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NO. ~~86480-2~~

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN THOMAS LYNCH,

Appellant.

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SUPREME COURT
STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether direct review should be denied when Lynch has not supplied the report of proceedings necessary to determine whether the trial court's denial of his motion to vacate the judgment was an appropriate exercise of discretion?

2. Whether direct review should be denied when the case does not present any issue of broad public import requiring prompt and ultimate determination?

3. Whether Lynch has failed to show that his judgment and sentence is facially invalid?

4. Whether Lynch has failed to show that his untimely motion to vacate his judgment falls within a statutory exception to the one-year time-limit for collateral attacks?

B. STATEMENT OF THE CASE

On December 8, 2005, Stephen Lynch was charged in King County Superior Court with assault in the second degree. CP 1. According to the Certification of Probable Cause, Lynch entered his neighbor's home, where several contractors were working. CP 2. Shouting and using profanities, Lynch angrily demanded that his neighbor, Connie Laire, return his garage-door opener. Id.

When contractor Larry Vanderhoof heard the disturbance, he told Lynch that he should leave. CP 2. Lynch replied, "Don't tell me what to do, you little punk." Id. Vanderhoof, becoming increasingly concerned about Lynch's behavior, again asked Lynch to leave. Id. Lynch said that if anyone touched him, he would "bring down more trouble" than they could deal with, and claimed that he "owned" the police department. Id. As he was leaving, Lynch told Laire that he would "return to the house once the contractors had left." Id.

Approximately a half-hour later, Lynch returned and parked his truck in front of Laire's driveway so as to block anyone from coming or going from Laire's home. CP 2. Contractor Joshua Beckett saw that Lynch had a rifle, and saw Lynch aim the gun at Laire's house. CP 3. Lynch then pointed the rifle directly at contractor Vanderhoof as Vanderhoof stood in the garage. Id. When he saw Lynch point the rifle at him, Vanderhoof was so afraid that he ran for cover. Id. Laire saw Lynch point the rifle at her house and heard him "daring" people to come outside. Id.

King County Sheriff's Deputies arrived and arrested Lynch. CP 3. They recovered a loaded .22 caliber rifle from the floorboard

of his truck. Id. The safety was not activated, and the rifle was ready to be fired. Id.

Lynch admitted that he went to Laire's house to "demand" his garage door opener, but claimed that the contractors "surrounded and threatened" him. CP 3. Lynch told the police that he left to run errands. CP 3. Lynch denied pointing the rifle at anyone, and said that he only had the rifle with him because he was planning to clean it. CP 4.

On September 14, 2006, Stephen Lynch entered an Alford¹ plea to a reduced charge of felony harassment. CP 6-16. Lynch was sentenced to a first time offender waiver with 30 days of home detention. CP 29. He did not appeal.

On June 17, 2011, almost five years after he was sentenced, Lynch filed a motion to vacate the judgment pursuant to CrR 7.8(b). CP 34-64. The trial court requested briefing from the parties and set a hearing date to consider Lynch's motion. CP 82. The State's

¹ In North Carolina v. Alford, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), the U.S. Supreme Court held that a defendant "may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the . . . crime." In State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976), the Washington Supreme Court adopted the rationale of Alford and held that a defendant can maintain his innocence and still plead guilty, so long as there is sufficient evidence to support a jury finding of guilt, and if the plea is "a voluntary and intelligent choice" among options available to the defendant. Newton, 87 Wn.2d at 372.

brief pointed out that Lynch's motion was untimely, and asked the trial court to transfer the motion to the court of appeals as a personal restraint petition pursuant to CrR 7.8(c)(2). CP 83-86. Lynch filed a responsive brief arguing that the motion was not time-barred, citing several of the exceptions listed in RCW 10.73.100. CP 65-76.

On August 5, 2011, the trial court held a hearing and heard argument from the parties. Supp. CP __ (Sub No. 87, Motion Hearing). The court entered an order simultaneously denying the motion to vacate and transferring the motion to the court of appeals as a personal restraint petition. CP 77. Lynch filed a notice of appeal directly in this Court. CP 78-81.

C. ARGUMENT

- 1. REVIEW SHOULD BE DENIED BECAUSE LYNCH HAS NOT SUPPLIED THE REPORT OF PROCEEDINGS NECESSARY FOR THIS COURT TO REVIEW HIS CLAIM.**

Lynch asks this Court to accept direct review of his challenge to the lower court's denial of his motion to vacate the judgment. However, he has not provided this Court with the record

necessary to present the issue he raises. Therefore, direct review should be denied.

