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5 **IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

6 *In re Personal Restraint Petition of:*

No. 83544-6
CoA No. 38894-4-II

8 JEFFREY COATS,
9 Petitioner.

MOTION FOR DISCRETIONARY
REVIEW

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FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY CLERK
RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2009 SEP 14 AM 8:00
BY RONALD R. CARPENTER
CLERK

12 I. IDENTITY OF MOVING PARTY

13 Petitioner, Jeffrey Coats, seeks the relief designated in Section II below.

15 II. STATEMENT OF RELIEF SOUGHT

16 Grant discretionary review. RAP 13.5A. On August 19, 2009, Acting Chief
17 Judge Penoyar entered an order dismissing Mr. Coats' Personal Restraint Petition. A
18 copy of the order is attached as *Appendix A*.

21 III. FACTS

22 On March 17, 1995, 14-year old Jeffrey Coats pleaded guilty to one count of
23 Robbery in the First Degree, one count of Conspiracy to Commit Robbery in the First
24 Degree, and one count of Conspiracy to Commit Murder in the First Degree. All three
25 charges were contained in a single information. Coats entered guilty pleas to all three
26 charges in one proceeding—on one plea form.
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1 Coats's *Judgment* indicates that the maximum punishment for all three crimes,
2 including the conspiracy to commit robbery count, is "LIFE." In fact, the maximum term
3 for conspiracy to commit first-degree robbery was 10 years in prison. *See* RCW
4 9A.20.021; 9A.28.040 (3)(b).
5

6 Like his judgment, Coats's written plea statement also contains misinformation
7 about the maximum sentence for conspiracy to commit robbery, although that form
8 incorrectly lists the maximum as "20 yr/\$50,000." Both maximums on the plea form (the
9 maximum term of imprisonment and the fine) are incorrect.
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12 Instead, the correct maximum for the conspiracy crime was 10 years and/or a
13 \$20,000 fine.
14

15 IV. ARGUMENT

16 *Introduction*

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18 In his PRP, Coats's argued his *Judgment* was facially invalid because it contains
19 an obvious error. The "face" of Coats's judgment reveals that the sentencing court set a
20 maximum penalty of "life" for a crime with a maximum of ten years. This penalty also
21 exceeds the jurisdiction of the court. Thus, Coats's argued his petition was not time
22 barred.
23
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25 Acting Chief Judge Penoyar disagreed and dismissed Coats's petition. The one-
26 judge *Order* below relies almost exclusively on one sentence, *dicta*, from *In re Pers.*
27 *Restraint of McKiearnan*, 165 Wn.2d 777, 203 P.3d 275 (2009): "(t)o be facially invalid,
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1 a judgment and sentence requires more than a substantial defect than a technical
2 misstatement that had no actual effect on the rights of the petitioner.” 165 Wn.2d at 783.
3
4 If that one sentence represented the holding of *McKiearnan* then it overrules much of this
5 Court’s “facial invalidity” jurisprudence.

6
7 Instead, it is easy to distinguish the holding of *McKiearnan* from the instant case.
8 In *McKiearnan*, this Court found that the judgment did not contain any error. Thus, the
9 decision below is incorrect when it concludes that, in *McKiearnan*, “the judgment and
10 sentence listed an erroneous maximum sentence.” *Order*, p. 2.

11
12 In fact, *McKiearnan* comes to the exact opposite conclusion: “McKiearnan was
13 aware of the maximum amount of time he could serve in confinement.” *Id.* at 783. In
14 other words, McKiearnan’s judgment *correctly* stated the maximum punishment was life.
15 *Id.* at 782-83 (“The maximum was life in prison whether he was informed that the
16 maximum sentence was 1 year to life, 10 years to life, or 20 years to life.”).

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19 In stark contrast, the judgment in the instant case contains an error, unmistakable
20 from its face—a point not disputed in the decision below.

