

SUPREME COURT NO: 91268-8

COURT OF APPEALS NO: 45862-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JERRY LEE SWAGERTY,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent,

Received
Washington State Supreme Court

FEB 23 2015

Ronald R. Carpenter
Clerk

(Amended) MOTION FOR DISCRETIONARY REVIEW

REVIEW OF COURT OF APPEALS OPINION PURSUANT RULE 13.5(b)(1)(2)

By order dated 12-9-2015, the Court
Granted Petitioner's motion to amend.
The motion to amend is attached.

Jerry Swagerty #903395
BE-11-1L
Coyote Ridge Corrections Center
P.O. Box 769
Connell, Wa. 99326

Table of Contents

I. ASSIGNMENTS OF ERROR

1. Whether Court of Appeals Division II misapprehended a recent Wa State Supreme Court Decision.
2. Whether State violated double jeopardy when it charged defendant with (2) First Degree Crimes for (1) single act.
3. Whether State perpetrated misconduct by charging the defendant with (2) First Degree Crimes to avoid Statute of Limitations where primary evidence only supports (1) Third Degree Offense time-barred.
4. Whether (2) lawyers from the department of assigned counsel committing more than several cumulative errors constitutes malevolent counsel.
5. Whether Judicial Prejudice exists when a Judge cancels an evidentiary hearing that would have cleared up many errors and instead adjudicated exceptional consecutive sentences.

6. Whether State violated due process for not providing "certified copies" of defendant's criminal history while claiming defendant may be under the jurisdiction of persistent offender status.
7. Whether Court of Appeals panel of Judges violated due process rights of Petitioner by not ordering commissioner to Order respondent provide parts of the record relevant to PRP proceeding.
8. Whether respondent ignoring RAP 16.9 violates due process.
9. Whether it's abuse of discretion when Court of Appeals does not Order Petition back to the superior court to protect the due process rights of the accused in several reference hearings for multiple determinations on the merits.
10. Whether erroneous sentence was willfully perpetrated by the State & assigned counsel. And whether Petitioner may challenge Characterization of Statute in violation actual elements & ex post facto clauses.
11. whether "actual innocence" exists and was ignored by the Court of Appeals Division II panel of Judges.

II.	<u>IDENTITY & AUTHORITY</u>	1
III.	<u>DECISION OF THE COURT OF APPEALS</u>	1
IV.	<u>ISSUES PRESENTED FOR REVIEW</u>	1-6
V.	<u>STATEMENT OF THE CASE</u>	
	1. Substantive Facts	6
	2. Procedural Facts	7,8
VI.	<u>ARGUMENT WHY REVIEW SHOULD BE GRANTED</u>	8-19
VII.	<u>CONCLUSION</u>	19
VIII.	<u>CLOSING ARGUMENT</u>	20

Table of Authorities

Wa State Cases:

In Re Carle, 93 Wn.2d 31 (1980)	18
In Re Carter, 172 Wn.2d 923 (2011)	15
State v. Hunley, 175 Wn.2d 901 (2012)	18
State v. Lindsey, 288 P.3d 641 (2013)	10
State v. Miller, 324 P.3d 791 (2014)	15
State v. Peltier, 332 P.3d 459 (2014)	1,2,9
In Re Rice, 118 Wn.2d 876 (1992)	14
In Re Stenson, 174 Wn.2d 474 (2012)	15
In Re Stoudmire, 5 P.3d 1240 (2000)	2,9
State v. Thompson, 173 Wn.2d 865 (2012)	19

Federal Cases:

Anado v. Gonzales, 734 F.3d 936 (9th Cir. 2014)	15
Cannady v. Adams, 706 F.3d 1148 (9th Cir. 2013)	12
Howard v. Clark, 608 F.3d 563 (9th Cir. 2010)	12
Hurles v. Ryan, 752 F.3d 768 (9th Cir. 2014)	13,15
Reynoso v. Guirbino, 462 F.3d 1099 (9th Cir. 2014)	12
Stanley v. Schriro, 598 F.3d 612 (9th Cir. 2010)	13,15
Flore v. White, 121 S.Ct. 712 (2001)	18
Martinez v. Ryan, 132 S.Ct. 1309 (2012)	15
Trombetta, 104 S.Ct. 2528 (1984)	19

Wa State Statutes:

RCW 9.94A.460 13

Rules:

RAP 13.5(b)(1)(2) 1

RAP 16.9 8,13

RAP 16.11 14,15

RAP 16.12 14

A. IDENTITY & AUTHORITY

Jerry Swagerty asks this Court to accept review of the unpublished opinion of the CoA Division II designated in Part B of this Motion pursuant Rule 13.5(b)(1)(2) whereas a panel of Judges has committed obvious errors that render any further proceedings useless, and panel of Judges have committed probable errors that subsequently limits the freedom of Pro Se Petitioner to act.

B. DECISION

The Court of Appeals Division II rendered an unpublished opinion of "vacate convictions and remand for an Order for dismiss" addressing only (1) single issue while ignoring (4) core Grounds of "erroneous sentence", "ineffective assistance of malevolent counsel", prosecutorial misconduct", and "judicial prejudice" underlining violations of "due process", "double jeopardy", "actual elements", including and not limited to "actual innocence". [see Appendix A].

C. ISSUES PRESENTED FOR REVIEW

1. On 1st impression & conclusion of State v. Peltier, 181 Wn.2d 290, 332 P.3d 459 (2014), this Court re-established that once the statute of limitations had run, it did not affect the trial court's subjectmatter jurisdiction, but rather the authority to **sentence** a defendant.