RAP 9.2(b) requires the party seeking review to "arrange for transcription of all of those portions of the verbatim report of proceedings necessary to present the issues raised on review." In the absence of an adequate record on appeal, an appellate court may either decline to consider the issue, or it may order supplementation of the record pursuant to RAP 9.10. State v. Wade, 138 Wn.2d 460, 465, 979 P.2d 850 (1999). If the appellate court directs supplementation of the report of proceedings, it may simultaneously impose sanctions as a condition to supplementing the record. RAP 9.10.

The trial court's denial of a CrR 7.8 motion to vacate a judgment is reviewed by the appellate court for abuse of discretion. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 879-80, 123 P.3d 456 (2005); State v. Larranaga, 126 Wn. App. 505, 509, 108 P.3d 833 (2005); In re Marriage of Scanlon, 110 Wn. App. 682, 686, 42 P.2d 447 (2002).

An abuse of discretion occurs when the decision "is manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615

(1995); State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). The decision of the trial court “is presumed to be correct and should be sustained absent an affirmative showing of error.” Wade, 138 Wn.2d at 464.

Lynch filed a statement indicating that no verbatim report of proceedings is necessary in this appeal. However, the trial court's one-page written order denying/transferring Lynch's motion includes no findings, and provides no information about the court's reasoning. CP 77. According to the clerk's minutes of the August 5, 2011 hearing, the trial court heard argument from the parties and ruled on Lynch's motion to vacate his judgment in open court. Supp. CP __ (Sub No. 87, Motion Hearing).

A trial court's oral ruling may supplement its written findings. State v. Bynum, 76 Wn. App. 262, 266, 884 P.2d 10 (1994). See also In re Marriage of Booth, 114 Wn.2d 772, 777, 791 P.2d 519 (1990) (appellate court may refer to oral opinion of the court in the absence of a written finding). When there are no written findings, and the appellate court is not presented with the record of the hearing on the issue, the reviewing court cannot properly determine whether the trial court's decision was manifestly unreasonable or based on untenable grounds. Wade, 138 Wn.2d at 466.

Without the verbatim report of proceedings for the August 5, 2011 hearing, it is impossible to fairly assess whether the trial court abused its discretion. As the party seeking review, Lynch has the burden of providing the transcript of that hearing. RAP 9.2(b); Wade, 138 Wn.2d at 464. Because he has failed to do so, Lynch has provided a hopelessly inadequate foundation upon which this Court can consider his claim. Direct review should be denied.

2. DIRECT REVIEW SHOULD BE DENIED BECAUSE LYNCH DOES NOT RAISE A FUNDAMENTAL OR URGENT ISSUE OF BROAD PUBLIC IMPORT THAT REQUIRES PROMPT AND ULTIMATE DETERMINATION.

In his statement of grounds for direct review, Lynch states that the harassment charge “was based upon his speech,” and that there was insufficient evidence that his speech constituted a “true threat.” Appellant’s Statement of Grounds at 1, 4. He then summarily states that this Court should grant direct review pursuant to RAP 4.2(a)(4) because the case “involves fundamental and urgent issues of broad public import arising under the First Amendment and [the harassment statute].” Id. at 8.

Lynch further claims, again without any persuasive authority or supporting argument, that “the interplay between motions to

vacate judgment brought under CrR 7.8(b) and the [exceptions to the statutory time bar]" present fundamental issues of broad public import. Appellant's Statement of Grounds at 8-9.

Lynch was charged with assault for pointing a firearm at Larry Vanderhoof after shouting obscenities and telling Vanderhoof and others that he would "bring down the trouble" on them. CP 1-5. Recognizing the strength of the State's case, Lynch entered an Alford plea to the reduced charge of felony harassment. CP 6-16. Lynch's claim that his conduct did not constitute a "true threat" is nothing more than an argument that his plea lacked a sufficient factual basis.

The law as it applies to Lynch's case was well-settled at the time of his plea, and remains so. Washington courts have consistently interpreted statutes criminalizing threatening language as proscribing only "true threats," which are not protected by the First Amendment. State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001); State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001); State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004).² A "true threat" is

² Williams, J.M., and Kilburn were all decided before Lynch pled guilty. Thus he was fully aware at the time of his plea that a felony harassment charge required proof that he made a "true threat." The fact that he waited five years to bring his challenge undercuts any argument that his case requires "prompt" resolution.

made under circumstances where “a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of another person.” Kilburn, 151 Wn.2d at 43 (quoting Williams, 144 Wn.2d at 208-09). Lynch makes no argument that this standard is wrong; he claims only that his actions do not meet it.

