

NO. 34540-4

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRENTON D. THOMPSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Sergio Armijo

No. 99-1-01611-6

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**BRIEF OF RESPONDENT**

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## Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u> .....	1
1.	Did the trial court properly deny defendant's motion to exclude prior convictions from his criminal history when the motion was a collateral attack on those prior convictions and, under controlling authority, the type of challenge he raised was not one that could be brought in a sentencing hearing? .....	1
2.	Is the law of the case doctrine inapplicable in this case because the language in an earlier order on a personal restraint petition upon which defendant relies is dicta rather than a holding? .....	1
3.	Should the law of the case doctrine not be applied in this case because the court's decision on a personal restraint petition as to what should happen on remand represents a clearly erroneous decision that would work a manifest injustice if the decision were not set aside? .....	1
4.	Did the trial court properly deny a collateral attack on prior convictions that was untimely and unsupported by any evidence? .....	1
B.	<u>STATEMENT OF THE CASE</u> .....	1
C.	<u>ARGUMENT</u> .....	4
1.	THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO EXCLUDE PRIOR CONVICTIONS FROM THE CALCULATION OF THE OFFENDER SCORE AS IT WAS AN IMPROPER, UNSUPPORTED, AND UNTIMELY COLLATERAL ATTACK.....	4
D.	<u>CONCLUSION</u> .....	18

## Table of Authorities

### Federal Cases

<u>Christianson v. Colt Indus. Operating Corp.</u> , 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988).....	10
<u>Custis v. United States</u> , 511 U.S. 485, 496-97, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).....	6, 7, 8, 9, 12
<u>Gideon v. Wainwright</u> , 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).....	7
<u>Johnson v. United States</u> , 544 U.S. 295, 303, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005).....	8

### State Cases

<u>Bellevue v. Acrey</u> , 103 Wn.2d 203, 207, 691 P.2d 957 (1984).....	11
<u>Concerned Coupeville Citizens v. Coupeville</u> , 62 Wn. App. 408, 416, 814 P.2d 243, <u>review denied</u> , 118 Wn.2d 1004 (1991).....	11
<u>Greene v. Rothschild</u> , 68 Wn.2d 1, 414 P.2d 1013 (1966).....	10, 11
<u>In re Cook</u> , 114 Wn.2d 802, 810-11, 792 P.2d 506 (1990).....	14
<u>In re Hagler</u> , 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982).....	13
<u>In re Haverty</u> , 101 Wn.2d 498, 681 P.2d 835 (1984).....	14
<u>In re Pers. Restraint Hemenway</u> , 147 Wn.2d 529, 532, 55 P.3d 615 (2002).....	5-6, 16, 17
<u>In re Pers. Restraint of Goodwin</u> , 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002).....	6
<u>In re Pers. Restraint of Stoudmire</u> , 141 Wn.2d 342, 353, 5 P.3d 1240 (2000).....	6
<u>In re Pers. Restraint of Thompson</u> , 141 Wn.2d 712, 718, 10 P.3d 380 (2000).....	6

<u>In re Rice</u> , 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).....	15
<u>Lutheran Day Care v. Snohomish County</u> , 119 Wn.2d 91, 113, 829 P.2d 746 (1992) .....	10
<u>Petition of Williams</u> , 111 Wn.2d 353, 365, 759 P.2d 436 (1988) .....	14, 15
<u>Shumway v. Payne</u> , 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998) .....	16
<u>State v. Ammons</u> , 105 Wn.2d 175, 187, 713 P.2d 719 (1986) .....	4, 5, 7, 8, 9, 12
<u>State v. Harrison</u> , 148 Wn.2d 550, 562, 61 P.3d 1104 (2003).....	10
<u>State v. Potter</u> , 68 Wn. App. 134, 150, 842 P.2d 481 (1992) .....	11
<u>State v. Roberts</u> , 142 Wn.2d 471, 529, 14 P.3d 713 (2000) .....	6, 7, 8, 9, 12
<u>State v. Worl</u> , 129 Wn.2d 416, 424-425, 918 P.2d 905 (1996) .....	11

