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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT
PETITION OF:

NO. 86001-7

STATE'S RESPONSE TO MOTION FOR
DISCRETIONARY REVIEW AND
SUPPLEMENTAL BRIEF

DANIEL J. STOCKWELL,

Petitioner.

I. IDENTITY OF PARTY:

Respondent, State of Washington, as represented by the Pierce County Prosecuting Attorney's Office, requests the relief designated in Part II.

II. DECISION BELOW:

The State of Washington, respondent below, asks this Court to deny the motion for discretionary review of the published opinion dismissing the personal restraint petition filed April 19, 2011, as the court below correctly determined that petitioner could show no actual prejudice due to the misstatement of the maximum term on his 1986 guilty plea to first degree statutory rape when he fully served his standard range sentence and was

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1 discharged for supervision without the maximum term having any impact on his sentence.

2 *In re Stockwell*, 161 Wn. App. 329, 254 P.3d 899 (2011).

3
4 III. STATEMENT OF THE CASE:

5 In 1986, petitioner Dan Stockwell was sentenced on one count of statutory rape in
6 the first degree in Pierce County Superior Court Cause No. 86-1-00878-2 following his
7 entry of a guilty plea. Appendix C¹. In 2007, petitioner filed his first personal restraint
8 petition challenging this conviction; it was filed more than twenty-one years after his
9 conviction became final, and more than fifteen years after petitioner was discharged from
10 the Department of Corrections on this conviction. Appendix F.

11 Petitioner asserted that his plea was involuntary and that the time bar of RCW
12 10.73.090 did not apply to his petition because his judgment was facially invalid.
13 Alternatively, he argued that the time bar shouldn't apply because he was not properly
14 advised of the existence of the time bar by the Department of Corrections when it first
15 went into effect. The State responded that petitioner had failed to demonstrate the
16 invalidity of his judgment and that the Department of Corrections had taken reasonable
17 steps to notify probationers of the enactment of RCW 10.73.090, therefore the petition
18 should be dismissed as time barred. The Court of Appeals agreed with the State, finding
19 that while there was a technical error on the judgment -- it listed the maximum term as
20 being twenty years instead of the correct term of life- that this error did not render his
21 judgment invalid. *See* Order Dismissing Petition at p. 4, filed September 23, 2008. The
22 court noted that: 1) petitioner was given, and fully served, a sentence under the a Special
23 Sexual Offender Sentencing Alternative ("SSOSA") and, thus, was never confined
24 pursuant to his conviction; 2) the sentence imposed was not in excess of that authorized by

1 the legislature; and, 3) petitioner never faced a longer maximum term than that of which he
2 was given notice. The court concluded:

3 In short, this technical error did not affect Stockwell in any way and did not
4 violate any law that Stockwell raises or we discovered. Stockwell
5 demonstrates only that the judgment and sentence is technically imperfect,
6 not that it is facially invalid. The one-year time bar applies to this collateral
7 attack and it expired twenty years ago. As Stockwell does not argue that an
8 exception to the time-bar applies, we dismiss his petition as untimely.

9 Order Dismissing Petition at p. 4. Petitioner sought discretionary review. This Court
10 stayed the petition until the Supreme Court issued its decision in *In the Matter of the*
11 *Personal Restraint of McKiernan*, 165 Wn.2d 777, 203 P.3d 365 (2009); then remanded
12 the case back to the Court of Appeals for it to reconsider in light of that decision.

13 While the decision in *McKiernan* did not require it, on remand, a panel of the
14 Court of Appeals changed its mind about the applicability of the time bar, finding that the
15 Department of Corrections had not made a good faith effort to notify² petitioner of the one
16 year time bar when RCW 10.73.090 first went into effect. It held the time bar was not
17 applicable to petitioner's petition, irrespective of whether he had received actual notice of
18 the time bar through other means. Nevertheless, the court below still dismissed the
19 petition on the merits, holding that petitioner had failed to show that he suffered actual
20 prejudice by the misadvisement as to the maximum term for his offense; it rejected
21 petitioner's claim that all he had to do was show a presumption of prejudice to obtain
22 collateral relief. The Court of Appeals distinguished the cases petitioner relied upon for
23 relief and disagreed with petitioner as to the holding of two recent supreme court cases.

24
25 ¹ All references are to appendices refer to the attachments to the State's response filed in the Court of Appeals.

² Petitioner was on DOC supervision on July 23, 1989, but was discharged from supervision in October 1989, before the notifications about the enactment of the one year time bar were posted at DOC offices.

1 *See, In re Stockwell*, 161 Wn. App. at 339. The court noted that not only had the statutory
2 maximum term (either the incorrect shorter term of which defendant was advised or the
3 longer, correct term) not impacted the sentence that Stockwell actually served, that the
4 correct statutory term never could be imposed as the State would be forever bound by the
5 misstated lower maximum term of 20 years.