His claim is not a fundamental and urgent issue of broad public import. Nor does his claim require the “prompt and ultimate” determination contemplated by RAP 4.2(a)(4). His unpersuasive and conclusory request for direct review should be denied.

3. LYNCH’S COLLATERAL ATTACK IS TIME-BARRED PURSUANT TO RCW 10.73.090.

Should this Court decide to accept direct review in this matter, it should hold that Lynch’s motion is time-barred.

A motion to vacate judgment is a “collateral attack.” RCW 10.73.090(2). No motion collaterally attacking a judgment and sentence 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); see In re Pers. Restraint of Runyan, 121 Wn.2d 432,

444, 449, 853 P.2d 424 (1993). A judgment becomes final on the date that it is filed with the clerk of the trial court if no appeal is filed. RCW 10.73.090(3).

The one-year time limit outlined in RCW 10.73.090 applies to all collateral attacks, whether they are filed in the trial court or in the appellate courts. State v. Robinson, 104 Wn. App. 657, 662, 17 P.3d 653 (2001). Indeed, CrR 7.8(b) explicitly provides that a motion for relief from judgment must be made within a reasonable time "and is further subject to [the constraints of] RCW 10.73.090, .100, .130 and .140."

Lynch's judgment became final on October 2, 2006, the date it was filed with the clerk of the trial court. CP 26. Lynch's CrR 7.8 motion to vacate was filed with the King County Superior Court in June of 2011. CP 34. Thus, Lynch's collateral attack is time-barred unless he can show that the judgment is invalid on its face, or that his claim falls within an exception to the time-bar.

a. Lynch Has Failed To Demonstrate That His Judgment And Sentence Is Invalid On Its Face.

A judgment is valid on its face unless the judgment evidences an error without further elaboration. In re Pers. Restraint

of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000). Even if the defendant can show some legal error, the judgment is invalid on its face only if the court has exceeded its authority in entering it. In re Pers. Restraint of Coats, 173 Wn.2d 123, 143, 267 P.3d 324 (2011).

Judgments have been found facially invalid when entered for a crime that did not exist when it was charged (Thompson, 141 Wn.2d at 717-19), for a crime charged after the expiration of the statute of limitations (In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 353-54, 5 P.3d 1240 (2000)), and where the sentence imposed included juvenile convictions that had "washed out" (In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002)).

In all of those cases, the trial court did not have the power to impose the judgment or sentence. "[T]he general rule is that a judgment and sentence is not valid on its face if the trial judge actually exercised authority (statutory or otherwise) it did not have." In re Pers. Restraint of Scott, 173 Wn.2d 911, 917, 271 P.3d 218 (2012).

To the contrary, a defendant does not show facial invalidity of his judgment merely by showing some error in the plea

documents and arguing that his plea was involuntary. Scott, 173 Wn.2d at 917 (citing CrR 7.8 and In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002)). Unless the court exercised authority that it did not have, "a judgment and sentence is valid on its face even if the petitioner can show some error that might have received relief if brought . . . in a timely personal restraint petition." Scott, 173 Wn.2d at 917.

Lynch bears the burden of demonstrating that his judgment and sentence is facially invalid. In re Pers. Restraint of McKiearnan, 165 Wn.2d 777, 781, 203 P.3d 375 (2009) (citing In re Pers. Restraint of Turay, 150 Wn.2d 71, 82, 74 P.3d 1194 (2003)). He has failed to make such a showing.

Lynch cites to In re Pers. Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004) for the proposition that a defendant cannot be convicted of a "non-existent" crime.³ He further cites to Goodwin, supra, for its holding that a defendant cannot consent to a sentence outside the court's authority. Based on those cases, Lynch appears to reason that he "pled guilty to something that he in

³ In Hinton, the judgments were facially invalid because the petitioners were charged with and convicted of second degree felony murder predicated on assault. 152 Wn.2d at 857. The statute under which they were charged and convicted did not include assault as a predicate felony; thus petitioners were convicted of a "non-existent" offense. Id.

fact is innocent of,” and that his judgment is thus “invalid.” Brf. of Appellant at 10-13. He further claims that pursuant to CrR 7.8(b)(4), his judgment is “void” because he was “never charged with making ‘a true threat’ to kill” and that “[h]e was not convicted of such a charge either.” Brf. of Appellant at 18.

