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SUPREME COURT
STATE OF WASHINGTON

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No. 86001-7
COA NO. 37230-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE RESTRAINT OF:

DANIEL J. STOCKWELL,

Petitioner.

MOTION FOR DISCRETIONARY REVIEW

Judgment in Pierce County Superior Court No. 86-1-00878-2
The Hon. Robert H. Peterson, Presiding

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A. IDENTITY OF PETITIONER

Daniel Stockwell, the Petitioner, asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION

Petitioner requests review of the published decision of the Court of Appeals in *In re Personal Restraint Petition of Daniel Stockwell*, No. 37230-4-II, issued on April 19, 2011. App. A.

C. ISSUES PRESENTED FOR REVIEW

1. If prejudice is presumed when a defendant is given misinformation about the maximum sentence when pleading guilty, must a defendant seeking relief by means of a Personal Restraint Petition make a special showing of additional prejudice to gain relief?

2. Where it is undisputed that Mr. Stockwell was given the wrong information about the maximum sentence he faced when he pled guilty, was his guilty plea voluntary and knowing, or did it violate the Due Process Clauses of U.S. Const. amend. 14 and Wash. Const. art. 1, § 3?

D. STATEMENT OF THE CASE

1. *1986 Conviction*

By information filed on April 29, 1986, in Pierce County Superior Court No. 86-1-00878-2, the State of Washington charged Mr. Stockwell with one count of Statutory Rape in the First Degree, under former RCW 9A.44.070, alleging that Mr. Stockwell, “during the period between February 1, 1985 and March 31, 1985, did unlawfully and feloniously being over the age of 13 years, engage in sexual intercourse with Christina Sawyer, who was less than 11 years old.” PRP Exhibit 1.

Mr. Stockwell entered a guilty plea to that charge on July 29, 1986. A copy of the “Statement of Defendant on Plea of Guilty” was filed with the PRP as Exhibit 2. The statement lists the maximum sentence as “twenty (20) years” and a \$50,000 fine. In fact, because the crime took place after July 1, 1984, and Statutory Rape in the First Degree was a Class A felony, the maximum sentence was confinement for a term of life, not 20 years. RCW 9A.20.021.

Mr. Stockwell was sentenced on September 26, 1986 (judgment actually filed on October 3, 1986). The judgment repeats the error from

the plea form, stating in Section 4 that the maximum term is 20 years.¹
PRP Exhibit 3.

2. *Lack of Notice of the Time Limits in RCW 10.73*

Mr. Stockwell was under the supervision of the Department of Corrections until October 1989, until he finished making his legal financial obligation payments. PRP Exhibit 4. Mr. Stockwell did not receive a order of discharge until October 25, 1989. PRP Exhibit 5. Mr. Stockwell never received any notice from the Department of Corrections as to the requirements of RCW 10.73.090 - .100 with regard to this case. PRP Exhibit 7.

In 2004, the State used the conviction in this case as a predicate for a life sentence in a case out of Kitsap County. *See In re Stockwell*, 160 Wn. App. 172, 248 P.3d 576 (2011), *rev. pending* No. 85669-9. In 2007, Mr. Stockwell filed a PRP challenging this Pierce County conviction, arguing that the guilty plea was invalid because he was misadvised of the proper legal maximum sentence. Division Two of the Court of Appeals initially ruled that the PRP was time-barred. Mr. Stockwell moved for discretionary review. This Court accepted review and remanded the case

¹ There are no surviving transcripts from 1986 for this case. PRP Ex. 6.

back to the Court of Appeals for reconsideration in light of *In re McKiearnan*, 165 Wn.2d 777, 203 P.3d 375 (2009). The Court of Appeals then ultimately agreed with Mr. Stockwell that the PRP was not time-barred because the Department of Corrections failed to provide timely notice to Mr. Stockwell of the time-bar requirements as required under RCW 10.73.120. Slip Op. at 3-4.

3. *The Court of Appeals Denies Substantive Relief*

After finding that Mr. Stockwell's PRP was timely filed, the Court of Appeals denied substantive relief to Mr. Stockwell, holding that he had not made out a showing of actual prejudice. Recognizing that, on direct appeal, prejudice would have been presumed by the misinformation about the statutory maximum, the Court of Appeals held this presumption of prejudice did not carry over to the PRP context. Slip Op. at 4-10.

The Court of Appeals acknowledged that prior decisions from this Court (*In re Bradley*, 165 Wn.2d 934, 205 P.3d 123 (2009) and *In re Isadore*, 151 Wn.2d 294, 88 P.3d 290 (2004)) "appeared to have applied the direct appeal test when determining whether a petitioner may withdraw a plea rendered involuntary by misinformation." Slip Op. at 7. However, the Court of Appeals "question[ed] whether our Supreme Court would

abandon by implication the actual prejudice standard required in a PRP. [footnote omitted] Nor do we believe the Supreme Court intended to hold that the plea itself was the actual prejudice.” Slip Op. at 7-8.

