No. 86001-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE RESTRAINT OF:

DANIEL J. STOCKWELL,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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

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TABLE OF CONTENTS

Page

A. SUPPLEMENTAL ISSUE 1

B. SUPPLEMENTAL ARGUMENT 1

C. CONCLUSION 9

TABLE OF CASES

Page

Washington Cases

In re Boone, 103 Wn.2d 224, 691 P.2d 964 (1984) 1

In re Bradley, 165 Wn.2d 934, 205 P.3d 123 (2009) 1

In re Fonseca, 132 Wn. App. 464, 132 P.3d 154 (2006) 5

In re Gunter, 102 Wn.2d 769, 689 P.2d 1074 (1984) 1,2

In re Hews, 99 Wn.2d 80, 660 P.2d 263 (1983) 6

In re Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004) 1

In re Murillo, 134 Wn. App. 521,142 P.3d 615 (2006) 5

In re Richardson, 100 Wn.2d 669, 675 P.2d 209 (1983) 2

In re Stockwell, 161 Wn. App. 329, 254 P.3d 899 (2011),
review granted 175 Wn.2d 1005 (2012) 2

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) 7

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988) 1

State v. Lamb, 175 Wn.2d 121, 285 P.3d 27 (2012) 4

State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006) 1

State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988) 7

State v. Taylor, 83 Wn.2d 594, 521 P.2d 699 (1974) 4

State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001) 5,6,7,8

State v. Weyrich, 163 Wn.2d 554, 182 P.3d 965 (2008) 1,2,3,4

State v. Zhao, 157 Wn.2d 188,137 P.3d 835 (2006) 4

Statutes, Constitutional Provisions, Rules, and Other Materials

CrR 4.2(f) 3,4,5,8

RAP 2.5(a) 7,8

U.S. Const. amend. 5 10

U.S. Const. amend. 6 10

U.S. Const. amend. 14 10

Wash. Const. art. 1, § 3 10

Wash. Const. art. 1, § 21 10

Wash. Const. art. 1, § 22 10

A. SUPPLEMENTAL ISSUE

1. Is there a true difference between the standards required to challenge a plea based upon misadvice about the sentencing consequences in a direct appeal and in a collateral attack?

B. SUPPLEMENTAL ARGUMENT

As noted in prior briefing, this Court has already determined that, as it relates to wrong information given about the sentencing consequences of a conviction, such errors are presumed prejudicial in both the direct appeal and collateral attack contexts. *See, e.g., In re Bradley*, 165 Wn.2d 934, 205 P.3d 123 (2009); *State v. Weyrich*, 163 Wn.2d 554, 182 P.3d 965 (2008); *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006); *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004). These decisions do not differ from this Court's prior jurisprudence, where the Court held: "Those 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, 412-13, 756 P.2d 105 (1988), *citing In re Boone*, 103 Wn.2d 224, 691 P.2d 964 (1984); *In*

re Gunter, 102 Wn.2d 769, 689 P.2d 1074 (1984); *In re Richardson*, 100 Wn.2d 669, 675 P.2d 209 (1983).[1]

Yet, the Court of Appeals in the instant case attached great significance to the differences between challenges raised to guilty pleas in the direct appeal context and in the collateral attack context. It is important, however, to recognize that in practice there is little difference between the two methods of challenging guilty pleas based upon mis-information about the sentencing consequences.

For instance, the Court of Appeals in this case described this Court's decision in *State v. Weyrich*, *supra*, as a "direct appeal," and then held that *Weyrich*'s presumption of prejudice would not apply in the collateral attack context. *In re Stockwell*, 161 Wn. App. 329, 335-39, 254 P.3d 899 (2011), *review granted* 175 Wn.2d 1005 (2012). It is correct that *Weyrich* procedurally involved a direct appeal and was not a Personal Restraint Petition. However, the fact that the case was a direct appeal did not change the fact that the appellant still had a burden that was not much different than a petitioner has in a Personal Restraint Petition context.

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[1] Mr. Stockwell's "Reply Brief of Petitioner," filed in this Court on April 30, 2012, sets out a thorough discussion of these cases.

