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Division III  
State of Washington  
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No. 365140-III

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

ROCKY RHODES KIMBLE, Appellant.

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RESPONSE TO APPELLANT'S BRIEF

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**TABLE OF CONTENTS**

I. **STATEMENT OF FACTS**.....1

    A. Stevens County Superior Court Case no. 99-100221-5.....1

    B. Direct Appeal of Exceptional Sentence, Court of Appeals Case no. 193179.....2

    C. Direct Appeal of *First Transfer Order*, Court of Appeals Case no. 311660, Supreme Court Case no. 901741; PRP Related to *First Transfer Order*, Court of Appeals Case no. 311007.....2

    D. Direct *PRP*, Court of Appeals Case no. 332373, Supreme Court Case no. 91676-4.....4

    E. Direct Appeal of *Second Transfer Order*, Court of Appeals Case no. 357856, PRP Based on *Second Transfer Order*, Court of Appeals Case no. 357210.....7

    F. *Motion to Vacate* filed May 24, 2018.....9

II. **ARGUMENT**.....10

    A. Standard of Review for Decision on CrR 7.8 Motion.....10

    B. Collateral Estoppel Prevents Kimble from Relitigating the Facial Validity of his *Judgment and Sentence*.....11

    C. Judicial Estoppel Does Not Apply to Inconsistent Positions on Points of Law or to Inconsistent Assertions of Fact Made by One Party that Benefit the Other Party.....14

    D. Kimble's Attorney did not have a Conflict of Interest.....17

III. **CONCLUSION**.....20

**TABLE OF AUTHORITIES**

**UNITED STATES CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. V.....12

U.S. Const. amend. VI.....17

**UNITED STATES SUPREME COURT CASES**

*Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 291  
(2002).....18, 19

**WASHINGTON STATE CASES**

*Haslett v. Planck*, 140 Wn. App. 660, 166 P.3d 866 (Div. 3 2007).....14

*In re Pers. Restraint of Adams*, 178 Wn.2d 417, 309 P.3d 451 (2013).....11

*In re Pers. Restraint of Coats*, 173 Wn.2d 123, 267 P.3d 324 (2011).....10

*In re Pers. Restraint of Dove*, 196 Wn. App. 148, 381 P.3d 1280  
(Div. 2 2016).....10

*In re Pers. Restraint of Sktylstad*, 160 Wn.2d 944, 162 P.3d 413 (2007).....13

*In re Pers. Restraint of Snively*, 180 Wn.2d 28, 320 P.3d 1107 (2014)....10, 11

*King v. Clodgelter*, 10 Wn. App. 514, 518 P.2d 206 (Div. 1 1974).....15

*State v. Barnes*, 85 Wn. App. 638, 932 P.2d 669 (1997).....11, 12

*State v. Bryant*, 146 Wn.2d 90, 42 P.3d 1278 (2002).....12

*State v. Chavez*, 162 Wn. App. 431, 257 P.3d 1114 (2011).....19

*State v. Dhaliwal*, 150 Wn.2d 559, 79 P.3d 432 (2003).....18, Note 7

*State v. Dupard*, 93 Wn.2d 268, 609 P.2d 961 (1980).....13

*State v. Howell*, 102 Wn. App. 288, 6 P.3d 1201 (2000).....15

*State v. Jensen*, 125 Wn. App. 319,104 P.3d 717 (Div. 2 2005).....19

<i>State v. Kitt</i> , ___ Wn. App. ___, 442 P.3d 1280 (Div. 22019).....	17
<i>State v. MacDonald</i> , 122 Wn. App. 804, 95 P.3d 1248 (2004).....	17, 18
<i>State v. Mullin-Coston</i> , 152 Wn.2d 107, 95 P.3d 321 (2004).....	12
<i>State v. O'Neil</i> , 198 Wn. App. 597, 393 P.3d 1238 (2017).....	18
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	11
<i>State v. Regan</i> , 143 Wash. App. 419, 177 P.3d 783 (2008).....	17, Note 7
<i>State v. Reeder</i> , 181 Wn. App. 897, 330 P.3d 786 (Div. 1 2014).....	17
<i>State v. Robinson</i> , 193 Wn. App. 215, (Div. 1 2016).....	11
<i>State v. Vasquez</i> , 109 Wn. App. 310, 34 P.3d 1255 (Div. 3 2001).....	11, 12, 13
<i>State v. Williams</i> , 132 Wn.2d 248, 937 P.2d 1052 (1997).....	11, 12
<i>State v. White</i> , 80 Wn. App. 406, 907 P.2d 310 (1995).....	17