Mr. Stockwell now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. *Summary*

Pursuant to RAP 13.5A(b), the Supreme Court will apply the considerations set out in RAP 13.4(b) for determining whether to grant a motion for discretionary review of a PRP. In this case, review is appropriate under RAP 13.4(b)(1), (3) and (4).

The Court of Appeals’ decision explicitly conflicts with many prior decisions from this Court. Its “questioning” whether this Court meant what it wrote in those decisions calls out for review under RAP 13.4(b)(1).

Similarly, the Court of Appeals distinguishes between the type of prejudice that is “presumed” in a direct appeal and the “actual prejudice” that must be shown in a PRP. But no prior case ever made such a distinction, and past decisions of this Court have held that if prejudice is “presumed,” there is no reason then to require an additional showing of more prejudice to gain relief in the PRP context. Whether such “super

prejudice” is required, over and beyond “presumed” prejudice is an issue of public importance. Review should be granted under RAP 13.4(b)(4).

Finally, review should be granted under RAP 13.4(b)(3) because of the federal and state constitutional issues at stake.

2. *Misinformation About the Legal Maximum Makes the Plea Involuntary*

Under the Due Process Clauses of U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, a guilty plea is only constitutionally valid if it is made knowingly, voluntarily and intelligently. *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L.Ed.2d 108 (1976); *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). Whether a plea satisfies this standard depends primarily on whether the defendant correctly understood its consequences. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988); CrR 4.2(d). A defendant must understand “all” the “direct” consequences of the plea. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

A sentencing consequence is direct when “the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.” *Ross*, 129 Wn.2d at 284, quoting *State v.*

Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). The maximum possible sentence is a “direct” consequence of a guilty plea. *State v. Vensel*, 88 Wn.2d 552, 555, 564 P.2d 326 (1977) (“We believe it is important at the time a plea of guilty is entered, whether in justice or superior court, that the record show on its face the plea was entered voluntarily and intelligently, and affirmatively show the defendant understands the maximum term which may be imposed.”).

Accordingly, this Court has held that a plea is invalid when a defendant is mis-advised of the maximum sentence. *State v. Weyrich*, 163 Wn.2d 554, 182 P.3d 965 (2008). The Court has reached this result even in cases where the defendant was mistakenly told that the maximum sentence was lower than what it really was.²

The Court has repeatedly rejected the State’s arguments that it should apply a “materiality” test which requires a separate showing of prejudice:

In determining whether the plea is constitutionally valid, we decline to engage in a subjective inquiry into the defendant’s risk calculation and the reasons underlying his or her decision to accept the plea bargain. Accordingly, we

² In *Weyrich*, the defendant was told that the maximum sentence was five years in prison when in fact the maximum was ten years. He was sentenced within the correct standard range, however. 163 Wn.2d at 555.

adhere to our precedent establishing that a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated.

Mendoza, 157 Wn.2d at 590-91.

Similarly, in *Weyrich*, the Court held:

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); CrR 4.2(d) (2005). A defendant must be informed of the statutory maximum for a charged crime, as this is a direct consequence of his guilty plea. *See* CrR 4.2(g), no. 6(a). A defendant may challenge the voluntariness of his plea where he is misinformed of the sentencing consequences. *Mendoza*, 157 Wn.2d at 587-91. The defendant need not establish a causal link between the misinformation and his decision to plead guilty. *Id.* at 590; *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).

The State concedes that *Weyrich* was misinformed that the statutory maximum for the theft crimes was 5 years, rather than the correct 10 years. *See* RCW 9A.20.021(1)(b); RCW 9A.56.030(2). *Weyrich* did not waive the error but timely moved to withdraw his pleas before sentencing. *See Mendoza*, 157 Wn.2d at 591-92. The State's argument that the error did not actually affect *Weyrich*'s decision to plead guilty requires the sort of subjective hindsight inquiry into *Weyrich*'s decision of which *Mendoza* and *Isadore* disapprove. "Accordingly, we adhere to our precedent establishing that a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence [of] the plea" *Id.* at 591. . . .

...

Because Weyrich was misinformed that the statutory maximum sentence for the thefts was 5 years, he should have been allowed to withdraw his pleas.

163 Wn.2d at 556-57.

In Mr. Stockwell's case, there is no dispute that he was given incorrect information about the legal maximum. He was told it was 20 years, when in fact it was life. Under *Weyrich* and *Mendoza*, the guilty plea is "deemed" involuntary and prejudice is presumed.

