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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THEODORE R. RHONE, APPELLANT
PETITIONER

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 03-1-02581-1

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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

1. Is defendant improperly attempting to use a direct appeal from resentencing in a case on remand from a partially successful collateral attack to improperly litigate a time-barred challenge to jury instructions that exist behind his facially valid judgement?
2. Does defendant's consolidated collateral attack raise an extension of *Batson*, which is not retroactively applicable to his case, to challenge a valid judgement without the proof of actual prejudice he would need for a reviewable claim to prevail?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Defendant was charged with possessing crack cocaine with intent to deliver (Ct. I), first degree robbery (Ct. II), unlawful possession of a firearm (Ct. III) and bail jumping (Ct. IV). CP 1. Firearm enhancements attended Counts I-II. *Id.* The court denied defendant's CrR 3.6 motion to suppress the firearm and drugs recovered from a car he rode in during the robbery. CP 163. Defendant was convicted as charged. CP 212. He was sentenced to life as a persistent offender. *Id.* This Court upheld the CrR 3.6 ruling under

the search incident to arrest exception. No. 34063-1-II (2007 WL 831725, 1). The Supreme Court granted review of a claim raised under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), and affirmed. 168 Wn.2d 645, 229 P.3d 752 (2010). The United States Supreme Court limited the search incident to arrest exception. *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009). Defendant's case became final June 15, 2010. CP 352.

His first PRP was dismissed January 30, 2012, because his robbery conviction was supported by sufficient evidence. CP 383. (No. 42104-6-II). His second PRP was dismissed as time barred July 31, 2012. CP 385 (No. 42812-1-II). His third PRP was transferred to the Supreme Court under RCW 10.73.140 on July 9, 2013. It claimed the search incident to his arrest violated *Gant*. CP 387 (No. 44411-9-II). His case was remanded for reconsideration of the suppression ruling in light of *Gant*. CP 390.

The Honorable Edmund Murphy presided over the CrR 3.6 hearing as the previous trial judge, the Honorable Linda C.J. Lee, had ascended to this Court. RP(6/16/14). The State supplemented the record. RP (9/26/14) 25-28. Defendant argued from Judge Lee's findings without asserting this Court's 2007 decision as law of the case. RP(6/20/14) 5, 10; (9/26/14) 30-31, 33-35, 41-43. He conceded there was no search incident to arrest as there was no probable cause to arrest before the search. RP(9/26/14) 31.

Discussion focused on whether a warrant should have been secured to examine the car's interior. RP (9/16/14) 41-44.

Judge Murphy incorporated several of Judge Lee's findings into his own. RP (10/10/14) 46-50, 69-70. Consistent with defendant's concession, Judge Murphy decided the case did not involve a search incident to arrest, but rather a vehicle-safety sweep for weapons. RP(10/10/14) 50-55, 71-72. Denial of the motion was reaffirmed as *Gant* does not apply to pre-arrest safety sweeps for firearms. *Id.* Defendant appealed.

The State's response recalled this Court to the unusual posture of the case where the trial court's post-PRP CrR 3.6 ruling was on direct appeal, but defendant's convictions were not. For the convictions were transferred pursuant to a PRP that only avoided RCW 10.73.090's time bar under RCW 10.73.100(6)'s "significant change in the law" exception. Pursuant to the PRP posture, defendant was obliged to prove constitutional error attending the alleged *Gant* violation resulted in actual and substantial prejudice. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004). Constitutional errors incapable of being harmless on direct appeal are not presumed prejudicial in a collateral attack. *Id.* at 672, n.23. The State next recalled this Court to the immateriality of the firearm recovered during the challenged search to the first degree robbery conviction, where it was enough for defendant to have displayed "what appeared to be a firearm." CP

592; RCW 9A.56.200. Defendant's use of a gun was well proved through eye witnesses. *E.g.*, COA No. 34063-1-II (2007 WL 831725, 1-2).

This Court affirmed the robbery conviction underlying defendant's sentence, but reversed his firearm and drug convictions. COA No. 46960-0-II (2016 WL 3702707, 5-6). The Supreme Court denied review. (No. 93628-5). So, his case was remanded to the trial court for execution of the Mandate to vacate the reversed convictions, then resentence on the robbery. Defendant raised an alleged *Batson* error and uncharged means claim under CrR 7.5 and CrR 7.8, which were transferred to this Court as a fourth PRP. His latter claim was reframed in the consolidated direct appeal.

