NO. 42899-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

SPENCER MILLER, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Judge Frank Cuthbertson

No. 01-1-05476-9

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to transfer the defendant's motion to the court of appeals to be considered as a personal restraint petition because the motion was time barred. CP 267-69.

2. The trial court erred when it entered Finding/Conclusion No. 1 and determined that RCW 10.73.090 did not bar consideration of the defendant's collateral attack because ***In re Mulholland***, 161 Wn.2d 322 (2007) constituted a significant change in the law. CP 268.

3. The trial court erred when it entered Finding/Conclusion No. 2 that the defendant made a substantial showing that he was entitled to relief. CP 268.

4. The trial court erred when it entered Finding/Conclusion No. 3 that the court did not believe it had discretion to impose a concurrent sentence under RCW 9.94A.589(1)(b). CP 268.

5. The court erred when it entered Finding/Conclusion No. 5 that the court's failure to recognize its discretion to impose a mitigated exceptional sentence constituted a fundamental

defect which inherently resulted in a miscarriage of justice. CP 269.

6. The trial court erred when it entered is order vacating the defendant's judgment and sentence. CP 268-69.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the awkward procedural posture of this case renders the standard of review complicated where it is an appeal of the court's ruling on a collateral attack motion, not a personal restraint petition, but the statutes governing collateral attack and the rules of appellate procedure governing personal restraint petitions are complementary and closely related?

2. Whether the defendant's motion was time barred where it was brought several years after the collateral attack time limit expired and did not fall under any exception to the time limit?

3. Whether the motion should have been dismissed where the defense did not request an exceptional sentence below the standard range?

4. Whether, even if the defendant brought his claim by way of a claim of ineffective assistance of counsel, it would have nonetheless failed as time barred, and because he failed to establish such a claim?

C. STATEMENT OF THE CASE.

1. Procedure

On October 22, 2001, based on an incident that occurred on October 14, 2001, the State charged Spencer Miller as a co-defendant with Count I, attempted murder in the first degree; and Count II, murder in the first degree.[1] CP 1-2. On November 1, 2001 the State filed a Corrected Information that corrected the charge in Count II to attempted murder in the first degree. CP 5-6.

On January 10, 2002, the State filed an Amended Information that added additional co-defendants, added alternative charges of assault in the first degree to Counts I and II, and added Count III, unlawful possession of a firearm in the first degree. CP 7-10.

On March 11, 2012 the State filed a Second Amended Information that modified the language in Counts I and II regarding the elements of the completed crime murder in the first degree.[2] CP 12-15.

After trial, the jury returned verdicts, finding the defendant guilty of Counts I, and II, but did not make the special verdict finding that he was armed with a firearm. CP 16, 17, 21, 22.

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[1] Although the crime in Count II was listed as "Murder in the First Degree," the charging language went on to list the elements of attempted murder in the first degree.

[2] Presumably this was done so that the means could encompass the possibility of transferred intent.

On May 24, 2002, the court sentenced the defendant to 200 months on each count, imposed consecutive to each other for a total sentence of 400 months pursuant to RCW 9.94A.589(b). CP 28-44.

On May 24, 2002 Miller timely filed a notice of appeal. CP 270-75. In that appeal, Miller challenged a number of issues relating to trial, but did not challenge his sentence. *See* CP 49-70. The court affirmed the conviction in an unpublished opinion issued August 17, 2004. The Mandate issued May 9, 2005. CP 46-48.

On September 22, 2008, the defendant filed in superior court a Motion for Reconsideration and New Trial Pursuant to CrR 7.8. CP 71; 72-75. The motion raised two issues different from those raised in the motion at issue in this appeal. *See* CP 80-82. The motion was transferred to the court of appeals to be considered as a personal restraint petition. CP 76-77. This court dismissed the petition as time barred. CP 78-79. The certificate of finality was filed on October 12, 2009. CP 80-82.

On October 15, 2010 the defendant filed in superior court a Motion to Vacate Judgment and Sentence. CP 83-101. In that motion, he claimed that the trial court erred by running his sentence consecutive based on a misapprehension that was now clarified by the Washington Supreme Court's opinion in ***In re Muholland***, 161 Wn.2d 322, 166 P.3d 677 (2007) so that [as he claimed] the matter was now properly before the court. CP 83-84. On November 9, 2010, the defendant filed a motion to modify or correct judgment and sentence that raised substantially the same issue. CP

102-103. On November 19, 2010 the state filed a response to the motion to vacate in which it argued that the trial court was required by CrR 7.8 to transfer the motion the court of appeals to be considered as a personal restraint petition because the defendant's motion was time barred. CP 104-05. On November 30, 2010 the defendant replied to that argument by asserting, among other things, that as a result of the courts opinion in ***Muholland***, the Judgment and Sentence was invalid on its face, and also because the opinion in ***Muholland*** constituted a significant intervening change in the law. CP 106-112.

On December 10, 2010 the superior court used an uncaptioned blank order form to issue an order transferring the motion to the court of appeals to be considered as a personal restraint petition. CP 113. However, on February 3, 2011, because the trial court's order and the attached pleadings failed to comply with the court of appeals requirements for transfer, the court rejected the transfer and returned the matter to the superior court for further appropriate action. CP 114. With no further action having been taken by the superior court, the certificate of finality issued on March 23, 2011. CP 115-116.

On June 7, 2011 Miller filed in superior court a motion to clarify the status of his motion to vacate the judgment and sentence. CP 119-125.

The superior court then considered the motion to vacate on October 7, 2011. *See* CP 10-07-11. In doing so, the court considered supplemental materials filed by the defendant and then made its ruling in

light of the Washington Supreme Court's opinion in ***In re Mulholland***, 161 Wn.2d 322, 166 P.3d 677 (2007). CP 267-69; RP 10-07-11, p. 5, ln. 18-23; p. 8, ln. 7-23; p. 9, ln. 16 to p. 12, ln. 5. The court scheduled a show cause hearing under CrR 7.8 for November 18, 2011. RP 10-07-11, p. 5, ln. 18-23; p. 8, ln. 7-23; p. 9, ln. 16 to p. 12, ln. 5.

On October 12, 2011 the defendant filed supplemental exhibits to his motion to vacate judgment and sentence. CP 145-263. Those exhibits included a copy of the transcript from the original sentencing hearing. CP 145; 175ff. On November 10, 2011 the State filed an additional response with regard to the defendant's motion that directed the court to a portion of the transcript for the sentencing hearing. CP 279-80.