6 Where a defendant erroneously receives a lesser sentence, without any fraud
7 on his part or notice that the sentence might be increased, the State cannot
8 later seek a longer, correct sentence because the defendant has an
9 expectation of finality in the sentence once he has served it. Here, the State
concedes that it is now bound by the misstated 20-year maximum term.
Thus, the misstated maximum term is now the actual maximum term for
Stockwell's 1986 statutory rape conviction and is no longer a misstatement.

10 *Id.* at 339-40 (citations omitted). Because Stockwell could not show that he had been
11 actually prejudiced by the misstatement and because there was no possibility he could be
12 prejudiced in the future, the court dismissed the petition. *Id.*

13 Petitioner again seeks discretionary review of this decision. The Court has directed
14 the State to respond (including petitioner supplemental briefing filed in March 2012).

15
16 IV. ARGUMENT AS TO WHY REVIEW SHOULD BE DENIED:

17 A. AS THE DECISION BELOW DOES NOT CONFLICT WITH ANY
18 DECISION OF THIS COURT OR PRESENT A SIGNIFICANT
19 QUESTION OF CONSTITUTIONAL LAW, PETITIONER
20 CANNOT MEET THE CRITERIA FOR REVIEW UNDER RAP
13.4(b).

21 Discretionary review of a decision dismissing or deciding a personal restraint
22 petition is governed by RAP 13.5A, which provides that a party seeking review should
23 address the considerations governing acceptance of review in RAP 13.4(b). That rule
24 provides:
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A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner asserts that he meets the criteria in subsections (1) and (3).³ Petitioner is incorrect.

a. The decision below is in accord with decisions of this Court.

Petitioner claims that the decision below conflicts with this Court's decisions in *State v. Weyrich*, 163 Wn. 2d 554, 182 P.3d 965 (2008), *State v. Mendoza*, 157 Wn.2d 582 (2006), *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004), and *In re Bradley*, 165 Wn.2d 934, 205 P.3d 123 (2009). Petitioner insists that case law holds that all he needs to do is show an error in the advisement as to the statutory maximum of his crime and the courts can presume prejudice; he maintains that he is entitled to relief because of the showing of presumed prejudice and because the court ruled that his petition was timely filed. The Court of Appeals addressed all of these decisions in its decision below and distinguished each. Petitioner cannot show any conflict.

³ Petitioner asserts that subsection (4) is also applicable but does not articulate what substantial public interest is at stake.

1
2 First the court below held that petitioner's reliance on *Weyrich* and *Mendoza* was
3 misplaced because both of those cases were direct appeals rather than collateral attacks.
4 *Stockwell*, 161 Wn. App. at 335. That a petitioner seeking collateral relief must show
5 actual and substantial prejudice is a long standing principle that has been oft repeated by
6 the Washington Supreme Court. *In re Davis*, 142 Wn.2d 165, 170-171, 12 P.3d 603
7 (2000), citing *In re Personal Restraint of Benn*, 134 Wn.2d 868, 884-85, 952 P.2d 116
8 (1998) (citing *In re Personal Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835
9 (1994); *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992);
10 *In re Personal Restraint of Hews*, 99 Wn.2d 80, 87, 660 P.2d 263 (1983); *In re Personal*
11 *Restraint of Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990)). This is a burden applicable
12 to *all* requests for collateral relief, regardless of the issues raised. Collateral attacks have a
13 heightened standard and petitioner had made no showing that he was actually prejudiced
14 by any error. Petitioner's case is easily distinguishable from the *Weyrich* and *Mendoza*
15 decisions.

16 As for *Isadore*, which was also a personal restraint case, the court below also
17 found that it was distinguishable. *Isadore* had a community custody term added to his
18 sentence after the time for a direct appeal had passed and he had not been informed of this
19 consequence at the time of his plea. He was given relief because he had shown that he was
20 misinformed about the direct consequences of his plea. *Isadore's* case is distinguishable
21 from petitioner's, however, because *Isadore* was actually prejudiced by the imposition of a
22 community custody term of which he had not been informed prior to entering his plea. In
23 contrast, petitioner cannot identify any sentencing component that was imposed upon him
24 of which he was not informed at the time of his plea. Moreover, the court in *Isadore*,
25 applied direct appeal standards because the community custody term was added to

1 Isadore's sentence after the time for filing a direct appeal had expired. Isadore had no
2 opportunity to appeal the involuntary nature of his plea because he was not burdened by an
3 additional direct consequence until after the time for filing an appeal had expired. Thus the
4 heightened standard applicable to most personal restraint petitions was not employed in
5 *Isadore*. Petitioner in the case before the court cannot show any change to his sentence
6 that was imposed after the time for filing a direct appeal had elapsed. The heightened
7 standard of review for collateral attacks is applicable to petitioner's case. There is no
8 conflict between the decision below and this court's decision in *Isadore*.