2. FACTS

Deputy Shaffer received a report of a suspicious vehicle in the Jack in the Box drive-thru window. No. 34063-1-II (2007 WL 831725, 1-3). Dispatch relayed a red Camaro (DOL 677 HCS) with three occupants drove through a drive-thru window, during which one of the occupants displayed a gun and demanded money for a debt. *Id.* Shaffer fortuitously recognized the Camaro to be associated with a drug house in an area he patrolled. Shaffer found the Camaro at that house. *Id.*

Shaffer made a felony stop with his sidearm drawn out of concern for the reported firearm. Defendant was getting out of the car's passenger side when the stop was initiated. When Shaffer ordered him to show his

hands, defendant slowly and deliberately looked at Shaffer, then leaned back into the car. These movements made Shaffer believe defendant had a weapon or was reaching for one. Defendant was detained. *Id.*

Assisting officers removed the other occupants, Phyllis Burg and Cortez Brown, from the car. While being removed, Burg said they just came from Jack in the Box. An officer patted down all three occupants. Defendant had a knife without a handle, someone else's checkbook and a \$20 bill. All three were handcuffed and placed in separate police cars. As Shaffer walked toward the Camaro, Burg, the Camaro's owner, told him there was a gun inside her car. Officer Miller left to investigate at the Jack in the Box where the robbery occurred. *Id.*

Shaffer decided to secure the gun. He did not see anything in plain sight on his approach. He found the gun in a plastic bag wrapped inside a towel. Shaffer located crack cocaine inside a purple Crown Royal bag and small plastic tube. *Id.* Shaffer did not say he was arresting the occupants until Officer Miller called him from the Jack in the Box. Miller relayed the Camaro approached the drive-thru window where its occupants contacted an employee and demanded money from him. When the employee refused, one of the occupants displayed a gun and the employee threw \$30 into the car. Shaffer arrested all three occupants for armed robbery after receiving this information. *Id.* Jack in the Box employee Isaac Miller testified he owed

defendant money but claimed it had been collected by Brown, the Camaro's other male occupant. Isaac¹ noticed defendant holding a gun in his lap and pointing it at Isaac during their contact. Isaac decided to give defendant the money and threw what he had into the car. *Id.*

Burg testified defendant asked Brown and her for a ride to Jack in the Box in her Camaro. Although she could not see defendant's lap, she heard him demanding \$40, and saw money thrown into her Camaro. She saw defendant with a bag and she saw a gun in the bag when defendant threw it into the back seat after police surrounded her Camaro. *Id.*

Deputy Shaffer testified at length about the Crown Royal bag's contents. Inside the bag, he found five small baggies of crack cocaine, a handwritten note with "40's" written on it, and \$30 in cash. *Id.* Detective Hickman testified as an expert on street level crack cocaine transactions. He noted a typical street sale involved selling amounts in \$20 or \$40 values. The crack rocks in this case were uniform in size, suggesting they had been measured by a drug dealer. And the note with "40's" indicated it was likely the drugs were packaged for sale in \$40 increments. Hickman conceded a user could consume five packages in a week and a dealer would normally possess a cell phone, pager, scale and crib notes. *Id.*

¹ Mr. Isaac Miller's first name is used to avoid confusion with Officer Darrin Miller; no disrespect is intended.

C. ARGUMENT.

On review from an order denying a motion to vacate judgment, only the propriety of denial is reviewable; alleged improprieties in an underlying judgment are not. *State v. Gaut*, 11 Wn.App. 875, 880, 46 P.3d 832 (2002); *Bjurstrom v. Campbell*, 27 Wn.App. 449, 450, 618 P.2d 533 (1980). Final judgments cannot be restored to an appellate track by moving to vacate them and appealing the result. *State v. Wheeler*, 183 Wn.2d 71, 79, 349 P.3d 820 (2015); *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 427, 309 P.3d 451 (2013); *State v. Kilgore*, 167 Wn.2d 28, 38, 216 P.3d 393 (2009); RAP 2.4.

1. THE APPEAL WRONGLY URGES THIS COURT TO REVIEW A TIME-BARRED COLLATERAL CLAIM OF INSTRUCTIONAL ERROR THAT EXISTS BENEATH A FACIALLY VALID FINAL JUDGMENT AND FOR WHICH THERE IS NO RCW 10.73.100 EXCEPTION.