**Statutes**

RCW 10.73.090 .....	5, 6, 16
RCW 10.73.090(1) .....	5, 14
RCW 10.73.090(2) .....	13

**Rules and Regulations**

RAP 12.2 .....	12, 13
RAP 12.5 .....	13
RAP 12.9 .....	13
RAP 16.7(a)(2) .....	14
RAP 2.5(c)(2) .....	11, 13

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

1. Did the trial court properly deny defendant's motion to exclude prior convictions from his criminal history when the motion was a collateral attack on those prior convictions and, under controlling authority, the type of challenge he raised was not one that could be brought in a sentencing hearing?
2. Is the law of the case doctrine inapplicable in this case because the language in an earlier order on a personal restraint petition upon which defendant relies is dicta rather than a holding?
3. Should the law of the case doctrine not be applied in this case because the court's decision on a personal restraint petition as to what should happen on remand represents a clearly erroneous decision that would work a manifest injustice if the decision were not set aside?
4. Did the trial court properly deny a collateral attack on prior convictions that was untimely and unsupported by any evidence?

B. STATEMENT OF THE CASE.

This is an appeal after a re-sentencing hearing following a partial grant of relief on a personal restraint petition. A brief summary of the case's procedural history follows:

Appellant, BRENTON D. THOMPSON, hereinafter “defendant,” was convicted of murder in the first degree and assault in the first degree in Pierce County Superior Court Cause No. 99-1-01611-6, following a jury trial before the Honorable Sergio Armijo. CP 4-15. Defendant appealed his convictions; in an unpublished opinion the Court of Appeals affirmed his murder conviction but reversed his assault conviction for instructional error. CP 43-65. The matter was remanded to superior court for retrial on the assault conviction. The assault count was tried to a jury before the Honorable Stephanie Arend and defendant was again convicted of the assault in the first degree. CP 66, 69-70. Defendant again appealed. CP 68.

While this second appeal was pending, defendant filed a personal restraint petition challenging both his 2000 murder conviction and his 2004 assault conviction. CP 81-86. The court rejected most of defendant’s claims. *Id.* In this petition, defendant asserted that two prior solicitation convictions should not have been included in his offender score because the convictions were based on involuntary pleas. The court found that defendant had not shown that his attack on these convictions was timely or that “the judgment and sentence evidencing these convictions [was] invalid on its face” and denied relief. The order went on to state:

[Defendant] may, however, present whatever documents and arguments he claims support his position at the resentencing hearing that we order below.

CP 81-86. The court but did grant relief on the calculation of the offender score stating that it should have been three, not six. Id.

The State brought defendant back before the Honorable Sergio Armijo to comply with this order granting relief. 1RP<sup>1</sup> 2; 2RP 2-5. Defendant filed a motion asking the court to exclude his prior convictions from the calculation of his offender score. CP 88-92. At the hearing defendant called the court's attention to his motion and asked the court to rule upon it. 2RP 8, 13-15. The court denied his motion. 2RP 15. The court then sentenced defendant using an offender score of three. CP 93-105. Defendant filed a timely notice of appeal from entry of this judgment. CP 106-108.

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<sup>1</sup> The State will use the same designations for the verbatim report of proceedings as employed by appellant. "1RP" refers to the transcript for the hearing on January 27, 2006. "2RP" refers to the transcript for the hearing on February 3, 2006.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO EXCLUDE PRIOR CONVICTIONS FROM THE CALCULATION OF THE OFFENDER SCORE AS IT WAS AN IMPROPER, UNSUPPORTED, AND UNTIMELY COLLATERAL ATTACK.

a. The Court Properly Denied The Motion Because Defendant Attempted To Raise Challenges To His Prior Convictions That May Not Be Raised At A Sentencing Hearing.