9 Finally petitioner relies upon the decision in *In re Bradley* arguing that a
10 heightened standard for personal restraint petitions was not employed in that case and,
11 therefore, should not be applied to his case. But the *Bradley* decision was examined
12 recently by this court in *In re Restraint of Coats*, 173 Wn.2d 123, 267 P.3d 324 (2011).
13 This court noted that because the parties in *Bradley* conceded some legal issues, the court
14 accepted the concession and did not examine whether it was in accord with its own case
15 law. See *Coats*, 173 Wn.2d at 137-38. The court below noted that *Bradley* did not did not
16 discuss "PRP standards or the defendant's burden of showing actual prejudice." *Stockwell*,
17 161 Wn. App. at 336. The Court of Appeals concluded that "*Isadore* and *Bradley*
18 establish that a personal restraint petitioner does not have to show that the misinformation
19 was material to his decision to plead guilty" but then went on to point out that whether the
20 misinformation caused actual harm was a different question. *Id* at 338. The Court of
21 Appeals found that both Isadore and Bradley had demonstrated actual prejudice flowing
22 from a misadvisement as to direct consequences.. *Id* at 337-38. In contrast, petitioner has
23 never be able to articulate any actual prejudice

24 The Court of Appeals concluded that it was:
25

1
2 unwilling to read *Isadore* and *Bradley* as implicitly abandoning the actual
3 prejudice standard in PRPs claiming involuntary guilty pleas. See [*In re*
4 *Personal Restraint of Fawcett*, 147 Wn.2d [298,] at 301-02, 53 P.3d 972;
5 [*In Re Personal Restraint of Hews*, 99 Wn.2d [80,] at 88, 660 P.2d 263.
6 We are also unwilling to read these cases as holding that the involuntary
7 plea itself constitutes actual prejudice. Neither *Isadore* nor *Bradley*
8 expressly held that a plea rendered involuntary due to misinformation
9 constitutes actual prejudice.

10 *Stockwell*, 161 Wn. App. at 339.

11 Here the Court of Appeals properly noted that “Stockwell does not claim he
12 suffered actual prejudice from the misstated lower maximum sentence in his plea form, and
13 the record contains no hint of such harm.” *Id.* at 339. As the petitioner did not show that
14 he was actually prejudiced by the misstated maximum term, the Court of Appeals properly
15 dismissed the petition. That result is completely consistent with the decisions of this court.
16 Petitioner has failed to show any basis for discretionary review under RAP 13.4(b)(1).

17 b. Petitioner fails to present a constitutional issue.

18 Petitioner asserts that his issue presents a significant constitutional issue such that
19 review is appropriate under RAP 13.4(b)(3). But his argument is premised on his theory
20 that he entered an involuntary plea because he was advised that the statutory maximum for
21 his crime was twenty years when the Legislature set it at life. Petitioner was not subject to
22 a single direct consequence of which he was not informed prior to entering his plea. Nor is
23 petitioner at risk of having any unknown direct consequence applied to his sentence in the
24 future. The most that petitioner can show is that his guilty plea did not conform to the
25 Legislature’s sentencing scheme.

1 A criminal defendant acquires a legitimate expectation of finality in a sentence that
2 has been substantially or fully served, unless the defendant was on notice the sentence
3 might be modified, due to either a pending appeal or the defendant's own fraud in
4 obtaining the erroneous sentence. *State v. Hardesty*, 129 Wn.2d 303, 312, 915 P.2d 1080
5 (1996); *see also United States v. Jones*, 722 F.2d 632, 638 (11th Cir. 1983) (a defendant
6 has an expectation of finality in the sentence once he or she begins to serve it, unless a
7 review process is employed or the defendant "intentionally deceived the sentencing
8 authority or thwarted the sentencing process"); *United States v. Daddino*, 5 F.3d 262, 265
9 (7th Cir. 1993) (legitimate expectation of finality in completed sentence). Double jeopardy
10 and due process considerations will preclude increasing a sentence where there is a
11 legitimate expectation of finality in a sentence. *Hardesty*, 129 Wn.2d at 312.