Collateral relief undermines the finality of litigation, degrades the prominence of trial and can cost society its right to punish guilty offenders. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823, 650 P.3d 1103 (1982). These grave costs require collateral relief to be limited in state as well as federal courts. *Id.* Statutory limitations on collateral relief cannot be avoided by moving to vacate judgments on remand for resentencing. *See Wheeler*, 183 Wn.2d at 79; *Adams*, 178 Wn.2d at 427; *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 141-42, 267 P.3d 324 (2011). The collateral attack time bar controls and must be overcome by the petitioner even if it stands in the way

of otherwise meritorious claims. RCW 10.73.090(2); *Shumway v. Payne*, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998); *In re Pers. Restraint of Quinn*, 154 Wn.App. 816, 226 P.3d 208 (2010); *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 754-57, 101 P.3d 1 (2004).

No motion for collateral attack may be filed more than one year after the judgment becomes final if the judgment is valid on its face and was rendered by a court of competent jurisdiction, unless one of six exceptions apply. RCW 10.73.090, .100. Here, defendant maintains the facial invalidity rule enables review of his instructional error claim. He is mistaken. The fact one error was corrected by way of a personal restraint petition did not open the remainder of his facially valid judgment to attack. Our Supreme Court has rejected the notion of treating a reviewable error as a “super exception” that opens the door to other claims unrelated to a judgment’s facial validity. *Adams*, 178 Wn.2d at 422-23.

- a. Binding precedent bars courts from delving beneath a facially valid judgment to review untimely raised claims of instructional error.

The facial invalidity exception is narrowly drawn. *Id.* at 424. Facial invalidity means a court exercised authority it did not have. *In re Pers. Restraint of Scott*, 173 Wn.2d 911, 917, 271 P.3d 218 (2012). “Invalid on its face” does not mean the court committed legal error as most legal errors do not deprive courts of their authority. *Id.* Most errors must be raised on

direct review, or in a timely PRP, or not at all. *Id.* at 916. Judgements for nonexistent crimes are facially invalid as are those for crimes charged after the statute of limitation expired. *Id.* Courts cannot consult jury instructions that support fair trial claims, for they cannot be reached once blocked by the one-year bar to collateral attacks. *Coats*, 173 Wn.2d at 140-41.

Courts can only look at charging documents and verdicts when they reveal error on the face of the judgment, not the other way around. *Coats*, 173 Wn.2d at 139; *In re Pers. Restraint of Stoudmire*, 114 Wn.2d 342, 5 P.3d 1240 (2000) (Information showed statute of limitation expiration). Instructions may not be consulted to determine facial validity. *Scott*, 173 Wn.2d at 917. For courts cannot look beneath a judgment to legal error implicating convictions in a way that does not deprive the court authority to adjudicate. *Coats*, at 141-42 (“invalid plea ... cannot on its own overcome one-year time bar or render ... valid judgment ... invalid”); *In re pers. Restraint of McKiearnan*, 165 Wn.2d 777, 782, 203 P.3d 375 (2009); *State v. Ammons*, 105 Wn.2d 175, 189, 713 P.3d 719 (1986).

It was recently discovered that defendant was charged with first degree robbery predicated on being “armed with a firearm,” but his jury was instructed on the “display[ed] what appear[ed] to be a firearm” means of committing that offense. It was that timely-filed charge’s viability not its means of commission that long ago empowered the court to enter judgment.

RCW 9A.04.080(1)(i); RCW 9A.56.200 (1)-(2). Both the “armed with a firearm” means charged and “display[ed] what appear[ed] to be a firearm” means instructed on have existed since the crime’s 1975 enactment. [1975 1st ex.s c 260]. So the mismatch of means between the Information and instructions behind the verdict, and beneath the judgment, has no bearing on the facial validity of that judgment.

Defendant mistreats an appeal from a CrR 7.8 motion he filed at resentencing as a direct appeal of his long ago final judgment. According to him, this Court should reverse his robbery conviction because a comparison between his charging document and jury instructions—two documents that exist beneath his judgment—reveal his valid conviction for the existent and timely filed charge of first degree robbery to be predicated on an uncharged means of committing that offense. This claim of legal error depends on the forbidden-inverted approach of untimely attacking a final judgment.