In the instant case, the State conceded a "package deal" was signed sealed where (3) of the (4) amended charges were in violation of the statute of limitations whereof Jerry Swagerty did not sign an express waiver at the time the plea bargain was made. When confronted by the Court of Appeals on the matter, the State then claimed Petitioner could only sign the waiver or go to trial on the original charges. Jerry Swagerty argued that " "State must stay the plea bargain and return Petitioner to the superior court to be re-sentenced on the single remaining amended charge that is not time-barred."

The CoA rejected Petitioner's argument, and overturned all the convictions completely in favor of the State without prejudice.

Did the CoA panel of Judges misapprehend this Court's Decision in Peltier, supra, [in review of] In Re Stoudmire, 141 Wn.2d 342, 5 P.3d 1240?

2. The State charged Jerry Swagerty with (2) First Degree Crimes for (1) single alleged act.

Does charging a defendant with (2) separate crimes for (1) act constitute a violation of the double jeopardy clause?

3. The State charged Jerry Swagerty with (2) First Degree

crimes whereof only (1) single Third Degree Offense exists based upon primary evidence.

Did the State perpetrate misconduct by purposely exaggerating charges to avoid time-barred statute of limitations?

4. Two lawyers from the department of assigned counsel did not provide & preserve any type of protections for a proper defense for a defendant charged with (2) First Degree Crimes facing threat of erroneously being sentenced to life without the possibility of parole.

Does no defense at all, and negotiating a plea deal completely in favor of the State constitute ineffective assistance of malevolent counsel?

5. The sentencing Judge cancelled an evidentiary hearing that would have corrected cumulative errors perpetrated by both State & assigned counsel, and instead sentence defendant to a natural life sentence.

Is it judicial prejudice when a Judge ignores the defendant claiming errors at both plea hearing & sentence hearing?

6. The State refuses to provide "certified copies" of Jerry Swagerty's "actual criminal history", "hospital report", and "alleged victim description of suspect".

Has the State continued to violate the due process rights of Jerry Swagerty?

7. The CoA panel of Judges did not Order commissioner to compel respondent to provide parts of the record relevant to proceeding of PRP filed by Jerry Swagerty.

Did CoA panle of Judges violate the due process rights of Jerry Swagerty via abuse of discretion?

8. Respondent did not answer allegations in the initial or Amended PRP filed by Jerry Swagerty.

Does continuing willful neglect of an accused's on the part of the State constitute abuse of power resulting in prosecutorial misconduct?

9. The CoA panel of Judges completely ignored the "actual facts of the case" and "misconstrued unsubstantuated allegations by the State as being true". Then said panel of Judges opined the issue of statute of limitations "dispositive" ignoring all

other claims of Petitioner including and not limited to primary claim of "purposeful" violation of the statute of limitations just to save face for police who wasted over \$40,000.00 in man hours that were charged to Jerry Swagerty as an LFO.

Did the CoA panel of Judges violate the due process rights of Jerry Swagerty by not Ordering the case back to the superior court for several reference hearings for multiple determinations on the merits?

10. The State arose Jerry Swagerty's 1989 Robbery II convictions for the 1st time as strikes in the form of being seperate and accorded threat of persistent offender status if defendant did not take outlandish plea agreement, notwithstanding both of the Robbery II convictions were in fact decreed non-violent and adjudicated "same criminal conduct".

Did the State & assigned counsel purposely neglect facts not excused as harmless error? And is it a violation of "actual elements" and the "ex post facto clause" when a Wa State Statute does in fact "retroactivate" prior convictions and make them worst than when they were when committed?

11. Jerry Swagerty's d.n.a. was not discovered on swabs taken

directly from alleged victim at the time of alleged incident.

Did the CoA panel of Judges abuse it's discretion by violating Petitioner's due process rights when Petitioner has consistently proclaimed "actual innocence"?

D. STATEMENT OF THE CASE

Substantive Facts

On approximately February 14th, 2004, a male subject was followed out of a Safeway store by an adolescent girl where police alleged the male suspect licked said girl's private area. PR. That same little girl was immediately taken to the hospital whereof an official examination concluded that no physical crime was evident, and Jerry Swagerty's d.n.a. was not discovered on swabs taken directly from alleged victim's private area at the time of alleged incident. HR.

Police conducted several investigations over the years to no avail. However, over 8 years later, out of nowhere, police claim they finally ran a d.n.a. test on the adolescent girl's underwear claiming they then found Petitioner's d.n.a., and that the cold case warranted (2) separate First Degree crimes for the (1) single alleged incident that didn't reveal any such evidence 8 years prior at the time of alleged incident. DPCC-11.

Procedural Facts

When Jerry Swagerty arrived at the pierce county jail, (2) lawyers from the department of assigned counsel did not schedule any evidentiary hearings, nor file any Motions with the court to preserve issues for a proper defense of the accused claiming innocence where primary evidence supports such a claim. Instead both attorney's only tried to have Jerry Swagerty deemed incompetent to stand trial. DRCD-1&2. And when that didn't work, both attorney's only negotiated a plea agreement completely in faovr of the State. PA-A&B.

Jerry Swagerty claimed multiple errors were perpetrated at plea hearing. AMENDED PRP w/ EXHIBITS. Instead of sentencing Judge stopping the proceedings and ordering an evidentiary hearing , said Judge instead cancelled a scheduled omnibus hearing. CCC-3. And sentenced Petitioner to a harsh excessive set of consecutive sentences even after Jerry Swagerty protested punishment was unlawful at sentence hearing.