Lynch’s argument is analytically and factually flawed. The concept of a “true threat” merely defines and limits the scope of what the State is required to prove with respect to the “threat” element of harassment. State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007). That the threat must be a “true threat” is not an essential element of the crime of felony harassment required to be charged in the information. Id. The caselaw limiting the scope of the felony harassment statute to conduct involving “true threats” does not render Lynch’s crime “non-existent,” nor does it divest the sentencing court of its authority to sentence him.

Although Lynch does not articulate as much, his claim that his conduct fails to meet the “true threat” requirement is really an argument that his plea lacked a sufficient factual basis. The establishment of a factual basis for a plea is a procedural requirement under CrR 4.2, and becomes constitutionally significant only to the extent that it relates to the voluntariness of

the plea. In re Pers. Restraint of Hews, 108 Wn.2d 579, 591-92, 741 P.2d 983 (1987); State v. Zhao, 157 Wn.2d 188, 199-200, 137 P.3d 835 (2006).

Lynch does not claim that his plea was entered involuntarily. However, even if this Court were to interpret that to be his argument, he has not met his burden to prove that his judgment and sentence is facially invalid. "In reviewing the plea agreement documents, where a clear determination of constitutional invalidity cannot be made, the conviction is not facially invalid." State v. Thompson, 143 Wn. App. 861, 867, 181 P.3d 858 (2008) (citing State v. Ammons, 105 Wn.2d 175, 189, 713 P.2d 719 (1986)).

To find a factual basis in support of a plea, a trial judge need not be convinced of the defendant's guilt beyond a reasonable doubt. Zhao, 157 Wn.2d at 198. A factual basis for a plea exists when there is sufficient evidence, from any reliable source, for a jury to find guilt. Id.

A person commits the crime of harassment when, without lawful authority, the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to any other person, and the person by words or conduct places the person threatened in reasonable fear that the threat will be carried

out. RCW 9A.46.020(1)(a)(i). If the threat is a threat to kill, the crime is a felony. RCW 9A.46.020(2)(b). Additionally, as noted in Sec. C.2, supra, a threat is a “true threat” when it is made under circumstances where “a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of another person.” Kilburn, 151 Wn.2d at 43 (quoting Williams, 144 Wn.2d at 208-09).

Here, Lynch stipulated that the trial court could review the facts contained in the certification for determination of probable cause for the purpose of determining a factual basis for his plea. CP 14. According to the certification, while angrily yelling obscenities at his neighbor and the contractors working at her home, Lynch threatened to “bring down more trouble” than they could deal with. CP 18. A short time later, Lynch blocked his neighbor’s driveway with his vehicle, armed himself with a rifle and dared the occupants of the home to come outside. CP 18-19. One of the contractors saw Lynch point his rifle at the home; he informed the other occupants that Lynch had a gun. Id. Then, contractor Vanderhoof, who was standing in the garage, saw Lynch

point the rifle directly at him. CP 19. Vanderhoof was so afraid for his life that he ran for cover. Id.

The certification plainly outlines a sufficient factual basis for a felony harassment plea, including the requirement that the threat was a “true threat.” Lynch has failed to meet his burden of establishing that his judgment is facially invalid.

b. Lynch Has Failed To Establish An Exception Under RCW 10.73.100.

Lynch argues that his collateral attack falls within the exceptions to the one-year time bar found in RCW 10.73.100(2), (4), and (5). This Court should reject his arguments, as none of those statutory exceptions apply to Lynch. His claim is time-barred and meritless.

I. The felony harassment statute is not unconstitutional as applied to Lynch's conduct.

The one-year time-limit for collateral attacks does not apply when, “The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct.” RCW 10.73.100(2).

Lynch has failed to show how this exception applies to his case. He has not pointed to any specific constitutional defect in the harassment statute, much less one that applies to him. His claim that his conduct did not rise to the level of a “true threat,” and that the harassment statute is somehow unconstitutional as applied to him is without citation to supporting authority and without any persuasive argument.

In a personal restraint petition, petitioner bears the burden of showing prejudicial error by a preponderance of the evidence. In re Pers. Restraint of Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004); State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986). Bare allegations unsupported by citation to authority, references to the record, or persuasive reasoning cannot sustain this burden of proof. In re Personal Restraint of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); Brune, 45 Wn. App. at 363.