Failure to properly notify a defendant of the nature and cause of a charge is an error of notice implicating the perceived fairness of a trial; it is not an error capable of depriving a court authority to enter judgment upon resulting convictions. *See Coats*, 173 Wn.2d at 140; *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 535, 309 P.3d 498 (2013) (uncharged means considered in “a timely” PRP). Convictions predicated on verdicts are not

treated differently than convictions derived from guilty pleas in a collateral attack. *Scott*, 173 Wn.2d at 173.

Proof of notice failures that would invalidate convictions on direct review, and may invalidate them on timely collateral review, cannot be considered in untimely collateral attacks. *See Scott*, 168 Wn.2d at 917; *In re Pers. Restraint of Clark*, 168 Wn.2d 581, 586, 230 P.3d 156 (2010). Defendant's judgment is validly predicated upon an existent crime of first degree robbery charged before its statute of limitation expired. The legal error he raises unreviewably exists beneath his judgment on the face of an instruction that cannot invalidate that judgment. *Scott*, 173 Wn.2d at 917.

"Collateral attack includes such actions as a ... motion to vacate judgment." *In re Pers. Restraint of Becker*, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). Nothing about defendant's act of directly appealing the transfer of his motion to vacate judgment alters its original character as an untimely collateral attack for which no exception to the time bar exists. His reliance on direct appeal precedent reversing convictions based on uncharged means is fundamentally misplaced. The same is true of his reliance on RAP 2.5 and *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). The former empowers this Court to reach issues before it in a subsequent appeal; but not if it would conflict with statute, so RAP 2.5 does not permit review of claims precluded by RCW 10.73. *Barberio* pertains to review of trial court

decisions on remand, but trial courts cannot by considering a time-barred claim restore its reviewability. *Adams*, 178 Wn.2d at 422-23.

On appeal from a CrR 7.8 motion, review is limited to whether the trial court abused its discretion in denying it, or transferring it under CrR 7.8(c) as happened here. See *State v. Larranaga*, 126 Wn.App. 505, 509, 108 P.3d 833 (2005). The underlying conviction could not be restored to an appellate track through the transfer. Misfiled appeals that raise a claim only reviewable through a collateral attack will be rejected, for they will not be converted into PRPs. *State v. Smith*, 144 Wn.App. 860, 863, 185 P.3d 666 (2008). Defendant's effort to secure direct review of his PRP should fail.

- b. If the time bar did not prevent defendant from collaterally attacking his jury's instruction on an uncharged means of robbery, the collateral attack should still fail as he cannot prove the error caused actual-substantial prejudice.

Courts will not look beneath facially valid final judgments to review claimed failures of notice or instructional errors that bear upon the fairness of an underlying conviction once the collateral attack time bar has expired. *Coats*, 173 Wn.2d at 139; *Scott*, 173 Wn.2d at 917. Defendant's challenge to the uncharged means on the face of his jury's instructions should be summarily dismissed because it does not affect his judgment's validity. His inability to overcome the stringent collateral attack standard of review is addressed in case the merits of his claim are improvidently considered.

Defendant's time-barred claim would fail if reviewable as it raises a technical error that did not actually prejudice the verdict. See *Brockie*, 178 Wn.2d at 538. Although this Court used language more befitting a direct appeal than the collateral attack on review, its recitation of facts in the most recent review of defendant's case reveals the same proof of his robbery supported both means of its commission:

The jury instructions required the jury to find only that [defendant] displayed what appeared to be a firearm in order to convict for first degree robbery, not that he possessed an actual firearm. The unchallenged findings of fact include **Miller's statement that the front seat passenger pointed a gun at him** when the Camaro proceeded through the drive through, **Burg's statements that there was a gun in the car** and that they had just returned from the Jack in the Box, and that [defendant] exited from the passenger door of the vehicle. The State meets its burden and establishes that the untainted evidence necessarily supports a finding defendant displayed what appeared to be a firearm.

State v. Rhone, 194 Wn.App. 1049, *5 (2016) (No. 46960-II) (emphasis added). Those facts support a finding defendant was armed with a firearm. For "testimony alone [is] sufficient to prove a defendant was armed with a firearm in committing [a] crime[.]" *State v. Tasker*, 193 Wn.App. 575, 585-86, 373 P.3d 310 (2016); *State v. Mathe*, 35 Wn.App. 572, 581, 668 P.2d 599 (1983) ("testimony ... a defendant was armed with what appeared to be a real firearm satisfied the State's burden of proving beyond a reasonable doubt the presence of a deadly weapon or firearm") *aff'd*, 102 Wn.2d 537,

668 P.2d 589 (1984). Actual prejudice would require the admitted testimony to be incapable of supporting his conviction, yet it is plainly sufficient. But, again, defendant's time-barred claim of instructional error predicated on an uncharged alternative means should not be reviewed. *Scott*, 173 Wn.2d at 917; RCW 10.73.100.