3. *If There is a Presumption of Prejudice in a Direct Appeal, The Same Standard Applies to a Collateral Attack*

The Court of Appeals recognized that if Mr. Stockwell's case was a direct appeal, he would prevail. Slip Op. at 4. However, the Court of Appeals distinguished cases such as *Weyrich* and *Mendoza* on the grounds that they were direct appeals as opposed to Personal Restraint Petitions. Because Mr. Stockwell has raised a collateral attack on the conviction, the Court of Appeals reasoned, he had the burden of showing "actual prejudice," above and beyond the presumed prejudice that was applied in *Weyrich* and *Mendoza*. Slip Op. at 5-10. With all due respect, the Court of Appeals was wrong, and its decision conflicts with multiple decisions of this Court.

Although *Weyrich* and *Mendoza* were direct appeals, their holdings were explicitly based this Court's prior decision in a Personal Restraint Petition case, *In re Isadore, supra*. See *State v. Mendoza*, 157 Wn.2d at 589-90; *State v. Weyrich*, 163 Wn.2d at 557. In *Isadore*, the Court held that a defendant "need not make a special showing of materiality," in order for misinformation to render a guilty plea invalid, but instead must only show that the misinformation concerned "a direct consequence of [the] guilty plea." 151 Wn.2d at 296. The Court rejected the State's arguments about materiality:

[T]he materiality test requested by the State conflicts with this court's jurisprudence. This court has repeatedly stated that a defendant must be informed of all direct consequences of a guilty plea, and that failure to inform the defendant of a direct consequence renders the plea invalid.

151 Wn.2d at 301.

More recently, in *Bradley*, the Court held that a defendant who had been mis-advised of the offender score was entitled to withdraw his plea on collateral attack, even though his sentence was running concurrently with another sentence and, as the State argued, the miscalculated sentence had no practical effect. 165 Wn.2d at 940. Nonetheless, even on collateral review, the Court held: "Bradley was misinformed about a direct

consequence of his simple possession plea. Therefore, his plea was involuntary and he is entitled to withdraw it.” 165 Wn.2d at 944.

The Court of Appeals in Mr. Stockwell’s case recognized these decisions, but did not believe that the Court meant what it said. First, the Court of Appeals tried to find actual prejudice to Mr. Bradley and Mr. Isadore as an alternative explanation for this Court’s apparent presumption of prejudice. Slip Op. at 8. Similarly, the Court of Appeals tried to distinguish *Bradley* and *Isadore* on the grounds that in both cases the State’s arguments and decisions “focused on whether the defendants’ pleas were involuntary, not whether the defendants suffered actual prejudice.” Slip Op. at 9. The Court of Appeals was “unwilling to read *Isadore* and *Bradley* as implicitly abandoning the actual prejudice standard in PRPs claiming involuntary guilty pleas . . . We are also unwilling to read these cases as holding that the involuntary plea itself constitutes actual prejudice.” Slip Op. at 10.

Yet, *Isadore* and *Bradley* were not poorly drafted decisions that ventured into uncharted territory. The presumption of prejudice and the explicit rejection of a materiality test, even in the collateral attack realm, rested on this Court’s earlier decisions.

To be sure, this Court has repeatedly applied an “actual prejudice” standard in collateral attack cases because “[c]ollateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs the society the right to punish admitted offenders.” *In re Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). However, at the same time, this Court has held that “[t]hose types of constitutional errors which can never be considered harmless on direct appeal will also be presumed prejudicial for purposes of personal restraint petitions.” *State v. Kitchen*, 110 Wn.2d 403, 413, 756 P.2d 105 (1988), citing *In re Boone*, 103 Wn.2d 224, 233, 691 P.2d 964 (1984); *In re Gunter*, 102 Wn.2d 769, 774, 689 P.2d 1074 (1984); *In re Richardson*, 100 Wn.2d 669, 679, 675 P.2d 209 (1983).

In *Richardson*, the Court held:

Ordinarily, as noted above, one raising error in a personal restraint petition must also prove by a preponderance of the evidence that the error was not harmless, *i.e.*, that it was prejudicial. *In re Hagler*, 97 Wn.2d 818, 826, 650 P.2d 1103 (1982). Where, as in the present case, however, the error which is alleged gives rise to a conclusive presumption of prejudice, proof of the error automatically provides proof of the prejudice. *Cf. In re Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983) (proof of constitutional invalidity of guilty plea constitutes proof of actual prejudice). *See also United States v. Frady*, 456 U.S. 152, 170, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982)

(indicating that prejudice requirement for federal habeas corpus relief would always be satisfied if error was one which was per se prejudicial). Thus, no independent showing of prejudice is necessary here.

100 Wn.2d at 679.

Thus, under these cases, if mis-advice about the maximum sentence is presumed prejudicial and per se grounds for reversal in the direct appeal context, there is no requirement in the collateral attack context for a petitioner to show additional prejudice above and beyond that which is presumed. This Court's decisions in *Isadore* and *Bradley* follow these prior decisions and are consistent with them, whereas the Court of Appeals' decision in Mr. Stockwell's case conflicts with these prior decisions.

