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No. 68740-9-1

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION I

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IN RE THE PERSONAL RESTRAINT PETITION OF:

**BENJAMIN SMALLS**

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**REPLY IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

1 A. INTRODUCTION

2  
3 Benjamin Smalls challenges his 2009 King County convictions for Second Degree  
4 Murder while armed with a firearm and Assault in the Second Degree. When Smalls was  
5 arraigned, throughout his pretrial, when he pled guilty and again when he was sentenced (as  
6 reflected on the *Judgment and Sentence*), the prosecutor, defense attorney(s) and the trial court  
7 told Smalls that he was lawfully charged with Assault in the Second Degree while armed with a  
8 firearm. As the State now correctly concedes in it's *Response*, the Assault in the Second Degree  
9 while armed with a firearm was charged beyond the statute of limitations.

10 Given the clear and unmistakable error on the *Judgment*, the State further implicitly  
11 agrees that Smalls petition is not time barred. In short, Small's *Judgment* is facially invalid.

12 However, the State argues that Small's remedy should be limited to correction of the  
13 error on the *Judgment*, notwithstanding the fact that Smalls was erroneously charged with an  
14 offense that was barred by the statute of limitations and this offense was used to mislead Small's  
15 and induce him to plea involuntarily and unknowingly to an offense he would have otherwise not  
16 plead to.

17 In support of it's argument, the state cites to cases where the defendant sought only  
18 correction of the sentencing error or where there was no error in the underlying conviction as  
19 proof of it's claim that Small's is not entitled to withdraw his plea. Cases where a defendant  
20 seeks and is given a limited remedy certainly does not stand for the proposition that alternative  
21 remedies are legally unavailable. Most importantly, cases cited by the state are not factually  
22 analogous to the present case. Simply put Mr. Smalls contends that his PRP is timely because his  
23 judgment contains an error of law obvious from the face of the document, an offense that was  
24 charged in violation of the statute of limitations. This constitutes "facial invalidity." That facial  
25 invalidity *reveals* an invalid guilty plea. Small's guilty plea becomes invalid the moment the  
court rules that the Assault in the Second Degree with firearm violates the statute of limitations

1 before such a ruling any challenge to the plea would be without merit and thus cannot now be  
2 time barred.

3 In their *Response* the state attempts to erroneously benefit from having fraudulently  
4 mischarged Small's and then utilized such charge to induce a guilty plea. This Court should  
5 vacate Small's invalid judgment and sentence and remand for Small's to withdraw his invalid  
6 guilty plea.

7 **B. Argument**

8 1. Introduction

9 Because the State correctly concedes that Small's PRP is not time barred, this Reply  
10 focuses on the issue of remedy.

11  
12 2. SMALL'S IS NOT LIMITED TO DISMISSAL OF THE  
13 ASSAULT IN THE 2<sup>ND</sup> DEGREE CHARGE AND  
14 CORRECTION OF THE MURDER IN THE 2<sup>ND</sup>  
15 DEGREE SENTENCE, WHERE FACIAL INVALIDITY  
16 REVEALS AN ERROR IN THE MURDER 2<sup>ND</sup>  
17 DEGREE SENTENCE AND THE GUILTY PLEA

18 Small's *Judgment* is facially invalid because it contains an error of law. The "face" of  
19 Small's judgment reveals that the sentencing court accepted a plea that contained and was  
20 induced by an offense that could not have been charged because it violated the statute of  
21 limitations. As a result Small's plea, conviction and sentence for both the assault and 2<sup>nd</sup> degree  
22 murder is illegal. Thus, Small's petition is not time barred.

23 The error on the judgment reveals an error in obtaining the conviction. In criminal cases.  
24 "The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212, 58 S. Ct. 164,  
25 (1937)(stating a judgment cannot be final if the sentence has been vacated); See also *State v.*

1 *Harrison*, 148 Wn.2d 550, 561-62 (2003) (stating after defendant's "sentence was reversed,...the  
2 finality of the judgment is destroyed" and defendant's "prior sentence ceased to be a final  
3 judgment on the merits"); *Siglea*, 196 Wash. 2d at 286 ("In a criminal case, it is the sentence that  
4 constitutes the judgment against the accused, and hence, there can be no judgment against him  
5 until the sentence is pronounced.").

6 Relative to the issue of involuntary plea the State tries to put the cart before the horse in that they  
7 argue that the issue could have and should have been raised before the time bar for filing the PRP  
8 expired. The statutory time bar is not applicable in this case because there is no bar to the statute  
9 of limitations issue and the issue of the involuntary plea could not have been raised until the  
10 court makes the determination that the assault in the second degree charge violated the statute of  
11 limitations rendering the judgment and sentence invalid and the resulting plea involuntary. Prior  
12 to such action by the court there would have been no grounds under which Small's could have  
13 raised such an issue.