- c. Proof of actual-substantial prejudice is also beyond defendant's reach as he never had standing to challenge the search of a third party's car as to his robbery charge since it is not a possessory offense to which automatic standing applies.

A defendant only has "automatic standing" to challenge the search of a car in which he lacks a legitimate expectation of privacy to defend against a possessory offense. *State v. Foulkes*, 63 Wn.App. 643, 646-48, 821 P.2d 77 (1991) (citing *Rakas v. Illinois*, 439 U.S. 128, 133, 99 S.Ct. 421 (1978)) (passenger lacked standing to challenge search and seizure of rifle from vehicle). Burg owned the searched Camaro. Defendant's only connection to it was Burg's willingness to give him a ride to the Jack in the Box where defendant committed the robbery. Defendant was exiting the car at the end of that trip when the stop was initiated. Burg's act of alerting police to the gun's presence in the car was tacit consent to its recovery that defendant could not countermand. Regardless, defendant had no reasonable expectation of privacy in Burg's car, so defendant was without standing to challenge the gun's recovery from the car as to his robbery count, which is

not a possessory offense. A presumptively followed limiting instruction or severance would have enabled admission of the gun as to the robbery. That proof joins testimony about the gun to further defeat a claim of prejudice.

2. DEFENDANT'S CONSOLIDATED PRP RAISES *ERICKSON'S* EXTENSION OF *BATSON*, WHICH IS NOT RETROACTIVELY APPLICABLE TO HIS CASE, TO ATTACK A VALID JUDGMENT WITHOUT PROOF OF ACTUAL PREJUDICE AS NEEDED FOR EVEN REVIEWABLE CLAIMS OF *BATSON* ERROR TO PREVAIL.

Just as with the collateral attack addressed above, the consolidated *Batson* claim is a time-barred collateral challenge that must be reviewed according to the standards that limit collateral relief because it undermines finality, degrades the trial's prominence and would here deprive society the right to punish a plainly guilty violent offender. See *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005); *Rhone, supra*. Petitioner must prove a timely raised claim of constitutional error resulted in actual prejudice or his claim must be dismissed. Mere assertions are inadequate to demonstrate prejudice. The rule that constitutional errors must be proven harmless beyond a reasonable doubt has no application. *In re Pers. Restraint of Mercer*, 108 Wn.2d 714, 718-721, 741 P.2d 559 (1987); *Hagler*, 97 Wn.2d at 825; *Woods*, 154 Wn.2d 409.

A PRP is time barred if filed more than one year after the judgment becomes final. *In re Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759, 764,

297 P.3d 51 (2013); RCW 10.73.090(1). The time bar created by RCW 10.73.090 is a "mandatory rule" with no "good cause" or "ends of justice" exception. *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 694-95, 9 P.3d 206 (2000)(citing *Shumway v. Payne*, 136 Wn.2d 383, 398-99, 964 P.2d 349 (1998)); *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998). Untimely PRPs can only be reviewed if the judgment is facially invalid or an exception under RCW 10.73.100 applies. Defendant asserts RCW 10.73.100(6), claiming there is a retroactively applicable significant change in the law to be found in *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

He is again mistaken. The exception under 10.73.100(6) provides:

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: ... (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.

Id. (emphasis added). To avail himself of this exception defendant must prove: there has been a significant intervening change in the law material to

his conviction and the change is retroactively applicable to his case. *In re Pers. Restraint of Erhart*, 183 Wn.2d 144, 148, 351 P.3d 137 (2015).

- a. An intervening change in the law cannot be proved as *Erickson* did not overturn binding precedent that barred defendant from making his *Batson* claim; instead, *Erickson* adopted the bright-line rule he did not persuade a majority of the Court to adopt in his case.