The Court of Appeals, however, relied on *In re Fawcett*, 147 Wn.2d 298, 53 P.3d 972 (2002), to conclude: "While *Isadore* and *Bradley* establish that a personal restraint petitioner does not have to show that the misinformation was material to his decision to plead guilty, whether the misinformation caused actual harm, such as a longer sentence, is a different question." Slip Op. at 9. In *Fawcett*, the petitioner argued that his guilty plea was involuntary because he was misinformed of the length of community placement for a SSOSA sentence – when he pled guilty, he

was told he was subject to at least one year of community placement, whereas the mandatory minimum was two years, the length of placement actually imposed. Within two months of sentencing, Mr. Fawcett was terminated from the SSOSA program and was sentenced to prison. Under these circumstances, the Court held that Mr. Fawcett could not show prejudice because his violation took place within the one year of community placement that he claims he should have received –“the only way he can establish actual and substantial prejudice from the alleged error is if he violated the conditions outside the period of community placement time he alleges he should have received but within the period of time actually imposed.” 147 Wn.2d at 302.

Fawcett is a decision that has never been cited since it was issued (except by the Court of Appeals in Mr. Stockwell’s case). It precedes *Isadore, Mendoza, Weyrich* and *Bradley*, and does not mention earlier decisions about the presumption of prejudice in PRP cases such as *Richardson*. In fact, substantively, *Fawcett* cites to only one case, for the general proposition that a petitioner in a PRP must show actual prejudice. 147 Wn.2d at 301, citing *In re Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994), writ of habeas corpus granted sub nom. *Lord v. Wood*, 184 F.3d 1083 (9th

Cir. 1999). There was no discussion in *Fawcett* of constitutional principles regarding voluntary guilty pleas, the requirements of CrR 4.2, and past decisions regarding prejudice and misinformation about the direct consequences of a plea.

Fawcett's holding also conflicts directly with later decisions of this Court. See *Isadore*, 151 Wn.2d at 298, quoting *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003) (“[F]ailure to inform a defendant that he will be subject to mandatory community placement if he pleads guilty will render a plea invalid.”).³ To the extent it even survives cases such as *Isadore* and *Bradley*, the decision should be limited to its facts and should not be seen as a case which departed from prior cases holding that if an error was presumed prejudicial in the direct appeal context, no additional showing of prejudice was required for granting a PRP.

In any case, the distinction that the Court of Appeals appeared to adopt by its reliance on *Fawcett* – that a personal restraint petitioner does not have to show that misinformation was material to the decision to plead guilty, but that it caused “actual harm,” such as a longer sentence – does

³ Moreover, Mr. Fawcett did not timely file a PRP that challenged his original judgment, entered before his SSOSA sentence was revoked. His PRP challenging his original conviction was likely time-barred, even though this was not mentioned in this Court's decision.

not make sense. If it is not appropriate to engage in subjective hindsight as to what is material, then it is inappropriate to conclude that only a longer sentence would be material, but not the stigma of a conviction.

In the last ten years, this Court has firmly held that if a defendant is misinformed about a direct consequence of conviction, the guilty plea is invalid. Prejudice is presumed in both the direct appeal and PRP contexts. The Court of Appeals' decision in this case conflicts with this principle.

F. CONCLUSION

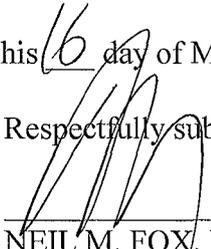
The Court of Appeals' decision in this case conflicts with past decisions of this Court, including *Isadore*, *Bradley*, *Mendoza*, *Weyrich*, *Kitchen*, and *Richardson*. Review should be granted under RAP 13.4(b)(1). Because the Court of Appeals questioned contrary statements in these cases, and believed this Court did not mean what it said, review is required under RAP 13.4(b)(4), as such "questioning" raises issues of public importance. Finally, because Mr. Stockwell's plea was involuntary not knowingly and intelligently made, the conviction here violated due

process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3.

Review should be granted under RAP 13.4(b)(3).

Dated this 16 day of May 2011.

Respectfully submitted,



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Attorney for Petitioner

APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Personal Restraint Petition of:

DANIEL STOCKWELL,

Petitioner.

No. 37230-4-II

PUBLISHED OPINION

ARMSTRONG, P.J. — Daniel Stockwell seeks to withdraw his guilty plea to a 1986 first degree statutory rape conviction, arguing (1) his judgment and sentence is facially invalid because it contains the wrong maximum term, (2) his personal restraint petition (PRP) is not time barred because the Department of Corrections (DOC) did not inform him of the one year limitation, and (3) he should be allowed to withdraw his guilty plea because he was not informed of the true maximum sentence. Because Stockwell has not shown that he was actually prejudiced by the misstated maximum sentence, we dismiss his petition.