Soon after Jerry Swagerty arrived at prison, Petitioner attempted to retain all the records of the instant case to file a PRP and appeal to a higher Court. PRP-EXHIBIT 4. However, after more than several attempts -- due to Jerry Swagerty being too poor to pay for said materials -- Petitioner was able to secure a meager enough amount of the case file to file Amended PRP in the 11th hour before the 1 year time constraint expired.

Once the PRP was filed, the State file it's answer that did not address allegations in the PRP. AB. Jerry Swagerty then

filed a Reply Brief standing on the foundation that the State was continuing corrupt & unlawful practices, RB. After that Jerry Swagerty filed several Motions concerning demand for records pursuant RAP 16.9 that were continually ignored by commissioner. [see APPENDIX B]. When Supplemental Briefs were ordered from respondent & Petitioner for statute of limitations on amended charges, Jerry Swagerty had to file an informal prejudice complaint because Petitioner was not notified by the CoA as to filing a Reply to State's Supplemental. Soon thereafter, Jerry Swagerty was able to acquire an on-line copy of Peltier, infra, to file a Final Amended Reply, PRSSB. Within a few weeks of that incident, Jerry Swagerty filed a Motion on the Merits to reverse with prejudice that was placed in the file without consideration due to rule constraints.

Approximately January 29th, 2015, Jerry Swagerty received in the U.S. Mail the CoA panel of Judge's unpublished opinion of "vacate convictions and remand for dismiss" not addressing core claims of Pro Se Petitioner Jerry Swagerty.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Statute of Limitations on Amended Charges

1. As a matter of question, the facts of the instant case are that the State -- knowing (3) of (4) amended charges offered in a "package deal" --- were time-barred where an express waiver was never mentioned at plea hearing and/or sentence hearing.

In this Court's recent Decision of State v. Peltier, 332 P.3d 457 (2014), on 1st impression & conclusion, this Court upheld long-standing precedence in In Re Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000) that "when statute of limitations has already ran, it doesn't affect the subject matter jurisdiction [plea bargain?], but rather the authority to sentence defendant for crimes [in a plea bargain?]¹¹". The issue being considered in the instant case is that Jerry Swagerty has continuously only challenged the unlawful parts of the plea agreement such as the time-barred amended charges & erroneous harsh exceptional consecutive sentences.

Should this Court overrule the CoA opinion and hold the State accountable to honor it's own plea agreement --- notwithstanding time-barred parts --- and re-sentence Jerry Swagerty to amended charge not in violation of statute of limitations?

In respondent's Supplemental, the State proclaims that amended information does not supercede the original when the defendant procures a plea bargain, then successfully withdraws plea bargain in a subsequent proceeding quoting this Court's Decisions in Oestreich, Johansen, Korum.

Jerry Swagerty argued that Petitioner is not nor did not want to take back the "package deal agreement". Jerry Swagerty

is only seeking "what is just & right" easily distinguished from the corruption & unlawful practices of the pierce county superior court system.

Violation of Double Jeopardy

2. The alleged facts of the instant case are that an adolescent girl was licked in the privates by a male suspect. (1) single incident clearly claimed by police & prosecutor. However, State charged defendant with (2) separate 1st degree crimes.

Will this Court consider and uphold it's Decision in State v. Lundsey, 288 P.3d 641, "two separate crimes for one offense violates double jeopardy"?

Primary Statute of Limitations Violation

3. Jerry Swagerty alleges that primary evidence in the instant case may or may not only support a single offense of the time-barred charge of luring of a child.

The facts are that alleged victim was immediately taken to the Hospital whereupon a thorough examination concluded that no physical crime was evident, and Jerry Swagerty's d.n.a was not discovered on swabs taken directly from alleged victim's private area at the time of alleged incident. However, over 8 years later, police claim only then was Petitioner's d.n.a. found on alleged victim's underwear. Upon this information only,

the State charged Jerry Swagerty with (2) separate 1st degree crimes to avoid the (3) year statute of limitations on the offense of luring of a child.

Will this Court Order respondent to provide the "complete case file" whereof this Court may be able to see it's way clear to a de novo reverse with prejudice Decision based upon fact & Law?

Ineffective Assistance of Malevolent Counsel

4. The facts of the instant case are that while Jerry Swagerty faced (2) 1st degree crimes alleged to possibly result in an unsubstantuated persistent offender sentence. Both lawyers from the department of assigned counsel did not conduct any type of investigation at all, did not schedule 404(a) & 404(b) hearings pursuant a requested character & criminal history defense, and did not file any Motions with the court concerning suppression of outdated evidence, dismissal on actual innocence, including and not limited to change of venue because the police fed the media vulgar disgusting lies about the defendant where the description of the suspect does not describe defendant and defendant's d.n.a. was not discovered on swabs taken at the time of alleged incident. INSTEAD, both assigned counsel tried to have defendant deemed incompetent to stand trial, and when that didn't work, "malevolent counsel" would only

negotiate a plea agreement completely in favor of the State that went from a simple disgusting offense of licking the pussy of an adolescent girl to a so called bargain that gives the appearance that defendant broke into a house, lured a child outside, raped said child, and then threatened same child not to tell. Absolutely nowhere near the actual elements of the alleged incident.

