proceedings.

the original court conducted a capacity hearing regarding the oldest charge and defense counsel represented to this Court that the transcripts are no longer in existence." CP 48 (Finding of Fact No. 6). This *unchallenged finding* is a verity on appeal[5] and is supported by the defendant's admitted failure at that time, and at *any time since*, to provide any transcript of any hearing held during the course of Kassner's case, even though he acknowledges that such transcripts exist.[6]

The trial court properly denied Kassner's requested relief because he failed to provide support for his complaint. That is his burden.[7] Bare allegations unsupported by citation to authority, references to the record, or persuasive reasoning cannot sustain the petitioner's burden of proof. He

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[5] Any unchallenged findings of fact are considered to be verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. Bonds*, 174 Wn. App. 553, 562, 299 P.3d 663 (2013).

[6] *See* Declaration of Richard Wall, filed with the appellate court on January 11, 2018. Additionally, counsel for defendant failed to provide a transcript from any of the superior court's discussion or argument of rulings during the CrR 7.8 motion.

[7] *See Matter of Cook,* 114 Wn.2d 802, 814, 792 P.2d 506 (1990).

> After establishing the appropriateness of collateral review, a petitioner will be entitled to relief only if he can meet his ultimate burden of proof, which, on collateral review, requires that he establish error by a preponderance of the evidence. *Hews*, 99 Wn.2d at 89, 660 P.2d 263; *see also State v. Kitchen*, 110 Wn.2d 403, 413, 756 P.2d 105 (1988) (personal restraint petitioner must show that, more likely than not, his rights were actually and substantially prejudiced).

may not rely on conclusory allegations, but must show with a preponderance of competent, admissible evidence that the error caused him prejudice. *In re Ruiz-Sanabria*, 184 Wn.2d 632, 636, 362 P.3d 758 (2015); *In re Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004); *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986) (where the record does not provide any facts or evidence on which to decide the issue and the petition instead relies on conclusory allegations, a court should decline to determine the validity of a personal restraint petition).

Our courts have purposefully imposed limitations on these collateral attacks, and these limitations are soundly based because collateral attacks, such as personal restraint petitions, may undermine the principles of finality of litigation, degrade the prominence of trial, and sometimes cost society the right to punish admitted offenders. *Matter of Cook*, 114 Wn.2d at 809. The requirements for a factual basis and evidentiary support are threshold procedural bars.[8] Courts should refuse to reach the merits of any petition

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[8] Where the record does not provide any facts or evidence on which to decide the issue and the petition instead relies solely on conclusory allegations, a court should decline to determine the validity of a personal restraint petition. *Williams*, [111 Wn.2d] at 365, 759 P.2d 436. *We emphasize that the quoted principle from Williams, is mandatory*; compliance with that threshold burden is an absolute necessity to enable the appellate court to make an informed

that fails to comply. Therefore, the trial court did not abuse its discretion in finding the defendant failed to meet his burden of proof in establishing that his claimed violation, from two decades ago, actually occurred.

3. The defendant is barred from complaining regarding the plea agreement he reached.

The State raised this issue in the court of appeals, but the court did not address it. *See* Br. of Respondent at 16-18. This issue was not addressed by the Court of Appeals.

The defendant has dirty hands.[9] He is barred from attacking his plea agreement by *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984), *holding modified on other grounds by Matter of Hews*, 108 Wn.2d 579, 741 P.2d 983 (1987). In *In re Barr*, our Supreme Court held that a plea can be voluntary and intelligent, even absent a factual basis for the ultimate charges, as long as the plea is based on informed review of all the alternatives and the defendant understands the nature of the consequences

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> review. *Lack of such compliance will necessarily result in a refusal to reach the merits*. *Williams*, at 365, 759 P.2d 436.

Matter of Cook, 114 Wn.2d at 813-14 (emphasis added).

[9] While the superior court was not operating in equity, necessary to defendant's position is the claim that the court's decision results in a complete miscarriage of justice. Similarly, and basic to equity, is the proposition that a court of equity will not intervene on behalf of a party whose conduct has been unconscientious, unjust, or marked by a lack of good faith. *Portion Park, Inc. v. Bond*, 44 Wn.2d 161, 170, 265 P.2d 1045 (1954).

of the plea. *Id.* at 269-70. Here, the defendant does not allege or complain he was misinformed as to the plea agreement, and, indeed, his plea statement indicates just the opposite – he understood what benefits he would obtain – and does nothing to refute the knowing and voluntary nature of his plea. Moreover, he waited more than twenty years to attack the plea.

Here, Kassner raises a procedural or evidentiary issue, the alleged failure to make a capacity determination, which is a statutory violation rather than a constitutional claim.[10] Because this claim falls on the side of being a procedural claim – that a capacity statute, RCW 9A.04.050, was not followed, his claim is not cognizable at this time in a personal restraint petition, because where a claim merely asserts a violation of the rules of criminal procedure, which this claim does, failure to bring an appeal *forecloses* relief in a personal restraint petition. "A plea does not become invalid because an accused chooses to plead to a related lesser charge that was not committed in order to avoid certain conviction for a greater offense." *In re Barr*, 102 Wn.2d at 269-70. Moreover, and in this regard, this Court recently decided that even if there is a constitutional problem with a guilty plea, "the petitioner must show not only error, but also actual and

[10] This is a statutory issue under RCW 9A.04.050. A hearing is required in juvenile court, but not in adult court. *See* JuCR 7.6(e). Therefore, this is a procedural claim, rather than one of constitutional import.

substantial prejudice. Prejudice at the guilty plea stage means that the defendant would more likely than not have refused to plead guilty and would have insisted on going to trial." *Buckman,* 190 Wn.2d at 65. The test is objective, and not based on defendant's self-serving statements that but for the claimed error, he would have refused to plead guilty. *Id*. at 200. Kassner has not even attempted to establish that he would not have entered a plea to the lesser, earlier offense, to avoid the harsher sentence for a later offense where both counts involve the same victim. He has, therefore, failed to demonstrate the prejudice required by *Buckman*.

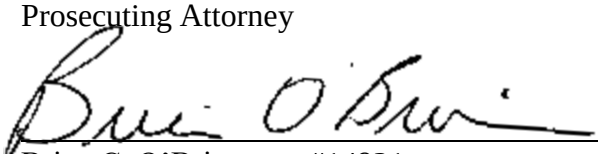
VII. CONCLUSION

Mr. Kassner entered into a plea agreement and received its benefits, yet now seeks to undo it more than 20 years later. This request, would be a complete miscarriage of justice, if granted.

For the reasons stated above, Respondent requests this Court deny the petitioner's request for review.

Respectfully submitted this 19 day of February 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RUSSELL KASSNER, Petitioner.	NO. 96481-5 CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 19, 2019, I e-mailed a copy of the Answer to Defendant's Petition for Review in this matter, pursuant to the parties' agreement, to:

Richard Wall
rdwallps@comcast.net

2/19/2019 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

February 19, 2019 - 9:34 AM

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