

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE PERSONAL RESTRAINT PETITION OF:

STEVEN J. CLARK,

PETITIONER.

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SUPREME COURT  
STATE OF WASHINGTON  
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**RESPONSE TO MOTION FOR DISCRETIONARY REVIEW**

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A. INTRODUCTION

On March 31, 2008, the Court of Appeals granted Steven Clark's *Personal Restraint Petition* after concluding his *Judgment* was facially invalid because it erroneously included community placement for a second-degree robbery conviction—a sentencing condition not statutorily authorized. The Court of Appeals further found that this facial invalidity on the judgment revealed an underlying constitutional infirmity: Clark's guilty plea was involuntary because he was mistakenly told that community placement was a required condition of his conviction. The Court reached these conclusions by correctly applying caselaw from this Court, most notably: *In re Restraint of Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004); and *State v. Mendoza*, 157 Wn.2d 582, 151 P.3d 159 (2006).

Because the Court of Appeals' decision correctly applies established law to the facts of this case, this Court should deny the State's request for discretionary review.

B. ARGUMENT

1. The Judgment is Facially Invalid

The State begins by arguing that the Court of Appeals wrongfully concluded that Clark's *Judgment* was facially invalid—that the Court

looked behind the judgment in order to reach its conclusion. The State is incorrect.

Clark's *Judgment* plainly includes a term of community placement for robbery in the second degree. The State does not contend that community placement was authorized for robbery at the time of Clark's conviction. Thus, the facial invalidity determination was limited to the "face" of Clark's judgment.

The State then argues that *In re Restraint of Hemenway*, 147 Wn.2d 529, 55 P.3d 615 (2002), is on point. However, *Hemenway* is easily distinguished. In *Hemenway*, the claimed error did not appear on the judgment—it existed only in the guilty plea. This Court looked first to the judgment and concluded that it was facially valid. Thus, the Court could not reach the underlying error. Here, the error is on the face of the Clark's judgment. Thus, the Court of Appeals correctly concluded that Clark's judgment was facially invalid.

2. Clark's Guilty Plea Was Based on Incorrect Information About a Direct Consequence

After finding that the judgment was facially invalid, the Court of Appeals moved to Clark's guilty plea to determine if it was valid. Examining the statement on plea of guilty, the Court of Appeals found the same mistake on the plea that was on the face of the judgment—Clark was wrongly informed when he pled guilty that community placement was a

required condition of his sentence. Applying *Isadore* and *Mendoza*, the Court held that Clark's guilty plea was based on misinformation about a direct consequence. See *Opinion*, p. 3. ("Due process requires a defendant's guilty plea to be knowing, voluntary, and intelligent. A guilty plea is not made knowingly if it is based on misinformation regarding a direct sentencing consequence. Mandatory community placement is a direct consequence of a guilty plea. If a defendant's guilty plea is invalid, he may elect to specifically enforce the plea or withdraw it."). The Court's reasoning is nothing more than the straight-forward and correct application of applied law to settled facts.

Nevertheless, the State attempts to create a distinction where one does not exist—arguing that misinformation about a direct consequence of a guilty plea only renders a plea involuntary where the plea form fails to advise a defendant of a possible punishment, not where the plea form mistakenly informs a defendant that the punishment will be more onerous than permitted. Of course, in order to make this argument that State is forced to ignore this Court's clear statement to the contrary in *Mendoza*: "Absent a showing that the defendant was *correctly informed* of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." 157 Wn.2d at 591 (emphasis added). The inquiry is not limited to those cases where the plea form promises punishment less onerous than required. If that were the case, *Mendoza* would have turned out differently

since his plea form indicated a higher standard range than he actually faced at sentencing. The question is whether the plea form accurately describes the direct consequences of the plea. Factually speaking, there is no dispute—the plea form inaccurately informed Clark that community placement would follow when, in fact, it was unauthorized.

3. The Court of Appeals Correctly Concluded that the Order Modifying was Void

Finally, the State argues that the Court of Appeals improperly concluded that Clark was not given notice or an opportunity to appear when an order was entered modifying the judgment by vacating the improper community placement condition. However, the face of that order shows otherwise. The order indicates only that it was the result of a motion by the prosecutor. It does not state that Clark or his counsel was provided notice. It does not include a signature of Clark or his counsel. Instead, it bears only the signature of the judge and prosecutor. It does not indicate that Clark agreed to the order or waived his right to respond. It does not indicate that, once signed, it was served on Clark (certificates of service are certainly not unknown to the State). It does not inform Clark of his right to appeal. Further, to the extent that there was any question about whether Clark was given notice or an opportunity to appear, Clark submitted a declaration which the State did not contest.

The State's final argument is that, even though Clark was not given an opportunity to withdraw his plea when the State unilaterally chose to modify his judgment in an *ex parte* hearing, that Clark waived his ability to argue for withdrawal of his plea in his PRP by not finding out about the order and then filing an appeal. This rather absurd position, which the State tries to fit within the limited exception in *Mendoza*, was correctly rejected by the Court of Appeals.

First, the Court of Appeals correctly concluded that this *ex parte* order was void. *Opinion*, p. 2 (“Clark had a right to withdraw his guilty plea and, therefore, the order modifying his judgment and sentence is void because it was entered without due process. *See Amunrud v. Board of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (to accord due process, state must give notice and an opportunity to be heard before depriving a person of a protected interest); *see also In re Marriage of Ebbighausen*, 42 Wn.App. 99, 102, 708 P.2d 1220 (1985) (judgments entered without due process are void)”).

Next, the Court of Appeals found that Clark's failure to appeal an order that he did not know existed because the State failed to notify him of it, did not fall within the limited waiver rule in *Mendoza*: “But when the defendant is informed of the less onerous standard range before he is sentenced and given the opportunity to withdraw the plea, the defendant may waive the right to challenge the validity of the plea.” *Id.* at 591. The

Court of Appeals correctly refrained from applying that rule to Clark in light of the fact that the State failed to inform Clark of the motion to modify. Thus, Clark was never given an opportunity to withdraw his plea.

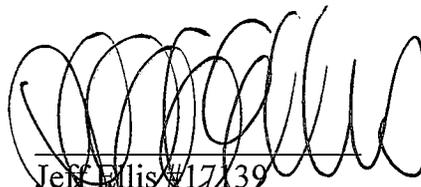
Once again, the Court of Appeals decision applies settled law to clear facts—none of which were disputed below.

C. CONCLUSION

Based on the above, this Court should deny discretionary review.

DATED this 1<sup>st</sup> day of May, 2008.

Respectfully Submitted:



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**CERTIFICATE OF SERVICE**

I, Jeff Ellis, certify that on May 1, 2008, I mailed a copy of the attached *Reply Brief* to counsel for Respondent by placing it in the mail addressed to:

Ann Summers  
Senior Deputy Prosecuting Attorney  
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5/1/08 Seattle, WA  
Date and Place



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