21
22 Because the lower court erred, by one judge erroneously dismissing a PRP, this
23 Court should either accept review and reverse or accept review and remand to the Court
24 of Appeals for consideration by a panel of three judges.
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1 *McKiearnan Did Not Change the Face of Facial Invalidity Law Sub Silentio*

2 A judgment and sentence is facially invalid if “the judgment and sentence
3
4 evidences the invalidity without further elaboration.” *In re Pers. Restraint of Goodwin*,
5 146 Wn.2d 861, 866, 50 P.3d 618 (2002) (citing *In re Pers. Restraint of Stoudmire*, 141
6 Wn.2d 342, 5 P.3d 1240 (2000); *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 10
7 P.3d 380 (2000)). This Court may, however, look to “related documents, *i.e.*, charging
8 instruments, statements of guilty pleas, [and] jury instructions,” to determine whether a
9 judgment and sentence is facially invalid. *In re Pers. Restraint of Hinton*, 152 Wn.2d
10 853, 858, 100 P.3d 801 (2004) (citing *In re Pers. Restraint of Hemenway*, 147 Wn.2d
11 529, 532, 55 P.3d 615 (2002)).
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15 This Court’s recent decision in *Personal Restraint of McKiearnan*, 165 Wn.2d
16 777, 203 P.3d 275 (2009), did not alter that rule.
17

18 The order below relies extensively on the aforementioned single sentence from
19 *McKiearnan*, concluding that this Court adopted a rule in that case requiring an
20 affirmative harm that flows from the “facial invalidity” before a reviewing court can
21 examine the validity of the underlying conviction. If that is what *McKiearnan* meant, it
22 overruled virtual all of this Court’s facial invalidity law in one fell swoop—and without
23 citation to any authority.
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26 Here are some of the cases that were overruled, according to the reasoning of the
27 *Order* below:
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1 *In re Restraint of Richey*, 162 Wn.2d 865, 175 P.3d 585 (2008);

2 *In re Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004) (there is no
3 misstatement of any kind, much less any actual negative effect from the use of the
4 word “murder” on a judgment);

5 *In re Restraint of Thompson*, 141 Wn.2d 712, 718-19, 10 P.3d 380 (1980) (name
6 of crime constituted a facial invalidity).

7
8 In fact, if *McKiernan* means what the decision below says it means, then this
9 Court’s *subsequent* decision reversing a facially invalid judgment of conviction, *In re*
10 *Restraint of Bradley*, __ Wn.2d __, 205 P.3d 123 (2009), was also incorrectly decided.
11 Of course, the decision below makes no mention of *Bradley*, one of the faults of having
12 one judge decide a case with obviously debatable issues. In that case, *Bradley*’s
13 offender score was miscalculated (at the time of the plea and sentencing) for one of his
14 two crimes of conviction. The miscalculation had no “actual effect” on his sentence
15 because his offender score was correct on the more serious offense and *Bradley*’s lesser
16 sentence (on the offense with the miscalculated offender score) ran concurrently with the
17 greater sentence. Nevertheless, this Court concluded that the judgment was facially
18 invalid because it contained an error obvious from the “face” of the document. In other
19 words, because the judgment revealed an error—an invalid guilty plea—the judgment
20 was invalid despite the fact that *Bradley* was not affirmatively harmed by the error on
21 the judgment. If *McKiernan* had changed the law in the manner as suggested by the
22 court below, *Bradley* would have been time barred.
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1 Likewise, the decision below conflicts with numerous unpublished decisions from
2 the lower appellate courts, including an early order from a Division II three judge panel
3 in *PRP of Vance Bartley*. See attached unpublished order.
4

5 Thus, according to the reasoning of the court below none of these petitioners
6 would be entitled to relief.
7

8 It is important to revisit the meaning of “facial invalidity,” as explained in *State v.*
9 *Ammons*, 105 Wn.2d 175, 713 P.2d 719 (1986). That Court held that to determine facial
10 invalidity of a prior conviction, the sentencing court may review the judgment and
11 sentence and any other document that qualifies as “the face of the conviction.” See *State*
12 *v. Gimarelli*, 105 Wash. App. 370, 377, 20 P.3d 430 (2001). The “face of the
13 conviction” has been interpreted to include those documents signed as part of a plea
14 agreement. *State v. Phillips*, 94 Wash. App. 313, 317, 972 P.2d 932 (1999); *State v.*
15 *Davis*, 47 Wash. App. 91, 94, 734 P.2d 500 (1987). In reviewing the plea agreement
16 documents, where a clear determination of constitutional invalidity cannot be made, the
17 conviction is not facially invalid. *Ammons*, 105 Wn.2d at 189. If the “trial court would
18 have to go behind the verdict and sentence and judgment to make” a determination on
19 constitutional invalidity, the conviction is not facially invalid. *Ammons*, 105 Wn.2d at
20 189. In this case, the error on the judgment reveals that Coats’s guilty plea is invalid.
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26 Reading *Ammons* together with *McKiernan*, along with those cases decided in
27 between, it is clear that facial invalidity requires a mistake on the judgment that, read
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1 together with the documents that make up the static, historical record of the case, clearly
2 reveal that the conviction is infected by a constitutional or other significant error. In
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4 *Hinton*, the judgment and other relevant case documents showed the defendants had
5 been convicted of non-existent crimes. In *Thompson*, the judgment and other documents
6 unambiguously showed that the defendant was convicted of a crime which had been
7 amended at the time defendant committed his crime.
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10 Thus, the facial invalidity rule strikes a balance allowing the correction of an
11 error in a case that would otherwise be time barred, but only where the existing record
12 clearly reveals the error.
13