14  
15 Additionally, the assault and the attached firearm enhancement were used to induce  
16 Small's to plead guilty to the 2<sup>nd</sup> degree murder charge and if the Court for example determined  
17 that the assault was timely filed because of one of the exceptions tolling the statute of limitations  
18 Small's would have no grounds to raise the issue of an involuntary plea. Thus, the cases cited by  
19 the state to support it's argument are not factually analogous to the present in that the under  
20 circumstances here which renders the assault judgment and sentence invalid correspondingly  
21 results in an inaccurate standard range, an invalid judgment and sentence relative to the murder  
22 2<sup>nd</sup> degree and an invalid plea. The state concedes that the judgment and sentence for Small's  
23 assault charge reflects that it was charged beyond the statute of limitations, rendering the  
24 judgment and sentence invalid their face. And in doing so although not expressly stated the state  
25

1 also concedes that the Court, defense counsel and the state prosecutor misinformed Small's about  
2 his charges and the correct standard range for the 2<sup>nd</sup> degree murder charge. From the states  
3 concession, it follows that Small's is entitled to collateral relief. See e.g. *In re Personal Restraint*  
4 *of Stoudmire*, 141 Wn.2d. 345 (2000) (the one-year time limit for collateral attacks does not  
5 apply to convictions that are facially invalid). *In re Personal Restraint of Johnson*, 131 Wn.2d  
6 558 (1997)(a miscalculated offender score constitutes a fundamental defect that inherently  
7 results in a complete miscarriage of justice); *In re Personal Restraint of Isadore*, 151 Wn.2d.  
8 294, 300 (2004)(Constitutional personal restraint requirements met where Isadore was not  
9 informed of all the direct consequences of his plea, rendering his plea involuntary).

10 Accordingly, the only issue before this court is the remedy. The state claims that Small's  
11 is entitled only to remand for a "dismissal of the assault charge and correction of the sentence for  
12 the remaining second degree murder conviction. Applying the Supreme Court's decision in *State*  
13 *v. Turl ey*<sup>1</sup> and *In re Personal Restraint of Bradley*<sup>2</sup> Small's is entitled to withdraw his guilty plea.

14 Due process requires that a defendant's plea be knowing, voluntary, and intelligent. *In re*  
15 *Isadore*, 151 Wn.2d at 297(citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). This standard  
16

17 is reflected in CrR 4.2(d), which mandates that the trial court "shall not accept a plea of  
18 guilty, without first determining that it is made voluntarily, competently and with an  
19 understanding of the nature of the charge and the consequences of the plea." Under this rule,  
20 once a guilty plea is accepted, the court must allow withdrawal of the plea only "to correct a  
21 manifest injustice. *Isadore*, 151 Wn.2d at 298.

22  
23  
24 1 149 Wn.2d 395 (2003)  
25 2 165 Wn.2d 934(2009)

1  
2 The Supreme Court has repeatedly held a defendant may challenge the voluntariness of a  
3 guilty plea when the defendant was misinformed about sentencing consequences resulting in a  
4 more onerous sentence. See e.g. *State v. Miller*, 110 Wn.2d 528 (1988)(defendant entitled to  
5 withdraw his guilty plea because both parties unaware of a mandatory minimum sentence  
6 requirement); *State v. Ross*, 129 Wn.2d 279 (1996)(defendant entitled to withdraw plea when he  
7 was not informed of mandatory community placement because that term constitutes a “direct  
8 consequence” of a guilty plea). A sentence consequence is direct when “the result represents a  
9 definite, immediate and largely automatic effect on the range of the defendant’s punishment.”  
10 *Ross*, 129 Wn.2d at 284.

11  
12 The length of a sentence is a direct consequence of pleading guilty. *State v. Mendoza*, 157 Wn.2d  
13 at 591. In so holding, the Supreme Court has recognized that risk management decisions bear  
14 equally when the misinformation is that the standard range is lower than anticipated in the plea  
15 agreement.  
16

17 The state concedes that the court lacked authority to sentence Small’s for the assault yet  
18 fails to assert that the court also lacked authority to accept a plea agreement which includes the  
19 assault or to otherwise entertain the assault charge at all. And that because the court erroneously  
20 entered a judgment on the assault charge correspondingly the court misinformed Small’s that the  
21 standard range was higher than it actually should have been for the 2<sup>nd</sup> degree murder and  
22 imposed an illegal sentence. Like Small’s Turley and Bradley pled guilty to two charges but  
23 Bradley and Turley were only misinformed about one of the offenses and argued that the  
24 misinformation as to one of the charges to which they pled guilty as a package deal rendered  
25 both pleas involuntary. The Supreme Court agreed and allowed Turley and Bradley to withdraw

1 their pleas on both charges.

2 In Small's case the judgment and sentence on both charges are invalid, the assault charge  
3 because of the statute of limitation violation and the murder 2<sup>nd</sup> degree charge because of the  
4 incorrect standard range and resulting erroneous sentence, thus, Small's challenges are timely  
5 and he has shown manifest injustice as to both counts and is entitled to withdraw his plea.

