

NO. 86001-7

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DAN STOCKWELL, PETITIONER

Discretionary Review from the Court of Appeals

No. 37230-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does this court's holdings in *In re Personal Restraint of McKiernan* and *In re Personal Restraint of Coats* result in the conclusion that the judgment in this case is facially valid?
2. Does the Court' of Appeal's holding that DOC did not engage in proper notification actions to fulfill its duty, under RCW 10.73.120, to person on supervision in June 1989 directly conflict with this court's holding in *In re Personal Restraint of Runyan*?
3. Did the Court of Appeals properly dismiss the petition when petitioner failed to meet his burden of showing that he was actually and substantially prejudiced by constitutional error?
4. Should this court reject petitioner's argument that the heightened standard applicable to collateral attacks should not be applied to him when he has failed to show that the court's prior decision using this standard were incorrect or harmful?

B. STATEMENT OF THE CASE.

On May 19, 1986, petitioner, DANIEL STOCKWELL, was arraigned on one count of statutory rape in the first degree in Pierce

County Cause Number 86-1-00878-2. Appendix A¹ to the State's original response. He was out of custody at the time of his arraignment and he remained out of custody on personal recognizance pending trial. *Id.* On the date set for trial, petitioner, with the assistance of counsel, entered a plea of guilty to the information; in exchange for the plea, the prosecution agreed to recommend an exceptional sentence downward to bring the range within special sexual offender sentencing option (SSOSA) guidelines, provided that the petitioner's therapist affirmed that petitioner was still treatable in the community. Appendix B to the State's original response.

The presentence investigation report (PSI), which included a detailed statement from the petitioner, described how he had groomed and raped a young girl. Appendix D to the State's original response. Pursuant to a joint recommendation from the State and defense, the court imposed an exceptional sentence downward of 24 months so that petitioner was eligible for a sentence under the special sexual offender sentencing option (SSOSA). Appendices C and E to the State's original response.

The statement of defendant in his guilty plea form, the PSI, and the findings of fact and conclusions of law on the exceptional sentence provide the back story to this prosecution and its resolution. Appendices

¹ Please note that the cover sheet for this Appendix incorrectly labels it as being a "Judgment and Sentence" instead of the correct "Clerk's journal entry for the arraignment."

B, D, and E to the State's original response. Petitioner was convicted of indecent liberties in 1985 and given a SSOSA sentence that included treatment in the community. Appendix D and E to the State's original response. As part of his treatment, his therapist required petitioner to disclose any past sexual activity of a deviant nature; petitioner disclosed that he had had sexual contact with a child prior to his arrest and conviction on indecent liberties. Appendix E to the State's original response. That contact was the basis for the charge of statutory rape in the case now before the court. Until petitioner's disclosure, the existence of a second victim was unknown to any authorities. *Id.* The apparent goal behind the joint recommendation was for petitioner to continue under a SSOSA sentence thereby acknowledging petitioner's honesty in his disclosure and his efforts to cooperate with treatment of his deviancy; sending petitioner to prison would simply discourage such honesty and undermine the purpose of SSOSA sentences. *Id.* The proper statutory maximum term for the crime of statutory rape in the first degree committed after July 1, 1984, is life. RCW 9A.20.021(4). The judgment incorrectly lists the statutory maximum as 20 years. Appendix C to the State's original response.

Petitioner did not file a direct appeal from entry of his judgment. On October 27, 1989, the court signed a certificate and order of discharge after petitioner successfully completed his SSOSA sentence. Appendix F to the State's original response. The order discharged petitioner from the

confinement and supervision of the department of corrections and restored his civil rights. *Id.*

In 2004, petitioner was convicted of child molestation in the first degree and attempted child molestation in the first degree in Kitsap County. Appendix G to the State's original response. He was found to be a persistent offender and sentenced to life without the possibility of parole. *Id.* The criminal history listed on this judgment are petitioner's 1985 conviction for indecent liberties in Pierce County Cause Number 85-1-00611-1 and his conviction in for statutory rape in the first degree in Cause Number 86-1-00878-2. *Id.*

On December 24, 2007, petitioner filed his first personal restraint petition under Pierce County Cause Number 86-1-00878-2 alleging that he did not enter a voluntary plea. It was filed more than twenty one years after the conviction became final and more than fifteen years after petitioner's discharge from the department of corrections on this conviction.