Will this Court consider Howard v. Clark, 608 F.3d 563 at 579 (9th Cir. 2010), defense counsel should have conducted a prompt investigation of the case and explored all avenues leading to the facts relevant to the merits of the case", Cannedy v. Adams, 706 F.3d 1148 at 1162 (9th Cir. 2013), "that Petitioner receiving ineffective assistance of counsel is objectively reasonable of prejudice"; including and not limited to Reynoso v. Guirbino, 462 F.3d 1099 at 1112 (9th Cir. 2006), "counsel cannot be said to have made a tactical decision"?

Judicial Prejudice

5. The sentencing Judge actually cancelled an omnibus hearing that would have cleared up protested errors in the instant case that transpired between State & assigned counsel without the permission of the defendant.

Will this Court consider *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014), "CoA abused it's discretion in denying judicial bias claim [in review of] *Stanley v. Schriro*, 598 F.3d 612 (9th Cir. 2010), "Petitioner entitled to an evidentiary hearing on Sixth Amendment Violation"?

Violation of Due Process

6. State continuously violated the due process rights of Jerry Swagerty by not providing "certified copies" of several Judgment & Sentences at the trial court level & appellate level that prove Petitioner's Robbery II prior convictions were in fact adjudicated "same criminal conduct" by the King County Court and conceded by the later Clark County Court, thus the fact of err by the current pierce county court.

Will this Court Order respondent to provide the requested J&S's pursuant RCW 9.94A.460, "prosecutor shall not agree at any time to withhold information concerning plea agreement"?

CoA Due Process Violation

7. The CoA panel of Judges abused it's discretion by not ordering commissioner to follow the appellate court's own Rule 16.9 to compel respondent to provide missing parts of the record relevant to Petitioner's collateral challenges whereas inaction

has caused detriment to Jerry Swagerty's right to fully legally challenge disputes whereof Pro Se Petitioner will continually be held hostage to corrupt & unlawful practices of the pierce county superior court system if left unattended. Jerry Swagerty proffers "actual bias" because of genuine prejudice against Petitioner is evident via requesting specific documents that vindicate Jerry Swagerty of any wrongdoing may also lead to "citationable" disbarment proceedings at the superior court level.

Will this Court consider In Re Rice, 118 Wn.2d 876 at 885, "if Petitioner makes a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely upon the record, the Court shall remand Petition for a determination on the merits pursuant RAP 16.11 & RAP 16.12"?

State Abuse of Power Violation

8. The respondent refused to answer allegations against the State, Judge, and assigned counsel not allowing Petitioner to confront corrupt unlawful practices upon request of corpus so Jerry Swagerty could follow the Law continuously abridged by consistently practicing alleged professionals.

Will this Court remand the case back to the superior court, or Order CoA remand Petition back to the trial court for reference hearings under condition of "promulgated citations" via RAP 16.11?

CoA Abuse of Discretion / Due Process Violation

9. The CoA panel of Judges completely ignored the "actual facts of the actual elements of an actual innocence claim", and instead misappropriated State's clear & convincing evidence of the existence of improperly excluded facts, and the admission of false facts whereas in the least, CoA should have considered *In Re Carter*, 172 Wn.2d 923, "and remanded Petition to the trial court pursuant RAP 16.11". The CoA panel of Judges also completely ignored Petitioner's claims of "erroneous sentence", "ineffective assistnace of malevolent counsel", "prosecutorial misconduct", and "judicial prejudice" underlining multiple Brady violations.

Will this Court consider *Amado v. Gonzales*, 734 F.3d 936 (9th Cir. 2014), "Petitioner prejudiced by Brady violations"; *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), "remand required to determine whether counsel in 1st collateral proceeding was ineffect- & whether Petitioner was prejudiced"; *Hurles v. Ryan supra*, [in review of] *Stanley v. Schriro, supra*;

State v. Miller, 324 P.3d 791, "it's a fundamental defect not to sentence a defendant to concurrent sentences -- even for serious violent offenses -- when mitigating circumstances exist"; and In Re Stenson, 174 Wn.2d 474, "testing favorable to the defendant and suppressed by State whereas defendant prejudiced constitutes reversal"?

Erroneous Sentence / Statutory Challenge

10. In 1989, Jerry Swagerty was convicted of (2) Robbery II's where the facts are that Petitioner went into a chinese restaraunt and handed a note for money to cashier to pay drug dealer in the waiting car whereof instead of paying dealer, co-defendant threatened dealer out of the car without physical force = totally non-violent.

The sentencing Judge verbatim stated, "the (2) crimes were so close in comparison that he couldn't tell them apart", and "adjudicated same criminal conduct" of 17 months concurrent sentences. For people not too poor to pay like Jerry Swagerty, the herein previously stated information is easily discovered at the King County Superior Court cause no's: 89-1-04009-0 & 89-1-04023-5. 11 years later, the Clark County Superior Court cause no's: 00-1-02343-0 & 00-1-02170-4 erred in trying to count (2) prior Robbery II convictions seperately in offender score and was "citioned" and Ordered to re-sentence Jerry

Swagerty counting both Robbery II priors as (1) in offender score. [see CCSC cause no: 00-1-02170-4, SUB-41; DOCKET DATE 01/24/2002; DOCKET CODE/DESCRIPTION- Citation Action Resentence]

Will this Court consider that the CoA Division II may be the Court who Ordered said "citation" and CoA is ignoring it's own archives?

In addition, the instant case is the 1st time that Jerry Swagerty's prior Robbery II convictions are raised under threat of a Persistent Offender Accountability Act (POAA) sentence.