**WASHINGTON STATE STATUTES**

RCW 9A.44.040.....	Note 1
RCW 9.94A.360.....	5, 6, Note 5
RCW 9.94A.535.....	Note 1
RCW 10.73.090.....	10, 12, 13
RCW 10.73.100.....	10
RCW 10.73.140.....	5

**WASHINGTON STATE RULES OF APPELLATE PROCEDURE**

RAP 12.5.....	13
RAP 16.11.....	5
RAP 16.15.....	13

**WASHINGTON STATE SUPERIOR COURT CRIMINAL RULES**

CrR 7.8.....Passim

**RULES OF PROFESSIONAL CONDUCT**

RPC 3.1.....Note 6

**SECONDARY SOURCES**

14A WAPRAC § 35:59.....15

## I. STATEMENT OF FACTS

### A. Stevens County Superior Court Case no. 99-1-00221-5.

On November 9, 1999, Rocky Rhodes Kimble (hereafter Kimble) was charged by *Information* filed in the Stevens County Superior Court with First Degree Burglary (Count 1) and First Degree Rape (Count 2). CP 1-10. A *First Amended Information* filed March 16, 2000, charged Kimble with First Degree Rape (now Count 1), and a reduced charge of Residential Burglary (Count 2). CP 11-12.

Also on March 16, 2000, the parties filed a *Plea Agreement* and *Statement of Defendant on Plea of Guilty*, and Kimble pleaded guilty to First Degree Rape and Residential Burglary as charged in the *First Amended Information*. CP 13-27. In the signed *Plea Agreement*, Kimble's offender score is listed as three on both counts, with standard sentencing ranges of 120-160 months on the rape charge, and 13-17 months on the burglary charge. CP 15. These same sentencing ranges are listed in Kimble's signed *Statement of Defendant on Plea of Guilty*. CP 20.

In exchange for Kimble's guilty plea, the State agreed to recommend high-end concurrent sentences of 160 months in jail on the rape charge, and 17 months in jail on the burglary charge. CP 15.

After accepting Kimble's guilty plea, the Superior Court ordered a

presentence investigation report and deferred sentencing to a later date. RP 3-23. On April 20, 2000, a *Presentence Investigation Report* recommending an exceptional sentence of 240 months in jail for Kimble's rape conviction was filed. CP 28-34. That same day, Kimble was sentenced for his crimes. RP 24-51.

At sentencing, the Superior Court imposed an exceptional sentence of 360 months in jail for First Degree Rape, and 17 months in jail (concurrent) for Residential Burglary. CP 35-53, RP 24-51.<sup>1</sup>

**B. Direct Appeal of Exceptional Sentence, Court of Appeals Case no. 193179.**

Kimble's direct appeal of his exceptional sentence was denied by *Commissioner's Ruling* dated July 26, 2001. CP 54-55. On September 6, 2001, the *Mandate* ending Kimble's direct appeal of his exceptional sentence was filed in the Superior Court. CP 57.

**C. Direct Appeal of *First Transfer Order*, Court of Appeals Case no. 311660, Supreme Court Case no. 901741; PRP Based on *First Transfer Order*, Court of Appeals Case no. 311007.**

More than 11 years after his guilty plea and sentencing, on April 27, 2012, Kimble filed a *Motion to Withdraw Plea of Guilty* in the

<sup>1</sup> The Superior Court found Kimble committed First Degree Rape through three alternative means: (1) by the threat of use of a gun, (2) by the infliction of serious bodily injury to the victim's head, and, (3) by the felonious entry into the victim's home. The court also found Kimble's actions evidenced deliberate and extreme cruelty. CP 47-52; RP 29-51; See also RCW 9A.44.040, RCW 9.94A.535.