In reality, Lynch's claim is nothing more than a sufficiency of the evidence argument.⁴ And, as outlined above in Sec. C, 3, a, the certification plainly contains sufficient facts to support Lynch's

⁴ Lynch also appears to claim that the time-bar exception found in RCW 10.73.100(4) applies to him. However, that exception is for defendants who “pled not guilty and the evidence introduced at trial was insufficient to support the conviction.” RCW 10.73.100(4). Lynch did not go to trial; he entered a plea. By its very terms, this exception does not apply to him.

guilty plea. Lynch's motion does not fall within the exception found in 10.73.100(2) and is time-barred.

- ii. The sentence imposed was not in excess of the court's jurisdiction.

Lynch also states that his petition is timely under RCW 10.73.100(5), which provides that a petition is not time-barred if the sentence imposed was in excess of the court's jurisdiction. This unsupported claim should be rejected.

Lynch's conclusory assertion that the court lacked jurisdiction is without citation to legal authority or persuasive argument. Nonetheless, because the law is clear, the State will address it. The court of appeals has previously held that "jurisdiction" as used in RCW 10.73.100(5) means personal and subject matter jurisdiction. In re Pers. Restraint of Vehlewald, 92 Wn. App. 197, 200-01, 963 P.2d 903 (1998).

A court has subject matter jurisdiction where the court has the authority to adjudicate the type of controversy in the action. Vehlewald, 92 Wn. App. at 202. The superior court has original jurisdiction in all criminal cases amounting to felonies pursuant to

RCW 2.08.010. Thus, the court had subject matter jurisdiction in Lynch's case.

Personal jurisdiction arises when the defendant is present in court on the date of the arraignment. State v. Day, 46 Wn. App. 882, 896, 734 P.2d 491 (1987). The superior court was not lacking subject matter or personal jurisdiction at the time that sentence was imposed in Lynch's case.

This understanding of the term "jurisdiction" has been affirmed by this Court. In State v. Moen, 129 Wn.2d 535, 545, 919 P.2d 69 (1996), the court held that even when a sentencing court exceeds its statutory authority it is not acting without jurisdiction. Similarly, in In re Pers. Restraint of Fleming, 129 Wn.2d 529, 533, 919 P.2d 66 (1996), the court held that an untimely restitution order is not a jurisdictional defect. More recently, in In re Pers. Restraint of Richey, 162 Wn.2d 865, 872, 175 P.3d 585 (2008), this Court determined that "a sentence is not jurisdictionally defective merely because it is in violation of a statute or is based on a misinterpretation of a statute."

Furthermore, this Court has stated that the intent of the exception provided in RCW 10.73.100(5) was to preserve the constitutional right to jurisdictional challenges. Runyan, 121 Wn.2d

at 444. In Runyan, the petitioners argued that RCW 10.73.090 and 10.73.100 were an unconstitutional suspension of the writ of habeas corpus. Id. at 432. The court noted that the state constitution protects the right of citizens to challenge the jurisdiction of the sentencing court. Id. at 441. The court stated, "[t]raditionally, the writ of habeas corpus could not be used to attack even an erroneous judgment, unless that judgment was void for lack of jurisdiction." Id. at 441.

Turning to the exceptions provided in RCW 10.73.100, the court stated, "One of these exceptions is specifically for sentences imposed 'in excess of the court's jurisdiction.' This exception alone is adequate to preserve the jurisdictional inquiry protected by our constitution." Id. at 444. Finding that the constitutional scope of habeas corpus had been "explicitly preserved" in the statute, the court held that the statute was constitutional. Id.

In light of this precedent, this Court should reject Lynch's unsupported contention that the trial court acted without jurisdiction when sentencing him.

Lynch has failed to establish the existence of any exception to the one-year time-limit for collateral attacks. His motion to vacate his judgment is time-barred.

4. THE TRIAL COURT SHOULD NOT HAVE SIMULTANEOUSLY DENIED LYNCH'S MOTION AND TRANSFERRED IT TO THE COURT OF APPEALS FOR CONSIDERATION AS A PERSONAL RESTRAINT.

Should this Court accept direct review and also determine that Lynch's motion is time-barred, it would be appropriate to remand the matter to the trial court to provide Lynch the opportunity to withdraw the motion before it is transferred to the court of appeals as a personal restraint petition. Alternatively, this Court could affirm the trial court's denial of the motion to vacate, because remand would offer Lynch no meaningful relief.