Mr. Weyrich pled guilty to three counts of first degree theft and one count of unlawful issuance of bank checks. He was told that the maximum sentence for each count was five years, when in fact the maximum sentence for the theft counts was ten years. Despite this mistake, Mr. Weyrich received standard range sentences for all counts. Yet, prior to sentencing, Mr. Weyrich moved to withdraw his pleas, arguing that he was misinformed of the maximum sentence for the theft counts. The trial court denied the motion, and Mr. Weyrich appealed. *Weyrich*, 163 Wn.2d at 556.

The issue on appeal in *Weyrich* was whether Mr. Weyrich had made out his burden of demonstrating a "manifest injustice":

> The State argued in part, however, that because the trial court sentenced Weyrich within the correct standard range, the mistaken maximum sentence had no actual bearing on the plea. The Court of Appeals held that Weyrich failed to demonstrate a manifest injustice warranting withdrawal of the pleas.

Weyrich, 163 Wn.2d at 556.

Under CrR 4.2(f), Mr. Weyrich, in fact, had the burden of proving a "manifest injustice."[2] Not only was the "trial court's order on a motion

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[2] CrR 4.2(f) provides in part:

(continued...)

to withdraw a guilty plea or vacate a judgment . . . reviewed for abuse of discretion," *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012), but this Court has held "manifest injustice" is a "demanding standard." *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). A "manifest injustice" is "an injustice that is obvious, directly observable, overt, not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Yet, even under this standard, showing that a plea was involuntary is one of the ways a defendant can automatically prove manifest injustice, *id.* at 597, and, as this Court held in *Weyrich*, where a defendant can show that he or she was given misinformation about the maximum, even if told the maximum was less than it really was, the burden is met automatically, without inquiry into the thought processes of the defendant. *Weyrich*, 163 Wn.2d at 557.

Thus, there is little difference between requiring a defendant to demonstrate on appeal that a trial court abused its discretion by not finding the defendant had proven "manifest injustice" under CrR 4.2(f), and the requirement of showing of "actual prejudice" in the PRP context. If Mr.

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[2](...continued)

> The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. . . .

Weyrich could show an "obvious, directly observable, overt, not obscure" injustice simply by being told his maximum sentence for some of the counts he pled guilty was five years, rather than ten, he would have been able to meet the actual prejudice standard had he not filed a direct appeal of his convictions, but filed a PRP instead.

Indeed, Washington courts have consistently considered the two standards -- CrR 4.2's "manifest injustice" and the PRP "actual prejudice" -- to be essentially equivalent. *See, e.g., In re Murillo*, 134 Wn. App. 521, 530-31,142 P.3d 615 (2006) (reliance on CrR 4.2 "manifest" injustice" standard in PRP case involving misinformation about maximum sentence); *In re Fonseca*, 132 Wn. App. 464, 468, 132 P.3d 154 (2006) (applying CrR 4.2 "manifest injustice" standard in PRP where defendant misadvised about eligibility for DOSA sentence).

The congruity between the CrR 4.2 requirements and the PRP requirements is also illustrated by this Court's decision in *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001). In *Walsh*, the defendant pled guilty to second degree rape, with the understanding that the standard range sentence was 86-114 months. It turned out that the proper range was 95-125 months. The parties both asked for the low end of the range, but the

trial court imposed an exceptionally long sentence of 136 months, based upon deliberate cruelty to the victim. Mr. Walsh did not move to withdraw the guilty plea, and instead appealed, and raised, for the first time on appeal, a challenge to the voluntariness of the plea. *Walsh*, 143 Wn.2d at 4-5.

The Court first identified that Mr. Walsh had the burden, under CrR 4.2(f), of showing a "manifest injustice." *Walsh*, 143 Wn.2d at 6. Because Mr. Walsh, however, had not raised the issue in the trial court, the Court then relied on collateral attack precedent to hold that Mr. Walsh could raise a challenge to the voluntariness of the plea for the first time on appeal. *Walsh*, 143 Wn.2d at 6 ("In *In re Personal Restraint of Hews*, 99 Wn.2d 80, 660 P.2d 263 (1983), this court reviewed a challenge to the voluntariness of a plea agreement which was raised for the first time by way of a personal restraint petition. It follows that the issue can be raised for the first time on appeal.").