The prosecution does not have the affirmative burden of proving the constitutional validity of a prior conviction before it can be used in a sentencing proceeding. State v. Ammons, 105 Wn.2d 175, 187, 713 P.2d 719 (1986). The court stressed the policy reasons behind this rule:

To require the State to prove the constitutional validity of prior convictions before they could be used would turn the sentencing proceeding into an appellate review of all prior convictions. The defendant has no right to contest a prior conviction at a subsequent sentencing. To allow an attack at that point would unduly and unjustifiably overburden the sentencing court. The defendant has available, more appropriate arenas for the determination of the constitutional validity of a prior conviction. The defendant must use established avenues of challenge provided for post-conviction relief. A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

Ammons, 105 Wn.2d at 188. A prior conviction which has been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face may not be considered. Id. at 187-

188. Under Ammons, the *only* constitutional challenge a defendant may raise to a prior conviction in a sentencing hearing is one of *facial constitutional invalidity*; otherwise a defendant must try to collaterally attack the conviction in the court where it was entered or by personal restraint petition.<sup>2</sup> 105 Wn.2d at 187-188.

There is a distinction between a judgment that is “invalid on its face,” which might be relevant in assessing an untimely collateral attack, and a judgment that shows *facial constitutional invalidity*, which is relevant to a challenge made to use of a prior conviction at a sentencing hearing. In Washington, collateral attacks to a judgment must be brought in a timely manner- within one year after the “judgment has become final *if the judgment and sentence is valid on its face.*” RCW 10.73.090(1) (emphasis added). The Washington Supreme Court has held that a “‘facial invalidity’ inquiry under RCW 10.73.090 is directed to the judgment and sentence itself.” In re Pers. Restraint Hemenway, 147 Wn.2d 529, 532, 55

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<sup>2</sup> In addition to preventing sentencing hearings from becoming time consuming appellate reviews of all prior convictions, requiring a defendant to collaterally attack his prior conviction in the court where the conviction was entered, or by personal restraint petition, promotes consistency in how all future sentencing courts will treat the conviction. When a challenge is made in the court where the conviction was entered, the superior court clerk’s file will reflect the determination made by the original trial court. Similarly, if an appellate court grants relief on a personal restraint petition, a copy of the order will be filed in the superior court clerk’s file pertaining to that conviction. Anyone examining the court file will be able to determine whether the conviction has been vacated. In contrast, challenges raised in sentencing courts will be reflected in the superior court file pertaining to the new conviction rather than the court file pertaining to the prior conviction. This procedure invites inconsistent treatment each time the prior conviction is raised as criminal history in various sentencing courts.

P.3d 615 (2002). “‘Invalid on its face’ means the judgment and sentence evidences the invalidity without further elaboration.” Id. citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002); In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000); In re Pers. Restraint of Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000). The Court has held, however, that the statute does not limit facial invalidity strictly to constitutional issues. In re Pers. Restraint of Goodwin, 146 Wn.2d at 866. (“We have never held, however, that RCW 10.73.090 requires, merely by use of the words “valid on its face,” that the only type of invalidity that will prevent operation of the one-year bar to filing a personal restraint petition is constitutional infirmity.”) Thus, showing facial invalidity of a judgment under RCW 10.73.090 does not demonstrate a *facial constitutional invalidity*.

Both the United States and Washington Supreme Courts have addressed what constitutes facial constitutional invalidity that renders the conviction invalid for sentencing purposes. Custis v. United States, 511 U.S. 485, 496-97, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994); State v. Roberts, 142 Wn.2d 471, 529, 14 P.3d 713 (2000). In Roberts, the Court noted that simply attacking the validity of a plea does not implicate the facial constitutional validity of the judgment. Roberts asserted that the sentencing court should not have considered some of his Canadian convictions because there was no showing that he was informed of the same rights of which he would have been informed in an American court.

The court rejected the argument stating:

Even were this true, the Canadian convictions would presumably still be admissible. See Custis v. United States, 511 U.S. 485, 496-97, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994) (while denial of counsel renders a prior conviction per se invalid for sentencing purposes, other alleged errors, including involuntary plea, do not). Custis makes the same point this court made in Ammons: absent facial constitutional invalidity or an affirmative showing of infirmity by the defendant, the sentencing court should not be forced to conduct an appellate review of each of the defendant's priors. Custis, 511 U.S. at 496; Ammons, 105 Wn.2d at 188.