6 The "facial validity" rule finds its roots in this State's longstanding rule of law that a trial  
7 court retains the power and duty to correct an invalid sentence when invalidity is apparent on the  
8 face of the judgment and sentence. See *State v. Smissaert*, 103 Wn.2d 636, 639 (1985); *McNutt v.*  
9 *Delmore*, 47 Wn.2d 563, 565 (1955)("When a sentence has been imposed for which there is no  
10 authority in law, the trial court has the *power* and *duty* to correct the erroneous sentence , when  
11 the error is discovered") Sentencing provisions outside of the authority of the trial court have  
12 historically been described as "illegal" or "invalid." *Smissaert*, 103 Wn.2d at 639.

13 The error in *Smissaert*, like this case with the murder 2<sup>nd</sup> degree a jury found the  
14 defendant guilty of murder, and the court sentenced him to a maximum term of 20 years in  
15 prison. the Board of Prison Terms and Paroles later notified the court that the relevant statute  
16 required a maximum sentence of life imprisonment. Approximately two years after the initial  
17 sentencing, the trial court corrected the sentence to reflect the statutorily required maximum  
18 term. *Smissaert*, 103 Wn.2d at 638. In affirming the entry of a corrected sentence, this Court  
19 relied on the trial court's authority to correct an invalid sentence, even if the correction involved  
20 a more onerous judgment. *Smissaert*, 103 Wn.2d at 639. See also *State v. Traicoff*, 93 Wash.App.  
21 248, (1998)(the failure to appeal an erroneous term of community placement by the State or  
22 DOC does not vest the defendant with a legitimate expectation of finality in an erroneous term of  
23 community placement).

1  
2 A trial court only possesses the power to impose sentences provided by law. *In re Pers.*  
3 *Restraint of Carle*, 93 Wn.2d 31, 33-34 (1980)(“Because the trial court herein imposed an  
4 erroneous sentence, and since the error has now been discovered, the court has both the power  
5 and duty to correct it.”).

6 Recent caselaw has not overruled this solid line of precedent.

7 In *Bradley*, the Supreme Court accepted the State’s concession that the judgment, which  
8 contain an incorrect standard range on one of several counts of conviction, was facially invalid  
9 despite the fact that the error resulted in no actual harm to *Bradley*. Because the judgment  
10 contained an obvious error of law that revealed an invalid plea the Supreme Court held that  
11 *Bradley’s* petition was timely and that he should be permitted to withdraw his entire “package  
12 deal” of guilty pleas.

13 This case is distinguishable from *Bradley* in that although both involve judgments which  
14 contain obvious errors of law, and in both cases the error law reveals an invalidity in the guilty  
15 plea what is different is the error on Small’s judgment produced independent harm, the statute of  
16 limitations violation of the assault and an incorrect standard range and sentence on the murder  
17 2<sup>nd</sup> degree. As well as a fundamental defect in the conviction, an invalid guilty plea.

18 When a judgment reveals an infirmity “on its face,” the reviewing court then can look to  
19 other documents to determine whether there is “fundamental defect which inherently results in a  
20 complete miscarriage of justice.” See *In re Pers. Restraint of Thompson*, 141 Wn.2d at 719  
21 (quoting *In re Pers. Restraint of Fleming*, 129 wash. 2d 529, 532 (1996)).  
22

23 When a defendant pleads guilty, he must do so knowingly, voluntarily, and intelligently.  
24 *State v. Ross*, 129 Wn.2d 279, 284 (1996); Whether a plea satisfies this standard depends  
25

1 primarily on whether the defendant was correctly advised of and/or understood its consequences.  
2  
3 *State v. Walsh*, 143 Wn.2d 1, 8, (2001); *State v. Miller*, 110 Wn.2d 528, 531 (1988).

4 A defendant may withdraw his guilty plea if it was invalidly entered or if its enforcement  
5 would result in a manifest injustice. *Isadore, supra*;

6 CrR 4.2(f). "An involuntary plea produces a manifest injustice." *Isadore*, 151 Wn.2d at 298.

7 Where a plea agreement is based on misinformation, the defendant may choose specific  
8 enforcement of the agreement or withdrawal of the guilty plea." *Walsh*, 143 Wn.2d at 8-9. *See*  
9 *also In re Pers. Restraint of Hoisington*, 99 Wn.App. 423 (2000). The defendant's choice of  
10 remedy control, unless there are compelling reasons not to allow that remedy. *Miller*, 110 Wn.2d  
11 at 535.

12 As noted Small's chooses withdrawal of his plea.

13  
14 CONCLUSION

15 Based on the above, this Court should vacate Small's judgment, dismiss the assault 2<sup>nd</sup>  
16 degree charge, remand this case to the King County Superior Court to permit him to withdraw  
17 his guilty plea to the 2<sup>nd</sup> degree murder charge.

18  
19 Dated this 31<sup>st</sup> day of October, 2012

20  
21 Respectfully Submitted:

22   
23 **Benjamin Smalls**  
24 *Petitioner Pro Se*  
25

CERTIFICATE OF SERVICE

I, Benjamin Smalls certify that on October 31, 2012, I served the parties listed below with a copy of the Reply Brief by mailing it, postage pre-paid to:

Amy Meckling  
Senior Deputy Prosecuting Attorney  
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Dated this 31st day of October 2012.

Benjamin Smalls  
Benjamin Smalls

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