Intervening cases that settle points of law without overturning issue determinative precedent are not deemed significant changes in the law. *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 83, 74 P.3d 1194 (2003); *Greening*, 141 Wn.2d at 697; *Erhart*, 183 Wn.2d at 148. Settling decisions are distinguished from "significant changes" in their ability to be rendered without overturning a prior appellate court decision originally determinative of an issue. *Id.*; *In re Pers. Restraint of Tsai*, 183 Wn.2d 91, 108, 351 P.3d 138 (2015); *In re Pers. Restraint of Domingo*, 155 Wn.2d 356, 367-69, 119 P.3d 816 (2005).

Batson rightly guarantees a jury selection process free of racial animus. *Erickson*, 188 Wn.2d at 723. The *Batson* Court created a three-part test to determine if a racially motivated challenge was made while leaving the states to create procedures for implementing *Batson*. *Id.* at 727. Through *Erickson* our Supreme Court adopted a bright-line rule to trigger the race-neutral explanation procedure in Washington's courts:

In *Rhone*, the defendant made a *Batson* challenge after the State struck the last remaining African American member of the jury panel. Five justices held that the trial court did not err in not finding a prima facie case when the sole black juror was struck. ... In so doing, we declined to adopt a bright-line rule that the striking of the sole member of a particular race is a per se prima facie showing of discrimination. ...

Then Chief Justice Madsen's concurrence added that although applying such a rule would be inappropriate in the case before her, it could legitimately be applied “going forward.”

Id. at 731 (emphasis added). This is not a situation where defendant was barred from raising a claim by precedent *Erickson* overruled. He made the claim, but it was not embraced in his case as Judge Madsen later explained:

[B]ecause the parties were not on notice of a bright-line rule in *Rhone* itself, it was inappropriate to apply such a rule under *Rhone's* facts. However, ... “this alternative method of establishing the prima facie case [*i.e.*, the bright-line rule] **should be available once trial courts, prosecuting attorneys, and defendants and their counsel are on notice that this rule may be followed.”**

Erickson, 188 Wn.2d at 731 (quoting *State v. Meredith*, 178 Wn.2d 180, 186, 360 P.3d 942 (2013)) (emphasis added). So without overruling binding precedent existing when defendant’s appeal was decided, our Supreme Court in *Erickson* clarified what Washington’s procedure for implementing *Batson* would be going forward. Petitioner cannot prove an intervening “change” exists in *Erickson’s* prospective settling of that procedure.

- b. *Erickson* announced a procedural rule that is not to be retroactively applied to defendant's case, for it does not put conduct beyond the state's power to proscribe or pronounce a bedrock procedure implicit in ordered liberty.

RCW 10.73.100(6)'s final requirement is that there are "sufficient reasons" to require retroactive application of an alleged significant change in the law. Retroactivity is controlled by the decisions of the Washington Supreme Court, which maintains congruence in its retroactivity analysis with the United States Supreme Court. *In re Personal Restraint of Markel*, 154 Wn.2d 262, 268, 111 P.3d 249 (2005). The collateral attack statute's language has been interpreted to accord with the analysis the United States Supreme Court refined in *Teague v. Lane*, 489 U.S. 288, 299-301, 109 S. Ct. 1060 (1989). *Id.* at 269. *Teague* and its progeny first require reviewing courts to identify if a constitutional rule is "new" or "old." An "old" rule applies both to direct and collateral review. But a "new" rule is generally restricted to cases still on direct review. There are two exceptions that enable courts to apply a "new rule" to cases on collateral review:

A new rule will not be given retroactive application to cases on collateral review except where either: (1) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (2) the rule requires the observance of procedures implicit in the concept of ordered liberty.

Markel, 154 Wn.2d at 268-69. Neither exception is triggered by *Erickson*.

Our Supreme Court did not perceive *Erickson's* bright-line rule as retroactively applicable to cases tried before *Rhone*. As *Erickson* made clear, *Rhone* was the case that put courts and parties on notice of the change to the *Batson* procedure *Erickson* pronounced. *Erikson*, 188 Wn.2d at 734. Because the Washington Supreme Court appreciates it was not empowered to ignore *Batson*, the *Erickson* bright-line rule was narrowly defined as a subordinate “particular procedure to be followed upon a defendant’s timely objection to a prosecutor’s challenge,” for that is what *Batson* “left to the states to establish.” *Id.* at 728. The result was a rule of procedure; wherein, the requirement of a race-neutral explanation for a challenge is triggered when it affects the sole member of a racially cognizable group. *Id.* at 734. This “new tool” for ensuring the protection *Batson* espoused does not put any private individual conduct beyond the power of the state to proscribe; therefore, the first retroactivity exception is not met.