State v. Roberts, 142 Wn.2d at 529.

Custis v. United States concerned a defendant who challenged the use of his prior convictions at a sentencing hearing for a variety of reasons including: the denial of the effective assistance of counsel, an involuntary guilty plea, and inadequate advisement of his rights in opting for a "stipulated facts" trial. Custis claimed that the constitution mandated that he be allowed to raise challenges to his prior convictions at a subsequent sentencing hearing before they were used to increase his punishment. The United States Supreme Court rejected Custis's invitation "to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)," holding that "the failure to appoint counsel for an indigent defendant was a unique constitutional defect." Custis v. United States, 511 U.S. at 496 (U.S. 1994). The Court noted that one of the reasons

denial of appointment of counsel is treated differently than other claims is the relative ease in determining whether such an infirmity exists. The court noted that “failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order” whereas “determination of claims of ineffective assistance of counsel, and failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era.” Custis, 511 at 496; see also, Johnson v. United States, 544 U.S. 295, 303, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005) (“We recognized only one exception to this rule that collateral attacks were off-limits [at sentencing hearings], and that was for challenges to state convictions allegedly obtained in violation of the right to appointed counsel.”). The Washington Supreme Court expressed the same concern in Ammons when it stated that allowing defendants to bring any sort of constitutional challenge would “turn the sentencing proceeding into an appellate review of all prior convictions.” 105 Wn.2d at 188.

As noted in Roberts and Custis, showing a denial of counsel on the prior conviction- and only this showing- is the kind that may be raised at a sentencing hearing to render the prior conviction constitutionally invalid for sentencing purposes. Other claims, even ones seemingly based on constitutional principles such as an involuntary plea, do not result in facial constitutional invalidity of a judgment. Under Ammons, those type of

constitutional claims must be raised in a collateral attack in the court where the judgment was entered or by personal restraint petition.

Ammons, 105 Wn.2d at 188.

In the sentencing hearing below, defendant did not assert a claim that his two prior solicitation convictions were obtained without assistance of counsel. His motion to exclude consideration of his prior convictions alleged that his convictions were obtained as a result of an involuntary plea. CP 88-92. Under Ammons, Custis, and Roberts, defendant is precluded from making this type of collateral attack on his prior convictions at a sentencing hearing. Rather defendant must challenge his solicitation convictions directly via personal restraint petition.<sup>3</sup> If an appellate court vacates one or both of his convictions, then defendant may petition for a resentencing in this case without inclusion of the vacated conviction(s).

Although the trial court did not articulate this rationale as its reason for denying defendant's motion, the denial of the motion to exclude the prior convictions was proper. Defendant's motion did not raise denial of counsel on the prior convictions - the one permissible basis for collaterally attacking a prior conviction at a sentencing hearing. The trial court correctly denied the motion and included the prior convictions in defendant's criminal history.

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<sup>3</sup> Or by post-conviction motion in the court where the convictions were entered.

b. The Law of the Case Doctrine Should Not Apply.

Defendant asserts that defendant could properly raise any challenge he wanted at the sentencing hearing because the Court of Appeals had authorized such action in its order granting partial relief on his personal restraint petition. Defendant relies upon the law of the case doctrine.

The “law of the case” doctrine generally refers to the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand; it is based upon the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case. State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003), citing Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). The goal of the doctrine is to promote finality and efficiency of the judicial process. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988). The law of case doctrine is a discretionary rule that should not be applied when the result would be a manifest injustice. Greene v. Rothschild, 68 Wn.2d 1, 414 P.2d 1013 (1966).

Under the doctrine of “law of the case,” as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are “authoritatively overruled.” . . . Such a holding should be overruled if it lays down or tacitly

applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.