Superior Court arguing that the offender scores contained in his *Judgment and Sentence* had been miscalculated. Kimble further argued that the miscalculated offender scores rendered his *Judgment and Sentence* invalid on its face and entitled him to withdraw his guilty plea. CP 67-90.

On August 29, 2012, the Superior Court ruled Kimble's motion was both untimely and failed to show he was entitled to relief, and transferred his motion to the Court of Appeals for consideration as a personal restraint petition (PRP) pursuant to CrR 7.8. CP 109-111. More specifically, the Superior Court found that Kimble's offender score was properly determined to be three on the rape conviction, counting two points for a prior out-of-state robbery conviction and one point for his other current burglary offense. *Id.*

Kimble filed a direct appeal of the *First Transfer Order* (case no. 311660), and was later appointed counsel. CP 358. Ultimately, Kimble's appointed counsel filed an *Anders* brief requesting permission to withdraw based on her determination that the direct appeal of the *First Transfer Order* was frivolous. CP 116-120.

On November 6, 2013, this Court denied Kimble's direct appeal of the *First Transfer Order*, ruling that Kimble could not use the appeal to re-litigate his sentence and conviction when such issues were or could have

been raised in his initial direct appeal. CP 116-120; see also *Amended Commissioner's Ruling* filed in case no. 311660 on November 27, 2013.<sup>2</sup> The Court declined to address the substantive issues raised in Kimble's *Motion to Withdraw Guilty Pleas* because the PRP (case no. 311007) opened contemporaneous with the direct appeal of the *First Transfer Order* (case no. 311660) had been previously withdrawn *at Kimble's request*.<sup>3</sup> *Id.*

Thereafter, Kimble's motion to modify the *Commissioner's Ruling* and *Petition for Discretionary Review* filed in the Supreme Court were denied, and, on September 17, 2014, the *Mandate* ending case no. 311660 was filed in the Superior Court. CP 115.

**D. Direct PRP, Court of Appeals Case No. 332373,  
Supreme Court Case No. 916764.**

Apparently following the guidance of the Court outlined in the *Commissioner's Ruling* in case no. 311660, on April 3, 2015, Kimble filed

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<sup>2</sup> The *Amended Commissioner's Ruling* was issued three weeks after the initial ruling and does not appear to have been filed in the Stevens County Superior Court. A comparison of the initial and amended rulings reveals the following text was added to footnote 1 of the initial ruling: "Kimble to withdraw his personal restraint petition because he already had a 'direct appeal' pending."

<sup>3</sup> PRP No. 311007 was set to be dismissed as abandoned for Kimble's failure to pay the filing fee or to complete a statement of finances. Thereafter, however, Kimble filed a *Motion to Modify Commissioner's Ruling* asking the Court to either stay or withdraw PRP no. 311007 until his direct appeal of the *First Transfer Order* was resolved. The Court granted Kimble's motion and ordered PRP no. 311007 withdrawn. The Court explained that Kimble could refile his PRP to receive consideration of the substantive issues raised in his *Motion to Withdraw Guilty Pleas*. CP 116-120.

a PRP directly in this Court (case no. 332373, hereafter *Direct PRP*) arguing that he should be permitted to withdraw his guilty plea to both First Degree Rape and Residential Burglary because he was misinformed about sentencing consequences due to miscalculated offender scores contained in his *Judgment and Sentence*, rendering his plea involuntary. See Kimble's *Direct PRP*, attached as Exhibit A to the State's *Motion to Supplement Record*.