Does this Court have ultimate State jurisdiction pursuant an unlawful Wa State Statute challenge?

At the time of Petitioner's Robbery II convictions, it was 1989 before Strikes were enacted by the Wa State Legislature. Both crimes were deemed non-violent in character, and thus adjudicated "same criminal conduct" granting the most lenient sentence allowed.

In 1994, under the then new 3 strikes Law, Jerry Swagerty's (2) prior Robbery II convicted sentences already served also including community custody, instantly became "convictions that punishes acts not punishable at the time they were committed & aggravated said crimes making them worst than when committed".

Will this Court consider Article I, Section 9, Clause 3 of the U.S. Constitution, "no ex post facto Law shall be passed"? And *Flore v. White*, 121 S.Ct. 712, "it's a fundamental due process violation to convict a person of a crime without proof of all the elements"; crime in the instant case translates as a most severe LWOP sentence?

The State in the instant case is trying to infer defendant as a third striker (verbatim) based upon counting Robbery II priors from 25 years ago with a current non-violent charge of allegedly licking the private area of an adolescent girl as the elements that warrant an LWOP sentence. In *Re Carle*, 93 Wn.2d 31 at 34 states, "because trial court imposed erroneous sentence, Petitioner is entitled relief, and this Court has the power & duty to correct it".

Will this Court also consider *State v. Munley*, 175 Wn.2d 901, "due process violated when applied to allow prosecuting authority to establish prior convictions with an un-supported criminal history summary"?

Actual Innocence

11. Jerry Swagerty's d.n.a. was not discovered on swabs taken

from alleged victim at the time of alleged incident!

Will this Court consider State v. Thompson, 173 Wn.2d 865, "vaginal swabs have the potential to produce significant information and defendant is entitled to post conviction d.n.a. testing of any evidence collected during investigation"?

If the State conveniently lost evidence but seem to have contained other evidence for over 8 years. Will this court translate the legal definition of "exculpatory" as:

Will this Court consider Trombetta, 104 S.Ct. 2528, "State violates due process when it it fails to preserve irreplaceable evidence processing viable exculpatory value"?

F. CONCLUSION

Based upon facts, matters and Laws, Pro Se Petitioner Jerry Swagerty respectfully requests this Honorable Supreme Court of Washington State "modify" the CoA Division II opinion to a Published Decision of "Dismiss with Prejudice and forever release Jerry Swagerty from any and all charges associated with this case," and "Citation" all grievances back to the trial court for multiple determinations on the merits of violations.

CLOSING ARGUMENT

Jerry Swagerty has not ever before nore after alleged incident committed any type of sex crime or offense. Petitioner is simply not of the character. As is so, the only explanation of no d.n.a. on swabs taken directly from alleged victim at the time of alleged incident, and 8 years later d.n.a. found only then to have been discovered on alleged victim's underwear is either a chain of evidence violation exists. Or Petitioner gave a \$10.00 bill taken out of mouth after looking for change in the bottom of wallet and given to the little girl so she could buy some Valentine's Day candy who put the \$10.00 bill in her underwear not wanting to lose such a generous gift. However, the case may be, may this Court be the de novo Judge(s). I, Pro Se Petitioner, Jerry Swagerty am willing to take the entirety of this case all the way to the United States Supreme Court if need be via:

SWAGERTY v. WASHINGTON

"they picked the wrong fight witht the right guy"

I, Jerry Swagerty, dipose and say, that I am herin Pro Se Petitioner, and that I am too poor to afford legal fees & documentts, however, I am not so illiterate to understand injustice when it is being inflicted upon me.

Signed [Signature] and dated this 17th day of February 2015

NOTARY PUBLIC in and for the State of Washington
Residing at: Cornell, WA
My appointment expires: April 30 2018



Received
Washington State Supreme Court

OCT 22 2015

Ronald R. Carpenter
Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II

2015 OCT 19 PM 1:15

STATE OF WASHINGTON

BY _____
DEPUTY

In Re the Release of the

Personal Restraint of:

Case No: 91268-8

~~45268-4-II~~ 45862-4

JERRY LEE SWAGERTY,

Petitioner,

MOTION TO AMEND MOTION FOR

DISCRETIONARY REVIEW

1. IDENTITY OF MOVING PARTY & AUTHORITY

Pro Se Petitioner, Jerry Lee Swagerty, pursuant Form 18 under RAP 17.3 -- having received confirmation of an Order that consideration of the above named Case has been continued to this Court's November 3rd, 2015, Department One Motion Calander before the Honorables Chief Justice Madsen & Justices Johnson, Fairhurst, Wiggins, and Gordon McCloud unanimously -- asks this Court for Relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

Jerry Swagerty respectfully requests this Court consider "McNutt v. Delmore, *infra*, at 565", because it supports the statement ending on line 10 of page 2 of Petition for Review, and interpreted as the Case of Point for the 1st question of "Whether the Court of Appeals Division II misapprehended a recent Decision of this Court" in State v. Peltier, 181 Wn.2d 290, 332 P.3d 459 (2014), designated in Part 4.

3. FACTS TO SUPPORT MOTION

Jerry Swagerty infers there is no Rule to allow entire Petition for Review to be Amended with respect to more defined questions & corrections of clerical errors when consideration of the Brief has been continued to this Court's Department One Motion Calander. And this Court prohibits a Reply Brief if Respondent does not answer whereas procedural rule denies indigent Petitioner due process of a rebuttal before closing because said Pro Se Litigant is inherently prevented from addressing this Court in person under Oral Argument Rules.