Greene, at 10. This common law principle was codified in RAP 2.5(c)(2):

Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

Generally, a court should only reconsider an earlier decision if it was clearly erroneous and if it would work a manifest injustice to one party if the clearly erroneous decision were not set aside. State v. Worl, 129 Wn.2d 416, 424-425, 918 P.2d 905 (1996).

Firstly, the court's invitation to the defendant to present "whatever documents and arguments he claims support his position at the resentencing hearing" is not a "holding" of the decision on the personal restraint petition but dicta. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." State v. Potter, 68 Wn. App. 134, 150, 842 P.2d 481 (1992), citing Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) and Concerned Coupeville Citizens v. Coupeville, 62 Wn. App. 408, 416, 814 P.2d 243, review denied, 118 Wn.2d 1004 (1991). This sentence and supporting citation to authority could be left out of the order entirely without affecting any aspect of the

decision the court made on the issues in the petition before the court.

Without this sentence the order would still make sense and would resolve all of the issues raised in the petition. Since it is not a “holding” of the prior decision, it does not constitute the “law of the case.”

Additionally, the court’s invitation to defendant to present whatever arguments he wants at a sentencing hearing to show that his former convictions were based upon involuntary guilty pleas is clearly erroneous under Ammons, Roberts, and Custis. Applying the proper rule of law at this point does not harm defendant as he is still free to file a personal restraint petition directly challenging his prior convictions for solicitation. If he is successful in having the convictions vacated, he may seek a resentencing in the case now before the court. However, to apply the law of the case doctrine as defendant asks this court to do is manifestly unjust as it is asking the court to remand to allow defendant to make an argument in a sentencing hearing when the controlling authority forbids him from making such an argument. By affirming the action of the trial court, this court puts the case back on the proper legal footing without prejudice to the defendant to pursue relief through proper channels.

Defendant also relies upon RAP 12.2 as a basis for demanding compliance with the language in the order granting relief on the personal restraint petition allowing defendant to raise his claims at the sentencing hearing on remand. RAP 12.2 provides in the relevant part:

Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate as provided in rule 12.9, *and except as provided in rule 2.5(c)(2)*.

(emphasis added). Thus, this rule works in conjunction with the law of the case doctrine. If a party can show why the law of the case doctrine should not apply, then RAP 12.2 provides no additional barrier. The State has articulated why the law of the case doctrine should not apply above.

c. The Court Properly Denied The Motion As It Was Unsupported By Evidence And Untimely.

Under RCW 10.73.090(2) “collateral attack” means any form of postconviction relief other than a direct appeal. The term “collateral attack” includes, “but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.” *Id.* Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are significant costs, and they require that collateral relief be limited in state as well as federal courts. *In re Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982).

Where collateral relief is based upon constitutional error a petitioner must show actual and substantial prejudice. *In re Haverty*, 101

Wn.2d 498, 681 P.2d 835 (1984). A petitioner relying on non-constitutional arguments, however, must demonstrate a fundamental defect, which inherently results in a complete miscarriage of justice. In re Cook, 114 Wn.2d 802, 810-11, 792 P.2d 506 (1990). Because of the recognized costs and risks involved in providing collateral relief, there is a time limit in which to file a collateral attack. The statute that sets out the time limit provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

RCW 10.73.090(1).

The petition or motion must include a statement of the facts upon which the claim of unlawful restraint is based and the evidence available to support the factual allegations. RAP 16.7(a)(2); Petition of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). If the petitioner fails to provide sufficient evidence to support his challenge, the petition must be dismissed. Williams, at 364. Affidavits, transcripts, and clerk's papers are readily available forms of evidence that a petitioner may employ to support his claims. Id. at 364-365. A reference hearing is not a substitute for the petitioner's failure to provide evidence to support his claims. As the Supreme Court stated, "the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually

has evidence to support his allegations.” In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). “Bald assertions and conclusory allegations will not support the holding of a hearing,” but the dismissal of the petition. Rice, at 886, Williams, at 364-365.