Petitioner asserted that his plea was involuntary and that the time bar of RCW 10.73.090 did not apply to his petition because his judgment was facially invalid due to the erroneous maximum term. Alternatively, he argued that the time bar shouldn't apply because he was not properly advised of the existence of the time bar by the Department of Corrections ("DOC") when it first went into effect as required by RCW 10.73.120. The State responded that petitioner had failed to demonstrate the invalidity

of his judgment and that the Washington Supreme Court had previously examined the obligation of DOC under RCW 10.73.120 and determined that it had taken reasonable steps to notify probationers of the enactment of RCW 10.73.090 and that the statute does not require that actual notice be given, only “[a] good faith effort to advise.” *In re Personal Restraint of Runyan*, 121 Wn.2d 432, 452, 853 P.2d 424 (1993). The State contended the petition should be dismissed as time barred. The Court of Appeals agreed with the State, finding that while there was a technical error on the judgment – it listed the maximum term as being twenty years instead of the correct term of life- that this error did not render his judgment invalid. *See* Order Dismissing Petition at p. 4, filed September 23, 2008. The court noted that: 1) petitioner was given, and fully served, a sentence under the a Special Sexual Offender Sentencing Alternative (“SSOSA”) and, thus, was never confined pursuant to his conviction; 2) the sentence imposed was not in excess of that authorized by the legislature; and, 3) petitioner never faced a longer maximum term than that of which he was given notice. The court concluded that the “technical error did not affect Stockwell in any way and did not violate any law that Stockwell raises or we discovered. Stockwell demonstrates only that the judgment and sentence is technically imperfect, not that it is facially invalid.” *Id.* The court dismissed the petition as untimely. Order Dismissing Petition at p. 4. Petitioner sought discretionary review. This Court stayed the petition until the Supreme Court issued its decision in *In*

Personal Restraint of McKiearnan, 165 Wn.2d 777, 203 P.3d 365 (2009); then remanded the case back to the Court of Appeals for it to reconsider in light of that decision.

The decision in *McKiearnan* did not discuss the notification procedures of RCW 10.73.120 and therefore there was no mandate to reassess that portion of the decision; but on remand, a panel of the Court of Appeals changed its mind about the applicability of the time bar, finding that DOC had not made a good faith effort to notify petitioner of the one year time bar when RCW 10.73.090 first went into effect. It held the time bar was not applicable to the petition, irrespective of whether petitioner had received actual notice of the time bar through other means. Nevertheless, the court below still dismissed the petition on the merits, holding that petitioner had failed to show that he suffered actual prejudice by the misadvisement as to the maximum term for his offense; it rejected petitioner's claim that all he had to do was show a presumption of prejudice to obtain collateral relief. The Court of Appeals distinguished the cases petitioner relied upon for relief and disagreed with petitioner as to the holding of two recent Supreme Court cases. *See In re Personal Restraint of Stockwell*, 161 Wn. App. 329, 339, 254 P.3d 899 (2011). The court noted that not only had the statutory maximum term (either the incorrect shorter term of which defendant was advised or the longer, correct term) not impacted the sentence that Stockwell actually served,

that the correct statutory term never could be imposed as the State would be forever bound by the misstated lower 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. 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.

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

Petitioner again sought discretionary review in this court, which was granted.

C. ARGUMENT.

1. THE PETITION SHOULD BE DISMISSED AS TIME BARRED; UNDER *MCKIERNAN* AND *COATS* THE JUDGMENT IS FACIALLY VALID AND THERE IS NO EXCEPTION FOR A CLAIM OF INVOLUNTARY PLEA; UNDER *RUYAN* THE TIME BAR IS APPLICABLE AS THE DEPARTMENT OF CORRECTIONS FULFILLED ITS DUTY TO ADVISE UNDER RCW 10.73.120.

There are significant societal costs to granting collateral relief. “Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right

to punish admitted offenders.” *In re Personal Restraint of Hagler*, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982) (citing *Engle v. Issac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). These costs are significant and require that collateral relief be limited in state as well as federal courts. *Id.*

In Washington, collateral attacks to a judgment must be brought in a timely manner- within one year after the “judgment has become final if the judgment and sentence is *valid on its face*.” RCW 10.73.090(1) (emphasis added). Because of the costs and risks involved, there is a time limit in which to file a personal restraint petition. RCW 10.73.090(1) subjects petitions to a one-year statute of limitation. The statute provides:

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). The statute of limitations set forth in RCW 10.73.090(1) is a mandatory rule that bars appellate consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates that the claims raised fall within an exception to the time limit under RCW 10.73.090 or under RCW

10.73.100. Neither the Supreme Court nor the Court of Appeals may grant relief on a petition that is time barred. *See* RAP 16.4 (d)².