4. SUPPLEMENTAL ARGUMENT

On page 2 of Motion for Discretionary Review Case No: 91268-8;

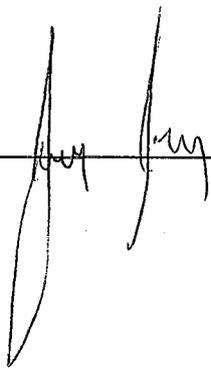
Jerry Swagerty previously proclaimed, "State must stay plea bargain and return Petitioner back to the superior court to be re-sentenced on the single remaining amended charge that is not time-barred". Jerry Swagerty now proffers precedent Case on Point is underlined in the following question:

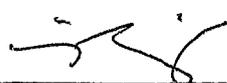
Will this Court consider McNutt v. Delmore, 47 Wash.2d 562 at 565, 288 P.2d 848 (1955), where the Decision of this Court clearly defined that, "Petitioner's entire sentence is not erroneous and does not affect portion of sentence that was correct and valid at time it was pronounced, holding only the erroneous portion of sentence must be corrected".

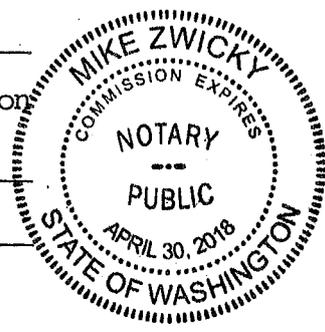
5. CONCLUSION

Based upon facts, matters, and laws, the foregoing Motion to Amend question 1 as furthermore defined, expressly only pertains to Petitioner respectfully requesting a Decision from this Court of "remand for re-sentencing Petitioner to remaining amended charge not time-barred" on the single issue of "Whether CAO misapprehended recent Decision of this Court". ~~Excluding~~ ~~the erroneous sentence,~~ Jerry Swagerty adamantly asks this Court for an Order of "Release with Prejudice", all Grounds.

I, Jerry Swagerty, depose and say, that I am the Pro Se Petitioner, that a true & correct copy of the foregoing Motion has been sent to the Court of Appeals Division II, as the Party that may have "failed to apprehend correctly", the precedence of the full Authority of this Court, and that the aforementioned has been prepared to the best of my abilities considering time & schedule constraints invoked by DOC Policy.

Signed  and dated this 15th day of October 2015


NOTARY PUBLIC in and for the State of Washington
Residing at: Connell, WA
My appointment expires: 4/30/2018



Upon Decision of "remand for re-sentencing to amended charge with a statutory maximum of 60 months that is not time-barred". Jerry Swagerty will prepare a Brief to serve in person to the superior court underlining In Re Brooks, 166 Wn.2d 664, "combination of confinement & community custody cannot exceed statutory maximum" that was argued in the Supplemental Brief filed with the COA because Petitioner has now served 40 months and ERD would have been in October 2015.

"APPENDIX A"

FILED
COURT OF APPEALS
DIVISION II

2015 JAN 21 AM 9:06

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of

JERRY LEE SWAGERTY,

Petitioner.

No. 45862-4-II

UNPUBLISHED OPINION

MELNICK, J. — Jerry L. Swagerty seeks relief from personal restraint imposed after he pleaded guilty by amended information to rape of a child in the third degree, luring, burglary in the second degree, and intimidating a witness. In his initial petition, Swagerty argued that he was entitled to relief because (1) his sentence is erroneous, (2) he received ineffective assistance of counsel, (3) the prosecuting attorney committed misconduct, and (4) judicial prejudice occurred. We requested additional briefing that addressed the statutes of limitations governing the amended charges. We find this issue dispositive and vacate and remand for dismissal of the convictions. For this incident, the State may refile charges for which the statute of limitations has not run.

FACTS

On May 22, 2012, Swagerty was charged with rape of a child in the first degree and child molestation in the first degree based on acts that occurred on or about February 14, 2004. Deoxyribonucleic acid (DNA) testing of the victim's underwear on April 11, 2012 established that Swagerty had contact with her in 2004, when she was 10 years old. Because a conviction for rape of a child in the first degree would be his third strike offense, Swagerty agreed to plead guilty on January 4, 2013 to the amended charges of rape of a child in the third degree, luring, burglary in the second degree, and intimidating a witness.¹ This plea allowed him to avoid a possible life sentence as a persistent offender. Swagerty stipulated to offender scores of 9+ for his offenses and to an exceptional sentence of 30 years that ran his individual sentences consecutively. He then filed this timely petition challenging his convictions.

ANALYSIS

To be entitled to relief, a petitioner must show constitutional error that resulted in actual and substantial prejudice or nonconstitutional error that resulted in a complete miscarriage of justice. *In re Cook*, 114 Wn.2d 802, 810-13, 792 P.2d 506 (1990). The possibility that Swagerty was charged after the statutes of limitations for his offenses expired implicates the complete miscarriage of justice standard. *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 355, 5 P.3d

¹ Swagerty's prior Washington convictions for robbery in the second degree (two counts) and an Oregon conviction for burglary in the first degree are also strike offenses. RCW 9.94A.030(32)(a), (37)(a).

1240 (2000). This is because the expiration of the statute of limitations deprives a trial court of authority to permit prosecution or enter judgment on the time-barred offense. *Stoudmire*, 141 Wn.2d at 355.