The second exception of a “watershed rule of criminal procedure” goes unmet as Washington’s “tool” for advancing *Batson's* purpose is not required by the constitution. According to the tool’s creator, it is merely one of the particular procedures left open to states to make good on *Batson's* promise of jury selection free of racial animus. But exception triggering procedures implicit in ordered liberty are a class that “is extremely narrow,

and it is unlikely that any ... [h]as yet to emerge.” *Markel*, 154 Wn.2d at 269 (quoting *Teague*, at 313).

That status could not even be claimed by *Batson* itself. *In re Pers. Restraint of Gentry*, 179 Wn.2d 614, 630, 316 P.3d 1020 (2014). For “*Teague* itself involved claims of racial bias under *Batson* ... and the court recognized the *Batson* rule did not apply retroactively.” *Id.* (citing *Teague*, 489 U.S. at 295–96). Retroactivity was likewise withheld from the revised rule of confrontation pronounced by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) and jury-fact finding rules established in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct.2348 (2000) and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). *Id.* Defendant’s time-barred *Batson* claim predicated on the *Erickson* “tool” should be dismissed.

- c. The *Erickson* claim should otherwise fail as defendant cannot prove actual prejudice from his trial court’s adherence to *Batson*.

A PRP is not a substitute for a direct appeal. *In re Pers. Restraint of Wolf*, 196 Wn.App. 496, 502, 384 P.3d 591 (2016). Relief by way of a collateral challenge to a conviction is extraordinary, so the petitioner must meet a high standard before otherwise settled judgments will be disturbed. *Coats*, 173 Wn.2d at 132. To be entitled to relief, a petitioner must establish by a preponderance of the evidence that a constitutional error resulted in actual-substantial prejudice or a nonconstitutional error was a fundamental

defect that resulted in a complete miscarriage of justice. *Id.* Proof of actual-substantial prejudice, much less a complete miscarriage of justice, cannot come from the adherence of defendant's trial court to the **Batson** test before its prospective procedural modification by our state Supreme Court. There is no proof of racial animus in the challenged peremptory strike nor in the jury's verdict of defendant's guilt. There was credible testimony putting a gun in his hand as he took his most recent victim's money by force.

In 2010, justices who perceived themselves less empowered to alter the three-part test adopted by the United States Supreme Court in **Batson** recognized the bright-line rule added by **Erickson** negates the first part of the **Batson** analysis by making prosecutors explain themselves whenever members of racially cognizable groups are challenged. *State v. Rhone*, 168 Wn. 2d 645, 229 P.3d 752 (2010), *abrogated by City of Seattle v. Erickson*, 188 Wash. 2d 721, 398 P.3d 1124 (2017). Returning to **Batson's** constitutional holding, a challenge's opponent must prove purposeful discrimination regardless of the explanation given. *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969 (2006); *Johnson v. California*, 545 U.S. 162, 171, 125 S.Ct. 2410 (2005). The first two **Batson** steps modified by **Erickson** govern production of evidence. *Id.* Speculation cannot be relied on to prove claims of discrimination. *Johnson*, 545 U.S. at 173. Here, the State's offer

to give its race-neutral reason for the challenge was declined by the court since defendant failed to make a *prima facie* showing of prejudice as required by *Batson*. Neither actual prejudice nor a miscarriage of justice can be proved from that silence. And there is no reason to believe the challenge at issue was anything other than a legitimate race-neutral act by a prosecutor committed to constitutionally protecting the people of Washington from those, like defendant, who profit from violence when given a chance.

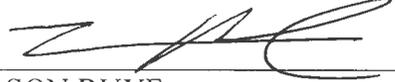
D. CONCLUSION.

This Court should summarily reject defendant's improper attempt to transform an appeal from a CrR 7.8(c) transfer of his time-barred collateral attacks into an appeal of his underlying conviction. Because of the collateral attack time bar, this Court should dismiss the time-barred challenges he makes to his convictions as they are predicated on facts that exist beneath his facially valid judgment. Those claims would otherwise fail in a collateral action due to defendant's inability to prove actual prejudice or a complete miscarriage of justice. The sentence he received for persistently perpetrating

most serious offenses should be affirmed as it is facially valid and keeping the community safe from him every day it remains in place.

RESPECTFULLY SUBMITTED: July 30, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

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.

7.30.18 Meusk
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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