Under RCW 10.73.090(1), a collateral attack on judgment and sentence may be filed more than a year after the judgment is final if the claim raised attacks the on facial validity of the judgment and sentence or the jurisdiction of court. Although what makes a judgment “invalid on its face” has vexed this court, it is clear that a petitioner must show something more than just an error in the judgment.

[A] judgment and sentence is not valid on its face if it demonstrates that the trial court did not have the power or the statutory authority to impose the judgment or sentence. “Invalid on its face” does not mean that the trial judge committed some legal error. A trial court does not lose its authority because it commits a legal error, and most legal errors must be addressed on direct review or in a timely personal restraint petition or not at all.

In re Personal Restraint of Scott, 173 Wn.2d 911, 916, 271 P.3d 218, 221 (2012).

The Washington Supreme Court addressed in two recent cases whether a technical misstatement of the maximum term of confinement in a judgment renders the judgment “facially invalid” such that the one year time bar of RCW 10.73.090 does not apply. *In re Personal Restraint of*

² RAP 16.2(d): Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

Coats, 173 Wn.2d 123, 267 P.3d 324 (2011); *In Re Personal Restraint of McKiearnan*, 165 Wn.2d 777, 203 P.3d 365 (2009).

McKiearnan pleaded guilty to robbery in the first degree in 1987 and his judgment listed the maximum term for the crime as twenty years to life imprisonment when it should have listed the maximum term simply as “life.” *McKiearnan*, 165 Wn.2d at 780. McKiearnan did not appeal but twenty years after his plea, he filed a personal restraint petition alleging that his plea had been involuntary because he had been misinformed of the correct statutory maximum term. As for the one-year time bar of RCW 10.73.090, McKiearnan did not assert that his claim fell under any of the exceptions to the time bar listed in RCW 10.73.100; rather, he argued that because the sentencing court had no “authority to set the maximum sentence at anything less than life imprisonment” and that he need do nothing more that point out this error in the judgment in order to avoid the one-year time bar. *Id.* at 782. The Supreme Court disagreed, noting “McKiearnan was convicted of a valid crime by a court of competent jurisdiction and was sentenced within the appropriate standard range,” and 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.” *Id.* at 782-783. The court held that as McKiearnan had failed to establish facial invalidity of his judgment, his personal restraint petition was time barred under RCW 10.73.090 and properly dismissed. *Id.* at 783.

In re Personal Restraint of Coats concerned a defendant who pleaded guilty to conspiracy to commit murder, conspiracy to commit robbery, and robbery, all in the first degree. He received a standard range sentence on each of his crimes for a total of 20 years confinement. His judgment and sentence erroneously stated that the maximum sentence for conspiracy to commit robbery was “life in prison” when it should have stated “ten years,” but the maximums for his other crimes were listed correctly, as were all the standard ranges. *Coats*, 173 Wn.2d at 127. Coats contended that this error rendered his judgment facially invalid, but this court disagreed. It reiterated its holding in *McKiernan* that not every error in a judgment renders it invalid, even errors in the maximum term. Rather it is only when “a court has in fact exceeded its statutory authority.” 173 Wn.2d at 135. It held:

[W]e have regularly found facial invalidity when the court actually exercised a power it did not have. However, we have never found a judgment invalid merely because the error invited the court to exceed its authority when the court did not in fact exceed its authority. Only where the judgment and sentence was entered by a court without the authority to do so have we held the judgment invalid.

173 Wn.2d at 137

In the case now before the court, the judgment became final on September 26, 1986, the day it was filed in superior court. RCW 10.73.090(3); Appendix C to the State’s original response. Petitioner Stockwell makes essentially the same argument that McKiernan and

Coats made with regard to the facial invalidity of his judgment due to a misstated statutory maximum term.

As the Supreme Court rejected this argument *McKiernan* and *Coats* and those decisions control here. Petitioner pleaded guilty knowing the correct standard range for his offense and was then given an exceptional sentence downward, which the trial court had the authority to do. Petitioner has failed to show that judgment shows that the trial court exceeded its authority. Under *McKiernan*, “a more substantial defect than a technical misstatement that had no actual effect on the rights of the petitioner” is required before the court will find that a judgment is facially invalid. *See* 165 Wn.2d at 783(emphasis added). Under both *McKiernan* and *Coats*, the type of error in petitioner’s judgment does not render his judgment “facially invalid.”

