

1 In this PRP, Blackwell claims that the State breached the plea
2 agreement in the juvenile case. Blackwell was made a promise. The promise
3 was part of his guilty plea. The State broke that promise. Blackwell seeks to
4 have his convicted vacated and his guilty plea withdrawn.
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7 In response, the State argues that Blackwell's petition is untimely and,
8 if not, is controlled by *State v. McRae*, 96 Wash. App. 298, 979 P.2d 911
9 (1999), which it contends permits the State to breach a plea agreement when
10 the law changes. The State is incorrect on both points.
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13 First, the one-year time bar invoked by the State in its *Response*
14 requires proof that Blackwell was informed of the time bar. RCW 10.73.110
15 ("the court shall advise the defendant of the time limit..."). In order to start
16 the one-year limit, a defendant must be given proper notice. *State v. Schwab*,
17 141 Wn. App. 85, 167 P.3d 1225 (2007). None of the documents from juvenile
18 court provide that required notice. In addition, Blackwell has submitted a
19 declaration, consistent with the documentary record, stating he was never
20 given notice. Because Blackwell was not provided with the required notice,
21 the State cannot invoke the time bar.
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26 Second, *McRae* is of dubious value, at best. Unlike this case, *McRae*
27 involved an attack on the use of a prior juvenile conviction in a subsequent
28 adult sentencing. By contrast, Blackwell challenges the juvenile proceeding
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1 itself, claiming a breach of the guilty plea terms. Next, *McRae*'s holding (and
2 its rationale) that the under-15 convictions at issue in that case should count
3 as criminal history was later overruled by implication. Most importantly, the
4 *McRae* court concluded that the advice given in those consolidated cases did
5 not give rise to an implied promise by the State that the convictions could not
6 be used even if the law changed. The statements made to Blackwell contain
7 the implied assurance. Construing the plea statement in a light favorable to
8 Blackwell, as the caselaw requires, Blackwell was told that over 15
9 convictions counted only until he was 23, but that could change. The obvious
10 only implication was that under 15 convictions did not and would never
11 count. After all, Blackwell was 12 years old when he was told that
12 convictions for his under-15 conduct would not count in adult court—that
13 advice was clearly an assurance about the future.

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When a defendant is given specific advice in order to secure a guilty
plea and the State later acts contrary to that promise, there is a breach.

II. ARGUMENT

A. Mr. Blackwell was not Informed of RCW 10.73's Time Bar

The one year limit on post-conviction petitions only starts to run where
notice has been given. There is nothing permissive or optional about the time
bar or the accompanying notice requirement. "Shall" means shall. Under RCW

1 10.73.110, the trial court must advise a defendant of the one-year statute of
2 limitations when it pronounces judgment and sentence (“the court shall advise
3 the defendant of the time limit specified in RCW 10.73.090 and 10.73.100”).
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5 *See In re Pers. Restraint of Vega*, 118 Wn.2d 449, 823 P.2d 1111 (1992) (we
6 held that where the State made no attempt to give petitioner notice of the
7 amended one-year limitation on filing a personal restraint petition, as
8 required by statute, petitioner was not bound by the one-year limitation).
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11 The statute requires the Court to advise a defendant of the definition of
12 a collateral attack (RCW 10.73.090), the existence of the one-year limitation,
13 when the one-year period begins, as well as the instances where the one-year
14 limit does not apply (RCW 10.73.100). This advice must be given in every case.
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16 *See In re Restraint of Runyan*, 121 Wn.2d 432, 452-53, 853 P.2d 424 (1993)
17 (finding that Dept. of Corrections did not need to prove actual notice to every
18 prisoner, but noting that notice would not be a problem for prisoners
19 sentenced after effective date of statute because Courts are required to provide
20 notice in every case).
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25 Washington courts have required strict compliance with the statute,
26 including the notice requirements, because “the very purpose of RCW
27 10.73.090...is to encourage prisoners to bring their collateral attacks
28 promptly.” *Runyan*, 121 Wn.2d at 450. It logically follows that strict
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1 compliance applies with equal force to the requirement of notice. “When a
2 statute requires that a court or DOC notify a defendant of a time bar and the
3 notice is not given, this omission creates an exemption to the time bar and a
4 court, therefore, must treat the defendant's petition for collateral review as
5 timely.” *State v. Schwab*, 141 Wash. App. 85, 91, 167 P.3d 1225 (2007). *See*
6 *also In re Restraint of Vega*, 118 Wn.2d at 450-51 (applying rule to RCW
7 10.73.120); *State v. Golden*, 112 Wn.App. 68, 78, 47 P.3d 587 (2002) (applying
8 *Vega* rule to RCW 10.73.110), *review denied*, 148 Wn.2d 1005, 60 P.3d 1212
9 (2003).
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14 Here, none of the documents from Blackwell’s juvenile court proceeding
15 show compliance with the rule. In addition, Blackwell has now provided a
16 declaration reaffirming what is apparent from those documents, namely that
17 he was not given such notice. That declaration states in part:
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20 2. In 1994, when I pleaded guilty and was sentenced in juvenile court
21 for the crimes of taking a motor vehicle and attempting to elude, I was
22 not told that I had a right to collaterally attack that conviction or
23 sentence.