FACTS

In 1985, Stockwell was convicted of indecent liberties, given a Special Sex Offender Sentencing Alternative (SSOSA), and required to participate in outpatient treatment. During treatment, Stockwell admitted to having sexual contact with a minor. In response, the State charged Stockwell with first degree statutory rape. In 1986, Stockwell pleaded guilty. Because Stockwell had voluntarily revealed his offense and was doing well in treatment, the State and

trial court agreed to give him another SSOSA. Stockwell's guilty plea form stated that the maximum sentence was "twenty (20) years" when the actual maximum was life. Personal Restraint Petition (PRP), Ex. 2 at 1. His judgment and sentence also identified the maximum term as "20 years." PRP, Ex. 3 at 2. Stockwell did not appeal the conviction or sentence from his 1986 guilty plea.

Stockwell served his sentence and was discharged from confinement and DOC supervision in October 1989. While Stockwell was on supervision, the legislature enacted a time-bar statute limiting collateral petitions, with a few exceptions, to those filed within one year of the judgment and sentence. RCW 10.73.090. The legislature required the DOC to attempt to notify persons subject to DOC supervision of the time-bar statute. RCW 10.73.120.

In 2004, Stockwell was convicted of first degree child molestation and first degree attempted child molestation. The trial court found that he was a persistent offender, counting the 1986 guilty plea conviction, and sentenced him to life without the possibility of parole.

In 2007, Stockwell filed this PRP, arguing his guilty plea was invalid and the one-year time bar of RCW 10.73.090(1) did not apply because (1) the DOC did not make a good faith effort to notify him of the time bar and (2) his judgment and sentence is facially invalid because it contains the wrong maximum penalty. We dismissed the PRP as untimely. The Supreme Court accepted review and remanded the case back to us to reconsider in light of *In re Personal Restraint of McKiearnan*, 165 Wn.2d 777, 203 P.3d 375 (2009).¹

¹ McKiearnan pleaded guilty to first degree robbery and both the plea form and the judgment and sentence misstated the maximum sentence as 20 years to life imprisonment, when the maximum was simply life. *McKiearnan*, 165 Wn.2d at 779-80. McKiearnan filed a PRP seeking to withdraw his plea. He sought to overcome the one-year time bar under RCW 10.73.090(1) by arguing that the judgment and sentence was facially invalid. *McKiearnan*, 165 Wn.2d at 780-81.

ANALYSIS

I. TIME-BAR STATUTE NOTICE REQUIREMENT

On July 23, 1989, three years after Stockwell's judgment and sentence were final,² the legislature amended chapter 10.73 RCW to provide: "No 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 and was rendered by a court of competent jurisdiction." RCW 10.73.090(1); LAWS OF 1989, ch. 395 § 1. The legislature also required the DOC to notify persons subject to the new limitation:

As soon as practicable after July 23, 1989, the department of corrections shall attempt to advise the following persons of the time limit specified in RCW 10.73.090 and 10.73.100: Every person who, on July 23, 1989, is serving a term of incarceration, probation, parole, or community supervision pursuant to conviction of a felony.

RCW 10.73.120. Thus, the time bar applies to Stockwell only if the DOC can show that it attempted to notify him of it. *See* RCW 10.73.120; *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 451, 853 P.2d 424 (1993); *In re Pers. Restraint of Vega*, 118 Wn.2d 449, 451, 823 P.2d 111 (1992).

The State argues that Stockwell received notice because the DOC posted notice of the new statute at all community corrections offices and work release centers. Such notice satisfies the DOC's statutory duty to give notice to those persons still under DOC supervision. *Runyan*,

The Supreme Court rejected this argument, holding: "To 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." *McKiearnan*, 165 Wn.2d at 783. Because we hold that the time-bar requirement does not apply to Stockwell's petition, we do not need to address whether his judgment and sentence is facially invalid due to the misstated maximum sentence.

² If the defendant does not file an appeal, a judgment and sentence is final on the date it is filed with the clerk of the trial court. RCW 10.73.090(3)(a).

121 Wn.2d at 437-38. In *Runyan*, our Supreme Court rejected the petitioners' argument that they never received actual notice of the time-bar statute, reasoning that RCW 10.73.120 does not require actual notice, only "[a] good faith effort to advise." *Runyan*, 121 Wn.2d at 452. The court concluded that posting notices was a good faith attempt to provide notice. *Runyan*, 121 Wn.2d at 436.

But Stockwell was discharged from DOC supervision in October 1989, and the DOC posted notice in December 1989. Although Stockwell was still under DOC supervision in July 1989, and was, therefore, a person to whom the DOC had to give notice, he was not under supervision in December 1989 when the DOC posted the notice. Because the DOC could have had no reasonable expectation that the postings would reach inmates released from its supervision, the postings were not a good faith effort to notify Stockwell of the new time limit on PRPs. The DOC has offered no evidence that it made any other effort to notify discharged inmates of the new statutory time bar. Where the DOC has made no effort to notify a particular individual, the time bar does not apply.³ *Vega*, 118 Wn.2d at 451. Accordingly, we address the merits of Stockwell's petition.