On April 15, 2015, Kimble's *Direct PRP* was summarily dismissed as frivolous by this Court pursuant to RAP 16.11(b) and RCW 10.73.140. CP 338-342. Specifically, the Chief Judge found that Kimble's offender score for rape was properly calculated at three because his *Judgment and Sentence* showed the sentencing court intended, consistent with the parties' signed *Plea Agreement*, to count Kimble's rape and burglary crimes *separately*, and not as the same criminal conduct. *Id.*

However, the Court also found that Kimble's Residential Burglary offender score was miscalculated at three because his prior out-of-state robbery conviction was erroneously doubled as a violent offense under former RCW 9.94A.360(15). *Id.* The Court ruled the proper Residential Burglary offender score was two, counting one point for the prior robbery and one point for the current rape offense. *Id.* Nevertheless, the Court

ruled that Kimble was not unlawfully restrained since his 17 month burglary sentence inhered in his 360 month rape sentence and had long been served in full.<sup>4</sup> *Id.*

Kimble filed a *Petition for Review* of this Court's *Order Dismissing Personal Restraint* Petition which was denied by the Washington Supreme Court under case no. 916764. CP 343-347.

In its *Ruling Denying Review*, the Supreme Court likewise held that Kimble's rape offender score was properly determined to be three. Specifically, the Supreme Court found that the checked "same criminal conduct" box contained in Kimble's *Judgment and Sentence* was "clearly a scrivener's error," observing that "the standard sentencing range specified in the plea agreement, the plea colloquy, and the judgment and sentence plainly reflect that the trial court counted the current offenses separately." *Id.* The Supreme Court further confirmed this Court's finding that Kimble's *Judgment and Sentence* was facially invalid to the extent his offender score for Residential Burglary should be two, not three, under RCW 9.94A.360(7) and (15). *Id.*

Nevertheless, because Kimble was not seeking to correct his burglary offender score, but only to withdraw his guilty plea, and had

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<sup>4</sup> This Court's dismissal of Kimble's *Direct PRP* (case no. 332373) became final on January 6, 2016. CP 361.

already finished serving the burglary sentence, the Supreme Court held his claim for relief was moot. *Id.*

**E. Direct Appeal of *Second Transfer Order*, Court of Appeals Case no. 357856, PRP Based on *Second Transfer Order*, Court of Appeals Case no. 357210.**

On November 20, 2017, more than 16 years after his guilty plea and sentencing, Kimble filed yet another *Motion to Withdraw Pleas of Guilt / CrR 7.8* in the Stevens County Superior Court. CP 128-217.

In this *CrR 7.8 Motion*, Kimble once again argued that he should be permitted to withdraw his guilty plea as involuntary because he was misinformed about sentencing consequences due to the miscalculated Residential Burglary offender score in his *Judgment and Sentence*. Kimble did not seek to correct the offender score, but only to withdraw his guilty plea. *Id.*

On December 12, 2017, the Superior Court transferred Kimble's *CrR 7.8 Motion* to this Court for consideration as a PRP. CP 247. On January 2, 2018, Kimble filed a direct appeal of the *Second Transfer Order* (case no. 357856). CP 260-261.

On appeal, the State argued the *Second Transfer Order* was neither appealable as a matter of right nor appropriate for discretionary review. CP 281-296. Additionally, the State argued that Kimble could not show

prejudice even where the State conceded the alleged offender score error. *Id.* At the time these arguments were made, the State's attorney was unaware that this Court and the Supreme Court had previously dismissed Kimble's *Direct PRP* after resolving the same offender score issue. See *Declaration of Special Deputy Prosecuting Attorney Matt Arpin*.

Ultimately, Kimble's direct appeal of the *Second Transfer Order* was denied as neither appealable as a matter of right nor subject to discretionary review. CP 368-371. Instead, the Court ruled that the PRP proceeding related to the *Second Transfer Order* (case no. 357210) was the appropriate forum to address Kimble's objection to that *Order*. *Id.*

After the *Mandate* terminating review of the *Second Transfer Order* issued, this Court ordered the State to file a *Response to Personal Restraint Petition* in case no. 357210. CP 372.