24 3. I was not told in writing or orally that I could file a Personal
25 Restraint Petition or any other type of collateral attack.

26 4. I was also not told in writing or orally there was a one-year time
27 limit for any collateral attack.
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1 5. Finally, I was not told in writing or orally of the statutory exceptions
2 to the one-year time limit for collateral attacks, including Personal
3 Restraint Petitions.

4 6. In addition to not being told, I did not know anything about Personal
5 Restraint Petitions, what they involved, or how long the law gave me to
6 file one.

7 It makes no difference that Blackwell may have been given that notice
8 years later that he had one year to collaterally attack an adult conviction,
9 although the State does not proffer that evidence either. First, he had no way
10 to determine if the law was the same or different for juvenile convictions.
11 Second, assuming the one-year term commenced upon conviction, Blackwell
12 would have concluded that his time to file expired years before he learned of
13 its existence. Subsequent notice in a different court years after the time would
14 have presumably run is not notice that Blackwell had a year from that new
15 date for any prior juvenile convictions, including the instant case. Mr.
16 Blackwell's declaration concludes:
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22 7. To the best of my knowledge, I was never told about my collateral
23 attack rights for any conviction or sentence in juvenile court, whether
24 in court, by my attorneys, or from any other source.

25 8. I do not recall when I first learned of my collateral attack rights.
26 However, it was much more than a year after the 1994 conviction and
27 disposition that I am challenging in this proceeding.

28 9. As a result, I assumed that my time to file a petition had run out
29 long before I was aware of those rights.
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1 Certainly, there was not preventing the State from providing express
2 notice to a defendant where it had failed to do so previously and establishing
3 a one-year term from that date. Compare RCW 10.73.120 (requiring notice to
4 cases sentenced before enactment of time bar). But the State did nothing of
5 the sort. This is not to cast blame on the State. Instead, the State's failure to
6 do so simply means they cannot invoke the time bar now. In other words, the
7 State's request to dismiss should be denied because it failed to provide
8 Blackwell the notice required to start the clock.
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10 This Court should find that Blackwell's petition is timely.
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12 B. The State Breached the Plea Agreement
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14 Mr. Blackwell claims a breach of his guilty plea agreement. The first
15 question is: what was Blackwell told when he pleaded guilty?
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17 The pre-printed statement on Blackwell's guilty plea provided:
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19 I have been told and fully understand that: (a) my plea of guilty and the
20 Court's acceptance of my plea will become part of my criminal history;
21 and (b) if the offense is a felony and I was 15 years of age or older when
22 the offense was committed, then the plea will remain part of my
23 criminal history when I am an adult, if I commit another offense prior
24 to my twenty-third birthday, and may remain beyond that date.
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26 The language above in subsection (a) advises Mr. Blackwell that, by
27 pleading guilty, his conviction will become part of his juvenile "criminal
28 history." There are no exceptions contained in subsection (a).
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1 Subsection (b) focuses on the consequence of his plea and conviction in
2 adult court. That subsection advises Mr. Blackwell that “if” he is over 15, the
3 instant conviction will be considered “criminal history” if he is convicted of a
4 felony as an adult. It then contains an exception, that adult felony must be
5 committed prior to his twenty-third birthday. That exception then contains a
6 caveat, namely that the juvenile conviction may “remain beyond that date.”
7 In other words, for crimes committed by a juvenile over 15, that crime will
8 count as adult criminal history until 23, although there may be unspecified
9 reasons resulting in the conviction counting as criminal history after age 23.