On November 18, 2011, the court entered an order vacating the judgment and sentence previously imposed and setting a new sentencing hearing. CP 267-69; *See also* RP 11-18-11.

On December 14, 2011 the State timely filed a notice of appeal to the order vacating the judgment and sentence pursuant to RAP 2.2(a)(10).

2. Facts

Because the issue raised in this appeal pertains to sentencing, and the court's withdrawal of the defendant's previously imposed sentence, the facts of the underlying case are not essential to the determination of the issues in this appeal. Nonetheless, for the court's convenience the following facts have been copied from the court's unpublished opinion

from Miller's and his co-defendant's appeals of their convictions, ***State v. Miller***, Nos. 28847-8-II, 28935-1-II and 28964-4-II, 122 Wn. App. 1074 (2004). *See* CP 46-70.

Robert Bonds and his cousin, Andre Bonds, are two of the thirteen original members of a Tacoma street gang called the Hilltop Crips. Although Spencer Miller was not an original member, he had been a member since the early 1990's. Tonya Wilson was Robert's girlfriend and a Crips "associate."

In October 2001, Keith Harrell was living in Tacoma's Hilltop neighborhood. Daron Edwards had been living with him for about seven years. There was an AM/PM store in the same neighborhood. The Crips assert dominion over an area that includes the Harrells' residence and the AM/PM store.

A rival street gang, the Bloods, originated in Compton, California. Edwards grew up in Compton but never belonged to the Bloods.

During the afternoon of October 13, 2001, Andre Bonds and Edwards had a confrontation in front of Harrell's residence. While displaying a gun, Andre said that he was revoking Edwards' Hilltop privileges and that he would return with five of his "homeboys" to enforce the revocation.

Later that night, Edwards went to Browne's Star Grill, a nightclub that the Crips frequented. Andre and Robert Bonds were there, as was Cory Thomas, a friend of Edwards. Andre hit Thomas in the face with

Edwards watching. Edwards responded by knocking Andre to the floor and hitting him several times. Robert punched Edwards in the face, and security guards ejected them all.

Outside, Edwards challenged Andre to continue the fight. The two exchanged more blows, with Edwards getting the better of Andre. Robert, Wilson, and Miller were among those watching. Edwards shouted, "This is Compton," or "I'm Compton," and Miller shouted back, "Fuck California, this is Hilltop." Edwards replied, "{Fuck} the Hilltop." As Edwards was preparing to leave, Robert took a gun from his waistband and said, "Fuck these niggers." A witness named Neecie Brown considered warning Edwards that "they got a gun," but Wilson told her to mind her own business.

Edwards, Thomas, Harrell, and several others returned to Harrell's residence. They had been back about ten minutes when the phone rang. Thomas answered and heard someone say that two of Harrell's friends were surrounded by Hilltop Crips at the AM/PM and feared for their safety.

Thomas, Edwards, and a man named Sinclair quickly drove to the AM/PM. Harrell and a person named Trent went also, but in a separate car. Thomas had a gun, and there was also a gun in Harrell's car. The time was about 2 a.m.

Andre, Robert, Wilson, Miller, and others were already at the AM/PM. Some of them were armed. Andre, Robert, and Miller

conferred, and then walked to different locations as the cars from Harrell's house arrived. Edwards got out and approached Andre, who was holding a gun. Edwards asked if Andre wanted "another ass whipping." The two exchanged words, Andre got in his car and left. At about this same time, Wilson was slowly driving a station wagon out of the parking lot with Robert as her passenger.

Gunfire then erupted from more than one place. According to several witnesses, it came from the station wagon, from an alley behind the AM/PM, and from across the street near a business called the Absolute Auto Shop. Edwards was shot in the back, hip, and arm. Harrell was shot in the head. Both survived, but Harrell remains impaired.

When police arrived, they found two pools of blood and eight shell casings. The guns were never recovered, and Miller later said they had been discarded in Seattle.

D. ARGUMENT.

1. THIS CASE IS IN AN AWKWARD PROCEDURAL POSTURE WHERE IT IS BEFORE THIS COURT ON AN APPEAL OF THE TRIAL COURT'S RULING ON THE DEFENDANT'S COLLATERAL ATTACK MOTION.

The defendant brought his motion before the trial court under CrR 7.8. As such, it is a form of collateral attack. *See* CrR 7.8(b). Procedure on collateral attack is governed by statutes (RCW 10.73.090-.140) as well

as court rules (RAP 16.4, et. al. and CrR 7.8). As explained further in section 2 below, the statutes governing collateral attack and court rules governing consideration of personal restraint petitions are complementary and work in conjunction with one another. Nonetheless, RAP 16.4, et. al. do not specifically apply to all forms of collateral attack, but only to personal restraint petitions.

Here, the trial court did not transfer the defendant's motion to the court of appeals to be considered as a personal restraint petition. Instead, the court considered the motion on the merits and granted the defendant's motion to vacate the judgment and sentence. The State has now appealed, so that this case is not before this court as a personal restraint petition. Rather, it is before this court on appeal for review of the trial court's consideration and ruling on the motion.

Nonetheless it is the State's position that the trial court error below was two-fold and that the ultimate result is that this court should in the end consider the defendant's motion as a personal restraint petition, but dismiss it as time barred. First, the trial court erred when it failed to transfer the motion to the court of appeals to be considered as a personal restraint petition because it was time barred. As argued in section 2 below, the opinion in ***Muholland*** did not constitute a significant intervening change in the law. Because the trial court erred when it failed to transfer the motion to this court as a PRP, it also erred when it entered

its order vacating the judgment and sentence where it had no authority to do so.

Where the trial court's error was its failure to transfer the motion to this court to be considered as a personal restraint petition, it is also the State's position that this court should now consider the motion as a personal restraint petition, and dismiss it as time barred. It serves no purpose and is contrary to the interests of judicial economy for this court to do nothing more than remand the matter back to the trial court with an order directing it to transfer the matter to this court to be considered as a personal restraint petition.

Because this matter is before the court on appeal, but the State also argues that the court should nonetheless also consider the motion as a personal restraint petition, the court should keep in mind the distinction between the statutes governing collateral attack, and RAP 16.4-16.15 that govern personal restraint petitions. Were the court to disagree with the State, the distinction between this court considering the case as an appeal as opposed to a personal restraint petition could possibly affect the relevant standards of review employed by the court as should become apparent from the argument in subsection 2 below.

2. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE DEFENDANT'S MOTION IS NOT TIME BARRED.

The State had argued in part in its written response to the trial court that the defendant's motion should be transferred to the court of appeals to be considered as a personal restraint petition because it was time barred. CP 104-05. However, the trial court ultimately concluded that the opinion in ***In re Mulholland*** was a significant change in the law, leading the trial court to hold that the defendant's claim was not time barred. CP 268 (Finding and Conclusion No. 1); ***In re Mulholland***, 161 Wn.2d 322. However, because the court's opinion in ***Mullholland*** was not a significant change in the law, the defendant's claim is time barred.

Personal restraint procedure came from the State's *habeas corpus* remedy, which is guaranteed by article 4, § 4 of the State Constitution. ***In re Hagler,*** 97 Wn.2d 818, 823, 650 P.2d 1103 (1982). Collateral attack by personal restraint petition is not, however, a substitute for direct appeal. ***Hagler,*** 97 Wn.2d. at 824. "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." ***Hagler,*** 97 Wn.2d at 824 (citing ***Engle v. Issac,*** 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). These costs are significant and require that collateral relief be limited in state as well as federal courts. ***Hagler,*** 97 Wn.2d at 824.

Because of the costs and risks involved, there is a time limit in which to file a collateral attack. The statute that sets out the time limit provides:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than 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 attack includes personal restraint petitions, as well as a motion to vacate judgment. RCW 10.73.090(2). Where an appeal has been filed, a judgment and sentence becomes final on the date the appellate court issues its mandate. RCW 10.73.030(b).

Pursuant to RCW 10.73.090(1), petitioner could have filed a first-time personal restraint petition within one year of May 16, 2005, the date the Mandate was filed. See CP 46-70. Any fist-time collateral attack filed after May 16, 2006 is beyond the one-year collateral attack time limit. Petitioner filed this petition on October 15, 2010, over five years too late unless it falls under an exception to the collateral attack time limit.

The plain language of RCW 10.73.090(1), limits the application of the collateral attack time limit to the judgment and sentences that are 1) valid on their face and 2) rendered by a court of competent jurisdiction. However, there are other specific exceptions to the one-year time limit for collateral attack as specified in RCW 10.73.100.

The Supreme Court has addressed what made a judgment facially invalid under RCW 10.73.090(1):

A "'facial invalidity' inquiry under RCW 10.73.090 is directed to the judgment and sentence itself." In ***re Pers. Restraint Hemenway***, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). "'Invalid on its face' means the judgment and sentence evidences the invalidity without further elaboration." ***Hemenway***, 147 Wn.2d at 532 (citing ***In re Pers. Restraint of Goodwin***, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002); ***In re Pers. Restraint of Stoudmire***, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000)).

A good review of what documents other than the judgment and sentence the court has considered in finding facial invalidity occurred recently in ***In re Coats***, 173 Wn.2d 123, 143, 267 P.3d 324 (2011).

While the Court does not limit its review for facial invalidity to the four corners of the judgment and sentence, it only considers other documents to the extent that they reveal some fact that shows the judgment and sentence is invalid on its face because of a legal error. ***Coats***, 173 Wn.2d. at 138-39. The court has found invalidity based upon charging documents, verdicts and plea statements of defendants on plea of guilty. ***In re Carrier***, 173 Wn.2d 791, 799, 727 P.3d 209 (2012). While the court may consult verdict forms, it may not consult the jury instructions, trial motions, and other documents that relate to whether the

defendant received a fair trial. ***In re Scott***, 173 Wn.2d 911, 917, 271 P.3d 218, (2012). "A judgment and sentence is valid on its face even if the petitioner can show some error that might have received relief if brought on direct review or in a timely personal restraint petition." ***Scott***, 173 Wn.2d at 917.

In ***Stoudmire***, the court held the judgment and sentence was facially invalid where the information showed that the statute of limitations had run when the counts at issue were charged so that the court lacked jurisdiction as to those counts. ***Coats***, 173 Wn.2d at 139 (citing ***In re Stoudmire***, 141 Wn.2d at 346, 5 P.3d 1240 (2000)).

In ***Thompson***, the court held the judgment and sentence was facially invalid where the information and statement of defendant on plea of guilty revealed that the crime the defendant had pleaded guilty to had not been enacted until two years after the charged conduct occurred. ***Coats***, 173 Wn.2d at 139 (citing ***In re Pers. Restraint of Thompson***, 141 Wn.2d 712, 716, 10 P.3d 380 (2000)).

In ***Hinton***, in determining facial invalidity, the court reviewed documents related to the charging instruments, statements of guilty pleas to determine that the defendant was convicted of a non-existent crime. ***Coats***, 173 Wn.2d at 139-40 n. 11 (citing ***In re Hinton***, 152 Wn.2d 8533, 100 P.3d 801 (2004)).

A judgment and sentence is invalid if it imposes a sentence in excess of the punishment authorized by law. ***In re Carrier***, 173 Wn.2d at 798. A miscalculated offender score renders a sentence invalid, and therefore may be challenged in a personal restraint petition at any time. ***Coats***, 173 Wn.2d 139 n. 10 (citing ***In re Pers. Restraint of Goodwin***, 146 Wn.2d 861, 865-67, 50 P.3d 618 (2002)).

An involuntary plea does not render a judgment and sentence facially invalid for purposes of circumventing the one-year bar on collateral attack under RCW 10.73.090. ***In re Coats***, 173 Wn.2d 123, 143, 267 P.3d 324 (2011).

In ***Bass v. Smith***, 26 Wn.2d 872, 176 P.2d 355 (1947), the Supreme Court addressed a challenge based on facial invalidity. Mr. Bass sought relief by *habeas corpus* contending that his judgment was void because it listed the statutory maximum for his conviction on rape as being "not more that fifteen years" when under the relevant law it should have been set at "not less than twenty years." ***Bass*** 26 Wn.2d at 874-875. The Supreme Court agreed that the judgment was erroneous but went on to hold that not every "erroneous judgment" is the equivalent of a "void judgment." It found that the judgment was not void because the trial court had had subject matter jurisdiction as well as personal jurisdiction over

Mr. Bass, who had been present at the time of sentencing. ***Bass*** 26 Wn.2d at 877.