14 In this case, the judgment and plea forms show that Mr. Coats's guilty plea was
15 invalid because he was given misinformation about a direct consequence of his guilty
16 plea, a mistake that was repeated, not corrected at the time of his sentencing. Thus,
17 Coats's judgment is facially invalid.
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20 *Coats's Petition Is Not Frivolous*

21 At a minimum, the facial invalidity issue in this case is fairly debatable. Thus, it
22 was improper for one judge to dismiss Coats's petition. ("Thus, we (*sic*) must dismiss
23 this petition as timely." *Order*, p. 3). As a result, Coats seeks the alternative remedy of
24 acceptance of review and remand for a decision by a three-judge panel.
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26 Petitioner recognizes that expediency is frequently invoked as a justification for a
27 departure from established judicial procedures, even when those procedures arguably
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1 exact a cost in terms of decisional accuracy. However, where a single lower court judge
2 reads a decision to have overruled a large number of prior cases without citation to
3 authority, that alone should signal the need for a panel decision. That need is heightened
4 where a subsequent decision by the same, higher court contradicts the reading applied by
5 the single judge in the lower court.
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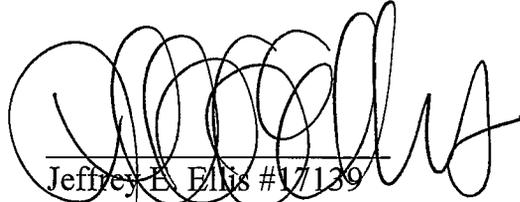
8 There is a recognized value to appellate panel decisions. That value clearly
9 outweighs expediency. Unfortunately, that value was subverted in this case.
10

11 V. CONCLUSION

12 This Court accepts review from an order dismissing a PRP where a decision of the
13 Court of Appeals conflicts with decisions of this Court or other decisions of the Court of
14 Appeals. RAP 13.5A; 13.4(b). This case qualifies for review under at least three of the
15 relevant criteria: the decision below conflicts with decisions of this Court and with
16 decisions of the Court of Appeals (including another Division II decision), and it involves
17 a substantial constitutional question (regarding the validity of Coats's guilty plea). This
18 Court has already accepted review in another facial invalidity case (*In re PRP of Steven*
19 *Clark*, 143 Wash. App. 1048, Not Reported in P.3d, 2008 WL 836158 (2008) (an
20 unpublished decision granting relief based on a facially invalid judgment and
21 corresponding invalid guilty plea where this Court granted review (No. 81522-4)).
22 However, it is unlikely that *Clark* will be dispositive of this case. Thus, review should be
23 accepted here, too.
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1 This Court should accept review and either remand to the Court of Appeals for a
2 decision by a panel of three judges or should accept review and reverse.
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4 DATED this 1st day of September, 2009.

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8 Jeffrey E. Ellis #17139
9 Attorney for Mr. Coats

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11 Holmes & Witchley, PLLC
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13 Seattle, WA 98104
14 206/262-0300
15 206/262-0335 (fax)

APPENDIX A ~
ORDER DISMISSING PRP

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
COURT OF APPEALS
09 APR 19 PM 2:32
STATE OF WASHINGTON
BY [Signature] DEPUTY

In re the
Personal Restraint Petition of

JEFFREY A. COATS,

Petitioner.

No. 38894-4-II

ORDER DISMISSING PETITION
AND DENYING MOTION FOR
RELEASE FROM CUSTODY

Jeffrey A. Coats seeks relief from personal restraint imposed following his 1995 guilty plea convictions for conspiracy to commit first degree murder, conspiracy to commit first degree robbery, and first degree robbery. He argues that his judgment and sentence is facially invalid and exceeds the sentencing court's jurisdiction because it contains the incorrect maximum sentencing term for conspiracy to commit robbery. He further argues that his guilty plea is invalid because he was misadvised about the maximum penalty for conspiracy to commit robbery and his possible term of community placement. Coats also moves for release from custody. We dismiss this petition as untimely and deny his motion.