II. GUILTY PLEA

Stockwell contends that he is entitled to withdraw his guilty plea because he was misinformed about the statutory maximum term. Although Stockwell's argument would succeed on direct appeal, he cannot meet the heightened PRP standard of establishing actual prejudice.

³ Stockwell's 2004 judgment and sentence gave him notice that any collateral attack on "*this* judgment and sentence . . . must be filed within one year." Resp't Responsive Br., App. G at 6 (emphasis added). This is insufficient notice that his 1986 judgment was also subject to the one-year time limit.

A PRP is not a substitute for an appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either a constitutional error that caused actual prejudice or a nonconstitutional error that caused a miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). If a petitioner claims a constitutional error but fails to make a prima facie showing of actual prejudice, we must dismiss the petition. *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

A defendant must be informed of the statutory maximum sentence for a charged crime because it is a direct consequence of his guilty plea. *State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008). In *Weyrich*, the defendant was misinformed that the statutory maximum for the charged crimes was 5 years, rather than 10 years. *Weyrich*, 162 Wn.2d at 556. Because the misinformation concerned a direct consequence of his guilty plea, the plea was not voluntary and the defendant was entitled to withdraw it. *Weyrich*, 163 Wn.2d at 557. Here, Stockwell was misinformed that the statutory maximum sentence for the charged crime was 20 years, rather than life. This misinformation concerned a direct consequence of his guilty plea. *Weyrich*, 163 Wn.2d at 557. Thus, Stockwell has shown a constitutional error.

But Stockwell fails to explain how he was actually prejudiced by the error. Instead of demonstrating actual prejudice, Stockwell argues that we must presume prejudice, relying on *Weyrich*, *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006), and *In re Personal Restraint of Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004). Stockwell correctly contends that *Weyrich* and *Mendoza* held that a defendant seeking to withdraw a guilty plea need not establish a causal link between the misinformation and his decision to plead guilty; nor did either case discuss actual

prejudice to the defendant. See *Weyrich*, 163 Wn.2d at 557; *Mendoza*, 157 Wn.2d at 590-91. But both *Weyrich* and *Mendoza* were direct appeals, not PRPs.

Isadore was a PRP, but it is distinguishable. In *Isadore*, the State attempted to add a community custody term to Isadore's sentence *after* the time for a direct appeal had passed. *Isadore*, 151 Wn.2d at 299-300. Because Isadore did not have an opportunity to challenge that decision on direct appeal, the court did not apply the heightened PRP standards: "Instead, the petitioner need show only that he is restrained . . . and that the restraint is unlawful." *Isadore*, 151 Wn.2d at 299. Consistent with this standard of review, the court ultimately concluded that Isadore's plea was involuntary because he was misinformed about community custody, a direct consequence of the plea. *Isadore*, 151 Wn.2d at 302. Because his plea was involuntary, his restraint was unlawful and the court granted his petition. *Isadore*, 151 Wn.2d at 302.

Although its holding is consistent with direct appeal standards, the *Isadore* court also stated, in dicta, that "even if Isadore were required to meet the standard personal restraint petition requirements, he has done so in this petition." *Isadore*, 151 Wn.2d at 300. The court then analyzed whether a defendant seeking to withdraw a guilty plea due to misinformation about direct consequences must show that the misinformation was material to his decision to plead guilty. *Isadore*, 151 Wn.2d at 300-02. The court's analysis was based on direct appeal cases—*State v. Acevedo*, 137 Wn.2d 179, 970 P.2d 299 (1999), *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996), and *State v. Walsh*, 143 Wn.2d 1, 17 P.2d 591 (2001)—and the court never referred back to the heightened PRP standards or discussed what actual prejudice Isadore had suffered. *Isadore*, 151 Wn.2d at 300-02.

Our Supreme Court recently relied on *Isadore* in *In re Personal Restraint of Bradley*, 165 Wn.2d 934, 940-41, 205 P.3d 123 (2009), holding that a personal restraint petitioner could withdraw his plea simply by showing he was misadvised as to a direct consequence. *Bradley* had pleaded guilty to possessing cocaine and possessing cocaine with intent to deliver, and the sentencing court imposed concurrent sentences. *Bradley*, 165 Wn.2d at 937-38. After *Bradley* learned that the court had miscalculated his offender score for the simple possession conviction, he filed a PRP seeking to withdraw both guilty pleas. *Bradley*, 165 Wn.2d at 938. Because *Bradley*'s concurrent sentence was longer than the miscalculated sentence, the State argued that the miscalculated sentence "was not a direct consequence of his plea because it had no practical effect on his sentence; he would have served the same sentence either way." *Bradley*, 165 Wn.2d at 940. The court rejected this argument, noting that the State relied on *Acevedo*, which had been "eclipsed" by *Isadore*. *Bradley*, 165 Wn.2d at 940. Without discussing PRP standards or the defendant's burden of showing actual prejudice, the court held: "Bradley was misinformed about a direct consequence of his simple possession plea. Therefore, his plea was involuntary and he is entitled to withdraw it." *Bradley*, 165 Wn.2d at 944.