While the judgment was deficient, it was not absolutely unauthorized, or of an entirely different character from that authorized by law. The judgment was erroneous, in that it did not impose a sentence of not less than twenty years, as provided by Rem. Rev. Stat. (Sup.), § 10249-2, but it was not absolutely void. ***Bass*** 26 Wn.2d at 877. The Court concluded that as only void judgments could be collaterally attacked by way of *habeas corpus*, Mr. Bass was not entitled to relief. ***Bass*** 26 Wn.2d at 876-77.

More recent cases discussing the nature of facial invalidity are in accord with ***Bass***. In ***In re Pers. Restraint of Stoudmire***, the court found that the judgment was void with respect to Stoudmire's convictions for indecent liberties because the judgment showed that the charges were filed after the statute of limitations had expired. ***Stoudmire,*** 141 Wn.2d at 354. A criminal statute of limitation is not merely a limitation upon the remedy, but is a "limitation upon the power of the sovereign to act against the accused[;]" it is jurisdictional. ***State v. Glover,*** 25 Wn. App. 58, 61, 604 P.2d 1015 (1979), citing ***State v. Fogel,*** 16 Ariz. App. 246, 248, 492 P.2d 742, 744 (1972). Similarly, in ***In re Pers. Restraint of Thompson***, 141 Wn.2d 712, 719, 10 P.3d 380 (2000), the plea documents showed that

Thompson had been charged with an offense that did not become a crime until nearly two years after his offense was committed. The court noted that "[e]xceptions to the foreclosure of collateral attack on a guilty plea exist where on the face of the record the court had no power to enter the conviction or impose the sentence. ***Thompson***, 141 Wn.2d at 720. The judgments in ***Stoudmire*** and ***Thompson*** revealed that those trial courts were without authority to enter a judgment against those defendants for the crimes to which they entered guilty pleas. These cases are significantly different from the defendant's, where the court had jurisdiction over his crimes.

Additionally, recent cases that have found facial invalidity based upon an incorrect sentence length have been limited to when the sentence is in excess of the length authorized by the legislature. *See* ***In re Pers. Restraint of West***, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005) ("A judgment and sentence is invalid on its face if it exceeds the duration allowed by statute..."); ***In re Pers. Restraint of Goodwin***, 146 Wn.2d 861, 873, 50 P.3d 618 (2002) ("In keeping with long standing precedent, we adhere to the principles that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based upon a miscalculated offender score (miscalculated upward)...").

In contrast, however, this Court rejected an untimely challenge to a trial court's imposition of an exceptional sentence upward where the defendant claimed that it was imposed based on an invalid reason. ***In re Pers. Restraint of Richey***, 162 Wn.2d 865; 175 P.3d 585 (2008). The court noted that "while the one-year time limit on collateral attack does not apply to sentences in excess of the court's jurisdiction, a sentence is not jurisdictionally defective merely because it is in violation of a statute or is based on a misinterpretation of a statute."

An assertion that a plea is involuntary does not establish that a judgment is invalid on its face. *See* ***In re Hemenway,*** 147 Wn.2d 529, 531, 55 P.3d 615 (2002) (holding that a defendant's collateral attack was time barred where he filed the petition more than one year past the one year time limit, and the defendant's only challenge was that his plea was not voluntary, knowing, and intelligent, because he was not informed of the term of mandatory community placement).

All of these modern cases follow the principles of ***Bass***; for a judgment to be "facially invalid" a petitioner must show that the judgment reveals that the trial court was without authority to enter judgment on the offense or that the sentence imposed was one which exceeded the sentencing authority given by the Legislature. An error in the judgment, however, does not necessarily render the judgment facially invalid.

Applying the principles of ***Bass*** to the case now before the court, petitioner has failed to show facial invalidity in his judgment. Indeed, his claim is that when the trial court imposed its sentence, it failed to exercise its discretion as to whether or not to run the sentences consecutive or concurrent. That does not render the judgment one that is not authorized by law. The judgment and sentence in this case is not invalid on its face.

Although the judgment and sentence is not invalid on its face, the court must also consider whether the defendant's claim falls under an exception to the time limit.

> The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:
>
> (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
>
> (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
>
> (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the State Constitution;
>
> (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
>
> (5) The sentence imposed was in excess of the court's jurisdiction; or
>
> (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court,

> in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100.

A defendant bears the burden of proving that his motion falls within an exception to the one-year time limit. ***Shumway v. Payne,*** 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998).

If the Court independently reviews a petition filed more than one year after finality, the issues within it must necessarily fall within one of three categories: 1) no exception applies, and issue is time barred; 2) issue is allowed under an exception listed in RCW 10.73.100; 3) issue is allowed under an exception listed in RCW 10.73.090(1).

The first step in that process is to determine if all of the issues in the petition fall within the exceptions listed in RCW 10.73.100. *See* ***Stoudmire***, 141 Wn.2d at 348-52. If so, the court hears the entire petition on its merits.

If some, but not all, of the issues raised fall within the exceptions in RCW 10.73.100, the petition is considered a "mixed petition." ***Stoudmire***, at 349. When faced with a "mixed petition," the issues raised are resolved in one of three ways: 1) those issues that do not fall within any exception to either RCW 10.73.090(1) or RCW 10.73.100 are

dismissed with prejudice as time barred; 2) those issues that fall within an exception to RCW 10.73.100 are dismissed without prejudice so they can be re-filed in a petition that lists "solely" those issues as required by RCW 10.73.100; and 3) those issues that fall within an exception to RCW 10.73.090(1) are heard on their merits. ***Stoudmire***, at 350-51. *See also* ***In re Carter***, 154 Wn. App. 907, 916, 230 P.2d 181 (2010).

Finally, if none of the issues fall into any exception, the entire petition is dismissed. ***Stoudmire***, at 350-51.

The defendant has not met his burden of proving that the issues in his petition fall within a recognized exception to the one-year time limit. As a result, his motion should have been dismissed by the trial court. *See e.g.*, ***Shumway v. Payne,*** 136 Wn.2d at 399-400. When a petitioner fails to meet his burden of proof on the merits of a personal restraint petition, the petition is dismissed. ***In re Hews,*** 99 Wn.2d 80, 88, 660 P.2d 263 (1983). It stands to reason, then, that if the petitioner fails to establish that his collateral attack is timely, such that the merits should not even be reached, and his attack should also be dismissed. Without reaching the merits of the personal restraint petition, the Court should dismiss it as time-barred.

Neither the Supreme Court nor the Court of Appeals may grant relief on a petition which is time-barred. RAP 16.4(d) provides, in part:

> The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100 and .130.