14 It has been long understood that the express mention of one thing will
15 be taken to imply the exclusion of another thing. *See e.g., State v. Williams*,
16 94 Wash.2d 531, 537, 617 P.2d 1012 (1980). Reading the agreement, crimes
17 committed by a person under 15 count as juvenile criminal history, but do not
18 count adult criminal history—not now or ever. In contrast to the over 15
19 convictions, there is no provision in the plea agreement suggesting any
20 scenario where an under 15 conviction “may” count in the future.

25 The State’s argument that *McRae* controls should be rejected because
26 the advice in that consolidated appeal did not include the “may remain
27 beyond that date” exception-to-the-rule language. As a result, *McRae*
28 construed the plea agreements at issue there as completely silent on the issue
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1 of the possibility of future change. *McRae*, 96 Wash. App. at 305 (“The
2 statements do not, however, establish a promise by the State to disregard
3 future changes in the law or an assurance that the law would not change.”).

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5 Here, the advice is not silent about the possibility of future change for
6 over 15 convictions—they may stop counting after the individual reaches 23
7 or they may not. That caveat, and the lack of any similar language for under
8 15 convictions, clearly tells Blackwell that because he was under 15 his
9 conviction will never be used in adult court. Moreover, the advice regarding
10 the use of juvenile convictions as adult criminal history obviously references
11 how the conviction can or cannot be used in the future. Blackwell was 12
12 years old when he pleaded guilty to the instant offense. He would not be an
13 adult for six more years. The advice about the when a juvenile conviction can
14 and cannot be used to calculate criminal history in adult court clearly
15 constitutes advice about the future.

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17 *McRae* can be distinguished on other grounds. The defendants in
18 *McRae* were challenging their offender score on due process grounds.
19 Blackwell challenge the juvenile plea agreement itself. The *McRae* opinion,
20 although it mentions the claim of breach, fails to analyze either the
21 requirements for guilty plea voluntariness or the law regarding the
22 construction of a plea agreement. This is understandable given that the
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1 attacks were on the preset use of the prior conviction, not whether relief in
2 juvenile court was justified.
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4 In analyzing a plea agreement, this Court should resort to basic
5 principles of contract. “Plea agreements are contracts.” *State v. Mollich*, 132
6 Wash.2d 80, 90, 936 P.2d 408 (1997).
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8 Just as there is an implied duty of good faith and fair dealing in every
9 contract, *Badgett v. Security State Bank*, 116 Wash.2d 563, 569, 807 P.2d 356
10 (1991), the law imposes an implied promise by the State to act in good faith in
11 plea agreements. *State v. Marler*, 32 Wash.App. 503, 508, 648 P.2d 903 (1982).
12 The State must comply with the terms of a plea agreement. *State v. Hall*, 104
13 Wash.2d 486, 490, 706 P.2d 1074 (1985). *Accord Mabry v. Johnson*, 467 U.S.
14 504, 509 (1984) (“when the prosecution breaches its promise with respect to
15 an executed plea agreement, the defendant pleads guilty on a false premise,
16 and hence his conviction cannot stand.”).
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22 However, plea agreements are more than simple common law contracts.
23 Because they concern fundamental rights of the accused, constitutional due
24 process considerations come into play. Due process requires a prosecutor to
25 adhere to the terms of the agreement. *Santobello v. New York*, 404 U.S. 257
26 (1971); *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir.1986) (the
27 defendant's underlying contract right is constitutionally based and therefore
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1 reflects concerns that differ fundamentally from and run wider than those of
2 commercial contract law). Fairness is mandated to ensure public confidence
3 in the administration of our justice system. *State v. Tourtellotte*, 88 Wash.2d
4 579, 583, 564 P.2d 799 (1977); *United States v. Carter*, 454 F.2d 426, 428 (4th
5 Cir. 1972).