In this case defendant filed a motion to “exclude prior convictions from the calculation of the offender score.” CP 88-92. The motion was collaterally attacking the validity of two 1995 convictions for solicitation to deliver a controlled substance (cocaine) and solicitation to possess with intent to deliver a controlled substance (cocaine) alleging that his plea was involuntarily entered. Id. The motion was unsupported by any evidence. Defendant did not present: 1) the judgment and sentence for the 1995 convictions; 2) the plea form<sup>4</sup>; or 3) the transcript of the plea hearing. The only thing supporting his motion were his own assertions of fact. Under the above cited authority, his collateral attack was properly denied for lack of supporting evidence.

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<sup>4</sup> On appeal, defendant has attached a copy of the plea form as an appendix to his brief. The plea form was attached to a memorandum which was filed in the superior court on November 2, 2004. The filing date indicates that this pleading was filed after the mandate from the first direct appeal, which affirmed the murder conviction and reversed the assault conviction. Judge Armijo’s presided over the first trial but not over the retrial of the assault count. CP 43-65. Judge Arend presided over the retrial on the reversed assault conviction. CP 66, 67, 69-80. The resentencing hearing that is the subject of the current appeal occurred on February 3, 2006. 2RP 2. So while this document was in the court file at the time of the re-sentencing, there is nothing to indicate that Judge Armijo was aware of that fact or that he considered the plea form in reaching his decision. The defendant referenced his “Motion and memorandum to exclude prior convictions,” but did not reference the motion to modify judgment that he had filed over a year earlier. 2RP 9. The State submits this document should not be considered by this court as relevant to the decision on appeal.

Moreover, defendant had to show that his collateral attack on 1995 convictions was not time barred under RCW 10.73.090. A petitioner bears the burden of proving that his collateral attack falls within an exception to the one-year time limit. Shumway v. Payne, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998). While defendant claimed that the judgment was “invalid on its face,” which is an exception to the time bar in RCW 10.73.090, he did not provide the judgment of the 1995 convictions to support his claims. The court would have to review this document in order for it to determine the merit of his claim of facial invalidity. Having failed to prove an exception to the time bar, the trial court properly denied the motion.

Finally, the argument asserted by defendant in his motion was that the judgment was facially invalid because the plea form was facially invalid. When a judgment is based upon a plea of guilty, showing that the judgment is invalid on its face is a distinct issue from showing an involuntary plea. In re Pers. Restraint Hemenway, 147 Wn.2d at 531. Hemenway filed a personal restraint petition alleging that his plea was involuntarily entered because he was not informed that a minimum of twenty four months of mandatory community placement would be a consequence of his plea. Because his petition was filed untimely under RCW 10.73.090, he had to show that an exception to the time bar was applicable to his petition. Hemenway claimed that his judgment was invalid on its face; he asked the court to look at the plea form he signed in

connection with the conviction under attack as proof that he had not been advised of this direct consequence. The court rejected this argument pointing out that the “question is not, however, whether the plea documents are facially invalid, but rather whether the judgment and sentence is invalid on its face.” Hemenway, 147 Wn.2d at 533 (2002). The court dismissed the petition as untimely without ever addressing Hemenway’s claim that his plea was involuntary. Id. at 532. Thus, under Washington law, a defendant does not establish a facially invalid judgment simply by establishing an involuntary plea. The issues are distinct. Here defendant’s motion failed to articulate how his judgment was facially invalid and therefore failed to show an exception to the time bar. The court properly denied an untimely collateral attack when defendant failed to prove a relevant exception to the time-bar.

For all of the foregoing reasons, the trial court properly denied defendant’s motion to exclude his prior convictions from his criminal history and sentenced him with an offender score of three. Defendant does not challenge the correctness of the court’s sentence based upon an offender score of three. The sentence imposed below should be affirmed.

D. CONCLUSION.

For the forgoing reasons the State asks this court to affirm the sentence imposed below.

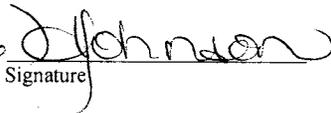
DATED: December 18, 2006.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant ~~and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/18/06   
Date Signature

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