[Emphasis added.]

Ordinarily collateral attacks in the appellate courts are personal restraint petitions, which are also governed by the rules of appellate procedure relating to personal restraint petitions. *See* RAP 16.4-16.15. Those rules work in conjunction with the statutes. *See e.g.*, 16.4(d) (stating that relief on PRPs will only be granted if it may be granted under RCW 10.73.090, .100 and RCW 10.73.130).

However, in any case, RAP 16.4-16.15 do not initially apply directly under the procedural posture of this case because the issue is before the court as an appeal, not a personal restraint petition so that the RAPs governing personal restraint petitions are inapplicable. Nonetheless, because the court rules on personal restraint petitions and the statutes on collateral attack are closely related, work together and contain similar language, many of the cases interpreting the statutes on collateral attack are personal restraint petition cases. Moreover, to the extent that this court accepts the State's argument that it should also as a second step consider the defendant's motion as a personal restraint petition, RAP 16.4-16.15 would be applicable.

Cases interpreting RCW 10.73.100(6) interpret "significant change in the law" as a change that effectively overturns prior material law so that the arguments currently at issue were previously unavailable to the litigants. ***In re Personal Restraint of Rowland***, 149 Wn. App. 496, 503, 204 P.3d 953 (2009); ***In re Stoudmire***, 145 Wn.2d 258, 264, 36 P.3d 1005 (2001); ***In re Greening***, 141 Wn.2d 687, 697, 9 P.3d 206 (2000). *See also* ***State v. Vandervlugt***, 120 Wn.2d 427, 432, 842 P.2d 950 (1992) (citing ***In re Taylor***, 105 Wn.2d 683, 688, 717 P.2d 755 (1986)).

The language of RAP 16.4(c)(4) mirrors the language of RCW 10.73.100(6). RAP 16.4(c)(4) provides that review in a personal restraint petition is available where:

> There has been a significant change in the law...and sufficient reasons exist to require retroactive application of the changed legal standard.

Here, the trial court erred when it concluded that the opinion in ***Mulholland*** constituted a significant change in the law. The opinion in ***Mulholland*** did not constitute a significant change in the law where it did not reverse established precedent. *See* ***In re Personal Restraint of Rowland***, 149 Wn. App. 496, 204 P.3d 953 (2009); ***In re Domingo***, 155 Wn.2d 356, 119 P.3d 816 (2005).

RCW 10.73.140 also limits the filing of subsequent collateral attack petitions.

> If a person has previously filed a petition for personal restraint, the Court of Appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the Court of Appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the Court of Appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition. Upon receipt of a first or subsequent petition, the Court of Appeals shall, whenever possible, review the petition and determine if the petition is based on frivolous grounds. If frivolous, the Court of Appeals shall dismiss the petition on its own motion without first requiring the state to respond to the petition.

[Emphasis added.] *See also* ***In Re Vasquez***, 108 Wn. App. 307, 31 P.3d 16 (2001) (holding that where a CrR 7.8 motion is transferred to the Court of Appeals for consideration as a personal restraint petition, the defendant is barred by RCW 10.73.140 from filing successive petitions without good cause). *See also* ***In re Smith***, 117 Wn. App. 846, 857, 73 P.3d 386 (2003), abrogated by ***In re Domingo***, 155 Wn.2d 356, 119 P.3d 816 (2005) on the issue of whether the issuance of ***State v. Roberts,*** 142 Wn.2d 471, 512-13, 14 P.3d 713 (2000) and ***State v. Cronin***, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000); ***In re Holmes***, 121 Wn.2d 327, 329-30 894 P.2d 1221 (1993); ***In re Johnson***, 131 Wn.2d 558, 563ff, 933 P.2d

1019 (1997); ***In re Personal Restraint Petition of Vasquez***, 108 Wn. App. 307, 31 P.3d 16 (2001); ***Kibler v. Walters***, 220 F.3d 1151, 1153-54 (9th Cir. 2000).

Here, the defendant has made no showing of good cause as to why the issue was not raised in his prior personal restraint petition. For that reason, the defendant's claim is also barred.

Indeed, RAP 16.4(d) also limits successive personal restraint petitions. RAP 16.4(d) provides: "No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown."

This case does not fall under the provision for a successive petition where the issue raised in the motion before the court was not raised previously. Nonetheless, the prohibition on successive petitions again shows how complementary and interconnected are RCW 10.73.140 and RAP 16.4(d). *See e.g.*, ***In re Personal Restraint of Taylor,*** 105 Wn.2d 683, 688, 717 P.2d 755 (1986) (applying to collateral review the rule limiting review of the same ground presented in a subsequent personal restraint petition as established in ***In re Haverty***, 101 Wn.2d 498, 681 P.2d 835 (1984), even while noting that the rule in ***Haverty*** was not directly on point because there is no rule similar to RAP 16.4(d) that prevents the ability of a petitioner to raise in a PRP issues that were already raised on appeal.)

Even with a successive petition, the Supreme Court has held that a petitioner demonstrates good cause for advancing the same grounds for relief under the rule when there has been a "significant, intervening change in the law [which] may occur as a result of a decision by this court." ***Johnson***, 131 Wn.2d at 567; *see also* ***In re Jeffries***, 114 Wn.2d 485, 488, 789 P.2d 731 (1990); ***Taylor***, 105 Wn.2d at 688. However, for the reasons explained above, the opinion in ***Mulholland*** did not constitute an intervening change in the law.

The court's reliance on ***Mulholland*** could also be viewed as based on a claim that the issues he raises are constitutional and that therefore the court must grant him relief if he shows actual prejudice stemming from the errors. Pet., p. 6 (citing RAP 16.4(c)(2)); and ***In re Personal Restraint of Hews***, 99 Wn.2d 80, 87, 660 P.2d 263 (1983)). However, RAP 16.4 operates in conjunction with RCW 10.73.090, .100, and .130. *See* RAP 16.4(d). Accordingly, this Court does not reach those issues if they are time barred unless they fall under an exception to the time bar. *See* RCW 10.73.090, .100. There is no general exception to the time bar simply because issues are constitutional in nature.

Here, the trial court erred when it concluded that the defendant's motion was not time barred. This is because the defendant failed to meet his burden to show that his motion fell under some exception to the time

bar. The judgment and sentence was rendered by a court of competent jurisdiction, is valid on its face and does not fall under an exception to the time bar where the court's opinion in ***Mulholland*** did not constitute a significant intervening change in the law because it did not overturn established precedent. The challenge the defendant now makes to his judgment and sentence could have been raised on direct appeal, or within the one-year collateral attack time limit.