The Court of Appeal erred in finding that the time bar did not apply to the petition because it found there was no evidence that DOC made any attempt to notify petitioner of the enactment of the time bar. Initially the Court of Appeals found the time bar was applicable; it was only after this court remanded the case to the lower court to reexamine its decision under *McKiernan*, that the court found that the time bar was not applicable because of DOC’s failure to do its duty under RCW 10.73.120. First, nothing in *McKiernan* required a reassessment of this aspect of the prior decision, so the lower court exceeded the scope of the remand order. Secondly, the Court of Appeal’s latter decision directly conflicts with this

Court's holding in *In re Personal Restraint of Runyan*, 121 Wn.2d 432, 853 P.2d 424 (1993). This Court construed RCW 10.73.120 and determined that it did not require that actual notice be given, only that the department engaged in "[a] good faith effort to advise." *Runyan*, 121 Wn.2d at 452. The duty established in RCW 10.73.120 did not require DOC to give immediate notice on or after July 23, 1989, but only "[a]s soon as practicable." The statute did not specify any particular method of advisement. In *Runyan*, the Supreme Court held that by posting notices in community corrections offices in December of 1989 the department had fulfilled its duty under RCW 10.73.120 to make a good faith effort to advise persons on community supervision on July 23, 1989 as soon as practicable of the enactment of the time bar. *Id.* at 451-453. Even though DOC's efforts may not have provided every probationer with *actual* notice, this Court held they were sufficient to trigger applicability of the time bar to persons such as petitioner. The court below erred in not following *Runyan* and finding the time bar is applicable to petitioner's collateral attack.

An assertion that a plea is involuntary does not establish that a judgment is invalid on its face, *see In re Personal Restraint of Hemenway*, 147 Wn.2d 529, 531, 55 P.3d 615 (2002) and there is no exception for this claim in RCW 10.73.100. As there is no exception for the issue raised in petitioner's untimely petition, it should be dismissed as time barred.

2. THE PETITION WAS PROPERLY DISMISSED BECAUSE PETITIONER HAS FAILED TO SHOW THAT HE SUFFERED ACTUAL AND SUBSTANTIAL PREJUDICE FROM AN ERROR OF CONSTITUTIONAL MAGNITUDE WHICH REQUIRED TO OBTAIN COLLATERAL RELIEF.

This court has stated repeatedly, that a personal restraint petition, like a habeas corpus petition, is not a substitute for an appeal. *In re Personal Restraint of Grantham*, 168 Wn.2d 204, 210-211, 227 P.3d 285, 289 (2010), *Hagler*, 97 Wn.2d at 824, 650 P.2d 1103 (citing *In re Personal Restraint of Myers*, 91 Wn.2d 120, 121 n. 1, 587 P.2d 532 (1978)). In order to “prevent it from becoming a substitute for an appeal, and to protect the finality of judgments, this court has imposed significant threshold, prima facie burdens on the petitioner before the merits of the substantive claim will be considered.” *Grantham*, 168 at 211. When there has been the prior opportunity for appellate review, the petitioner must first establish that a constitutional error has resulted in actual and substantial prejudice, or that a nonconstitutional error has resulted in a fundamental defect which inherently results in a complete miscarriage of justice in order to prevail on a collateral attack by way of personal restraint petition. *In re Personal Restraint of Grantham*, 168 Wn.2d 204, 212-213, 227 P.3d 285 (2010); *In re Personal Restraint of Isadore*, 151 Wn.2d 294, 298-99, 88 P.3d 390 (2004); *In re Personal Restraint of Cook*, 114 Wn.2d at 810, 812, 792 P.2d 506 (1990). These heightened

threshold requirements are “justified by the court’s interest in finality, economy, and integrity of the trial process and by the fact that the petitioner has already had an opportunity for judicial review.” *Isadore*, 151 Wn.2d at 298–99.

In this case, petitioner had the opportunity to file an appeal after the taking of his plea and the entry of judgment back in 1986, but did not seek appellate review. Because petitioner had the prior *opportunity* for judicial review, he must meet the heightened standard in order to obtain collateral relief. He has not met this standard. There are several facts beyond dispute in this case.