In its *Response*, the State's argued that Kimble's PRP based on the *Second Transfer Order* was successive, time-barred, and failed to show prejudice based, in part, on the orders of both this Court and the Supreme Court dismissing Kimble's *Direct PRP*. See *Response to Personal Restraint Petition*, attached as Exhibit B to the State's *Motion to Supplement Record*. The First Degree Rape “offender score concession” made in the State's initial response to Kimble's direct appeal of the *Second*

*Transfer Order* (case no. 357856) was not repeated in State's *Response to Personal Restraint Petition* (case no. 357210). *Id.*; CP 280-296.

Sometime after the State filed its *Response*, Kimble voluntarily asked this Court to withdraw PRP no. 357210, and, on November 28, 2018, the *Certificate of Finality* in that case was filed in the Superior Court. CP 348-349.

**F. *Motion to Vacate* filed May 24, 2018.**

On May 24, 2018, Kimble filed yet another CrR 7.8 *Motion to Vacate* in the Stevens County Superior Court. CP 267-296.

This time, Kimble based his *Motion to Vacate* on the “concession that Mr. Kimble's offender scores and presumptive sentencing ranges were miscalculated prior to sentencing” contained in the State's brief addressing whether a CrR 7.8 transfer order is appealable as a matter of right (case no. 357856). *Id.* The State responded by moving to strike the motion based on this Court and the Supreme Court's previous orders dismissing Kimble's *Direct PRP*. CP 334-347.

Ultimately, on December 10, 2018, the trial court denied Kimble's CrR 7.8 motion on the grounds that “the matters which have been raised by the defendant have been previously litigated.” CP 350. Thereafter, Kimble filed the instant appeal and was appointed counsel. CP 351-357.

## II. ARGUMENT

### A. Standard of Review for Decision on CrR 7.8 Motion.

CrR 7.8(b) authorizes a court to relieve a party from a final judgment or order for various reasons subject to RCW 10.73.090 and RCW 10.73.100. CrR 7.8.

RCW 10.73.090(1) provides that “[n]o 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.” RCW 10.73.090(1). It follows that where a judgment and sentence is not final or is invalid on its face, a collateral attack may be brought at any time. See *In re Pers. Restraint of Dove*, 196 Wn. App. 148, 154, 381 P.3d 1280 (Div. 2 2016); *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 135, 267 P.3d 324 (2011).

Similarly, a collateral attack based solely on one or more of the grounds listed in RCW 10.73.100 is not subject to the one-year time limit specified in RCW 10.73.090. See RCW 10.73.100. However, a collateral attack seeking to withdraw an unconstitutionally involuntary guilty plea based on misinformation conveyed about sentencing consequences is NOT an exempt ground for relief under RCW 10.73.100. See RCW 10.73.100; *In re Pers. Restraint of Snively*, 180 Wn.2d 28, 31, 320 P.3d 1107 (2014).

Moreover, a petitioner may not rely on the existence of a facial sentencing error to assert other time-barred claims. *Id.*, citing *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 424–25, 309 P.3d 451 (2013). The petitioner's sole remedy in such instances is correction of the sentence. *Id.*, citing *In re Adams*, 178 Wn.2d at 427.

A trial court's ruling on a CrR 7.8 motion is reviewed for abuse of discretion. *State v. Robinson*, 193 Wn. App. 215, 217-18 (Div. 1 2016). “Under this standard, the trial court's decision will not be reversed unless it was manifestly unreasonable or based on untenable grounds.” *Id.* (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

**B. Collateral Estoppel Prevents Kimble from Relitigating the Facial Validity of his *Judgment and Sentence*.**

The principle of collateral estoppel prohibits Kimble from re-litigating whether his *Judgment and Sentence* is facially invalid and/or whether he should be permitted to withdraw his guilty pleas.

“Collateral estoppel” reflects our legal system's emphasis on finality and prevents re-litigation of an issue previously decided by a valid and final judgment between the same parties. *State v. Williams*, 132 Wn.2d 248, 253-54, 937 P.2d 1052 (1997); *State v. Vasquez*, 109 Wn. App. 310, 34 P.3d 1255 (Div. 3 2001); *State v. Barnes*, 85 Wn. App. 638, 652-

53, 932 P.2d 669 (1997).