Accordingly, the conclusion of the trial court that the motion fell under an exception to the one-year collateral attack time limit was error. For this reason, trial court erred when it failed to transfer the motion to the court of appeals to be considered as a personal restraint petition and instead considered the motion on the merits. This court should therefore reverse the trial court's order vacating the defendant's judgment and sentence. Doing so, it should then go on to consider the motion as a personal restraint petition, and dismiss it as time barred.

3. THE COURT ERRED IN GRANTING THE DEFENDANT'S MOTION BECAUSE THE RECORD DOES NOT ESTABLISH THAT THE COURT WAS UNAWARE IT HAD DISCRETION, AND IN ANY CASE THE DEFENSE NEVER PRESENTED MITIGATION EVIDENCE AT THE ORIGINAL SENTENCING SO THAT ANY MISUNDERSTANDING OF THE COURT'S AUTHORITY WAS HARMLESS AND IRRELEVANT.

The trial court erred when it entered its finding no. 3 that the court believed that it did not have discretion to impose a concurrent sentence. *See* CP 268 (Finding/Conclusion no. 3).

Prior to Miller's sentencing, Miller's co-defendant Tonya Wilson asked the court for an exceptional sentence below the standard range. CP 145-263 (*See* Exhibit C, p. 42, ln. 14-16.) Indeed, the defense for Ms. Wilson made a significant presentation of mitigating factors in asking for a sentence below the standard range. CP 145-263 (*See* Exhibit C, p. 46, ln. 15 to p. 46, ln. 13; p. 52, ln. 13 to p. 54, ln. 25; p. 56, ln. 1 to p. 61, ln. 13). And indeed, the court in fact imposed an exceptional sentence below the standard range. CP 145-263 (*See* Exhibit C, p. 63, ln. 3 to p. 65, ln. 16.) In doing so, the court noted that RCW 9.4A.535 permitted it to depart from the guidelines if there are substantial and compelling reasons. CP 145-263 (*See* Exhibit C, p. 63, ln. 21-23.) Moreover, as was the case with Miller, Tonya Wilson was also convicted of two serious violent offenses. CP 145-263 (*See* Exhibit C, p. 42, ln. 6-10). The prosecutor asked the

court if the sentences on Wilson's counts were running consecutively or concurrently and the court specified consecutive sentences as to the two counts. CP 145-263 (*See* Exhibit C, p. 66, ln. 17-20).

Counsel for Miller asked the court to exercise its discretion and impose a low end sentence. CP 145-263 (*See* Exhibit C, p. 83, ln. 12 to 84, ln. 1). Counsel did not ask for an exceptional sentence below the standard range.

However, the court did not impose the low end of the range. Rather the court imposed 200 months per count, which was slightly above the low end of the standard range. CP 145-263 (*See* Exhibit C, p. 86, ln. 21 to p. 9). The court went on to say that 400 months was the appropriate amount of time. CP 145-263 (*See* Exhibit C, p. 87, ln. 5-7).

While a defendant cannot waive alleged legal errors regarding sentencing, a defendant can waive errors involving a matter of trial court discretion. ***State v. Mendoza***, 139 Wn. App. 693, 701, 162 P.3d 439 (2007). Because the defense did not request that the sentences be imposed concurrently, the issue was waived, and any misunderstanding by the trial court was irrelevant.

Where the defendant did not ask the court for an exceptional sentence by running the sentences on counts I and II concurrent, he cannot now claim that the court erred when it failed to impose such a sentence. Because his attorney did not request that the sentence be run concurrent, nor otherwise request an exceptional sentence below the standard range,

the defendant could only bring a claim by way of ineffective assistance of counsel. *See, e.g.,* ***State v. Aho***, 137 Wn.2d 736, 744-46, 975 P.2d 512 (1999) (holding that ineffective assistance of counsel is the mechanism to raise issues barred by invited error).

4. THE DEFENDANT CANNOT PREVAIL ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHERE IT PRESENTS NO NEW MITIGATION INFORMATION AND SUCH A CLAIM IS TIME BARRED.

Where the defendant's primary claim is time barred, he is not entitled to now re-frame it as a claim of ineffective assistance of counsel where he failed to make such a claim within the collateral attack time limit. *See* ***In re Haghighi***, 167 Wn. App. 712, 276 P.3d 311, 318 (2012).

Moreover, the defendant cannot prevail on a claim that defense counsel at sentencing was ineffective.

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Moreover, to raise a claim of ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. ***McFarland***, 127 Wn.2d at 333-34; ***State v. Riley***, 121 Wn.2d 22, 846 P.2d 1365 (1993).

It is unclear if the same standard applies when a claim of ineffective assistance of counsel is raised for the first time in a personal restraint petition. In ***In re Crace***, this court held that the defendant's burden on ineffective assistance was the same in a PRP and in a direct appeal, however, there was a dissenting opinion on that issue. *See* ***In re Crace***, 157 Wn. App. 81, 93-95, 114-119, 236 P.3d 914 (2010) (Quinn-Britnall, dissenting), *review granted*, 171 Wn.2d 1035, 257 P.3d 664 (2011).[3]

Notwithstanding the majority opinion in ***Crace***, it is the State's position that a higher standard of review applies to claims of ineffective assistance of counsel when raised in a personal restraint petition. This

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[3] Oral argument in the Supreme Court was held on January 24, 2012.

court should not follow the court of appeals' opinion in ***Crace*** because it is contrary to the established law in Washington.

It is a long standing principle in Washington law that a "personal restraint petition is not to operate as a substitute for a direct appeal." ***In re Hagler***, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). This Court expressly rejected the idea that constitutional errors that can never be harmless on direct appeal will also be presumed prejudicial in a personal restraint petitions. ***In re Personal Restraint of St. Pierre***, 118 Wn.2d 321, 823 P.2d 492 (1992), citing ***In re Boone***, 103 Wn.2d 224, 233, 691 P.2d 964 (1984).

> We have limited the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders. Therefore, we decline to adopt any rule which would categorically equate per se prejudice on collateral review with per se prejudice on direct review. Although some errors which result in per se prejudice on direct review will also be per se prejudicial on collateral attack, the interests of finality of litigation demand that a higher standard be satisfied in a collateral proceeding.