12 Petitioner was sentenced in 1986; neither the State nor petitioner appealed the
13 judgment. Petitioner received a favorable plea bargain, he served no prison time for the
14 rape conviction, and he was allowed to continue with a SSOSA sentence that he received
15 on an earlier offense. Petitioner then finished treatment, fulfilled his community custody
16 conditions, and was discharged from the DOC's supervision over 25 years ago. In 1989,
17 after petitioner fully satisfied the requirements of his sentence, he was "DISCHARGED
18 from the confinement and supervision of the Secretary of the Department of Corrections"
19 and his civil rights were restored. See Appendix F to the State's original response. As a
20 result of his plea, petitioner was under the control of the department of corrections for less
21 than four years –far less than the twenty years he was informed of at the time of the plea.
22 Once he was released from supervision, petitioner's legitimate expectation of finality in
23 this sentence became fully vested and any ability of the State might have had to "correct"
24 the erroneous statutory maximum evaporated at this time.

1 While his plea was to a different statutory maximum than the one set by the
2 Legislature, petitioner faces no risk that he might have to return to the supervision of the
3 department under this cause number because the constitutional considerations will preclude
4 any resentencing. His twenty year maximum cannot be increased by the court or the State
5 as petitioner has an expectation of finality in his fully served sentence. Under these
6 circumstances, defendant was **not** incorrectly informed of the consequences of *his*
7 particular plea despite the fact that an error was made with regard to the applicable
8 statutory maximum for statutory rape in the first degree. Petitioner suffered no greater
9 direct consequences than those of which he was informed at the time he entered his plea;
10 moreover, he will not suffer any additional direct consequences stemming from this cause
11 number in the future as long as his conviction remains in place. His punishment has been
12 completely consistent with his advisement as to consequences. Petitioner does not raise a
13 constitutional issue as he cannot show an involuntary plea as to the direct consequences.

14 Moreover, petitioner fails to show that any claim of an involuntary plea on
15 collateral attack presents a significant constitutional question under the federal
16 constitution. The petitioner here, having not challenged the voluntariness of his plea on
17 direct appeal, could not obtain relief in the federal courts unless he could show that he was
18 actually innocent of his crime. The United States Supreme Court held:

19 We have strictly limited the circumstances under which a guilty plea may
20 be attacked on collateral review. "It is well settled that a voluntary and
21 intelligent plea of guilty made by an accused person, who has been advised
22 by competent counsel, may not be collaterally attacked." *Mabry v.*
23 *Johnson*, 467 U.S. 504, 508, 104 S. Ct. 2543, 2546-2547, 81 L.Ed.2d 437
24 (1984) (footnote omitted). And even the voluntariness and intelligence of a
25 guilty plea can be attacked on collateral review only if first challenged on
direct review. Habeas review is an extraordinary remedy and "will not be
allowed to do service for an appeal." *Reed v. Farley*, 512 U.S. 339, 354,
114 S. Ct. 2291, 2300, 129 L.Ed.2d 277 (1994) (quoting *Sunal v. Large*,
332 U.S. 174, 178, 67 S. Ct. 1588, 1590-1591, 91 L. Ed. 1982 (1947)).
Indeed, "the concern with finality served by the limitation on collateral
attack has special force with respect to convictions based on guilty pleas."

1 *United States v. Timmreck*, 441 U.S. 780, 784, 99 S. Ct. 2085, 2087, 60
2 L.Ed.2d 634 (1979).

3 *Bousley v. United States*. 523 U.S. 614, 621, 118 S. Ct. 1604, 1610 (1998) (refusing to
4 review a claim that a plea was involuntary on habeas review when the petitioner had not
5 challenged the voluntariness of his plea on direct appeal and noting the only way to avoid
6 this procedural default was for petitioner to make a showing that he was actually innocent
7 of the crime to which he pleaded guilty.).

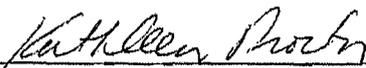
8 Petitioner has failed to show that review is warranted under RAP 13.4(b)(3).
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10 V. CONCLUSION:

11 For the foregoing reasons, the State asks the Court to deny the motion for
12 discretionary review.

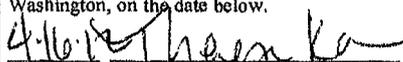
13 DATED: April 16, 2012.

14 MARK LINDQUIST
15 Pierce County
16 Prosecuting Attorney

17 
18 KATHLEEN PROCTOR
19 Deputy Prosecuting Attorney
20 WSB # 14811

21 Certificate of Service:

22 The undersigned certifies that on this day she delivered by U.S. mail and/or
23 ABC-LMI delivery to the attorney of record for the appellant and appellant
24 c/o his or her attorney true and correct copies of the document to which this
25 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.

26 
27 Date Signature

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Subject: In Re: The PRP of Daniel Stockwell, No. 86001-7

Please see attached the State's Response to Motion for Discretionary Review and Supplemental Brief in the below stated matter:

In RE: The PRP of Stockwell
No. 86001-7
Submitted by: K. Proctor
WSB 14811

Please call me at 253/798-7426 if you have any questions.

Therese Kahn
Legal Assistant to K. Proctor