Despite its civil origin, collateral estoppel applies in criminal cases through the Fifth Amendment guaranty against double jeopardy. *State v. Mullin-Coston*, 152 Wn.2d 107, 113, 95 P.3d 321 (2004) (citing *Williams*, 132 Wn.2d at 253-54). In this context, the party seeking to prevent re-litigation of an issue through enforcement of the rule must show that:

(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of [the] doctrine must not work an injustice.

*State v. Bryant*, 146 Wn.2d 90, 98–99, 42 P.3d 1278 (2002) (quoting *Williams*, 132 Wn.2d at 254, 937 P.2d 1052).

Whether a court is collaterally estopped from deciding an issue is a question of law reviewed *de novo*. *Vasquez*, 109 Wn. App. at 314 (citation omitted).

Here, the threshold issue raised in the multiple appeals and collateral attacks filed by Kimble over the years is whether his *Judgment and Sentence* contains a facial invalidity that allows him to avoid the one-year limitation on filing collateral attacks contained in RCW 10.73.090. If so, the issue then becomes whether Kimble can boot-strap an otherwise

untimely involuntary plea claim to a facial invalidity claim that is not time-barred. These issues have previously been decided by both this Court and the Supreme Court in final judgments/orders on the merits.

A judgment becomes final, *inter alia*, on “[t]he date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction.” RCW 10.73.090(3)(b); *In re Pers. Restraint of Skystad*, 160 Wn.2d 944, 948, 162 P.3d 413 (2007). Here, Kimble's *Judgment and Sentence* became final more than 17 years ago, on September 6, 2011, when the *Mandate* issued by this Court after his direct appeal was filed in the trial court. CP 57; RCW 10.73.090(3)(b); RAP 12.5. Similarly, the offender score calculations made by this Court and the Supreme Court became final when this Court issued the *Certificate of Finality* in PRP no. 332373 pursuant to RAP 16.15(e).

The application of collateral estoppel in the instant case directly serves the very purpose of the doctrine “to prevent relitigation of already determined causes, curtail multiplicity of actions, prevent harassment in the courts, inconvenience to litigants, and judicial economy.” *Vasquez*, 109 Wn. App. at 314 (citing *State v. Dupard*, 93 Wn.2d 268, 272, 609 P.2d 961 (1980)). The doctrine simply does not work any injustice.

The trial court correctly determined that collateral estoppel

prevents Kimble from relitigating his offender score calculations regardless of the continuing facial invalidity (miscalculated Residential Burglary offender score) contained in his *Judgment and Sentence* (which Kimble still does not seek to correct). Thus, the trial court did not abuse its discretion when denying Kimble's CrR 7.8 *Motion to Vacate*.

**C. Judicial Estoppel Does Not Apply to Inconsistent Positions on Points of Law or to Inconsistent Assertions of Fact Made by One Party that Benefit the Other Party.**

Kimble argues the State should have been “judicially estopped” from notifying the trial court about the prior decisions of this Court and the Supreme Court that directly address and resolve the issue confronting the trial court.

“[A] trial court's application of judicial estoppel to the facts of a case” is reviewed for abuse of discretion. *Haslett v. Planck*, 140 Wn. App. 660, 665, 166 P.3d 866 (Div. 3 2007). In the instant case, Kimble fails to show how or where the issue of judicial estoppel was raised in the trial court.

“[J]udicial estoppel” prevents a party from making assertions of *fact* inconsistent with a position that party previously took in litigation. “The rule applies only to inconsistent assertions of *fact*; it is not applicable

to inconsistent positions taken on points of law.” 14A WAPRAC § 35:59 (citing *King v. Clodgelter*, 10 Wn. App. 514, 518 P.2d 206 (Div. 1 1974)). Here, the State mistakenly contradicted this Court and the Supreme Court's answer to the question of law about whether Kimble's *Judgment and Sentence* contained an offender score miscalculation. See *State v. Howell*, 102 Wn. App. 288, 292, 6 P.3d 1201 (2000) (“The question of whether a sentencing court has miscalculated the defendant's offender score is a question of law that is reviewed de novo.”). Because the State did not make any inconsistent assertions of *fact*, judicial estoppel is simply inapplicable in the instant case.