St. Pierre, 118 Wn.2d at 329 (internal citation omitted) (emphasis added).

It was in ***Hagler***, that this Court discussed the federal standard applicable to collateral attacks and how the federal petitioner had "'the burden of showing, not merely that the errors at his trial created a

possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" ***Hagler***, 97 Wn.2d at 825, quoting ***United States v. Frady***, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). The Supreme Court then adopted the standard for collateral attacks under state law. ***Hagler***, at 825. It also articulated how this standard shifted an additional burden onto the petitioner. Once a criminal defendant shows a constitutional error in a direct appeal, the burden is on the State to show the error is harmless beyond a reasonable doubt, but in a collateral attack the burden is on the petitioner to show that the error was not harmless – or, said conversely –that it was prejudicial. This Court held that this additional burden had to be proved by a preponderance of the evidence:

> Thus, in order to prevail in a collateral attack, a petitioner must show that more likely than not he was prejudiced by the error.

Hagler, 97 Wn.2d at 826 (emphasis added). A petitioner who cannot establish actual and substantial prejudice is not entitled to collateral relief. ***St. Pierre***, 118 Wn.2d at 330-331. This principle has been reiterated by this Court repeatedly. ***In re Davis***, 142 Wn.2d 165, 170-171, 12 P.3d 603 (2000), citing ***In re Personal Restraint of Benn***, 134 Wn.2d 868, 884-85, 952 P.2d 116 (1998) (citing ***In re Personal Restraint of Lord***, 123 Wn.2d 296, 303, 868 P.2d 835 (1994)); ***Matter of Pirtle***, 136 Wn.2d 467, 490-93,

965 P.2d 593 (1998); ***In re Personal Restraint of Hews***, 99 Wn.2d 80, 87, 660 P.2d 263 (1983); ***In re Personal Restraint of Cook***, 114 Wn.2d 802, 810, 792 P.2d 506 (1990)).

This line of authority reflects that a petitioner in a collateral attack is not entitled to the benefit of many legal standards that are available to a defendant on direct review. For example, the rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. ***In re Mercer***, 108 Wn.2d 714, 718 21, 741 P.2d 559 (1987); ***Hagler***, 97 Wn.2d at 825. Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it. ***Hagler***, 97 Wn.2d at 825 26.

The decision of the majority in ***Crace*** ignores this long-standing principle and holds that when a petitioner presents a claim of ineffective assistance of counsel on collateral attack he must make no greater showing of prejudice than an appellant would on direct appeal. *See* ***In re PRP of Crace***, 157 Wn. App. at 110 ("But we disagree [with the State] that a petitioner must undermine our confidence in the trial more than an appellant must.") (citing ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)). As the majority decision below relieved Crace of the increased burden imposed on a petitioner in a

collateral attack, it is in direct conflict with ***Hagler*** and the above cited line of authority.

The majority opinion views the State's argument as advocating that the standard set forth in ***Strickland*** be either altered or ignored when a claim of ineffective assistance of counsel is raised in a personal restraint petition. That is not the State's argument. The ***Strickland*** standard is the correct standard to assess whether there has been a constitutional violation of the Sixth Amendment right to counsel. ***State v. Grier***, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). When the ***Strickland*** standard is met in a direct appeal, then the appellant has demonstrated a constitutional violation and will be entitled to a new trial unless the State can show that the ineffective representation was harmless beyond a reasonable doubt. ***Hagler***, 97 Wn.2d at 825-26.

In a collateral attack, a petitioner who establishes ineffective assistance of counsel under the ***Strickland*** standard has established the existence of constitutional error, but under ***Hagler***, will not be entitled to relief until he shows, by a preponderance of the evidence, that he was more likely than not prejudiced by the error. ***Hagler***, 97 Wn.2d at 825-26.

Thus, a petition seeking collateral relief on a claim of ineffective assistance of counsel must meet two different burdens of showing prejudice. To establish a constitutional error under ***Strickland***, he must

show there is a reasonable probability that the result would have been different but for the defense attorney's errors. But to obtain collateral relief, he must make a higher showing that the outcome of the trial more likely than not would have been different had the constitutional error not occurred. *See* ***Hagler***, at 826.

The different function of these two standards is demonstrated in the decision of this Court in ***In re Personal Restraint of Rice***, 118 Wn.2d 876, 828 P.2d 1086 (1992). Rice raised a claim of ineffective assistance of counsel in his personal restraint petition. The court noted that no evidentiary hearing would be required on this issue if "in a collateral proceeding if the defendant fails to allege facts establishing the kind of prejudice necessary to satisfy the Strickland test." ***Rice***, 118 Wn.2d at 889, citing ***Hill v. Lockhart***, 474 U.S. 52, 60, 106 S. Ct. 366, 371, 88 L. Ed. 2d 203 (1985). Ultimately, the Supreme Court dismissed Rice's ineffective assistance of counsel claim because he had "not presented sufficient facts or evidence to establish a prima facie case of ineffective assistance under the ***Strickland*** test." ***Rice***, 118 Wn.2d at 889 (emphasis added).

This language makes it clear that a petitioner cannot obtain collateral relief simply by establishing the existence of error under the ***Strickland*** standard, as this represents only one of the hurdles that must be

overcome before he is entitled to collateral relief. *See also* ***In re Hews***, 99 Wn.2d at 88 (After making a prima facie showing that his plea was constitutionally invalid, Hews was entitled to a hearing where he had "the burden of establishing that, more likely than not, he was actually prejudiced by the claimed error.").

The cases cited above establish that collateral relief is a distinct process from a direct appeal, and that a court applying legal principles applicable to a direct review cannot be assured that it has addressed all of the legal standards applicable to a collateral attack. The burden on a petitioner seeking collateral relief is intentionally more onerous in order to protect the finality of judgment and the prominence of the trial court – two very important concepts that strengthen the public's confidence in the justice system as a whole.

One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. "Without finality, the criminal law is deprived of much of its deterrent effect." ***McCleskey v. Zant***, 499 U.S. 467, 491, 111 S. Ct. 1454 (1991), citing ***Teague v. Lane***, 489 U.S. 288, 309, 109 S. Ct. 1060, 1074, 103 L. Ed. 2d 334 (1989).