Next, the Court held that the failure to inform a defendant of the proper maximum sentence constituted a "manifest error affecting a constitutional right," which allowed Mr. Walsh to raise the issue for the

first time on appeal under RAP 2.5(a)(3).[3] *Walsh*, 143 Wn.2d at 7. This is significant because this Court has held that, for there to be a "manifest error affecting a constitutional right," the defendant must not only identify a constitutional issue, but must also show that it is "manifest" -- he or she must "show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review . . . . If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis." *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). In *Walsh*, the Court held:

> "Manifest" in RAP 2.5(a)(3) means that a showing of actual prejudice is made. [Citations omitted] The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed. [Citation omitted] Walsh's claim that his plea was not voluntary is clearly likely to succeed. "A defendant must understand the sentencing consequences for a guilty plea to be valid." [*State v.*] *Miller*, 110 Wn.2d [528,] at 531[, 756 P.2d 122 (1988)]. Walsh may raise the issue of the involuntariness of his plea for the first time on appeal.

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[3] RAP 2.5(a) provides in part:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

143 Wn.2d at 8.

Mr. Walsh met this burden of showing actual prejudice simply by demonstrating that the plea "was involuntary based upon the mutual mistake about the standard range sentence." *Id.* Such prejudice was present even though the trial court imposed an exceptionally long sentence:

> Finally, there is no merit to the State's suggestion that defendant's choice makes no difference because the court imposed an exceptional sentence of 136 months. The issue here is whether the defendant voluntarily pleaded guilty. Since he did not, imposition of an exceptional sentence based upon that guilty plea cannot stand.

143 Wn.2d at 9. Even though he had received a sentence longer than any of the applicable standard ranges, because Mr. Walsh was misadvised of the sentence ranges, he could make out the necessary showing of actual prejudice to raise the issue for the first time on appeal under RAP 2.5(a)(3), and then demonstrate the "manifest injustice" necessary to withdraw the plea under CrR 4.2(f).

Accordingly, as explained in prior briefing, this Court's prior decisions carrying over the presumption of prejudice from a direct appeal context to a collateral attack context are correct. There is little difference between the burdens that exist in either context. If Mr. Walsh could make

out a showing of "actual prejudice" even though he received an exceptionally long sentence, or if Mr. Weyrich could demonstrate that being told the maximum sentence for some counts was less than what they really were was a "manifest injustice," Mr. Stockwell can meet the same burden even though he filed a PRP, rather than raising the issue for the first time on appeal.

Ultimately, it is the Court's and prosecutor's job to insure that a person pleading guilty is informed of the maximum sentence. This is not a burdensome requirement, nor is it difficult (nor was it in the 1980s) to determine the proper maximum sentence for a particular offense. Accordingly, where the record unambiguously shows that the trial court gave the wrong maximum to the defendant, this Court has held that such misadvice is presumptively prejudicial, in both the direct appeal and collateral attack contexts.

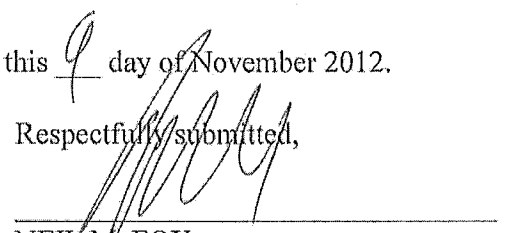
C. CONCLUSION

For these reasons, and the reasons set out in all prior briefing in this Court and in the Court of Appeals, this Court should hold that Mr. Stockwell's plea was involuntary and not knowing, and that the giving of misinformation about the maximum sentence violated Mr. Stockwell's

right to due process of law, the right to a trial by jury, the right to confront witnesses, the right to testify, and the right against self-incrimination, in violation of U.S. Const. amends. 5, 6 &14 and Wash. Const. art. 1, §§ 3, 21 & 22.

Dated this 9 day of November 2012.

Respectfully submitted,



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IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF DAN STOCKWELL, Petitioner.	No. 86001-7 CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare, that on the 9th day of November 2012, I deposited a copy of the "SUPPLEMENTAL BRIEF OF PETITIONER" 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.

11/9/12-SEATTLE, WA
DATE AND PLACE

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