Thus, neither *Isadore* nor *Bradley* discussed a defendant's heightened PRP burden of establishing actual prejudice. Instead, both courts appear to have applied the direct appeal test when determining whether a petitioner may withdraw a plea rendered involuntary by misinformation. See *Bradley*, 165 Wn.2d at 940; *Isadore*, 151 Wn.2d at 300-02. We could read these cases as implicitly holding that (1) we should presume prejudice whenever a PRP defendant demonstrates that his plea was involuntary, or (2) the plea itself was the actual prejudice. But we question whether our Supreme Court would abandon by implication the actual

prejudice standard required in a PRP.⁴ Nor do we believe the Supreme Court intended to hold that the plea itself was the actual prejudice.

First, it is apparent that the defendants in *Isadore* and *Bradley* both suffered actual prejudice beyond merely pleading guilty without being properly informed of all direct consequences of the plea. In *Isadore*, the State sought to impose an additional mandatory term of community custody that neither the court nor counsel advised Isadore of before he pleaded guilty. Thus, the misinformation would have resulted in actual prejudice to Isadore in the form of a longer sentence. In *Bradley*, the sentencing court incorrectly calculated Bradley's offender score and imposed a concurrent sentence that exceeded what his actual offender score would have supported. Although the wrongful sentence was masked by the longer, concurrent sentence, a wrongful sentence still harms a defendant and results in a miscarriage of justice. See *In re Pers. Restraint Petition of Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1997) (holding incorrect calculation of offender score is a fundamental defect in a sentence resulting in a miscarriage of justice and requiring relief under a PRP). Additionally, if the longer sentence was overturned, Bradley would still have to complete the wrongful lesser sentence.

Second, in *Isadore* and *Bradley*, the State framed the issues as whether the pleas were involuntary, not whether the misinformation resulted in actual prejudice to the defendants. In *Isadore*, the State relied on *Acevedo* to argue that a defendant must show the misinformation was material to his decision to plead guilty to prove that the plea was involuntary. *Isadore*, 151 Wn.2d at 300. The court rejected this argument, holding that a defendant does not have to show

⁴ We also note that *Isadore* set forth the actual prejudice standard in beginning of its analysis, explaining that Isadore did not have to meet it because he never had the opportunity to raise his issues on direct appeal. *Isadore*, 151 Wn.2d at 298-99. This discussion was unnecessary if the court intended to abandon the actual prejudice standard.

materiality. *Isadore*, 151 Wn.2d at 302. In *Bradley*, the State again relied on *Acevedo* to argue that Bradley's wrongful lesser sentence was not a direct consequence of his plea because it was subsumed within the longer sentence. *Bradley*, 165 Wn.2d at 940. The court rejected this argument, relying on *Isadore*. *Bradley*, 165 Wn.2d at 940. Thus, *Isadore* and *Bradley* focused on whether the defendants' pleas were involuntary, not whether the defendants suffered actual prejudice.

While *Isadore* and *Bradley* establish that a personal restraint petitioner does not have to show that the misinformation was material to his decision to plead guilty, whether the misinformation caused actual harm, such as a longer sentence, is a different question. For example, in *In re Personal Restraint of Fawcett*, 147 Wn.2d 298, 301, 53 P.3d 972 (2002), a personal restraint petitioner sought to withdraw a guilty plea because the plea form misstated the minimum community custody term as one year when it was actually two years. Our Supreme Court considered whether the misinformation actually prejudiced the petitioner, observing: "whether Fawcett would have pleaded guilty to first degree child molestation knowing he would be sentenced to a two year community placement term is irrelevant to whether he was actually and substantially prejudiced by the imposition of the two year community placement term." *Fawcett*, 147 Wn.2d at 302. Because Fawcett failed to demonstrate he was actually prejudiced by the misinformation, the court denied his petition.⁵ *Fawcett*, 147 Wn.2d at 303.

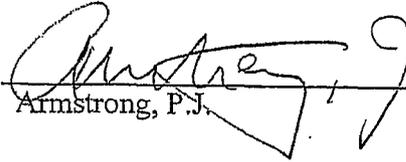
⁵ The sentencing court had imposed a SOSSA and two year community placement term. But Fawcett violated the conditions of community placement two months into the term and the court revoked the SOSSA and imposed a standard-range sentence instead. The court held: "Because Fawcett would be in precisely the same situation even if he had received a one year community placement term, we hold that Fawcett was not actually and substantially prejudiced by the imposition of the two year community placement term." *Fawcett*, 147 Wn.2d at 303.