Any decision that grants collateral relief when the petitioner has done nothing more than make the same showing required of a defendant

on direct review flies in the face of the long standing principles cited above. Decisions, such as the majority opinion in ***Crace***, that fail to maintain the distinctions between collateral attacks and direct appeals are harmful in that they undercut the finality of judgments and lead to collateral attacks becoming an endless string of appeals. This Court should reject the decision ***Crace*** to the extent that it holds that a petitioner in a collateral attack raising a claim of ineffective assistance of counsel bears no higher burden that an appellant raising a similar claim on direct review.

In ***State v. Grier***, 171 Wn.2d 17, the Washington Supreme Court unanimously reversed the Court of Appeals decision finding Grier's attorney was ineffective for failing to request lesser included instructions and in finding that an "all or nothing" approach was not a reasonable trial tactic. In doing so the Supreme Court criticized the lower court's use of a three pronged test to assess Grier's claim and reaffirmed the standard set forth in ***Strickland*** as the proper analysis for ineffective assistance of counsel claims.

The Supreme Court held that the three pronged test used in these decisions "distorts the [proper] ***Strickland*** standard" because it was not sufficiently deferential to the strong presumption that counsel rendered

effective assistance. ***Grier***, 171 Wn.2d at 38. The Supreme Court explained that:

> Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision. Just as a criminal defendant with slim chances of prevailing at trial may reject a plea bargain nevertheless, a criminal defendant who genuinely believes she is innocent may prefer to avoid a compromise verdict, even when the odds are stacked against her. Thus, assuming that defense counsel has consulted with the client in pursuing an all or nothing approach, a court should not second-guess that course of action, even where, by the court's analysis, the level of risk is excessive and a more conservative approach would be more prudent.

Grier, 171 Wn.2d at 35.

The Supreme Court also criticized the lower court's determination of prejudice as it presumed if the jury had been instructed on a lesser included offense that it would have resulted in a compromise verdict rather than assuming that the jury would have followed the law and its instructions and not convicted Grier of the greater offense unless the State had met its burden of proof. ***Grier***, 171 Wn.2d at 43-44.

The court in ***Crace*** relied upon this improper three pronged test and an incorrect assessment of prejudice prong of the ***Strickland*** standard. *See* ***Crace***, 157 Wn. App. at 109. The lower court's reliance upon faulty legal analysis can also be seen from the fact that the Court of Appeals initially dismissed Crace's petition, but then granted his motion for

reconsideration, when he cited the court to its decision in ***Grier*** and asked the court to apply this three pronged test to his case. It is beyond question that the decision below rests upon a legal analysis that has been found to be erroneous by the Supreme Court. Therefore, the decision in ***Crace*** should be rejected by this court.

The court's analysis in ***Crace*** suffers from a second defect. The court held that persons attacking their convictions on collateral review for ineffective assistance of counsel need only show a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. ***Crace***, 157 Wn. App. at 105.

Numerous decisions of the Supreme Court have held that only a petitioner who can establish "actual and substantial prejudice" is entitled to collateral relief. To establish "actual and substantial prejudice," a petitioner must show that the outcome of the trial more likely than not would have been different had the deficient performance not occurred – this is a higher standard that a reasonable probability of a different outcome - the standard used by the court in ***Crace***. *See* ***In re Hagler***, 97 Wn.2d 818, 826, 650 P.2d 1103 (1982).

A panel of Division II, in a subsequent opinion, has reiterated that it believes the "reasonable probability" standard to be the correct standard to assess a claim of prejudice when ineffective assistance of counsel is

raised on collateral review. ***In re Personal Restraint of Monschke***, 160 Wn. App. 479, 490-91, 251 P.3d 884 (2010). Notwithstanding the court's holding in Monschke, it is the State's position that under ***Strickland*** the defendant must show prejudice beyond "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Monschke***, 160 Wn. App. at 490 (citing ***Strickland***, 466 U.S. at 694.

Here, the defendant cannot meet any of the requirements to show a claim of ineffective assistance of counsel. He has not demonstrated the facts necessary to adjudicate the claimed error; he has not shown that the trial court would likely have granted the motion for a concurrent sentence if it was made; and he cannot show that the defense counsel had no legitimate tactical basis for not raising the motion for a concurrent sentence in the trial court. Nor can he show that there is a reasonable probability that but for counsel's errors the result of the proceeding would have been different.

First, Miller has not put forth any additional facts regarding mitigation than would support the imposition of a concurrent sentence. Where he fails to show that any additional mitigating facts existed that were not presented by his attorney, there is no basis to claim that the court would have imposed a sentence different than it did. Here, the court

imposed a sentence above the low end, and did not impose an exceptional sentence below the low end, even though the court imposed such an exceptional sentence on Miller's co-defendant immediately before it sentenced her. Miller certainly cannot show that there is a reasonable probability that but for counsel's unprofessional error the outcome of the sentencing would have been different.

Moreover, defense counsel made an obvious tactical decision in asking for the low end of the standard range. Miller was more culpable than Wilson. Having just seen Wilson receive an exceptional sentence below the standard range, counsel for Miller wisely choose not to ask for too much. Instead by asking for the low end, he largely achieved what he sought when the court imposed a sentence only slightly above the low end of the standard range.

This is precisely the type of tactical decision that the Supreme Court in Grier has indicated is not supposed to be second guessed by the appellate courts.

The defendant cannot prevail on a claim of ineffective assistance of counsel. The defendant's motion should be dismissed as barred by the collateral attack time limit. It should also be dismissed because it is without merit.

E. CONCLUSION.

The procedural posture complicates the standard of review in this case. However, the court should hold that the trial court erred when it failed to transfer the defendant's motion to this court to be considered as a personal restraint petition where it was time barred. Because the motion was filed several years after the collateral attack time limit, it was barred where it did not qualify for an exception to the time limit. The trial court's reliance on ***In re Mulholland*** as a significant intervening change in the law is without merit and was error where ***Mulholland*** did not overturn an established rule of law.

The defendant's claim also fails on the merits where it was waived because it was not made by defense counsel at sentencing. Even if the defendant brought his claim by way of a claim of ineffective assistance of counsel, it would have also failed as time barred. Moreover, the defendant cannot show a reasonable probability that the outcome of the sentencing would have been different, where he presented no new facts to support mitigation, he cannot show the court would have imposed a different sentence, and where defense counsel made a reasonable tactical decision not to ask for an exceptional sentence below the standard range.

For all these reasons, the trial court should be reversed, and the motion dismissed.

DATED: July 2, 2012

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Stephen Trinen by K. Proctor
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Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service: efile
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/2/12 [signature]
Date Signature

PIERCE COUNTY PROSECUTOR

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