In its supplemental response to this petition, the State concedes that the three-year statute of limitations applicable to the amended charges of luring, burglary in the second degree, and intimidating a witness expired before the filing of the amended information in 2013. *See* RCW 9A.04.080(1)(h). The State argues, however, that the statute of limitations has not yet run on the amended charge of rape of a child in the third degree.

When Swagerty allegedly committed his offenses in 2004, the three-year statute of limitations applied to rape of a child in the third degree. Former RCW 9A.04.080(1)(h) (1998). A 2006 amendment postponed the running of the limitations period for sex offenses, including rape of a child in the third degree, until one year from the date of the suspect's identification by DNA testing. LAWS OF 2006, ch. 132, § 1; *see* former RCW 9.94A.030(38) (2002) (rape of a child in the third degree included in definition of sex offense). In 2009, the limitations period for child rape and other sex offenses was further amended to allow prosecution up to the victim's 28th birthday and, in 2013, the limitations period was extended to the victim's 30th birthday. LAWS OF 2009, ch. 61, § 1; LAWS OF 2013, ch. 17, § 1.

A new limitations period applies to an offense if the prior period has not yet expired. *State v. Hodgson*, 108 Wn.2d 662, 666-67, 740 P.2d 848 (1987); *State v. Sutherland*, 104 Wn. App. 122,

134, 15 P.3d 1051 (2001). Because the initial three-year statute of limitations that applied to rape of a child in the third degree had not expired when the statute was amended in 2006, this and the subsequent extensions of the limitations period apply to the charge facing Swagerty. Consequently, the amended charge of rape of a child in the third degree was not barred by the statute of limitations when the State filed it in 2013.

Although the remaining amended charges were time barred, we reject Swagerty's claim that he is entitled to be resentenced for rape of a child in the third degree alone. We agree with the State that his plea was an indivisible "package deal." *See State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003) (plea agreement is indivisible when pleas to multiple counts were made at the same time, described in one document, and accepted in a single proceeding).

The State contends that on remand, Swagerty may still plead guilty to the amended charges as long as he agrees to waive the three-year statute of limitations that applies to all but the child rape charge. The Supreme Court recently explained, however, that a defendant may expressly waive a criminal statute of limitations only if he agrees to do so before the statute of limitations has run on the underlying charge. *State v. Peltier*, 181 Wn.2d 290, 298, 332 P.3d 457 (2014). Because the statute of limitations has expired on three of the charges to which Swagerty pleaded guilty, he may not now waive that limitations period.

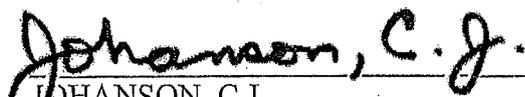
Accordingly, we must vacate Swagerty's convictions and remand for entry of an order of dismissal. The State may then refile any charges for which the statute of limitations has not yet expired.²

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

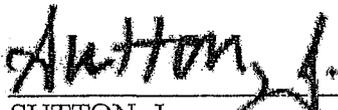


MELNICK, J.

We concur:



JOHANSON, C.J.



SUTTON, J.

² The statute of limitations has not yet run on Swagerty's original charges of rape of a child in the first degree and child molestation in the first degree. When these offenses allegedly occurred in 2004, the applicable limitations period expired three years after the victim's 18th birthday. Former RCW 9A.04.080(1)(c) (1998). As set forth above, the statute of limitations for these offenses as well as the amended charge of rape of a child in the third degree has since been extended.

"APPENDIX B"

Exhibit 4

Jerry Swagerty, # 903395
B-B-11-1L
Coyote Ridge Correction Center
P.O. Box 769
Connell, WA. 99326

February 10, 2014

Pierce County Superior Court
ATTN: JUDGE KATHRYN NELSON
930 Tacoma Ave. S. # 110
Tacoma, WA. 98402

To the Honorable Judge Nelson,

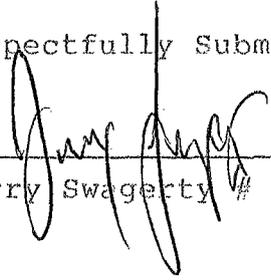
I am respectfully requesting that your Honor Order the Prosecutor's office in Cause No: 12-1-01877-6 release the discovery, Court transcripts, police & hospital reports.

Enclosed is a copy of a letter provided by the Department of assigned Counsel outlying that they can send me all the bogus made up information by the Prosecutor, but not the actual facts of the case to support my claims in my Personal Restraint Petition.

My right to defend myself pursuant to my right to due process is being denied. And I will appreciate it greatly if you will extend me the courtesy and grant my request.

Thank you for your time and cooperation in this matter.

Respectfully Submitted,



Jerry Swagerty # 12-1-01877-6

Exhibit 10

Jerry Swagerty #903395
BB-11-1L
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

April 2nd, 2014

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Commissioner Bearse,

Thank you for granting my motion for an extension of time and filing my Amended Petition. Prosecutors are most often afforded the professional courtesy of an extension of time. And I am grateful I have been awarded equal protection under the rules. Otherwise the Rule of Law lacks standing and unfruitful pursuant truth as the basis of justice.

In October 2013, I was able to get my completely pro se Petition typed although as is with no corrections. However, after many unsuccessful attempts, I was not able to receive previous cases of King & Clark County Judgement & Sentence that pertains to my current erroneous sentence. As well as the complete record of my current Pierce County case of discovery, police report, hospital report, court records and court transcripts to support my arguments and 4 other grounds.