CrR 7.8(c)(2) provides that the superior court shall transfer an untimely collateral attack to the Court of Appeals for consideration as a personal restraint petition. Here, the superior court entered an order transferring Lynch's motion to the court of appeals as a personal restraint petition. CP 77. However, for reasons that are unclear, the superior court "denied" the motion in addition to "transferring" it. Id.

In State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008), the superior court erroneously denied the defendant's time-barred CrR 7.8 motion. On appeal, the court of appeals declined the State's invitation to convert the matter to a personal restraint

petition, and instead remanded to the superior court to permit the defendant an opportunity to withdraw his motion before it was transferred. Id. at 863-64. The court's concern centered on the defendant's right to choose whether to pursue the personal restraint petition, as he would then be subject to the successive petition rule in RCW 10.73.140.

RCW 10.73.140 bars the court of appeals from considering a personal restraint petition raising the same issues as a previous petition. When filing a subsequent petition, the petitioner is required to certify that he has not previously filed a petition on similar grounds or to show good cause why he did not raise the new grounds in the previous petition. RCW 10.73.140. If a petition raises the same issues as a prior petition, the court of appeals shall dismiss the petition as successive. Id. If the petitioner fails to show good cause why the ground asserted was not raised earlier, and the petition is also time-barred, the court of appeals must dismiss the petition. Turay, 150 Wn.2d at 87. This statutory bar includes all collateral attacks, including habeas corpus petitions. In re Pers. Restraint of Becker, 143 Wn.2d 491, 496, 20 P.3d 409 (2001).

Because Lynch's CrR 7.8 motion is time-barred, the superior court should not have "denied" the motion in addition to transferring

it to the court of appeals. This collateral attack appears to be Lynch's first. Under Smith, it would be appropriate to refer the matter back to the superior court to provide Lynch the opportunity to withdraw his motion before it was transferred to the court of appeals as a personal restraint petition.

Alternatively, because it would make little sense for the trial court to transfer a motion that this Court has already deemed to be time-barred, this Court could simply affirm the trial court, given that remand would offer Lynch no meaningful relief.

D. CONCLUSION

This Court should deny direct review as Lynch has failed to provide an adequate record to review his claims, and because his issues lack "fundamental and broad" public import and do not require the "prompt and ultimate" determination contemplated by RAP 4.2(a)(4).

Should this Court accept review, it should find that Lynch has failed to show that his judgment and sentence is facially invalid or that it falls within an exception to the one-year time-bar.

This Court should either remand to allow Lynch the opportunity to withdraw his time-barred motion before it is disposed

it to the court of appeals. This collateral attack appears to be Lynch's first. Under Smith, it would be appropriate to refer the matter back to the superior court to provide Lynch the opportunity to withdraw his motion before it is transferred to the court of appeals as a personal restraint petition.

Alternatively, because it would make little sense for the trial court to transfer a motion that this Court has already deemed to be time-barred, this Court could simply affirm the trial court, given that remand would offer Lynch no meaningful relief.

D. CONCLUSION

This Court should deny direct review as Lynch has failed to provide an adequate record to review his claims, and because his issues lack "fundamental and broad" public import and do not require the "prompt and ultimate" determination contemplated by RAP 4.2(a)(4).

Should this Court accept review, it should find that Lynch has failed to show that his judgment and sentence is facially invalid or that it falls within an exception to the one-year time-bar.

This Court should either remand to allow Lynch the opportunity to withdraw his time-barred motion before it is disposed

of as a personal restraint petition, or simply affirm the trial court's denial of Lynch's motion.

DATED this 19 day of August, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

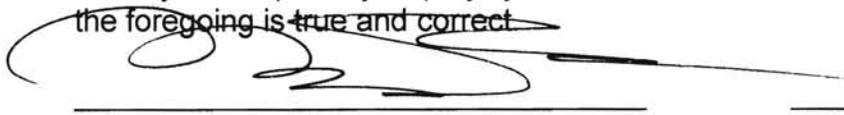
By: 

AMY R. MECKLING, WSBA #28274
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to John R. Muenster, the attorney for the appellant, at Muenster & Koenig, 14940 Sunrise Drive NE, Bainbridge Island, WA 98110, containing a copy of the Brief of Respondent, in STATE V. STEPHEN LYNCH, Cause No. 86480-2, in the Supreme Court, for the State of Washington.

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

 _____

Name
Done in Seattle, Washington

08-17-12

Date

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