Contrary to Kimble's assertion, the State did not benefit from mistakenly conceding a First Degree Rape offender score miscalculation. The State made multiple arguments against Kimble's attempt to directly appeal the trial court's transfer of his *Motion to Vacate* to the Court of Appeals for consideration as a PRP. First, the State argued the transfer order was not appealable as a matter of right. Second, the State argued that discretionary review was inappropriate because the trial court did not depart from the usual course of judicial proceedings when issuing the transfer order. To support this latter argument, the State showed how Kimble's *Motion to Vacate* was an unlawful attempt to boot-strap an

untimely involuntary plea claim to a facial invalidity claim. The State further argued that even if Kimble's involuntary plea claim was not time-barred, the matter should not be accepted for discretionary review because Kimble cannot show he would have rejected the plea bargain if his offender scores had been calculated differently.

The point the State erroneously “conceded” was based on the checked “same criminal conduct” box contained in Kimble's *Judgment and Sentence*. At the time, the State's attorney was unaware this Court and the Supreme Court had previously rule the checked box was “surplusage” and a “scrivener's error,” and that Kimble's two crimes were separate crimes properly scored as such.<sup>5</sup>

Regardless, the State's offender score “concession” merely showed that even if Kimble was permitted to boot-strap his otherwise untimely involuntary plea claim to a timely facial invalidity claim, the involuntary plea claim failed for lack of demonstrable prejudice. In short, Kimble is the only party who could have benefited from the State's mistaken concession of a point of law already adjudicated against Kimble's interest by this and the Supreme Court.

<sup>5</sup> The State also “conceded” Kimble's Residential Burglary offender score should be reduced by one (1) point because that amended charge was not a “violent offense” (unlike the original First Degree Burglary charge) subject to doubling under RCW 9.94A.360(10). In fact, and although similarly unknown to the State's attorney at the time, both this Court and the Supreme Court previously made the same determination.

Because the State's offender score concession concerned a previously resolved question of law, was made in the context of an alternative argument, and could have only benefited Kimble and not the State, judicial estoppel does not apply in the instant case.

**D. Kimble's Attorney did not have a Conflict of Interest.**

Because Kimble's attorney owed no duty to any party other than Kimble, Kimble and his attorney did not have a conflict of interest.

In order to establish a violation of the Sixth Amendment's constitutional right to effective assistance of counsel based on an alleged conflict of interest, “a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.” *State v. Kitt*, 442 P.3d 1280, 1284 (Wn. App. 2019) (citing) *State v. Regan*, 143 Wn. App. 419, 427, 177 P.3d 783 (2008). “If the defendant meets this two-part test, prejudice is presumed.” *Kitt*, 442 P.3d 1280 (citing *State v. Reeder*, 181 Wn. App. 897, 909, 330 P.3d 786 (Div. 1 2014).

“An actual conflict of interest exists when a defense attorney owes a duty to a party whose interests are adverse to those of the defendant.” *Kitt*, 442 P.3d at 1285 (citing *State v. White*, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995)). “The matters alleged to be in conflict must be ‘substantially related.’” *Id.*, (citing *State v. MacDonald*, 122 Wn. App.

804, 813, 95 P.3d 1248 (2004)).

Appellate courts review whether a conflict of interest exists de novo. *State v. O'Neil*, 198 Wn. App. 597, 542, 393 P.3d 1238 (2017).

Kimble has not alleged that his attorney owed a duty to the State or to some other individual or entity, or that his attorney's *own* interests were somehow in conflict with his interests. Instead, Kimble complains about difficulty communicating with his attorney from jail and objects to his attorney's recognition that previous rulings of this Court and the Supreme Court control and resolve the issues raised in his *Motion to Vacate*.<sup>6</sup> In short, Kimble fails to demonstrate the existence of any actual conflict of interest between himself and his attorney.