When Coats filed the present petition in 2009, more than one year had elapsed after his judgment and sentence was final, in 1995. See RCW 10.73.090, .100. Thus, we cannot review petitioner's claims unless he shows that either (1) the time bar does not apply because his judgment and sentence is facially invalid or it was not rendered by a

court of competent jurisdiction or (2) one or more of the six exceptions to the time bar enumerated in RCW 10.73.100 applies.

Regarding the time bar, Coats first argues that his judgment and sentence is facially invalid because it incorrectly states that the maximum sentence for conspiracy to commit first degree robbery is life, when it is actually ten years. A judgment and sentence is facially invalid if it evidences the invalidity without further elaboration. *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866 (2002). ~~*In re Pers. Restraint of McKiearnan*, 165 Wn.2d 777, 783 (2009)~~, controls our decision here. In that case, the judgment and sentence listed an erroneous maximum penalty for a conviction and the petitioner claimed that the error rendered his judgment and sentence facially invalid. Our Supreme Court, however, noted that the petitioner received a valid standard range sentence and held that “[t]o be facially invalid, a judgment and sentence requires a more substantial defect than a technical misstatement that had no actual effect on the rights of the petitioner.” *In re McKiearnan*, 165 Wn.2d at 783. Thus, the Court held that this technical misstatement did not render the judgment and sentence facially invalid and the petitioner’s claim of an invalid guilty plea was time barred. Here, the judgment and ~~sentence lists the incorrect maximum sentence, but Coats received a valid, standard range~~ sentence. Under *In re McKiearnan*, Coats has not demonstrated that his judgment and sentence is facially invalid.

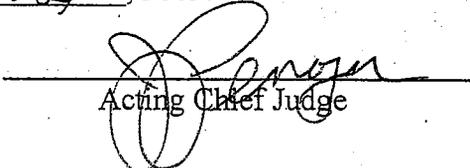
statute. *In re Pers. Restraint of Richey*, 162 Wn.2d 865, 872 (2008). As Coats does not claim lack of personal or subject matter jurisdiction, this exception to the time bar does not apply. *See In re Pers. Restraint of Vehlewald*, 92 Wn. App. 197, 200-01 (1998).

These arguments fail and Coats does not present any other argument regarding the time bar. Thus, we must dismiss this petition as untimely.

Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b) and the motion for release from custody is denied.

DATED this 19th day of August, 2009.


Acting Chief Judge

cc: Jeffrey A. Coats
Pierce County Clerk
County Cause No(s). 94-1-04848-1
Gerald A. Horne, Pierce County Prosecuting Attorney
Kathleen Proctor
Jeff Ellis

APPENDIX B ~
DIVISION II ORDER GRANTING PRP
IN DIFFERENT CASE WITH SIMILAR FACTS

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re the
Personal Restraint Petition of

VANCE GENE BARTLEY,

Petitioner.

No. 35203-6-II

ORDER GRANTING PETITION

07 MAY 23 AM 9:29
STATE OF WASHINGTON
BY [Signature]

FILED
COURT OF APPEALS

Vance Gene Bartley seeks relief from personal restraint imposed after he pleaded guilty to attempted second degree robbery in Pierce County Superior Court Cause No. 95-1-01273-8. Claiming he pleaded guilty involuntarily because the parties believed the maximum sentence to be ten years instead of five years, he seeks to withdraw his plea. Controlling authority compels us to grant relief.

PROCEDURAL POSTURE

Petitioner is not currently serving the sentence for the challenged conviction. Instead, Petitioner is serving a persistent offender life sentence after being convicted of a most serious offense in King County Superior Court Cause No. 97-1-07001-1. The King County court included the challenged Pierce County conviction in Petitioner's criminal history as one of the requisite two prior most serious offenses, resulting in a mandatory life sentence. *See* RCW 9.94A.030(29), .030(33), .570.

Petitioner's collateral attack on his prior Pierce County conviction is the proper mechanism for challenging its constitutional validity, as he could not do so by

challenging King County's use of that conviction in his offender score for his current sentence. See *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 449-51, 853 P.2d 424 (1993); *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986). If successful, Petitioner can then seek resentencing in King County. See *Ammons*, 105 Wn.2d at 188. But a collateral attack on a prior conviction still must be timely. See *Runyan*, 121 Wn.2d 450-51.