1. Petitioner is factually guilty of statutory rape in the first degree. He admitted his crime to his therapist and admitted his guilt in court.
2. He entered a plea agreement with the prosecution and the prosecution fully performed its responsibilities under its contract with him. He now seeks to undo his conviction which was the *benefit* that the prosecution received from its contract with him.
3. His crime’s maximum term had no impact on the actual sentence that petitioner received and served in this case. After his sentence, he remained in outpatient treatment, successfully completed it and was discharged from any further DOC restraint on this matter in 1989 - approximately three years after he was sentenced. His actual term of DOC restraint did not approach the twenty year maximum term he was informed of at the time of his plea or the “life” maximum that the Legislature had authorized for his crime.
4. Petitioner suffered no greater direct consequences than those of which he was informed at the time he entered

his plea.

5. For the three years he was under supervision and for many years following his discharge from supervision, there is no evidence in the record that petitioner was unhappy with his guilty plea or the resolution that flowed from it.

The Respondent would also contend that the circumstances of petitioner's plea indicate why he did not appeal from the entry of his plea and sentence. He had entered into a plea agreement with the prosecution that was very favorable to him; the sentencing court followed the agreed recommendation, which resulted in petitioner being given an exceptional sentence downward and enabled him to continue in outpatient treatment, thereby avoiding prison. In short, he received the best possible resolution that he could hope for under the circumstances. It would appear that petitioner remained content with his plea agreement right up until the time he reoffended and his prior conviction was used in a subsequent sentencing in 2004.

But petitioner cannot show that the misstatement of the maximum term caused him any actual or substantial prejudice. This is why he must argue that he is entitled to the presumption of prejudice that would flow in his favor were he raising this issue in a direct appeal. But here, unlike most direct appeals, the petitioner has fully served his sentence and the court knows exactly which - of the many direct consequences that might come to pass - actually did. The court knows with certainty that the

misstatement in the maximum term had no impact at all on the sentence actually served and that -while there may have been a technical mis-advisement- there was no actual mis-advisement. Thus, petitioner has not shown true constitutional error as he was fully advised of all of the direct consequences of his plea that he actually suffered.

Essentially, petitioner asks this court to ignore the distinction this court has so firmly maintained and to require no greater showing from him than he would have to show in a direct appeal. This court should reject his request to turn personal restraint petitions into substitutes for direct appeals. The burden placed on a petitioner to show actual and substantial prejudice arising from error of constitutional magnitude predates the 1989 enactment of the one year time bar in RCW 10.73.090. *See, e.g., In re Personal Restraint of Hews*, 99 Wn.2d 80 86, 660 P.2d 263 (1983). Hews wanted to challenge his guilty plea for the first time on collateral attack but case law precluded the raising of any issue that *could* have been raised on direct appeal. The court considered that this rule operated too bluntly. The court in *Hews*, noted that it was getting out of step with federal authority³ and wrestled with a way to allow some constitutional errors to be raised for the first time on collateral review without opening

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

the door to all constitutional claims – as that posed too great a risk to the finality of judgments. *Hews*, 99 Wn.2d at 86-87. The showing of actual and substantial prejudice flowing from constitutional error was the limitation placed on persons seeking collateral relief so that the finality of judgments was protected and personal restraint petitions did not just become a substitute for appeal.

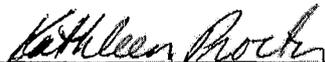
Petitioner asks this court to abandon this standard but he has not shown that *Hews*, or the court's many decisions applying this standard, were wrongly decided or harmful. The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. *State v. Abdulle*, 174 Wn.2d 411, 415, 275 P.3d 1113, 1115 (2012). Adopting petitioner's argument would be harmful to the finality of judgments. Finality of judgment has been described as "an indispensable ingredient for the effective administration of justice." *Honore v. Wash. State Bd. of Prison Terms & Paroles*, 77 Wn.2d 660, 691, 466 P.2d 485 (1970). Because he cannot show actual or substantial prejudice flowing from his 1986 guilty plea, this court should affirm the dismissal of his petition.

D. CONCLUSION.

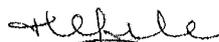
For the foregoing reasons, the State asks this court to affirm the dismissal of the petition.

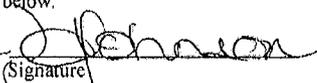
DATED: November 9, 2012

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Certificate of Service:

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

11/9/12 
Date Signature