8 Ambiguities in a contract are construed against the drafter. *Rouse v.*
9 *Glascam Builders, Inc.*, 101 Wash.2d 127, 135, 677 P.2d 125 (1984).
10 Especially when viewed in that required light, the State has breached this
11 agreement in this case.
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14 It is also important to note that subsequent cases from this Court and
15 the Washington Supreme Court have undermined the holding in *McRae*,
16 which upheld the use of pre-15 convictions based on a subsequent change in
17 the law. *In re Jones*, 121 Wash. App. 859, 869, 88 P.3d 424, 430 (2004)
18 (applying and explaining the caselaw holding that in some instances pre-15
19 convictions could not be used as adult criminal history).
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23 In conclusion, when Blackwell was assured when he pleaded guilty that
24 the only felony offenses that could be scored as criminal history in adult court
25 were convictions arising from conduct when he was “15 years of age or older
26 when the offense was committed” and was then told that those convictions
27 remain as criminal history until he was 23, “and may remain beyond that
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1 date,” he was assured that under convictions for conduct when he was under
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3 15 would not ever count in adult court. That promise is not enforceable in
4 adult court at a sentencing for a subsequent crime. *State v. Barber*, 170
5 Wash. 2d 854, 248 P.3d 494 (2011). It is enforceable in the juvenile court
6 proceeding where he was made the promise as part of what was required to
7 be a knowing, intelligent and voluntary plea. As a result, Blackwell’s
8 conviction should be vacated and he should be permitted to withdraw his
9 plea.
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13 III. CONCLUSION

14 Based on the above, this Court should grant this petition. In the
15 alternative, this Court should remand for an evidentiary hearing on the time
16 bar issue.
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19 DATED this 14th day of January 2020.

20 Respectfully Submitted:

21
22 /s/Jeffrey Erwin Ellis #17139
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DECLARATION OF CHRISTOPHER BLACKWELL

I, Christopher Blackwell declare:

1. I am the petitioner in this case.
2. In 1994, when I pleaded guilty and was sentenced in juvenile court for the crimes of taking a motor vehicle and attempting to elude, I was not told that I had a right to collaterally attack that conviction or sentence.
3. I was not told in writing or orally that I could file a Personal Restraint Petition or any other type of collateral attack.
4. I was also not told in writing or orally there was a one-year time limit for any collateral attack.
5. Finally, I was not told in writing or orally of the statutory exceptions to the one year time limit for collateral attacks, including Personal Restraint Petitions.
6. In addition to not being told, I did not know anything about Personal Restraint Petitions, what they involved, or how long the law gave me to file one.
7. To the best of my knowledge, I was never told about my collateral attack rights for any conviction or sentence in juvenile court, whether in court, by my attorneys, or from any other source.
8. I do not recall when I first learned of my collateral attack rights. However, it was much more than a year after the 1994 conviction and disposition that I am challenging in this proceeding.
9. As a result, I assumed that my time to file a petition had run out long before I was aware of those rights.

I declare under the penalty of perjury of the laws of the State of Washington that the following is true and correct to the best of my knowledge.

1-10-20 MONROE, WA.
Date and Place


Christopher Blackwell

ALSEPT & ELLIS

January 14, 2020 - 3:19 PM

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