ONE YEAR TIME-BAR

A personal restraint petition is a form of collateral attack. RCW 10.73.090(2). Restrained persons are barred from filing petitions more than a year after the judgment becomes final. RCW 10.73.090(1), RAP 16.4(d). Because Petitioner did not appeal, his judgment became final on April 18, 1995, when the superior court filed it. See RCW 10.73.090(3)(a). Petitioner filed this petition on July 24, 2006, more than eleven years after his judgment became final.

The time-bar statute provides as follows:

[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) (emphasis added). Thus, a petitioner may challenge a facially invalid judgment at any time. RCW 10.73.090(1); see, e.g., *In re Pers. Restraint of West*, 154 Wn.2d 204, 209, 110 P.3d 1122 (2005);¹ *In re Pers. Restraint of Hinton*, 152 Wn.2d 853,

¹ “[T]he one-year time limit does not apply if a judgment and sentence is invalid on its face.” *West*, 154 Wn.2d at 209.

858, 100 P.3d 801 (2004);² *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 81, 74 P.3d 1194 (2003);³ *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 718-19, 10 P.3d 380 (2000); *but see In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 347, 349-51, 354-56, 5 P.3d 1240 (2000).⁴

Petitioner's judgment and his guilty plea form⁵ both incorrectly list his potential maximum sentence as ten years. Although second degree robbery is a Class B felony with a ten-year maximum sentence, RCW 9A.20.021(1)(b), RCW 9A.56.210(2), *attempted* second degree robbery is a Class C felony with a five-year maximum sentence. RCW 9A.20.021(1)(c), RCW 9A.28.020(3)(c).

The State concedes that the incorrect maximum sentence renders Petitioner's judgment facially invalid. We agree. The judgment lists a maximum sentence greater than that authorized by statute, "evidenc[ing] the invalidity without further elaboration." *See In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002).

² "Because the petitioners' judgments and sentences are invalid on their face, their personal restraint petitions are not subject to the one year time limit of RCW 10.73.090." *Hinton*, 152 Wn.2d at 858.

³ "Where a judgment and sentence in a criminal case is invalid on its face, there is no limit on the time allowed to file a personal restraint petition under RCW 10.73.090." *Turay*, 150 Wn.2d at 81.

⁴ The *Stoudmire* opinion appears to treat facial invalidity as an exception, not an exemption, to the time-bar, in which the grounds for relief must be based on the nature of the facial invalidity.

⁵ We may examine related documents, such as the plea form, to see if they reveal the judgment's invalidity. *See Hinton*, 152 Wn.2d at 858; *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 533, 55 P.3d 615 (2002).

Because the judgment for attempted second degree robbery is facially invalid. RCW 10.73.090 does not bar petitioner's challenge.⁶

The State urges that the judgment's facial invalidity does not allow Petitioner to challenge his guilty plea. Instead, it suggests that the proper remedy is merely to correct or modify the judgment's reference to the incorrect maximum. We disagree. If the error on the judgment were the result of a clerical mistake, the proper remedy would be remand to correct that error under CrR 7.8(a). *See In re Pers. Restraint of Mayer*, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005). Thus, if the parties and the court knew and stated the maximum to be five years but merely inserted the wrong number into the judgment, we would remand for simple correction. *See State v. Snapp*, 119 Wn. App. 614, 627, 82 P.3d 252 (2004). But the incorrect maximum appears in the guilty plea form as well as the judgment, thus ruling out any realistic possibility that it was merely a clerical mistake.

The State further argues, however, that the remedy for a facially invalid judgment is limited to altering whatever makes the judgment invalid.⁷ Again, we disagree. Once a petitioner has demonstrated facial invalidity, the reviewing court may analyze challenges and impose remedies that are beyond simple revision of the judgment. *E.g., Hinton*, 152 Wn.2d at 861-62 (vacating convictions and discussing validity of guilty

⁶ We recognize that an involuntary guilty plea claim is not itself an exception to the time-bar. *See* RCW 10.73.100; *Hemenway*, 147 Wn.2d at 532-33. Petitioner may raise his otherwise untimely claim because his *judgment* is invalid, *not* because his plea form is invalid.

⁷ The State relies on dicta in *State v. Calhoun*, 134 Wn. App. 84, 90 n.5, 138 P.3d 659 (2006). But the *Calhoun* judgment was not actually facially invalid. *Calhoun*, 134 Wn. App. at 89, 90 n.5. Moreover, our Supreme Court has remanded *Calhoun* to Division One for reconsideration in light of *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006). *State v. Calhoun*. ___ Wn.2d ___, 146 P.3d 1195 (2006).

pleas); *Thompson*. 141 Wn.2d 720-29 (discussing voluntariness of guilty plea, benefit of the bargain, and invited error; also rejecting claim that alternative charge would be barred by statute of limitations).