For these reasons, we are unwilling to read *Isadore* and *Bradley* as implicitly abandoning the actual prejudice standard in PRPs claiming involuntary guilty pleas. See *Fawcett*, 147 Wn.2d at 301-02; *Hews*, 99 Wn.2d at 88. We are also unwilling to read these cases as holding that the involuntary plea itself constitutes actual prejudice. Neither *Isadore* nor *Bradley* expressly held that a plea rendered involuntary due to misinformation constitutes actual prejudice. And, as the facts of this case demonstrate, misinformation does not necessarily result in actual prejudice to a defendant. Here, Stockwell does not claim he suffered actual prejudice from the misstated lower maximum sentence in his plea form, and the record contains no hint of such harm. Stockwell received a favorable plea bargain, he served no prison time for the rape conviction, and he was allowed to continue with his SSOSA. He then finished treatment, fulfilled his community custody conditions, and was discharged from the DOC's supervision 21 years ago.

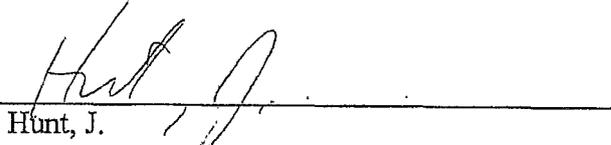
Finally, the State correctly contends that it is bound by the misstated maximum term of 20 years. Where a defendant erroneously receives a lesser sentence, without any fraud on his part or notice that the sentence might be increased, the State cannot later seek a longer, correct sentence because the defendant has an expectation of finality in the sentence once he has served it. *State v. Hardesty*, 129 Wn.2d 303, 312-14, 915 P.2d 1080 (1996). 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

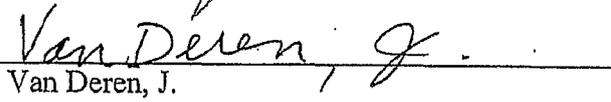
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longer a misstatement. Because Stockwell has not shown actual prejudice, we dismiss the petition.


Armstrong, P.J.

We concur:


Hunt, J.


Van Deren, J.

Relevant Statutory Provisions and Rules

RAP 13.4(b) provides:

(b) Considerations Governing Acceptance of Review. 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.

RAP 13.5A provides:

(a) Scope of Rule. This rule governs motions for discretionary review by the Supreme Court of the following decisions of the Court of Appeals: (1) Decisions dismissing or deciding personal restraint petitions, as provided in rule 16.14(c); (2) Decisions dismissing or deciding post-sentence petitions, as provided in rule 16.18(g); (3) Decisions on accelerated review that relate only to a juvenile offense disposition, juvenile dependency, or termination of parental rights, as provided in rule 18.13(e); and (4) Decisions on accelerated review that relate only to an adult sentence, as provided in rule 18.15(g).

(b) Considerations Governing Acceptance of Review. In ruling on motions for discretionary review pursuant to this rule, the Supreme Court will apply the considerations set out in rule 13.4(b).

(c) Procedure. The procedure for motions pursuant to this rule shall be the same as specified in rule 13.5(a) and (c).

U.S. Const. amend. 14, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. 1, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

RCW 9A.20.020, "Authorized sentences for crimes committed before July 1, 1984," provides in part:

(1) Felony. Every person convicted of a classified felony shall be punished as follows:

(a) For a class A felony, by imprisonment in a state correctional institution for a maximum term fixed by the court of not less than twenty years, or by a fine in an amount fixed by the court of not more than fifty thousand dollars, or by both such imprisonment and fine; . . .

.....

(4) This section applies to only those crimes committed prior to July 1, 1984.

Former RCW 9A.20.021 (1985), "Maximum sentences for crimes committed July 1, 1984, and after," provided in part:

(1) Felony. No person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine; . . .

. . .

(4) This section applies to only those crimes committed on or after July 1, 1984.

Former RCW 9A.44.070 (1985) provided:

Statutory rape in the first degree. (1) A person over thirteen years of age is guilty of statutory rape in the first degree when the person engages in sexual intercourse with another person who is less than eleven years old.

(2) Statutory rape in the first degree is a class A felony. . .

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF
DAN STOCKWELL,
Petitioner.

CAUSE NO. _____
COA No. 37230-4-II
CERTIFICATION OF MAILING

I, Alexandra Fast, certify and declare, that on the 16 day of May 2011 I deposited a copy of the MOTION FOR DISCRETIONARY REVIEW into the United States Mail with proper first-class postage attached, addressed to:

Kathleen Proctor
Pierce County Prosecuting Attorney's Office
930 Tacoma Ave. South, Room 946
Tacoma WA 98402-2171

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

5/16/2011, Seattle, WA
DATE AND PLACE

Alex Fast
ALEXANDRA FAST