Kimble argues he is entitled to automatic reversal of the order denying his *Motion to Vacate* because the trial court “failed to inquire” about the alleged conflict of interest. However, automatic “reversal is not mandated when a trial court knows of a potential conflict but fails to inquire.” *State v. Dhaliwal*, 150 Wn.2d 559, 571, 79 P.3d 432 (2003). Instead, a defendant asserting a conflict of interest must still show that an actual conflict adversely affected the attorney's performance. *Id.*; See also *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 291 (2002);

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<sup>6</sup> Under RPC 3.1, Kimble's attorney had an ethical obligation to not bring any argument that lacked a basis in law or fact. See RPC 3.1.

*State v. Chavez*, 162 Wn. App. 431, 442, 257 P.3d 1114 (2011) (Korsmo, dissenting).<sup>7</sup> This is the case “even if the trial court fails to inquire” about a known conflict. *State v. Jensen*, 125 Wn. App. 319, 330, 104 P.3d 717 (Div. 2 2005) (citing *Mickens*, 535 U.S. At 173-174).

Here, the trial court did inquire into the alleged conflict of interest. First, the court acknowledged Kimble's October 12, 2019, and November 7, 2019, filings wherein he complained about his relationship with his attorney and formally moved to discharge him. RP 86-88; CP 315-333, 377-382. Second, the trial court invited Kimble's attorney to comment on the record. RP 86-88. And finally, the trial court permitted Kimble to speak on the record, but Kimble failed to raise or address any conflict of interest issue. RP 86-88.

### **III. CONCLUSION**

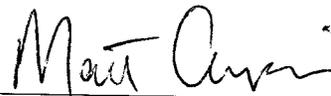
The trial court properly determined that the doctrine of collateral estoppel prevents Kimble from re-litigating his offender score calculations. Moreover, judicial estoppel does not apply to prevent the trial court from relying on this Court and the Supreme Court's previous orders resolving Kimble's offender score calculations. And, because

<sup>7</sup> *State v. Regan*, 143 Wn. App. 419, 177 P.3d 783 (Div. 3 2008), is distinguishable. In *Regan*, defense counsel was called as a witness to testify against his client. Moreover, the *Regan* court recognized that *Dhaliwal* “clarified the analytical framework for determining whether counsel labored under an actual conflict of interest.” *Regan*, 143 Wn. App. at 427.

Kimble failed to show any actual conflict of interest adversely affected his attorney's performance, the trial court had no duty to inquire further into the matter.

Based on the foregoing, the State of Washington urges this Court to affirm the Order of the Stevens County Superior Court dismissing Kimble's *CrR 7.8 Motion*.

Respectfully submitted August 28, 2019.

A handwritten signature in black ink that reads "Matt Arpin". The signature is written in a cursive style with a horizontal line underneath it.

Matt Arpin, WSBA #26302  
Special Deputy Prosecuting Attorney  
Stevens County, Washington

**CERTIFICATE OF MAILING**

I certify under penalty of perjury under the laws of the State of Washington that, on August 28, 2019, I mailed (postage prepaid) a true and correct copy of *Response to Appellant's Brief* to:

Rocky Rhodes Kimble, #808179  
Airway Heights Correction Center  
P.O. Box 2049  
Airway Heights, WA 99001-2049

Andrea Burkhart  
Two Arrows, PLLC  
8220 W. Gage Blvd. #789  
Kennewick, WA 99336

Signed at Spokane, Washington, on August 28, 2019.

A handwritten signature in black ink that reads "Matt Arpin". The signature is written in a cursive style with a horizontal line extending to the right from the end of the name.

Matt Arpin, WSBA #26302  
Special Deputy Prosecuting Attorney

**ARPIN LAW OFFICE**

**August 28, 2019 - 9:06 AM**

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