INVOLUNTARY GUILTY PLEA

To satisfy the constitutional guarantee of due process, a guilty plea must be knowing, voluntary, and intelligent. *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). A guilty plea is constitutionally involuntary when a defendant is misinformed about a direct consequence of pleading guilty. *Mendoza*, 157 Wn.2d at 587-88, 591; *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 300-01, 88 P.3d 390 (2004). The maximum possible sentence is a direct consequence of a guilty plea. *In re Pers. Restraint of Vensel*, 88 Wn.2d 552, 555, 564 P.2d 326 (1977); *State v. Kennar*, 135 Wn. App. 68, 74-75, 143 P.3d 326 (2006).

Here, Petitioner's guilty plea form misinformed him about a direct consequence of pleading guilty, the maximum penalty for the crime. The form told Petitioner the maximum was ten years when it was actually five years. The judgment and sentence contains the same misinformation. When Petitioner pleaded guilty, the superior court did not inform him of the correct maximum sentence but instead referred to the erroneous maximum listed in the plea form.

Petitioner has established that he was misinformed about a direct consequence of his guilty plea, the maximum sentence. He therefore pleaded guilty involuntarily, rendering his guilty plea unconstitutional. And he did not waive the right to challenge his guilty plea because he did not learn of the error before sentencing. *See Mendoza*, 157 Wn.2d at 591-92. The State offers nothing to dispute this.

Instead, the State argues that misinforming Petitioner about his maximum sentence did not materially affect his decision to plead guilty. But a defendant is not required to show that the misstated sentence length was material to his decision to plead. *Isadore*, 151 Wn.2d at 301-02; *Mendoza*, 157 Wn.2d at 590-91. Thus, we do not consider whether the mistake was material to the defendant's decision to plead guilty, and this is so whether the mistake over-stated or under-stated the possible sentence length. *Isadore*, 151 Wn.2d at 301-02; *Mendoza*, 157 Wn.2d at 590-91.

PREJUDICE

A personal restraint petitioner must demonstrate actual prejudice from a constitutional error to obtain relief. *Isadore*, 151 Wn.2d at 298; *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). "An invalid plea of guilty constitutes actual prejudice." *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983);⁸ accord *In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 277, 744 P.2d 340 (1987); *In re Pers. Restraint of Fuamaila*, 131 Wn. App. 908, 921, 131 P.3d 318 (2006); see *Isadore*, 151 Wn.2d at 300.

REMEDY

Ordinarily, a defendant who pleaded guilty involuntarily based on misinformation may choose either specific performance of the original bargain or withdrawal of his guilty plea. *Isadore*, 151 Wn.2d at 303. If the State objects to the chosen remedy, it must demonstrate that the remedy is unjust and should not be allowed for compelling reasons. *Isadore*, 151 Wn.2d at 303. Accordingly, it is hereby

⁸ At the time of *Hews*, our Supreme Court had already adopted the "actual prejudice" requirement for claims of constitutional error in personal restraint petitions. *Hews*, 99 Wn.2d at 86-87.

ORDERED that this petition is granted and the matter is remanded to the Pierce County Superior Court for further proceedings consistent with this order.

DATED this 23rd day of May, 2007.

Patricia C. Armstrong
Armstrong, P.J.

Quinn-Brintnall, J.
Quinn-Brintnall, J.

Penoyar, J.
Penoyar, J.

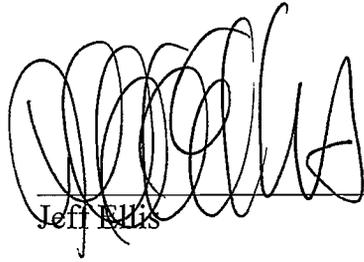
cc: Vance Gene Bartley
Pierce County Clerk
County Cause No(s). 95-1-01273-8
Alicia Burton
Jeffrey E. Ellis

CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on ~~August 31~~^{Sept 1}, 2009, I served the party listed below with a copy of the *Motion for Discretionary Review* by sending it postage pre-paid to:

Kathleen Proctor
Deputy Prosecuting Attorney
Pierce County Prosecutor's Office
930 Tacoma Ave. S., Rm 946
Tacoma, WA 98402-2171

9/1/09 Seattle, WA
Date and Place



Jeff Ellis

FILED
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DIVISION II
09 SEP -2 AM 11:37
STATE OF WASHINGTON
BY _____
DEPUTY