Due to timing constraints in the 11th hour, I was forced to file an initial PRP whereas finally after 4 months in the early part of the 12th hour. I was provided meager materials that I was able to label as exhibits to file an Amended Petition without changing the original brief that was prepared from memory after reviewing most of the record before it all mysteriously disappeared after an altercation while I was incarcerated in the Pierce County Jail.



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

March 25, 2014

Jerry Lee Swagerty
#903395
Coyote Ridge Corrections Center
PO Box 769
Connell, WA, 99326

Mark Evans Lindquist
Pierce County Prosc Office
930 Tacoma Ave S Rm 946
Tacoma, WA, 98402-2102

CASE #: 45862-4-II

Personal Restraint Petition of Jerry Lee Swagerty

Dear Counsel:

We have received the Personal Restraint Petition for post-conviction relief noted above. Since this petition is in proper form, we have filed it. RAP 16.3 et seq.

As RAP 16.9 requires, the respondent must, within 60 days of receiving this letter and the attached copy of the petition, file and serve a response to the petition on petitioner or petitioner's counsel and this court. If referring to the record of another proceeding answers the petition, include a copy of the relevant parts of that record. If a brief supports the petition, we have attached a copy, and the respondent's answering brief is likewise due within 60 days. RAP 16.10. If the respondent determines that the relief sought is appropriate, he should so stipulate. Petitioner may file a reply brief if done so within 30-days of receiving service of the respondent's brief. See RAP 16.10(a)(2).

This court has initially waived petitioner's filing fee based on his affidavit stating that he is indigent. Please include in the response any information you possess with regard to indigency and state whether you will contest petitioner's indigency claim.

When the time for filing briefs has expired, the Chief Judge will consider the petition and enter appropriate orders. **The court will defer any decisions on motions for appointment of counsel and/or motions for production of the record at public expense, if any, until we submit your petition to the Chief Judge for consideration. RAP 16.11(a). Any request limited solely to the status of the petition will be placed in the file without further action.** You will be notified if the court decides to call for additional briefs or portions of the record other than what the parties filed or decides that oral argument will be scheduled. Thank you for your attention to this matter.

Very truly yours,

David C. Ponzoha,
Court Clerk

DCP: rgh.



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

March 28, 2014

Jerry Lee Swagerty (via USPS)
#903395
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Mark Evans Lindquist (via email)
Pierce County Prosc Office
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102

CASE #: 45862-4-II
Personal Restraint Petition of Jerry Lee Swagerty

Mr. Swagerty & Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER BEARSE:

Petitioner has filed a motion to extend time in which to file an amended petition; he has also filed an amended petition. We accept the amended petition for filing. Although this petition is virtually identical to the original filing, it appears to contain additional exhibits. Respondent should respond to the amended petition. The response remains due May 27, 2014. If petitioner is asking for an additional extension of time in which to file a second amended petition, he should notify this court. Petitioner is advised that any amended petitions are potentially subject to the one year time bar stated in RCW 10.73.090.

Very truly yours,

David C. Ponzoha
Court Clerk



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

April 17, 2014

Jerry Lee Swagerty (via USPS)
#903395
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Mark Evans Lindquist (via email)
Pierce County Prosc Office
930 Tacoma Ave S Rm 946
Tacoma, WA, 98402-2102

CASE #: 45862-4-II
Personal Restraint Petition of Jerry Lee Swagerty

Mr. Swagerty & Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER BEARSE:

Petitioner has filed what appears to be a motion for production of the record. This motion does not specify what specific records petitioner is requesting. Accordingly, this motion is denied. Petitioner should note that the respondent is responsible for providing the portions of the record related to any relevant proceeding. RAP 16.9.

Very truly yours,

David C. Ponzoha
Court Clerk



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

August 25, 2014

Jerry Lee Swagerty (via USPS)
#903395
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Kimberley Ann DeMarco (via email)
Pierce County Prosecutor's Office
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102

CASE #: 45862-4-II
Personal Restraint Petition of Jerry Lee Swagerty

Counsel & Mr. Swagerty:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER BEARSE:

The State moves to stay this petition pending a decision in *State v. Peltier*, SC #89502-3. The Supreme Court issued its decision on August 21, 2014. The request for a stay is denied and the State's supplemental response is due within 30 days of the date of this ruling. This court declines to rule on the request for relief included in the petitioner's response to the State's motion at this time.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha", with a large, stylized flourish at the end.

David C. Ponzoha
Court Clerk

CERTIFICATE OF SERVICE

Supreme Court of Washington

Case No: 91268-8

Temple of Justice

P.O. Box 40929

Olympia, Wa. 98504-0929

Court of Appeals, Division II

Case No: 45862-4-II

950 Broadway, Suite 300 MS TB-06

Tacoma, Wa. 98402-4454

Pierce County Prosecutor's Office

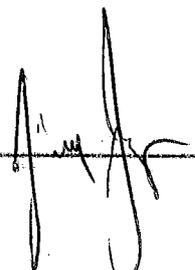
Cause No: 12-1-01877-6

930 Tacoma Avenue South, Room 946

Tacoma, Wa. 98402-2102

I, Pro Se Petitioner, Jerry Swagerty, hereby certify that the enclosed Motion for Discretionary Review was completed on February 14th, 2015, and Notarized and Mailed from the legal library to the Parites stated above at the earliest possible available date hereby declared with the signature below.

Signed



and dated this 17th day of February 2015