

No. 40745-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHARLES D. HAWKINS,

Appellant.

FILED
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DIVISION II
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STATE OF WASHINGTON
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Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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(2009)

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I. ISSUES

- A. Did the visiting judge have the authority to preside over Hawkins matter?
- B. Was the visiting judge required to accept the affidavit of prejudice filed by Hawkins and remove himself from this case?
- C. Did Hawkins have the right to be represented by counsel at the hearing to make a ministerial correction to the judgment and sentence?
- D. Should Hawkins's exceptional sentence be vacated?

II. STATEMENT OF THE CASE

The history of Hawkins's case is long and somewhat complex but the State believes a summary of Hawkins's post-conviction actions in this matter would be helpful to the Court. A statement of the facts of the underlying case can be found in *State v. Hawkins*, 53 Wn. App. 598, 769 P.2d 856 (1989), *review denied* 113 Wn.2d 1004 (1989), CP 2-13.

On March 25, 1987 Hawkins was found guilty by a jury of his peers of one count of Murder in the First Degree. CP 1. Hawkins was sentenced on April 17, 1987 and received an exceptional sentence of 600 months. CP 3. The standard sentencing range for Hawkins was 271 to 361 months. CP 2. The trial court entered findings to support Hawkins's exceptional sentence, specifically stating there was deliberate cruelty, particularly vulnerable victim

and the victim's zone of privacy was invaded. CP 5-6. Hawkins appealed his conviction and the Court of Appeals affirmed the conviction. See, *State v. Hawkins*, 53 Wn. App. 598, CP 1-13. In its holding the court stated it was not remanding the case for resentencing. *State v. Hawkins*, 53 Wn. App. 598, 608, CP 1, 13. The court did state that “[t] maximum life sentence and the designation of “minimum” are deleted; the exceptional sentence of 600 months shall be enforced.” *Id*, CP 13.

Hawkins filed a personal restraint petition (PRP) in 2001 raising the argument that *Apprendi v. New Jersey* required the aggravating factors used to justify his exceptional sentence must be submitted to jury. See *in re Hawkins*, COA no. 27091-9-II (2001), Appendix A, *review denied* Supreme Court No. 71386 (2001), Appendix B, *Apprendi v. New Jersey*, 530 U.S. 166, 120 S Ct. 2348, 147 L. Ed.2d 435 (2000). The court found in its order dismissing the petition that *Apprendi* did not apply and dismissed the petition as being time barred. See 27091-9-II Order Dismissing Petition, Appendix A. The Supreme Court also found that the trial court acted within its jurisdiction when it imposed the exceptional sentence. See 71386-3 Ruling Denying Review, Appendix B.

Hawkins filed his second PRP in 2003 claiming ineffective assistance of counsel and juror bias. The Supreme Court dismissed the personal restraint, stating in its written ruling that the petition was time barred. *See, in re Hawkins*, 73792-4 Ruling Dismissing Personal Restraint Petition, Appendix C.

Hawkins filed his third PRP in 2004 as a motion to modify and/or correct exceptional sentence in Lewis County Superior Court and the motion was transferred to the Court of Appeals as a PRP. This time Hawkins argued that changes in the law require him to be sentenced under the standard range because his judgment is void due to an impermissible exceptional sentence. Hawkins argued that *Blakely v. Washington*, 542 US 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004) applied retroactively to his case. The Court of Appeals disagreed with Hawkins and stated *Blakely* did not apply retroactively and the petition was time barred. *See, in re Hawkins*, 32231-5-II Order Dismissing Petition, Appendix D. The Supreme Court denied review of the petition under similar analysis as the Court of Appeals. *See* 76494-8 Ruling Denying Review and Denying Motion, Appendix E.

In 2006 Hawkins filed his fourth PRP, arguing that the court imposed an illegal indeterminate sentence and therefore his

judgment and sentence was illegal. The court rejected Hawkins's argument, stating that Hawkins's claim of facial invalidity fails and the petition is untimely and successive. *See in re Hawkins*, 34878-1-II Order Dismissing Petition, Appendix F. The Supreme Court denied review (79391-3).

Hawkins filed another post-conviction motion in December 2006, which the Lewis County Prosecutor's Office attempted to have transferred to the Court of Appeals as a PRP, COA No. 36689-4-II, but was rejected. Hawkins also filed a Writ of Mandamus with the Supreme Court, No. 80742-6, which was granted on March 7, 2008 and required Lewis County Superior Court to hear Hawkins's post-conviction motion. All three Lewis County Superior Court Judges recused on April 17, 2008. CP 96-98. Judge Lawler had previously represented Hawkins, Judge Brosey was Hawkins's trial attorney and Judge Hunt prosecuted Hawkins. CP 96-98. The motion was set before visiting Cowlitz County Judge Stephen Warning on May 28, 2008. CP 99. Judge Warning denied Hawkins motions for post-conviction relief and Hawkins appealed. CP 14-20. In an unpublished the Court of Appeals affirmed Judge Warning's ruling, stating that Hawkins's judgment became final on July 31, 1989 when the mandate was

issued and the collateral attacks were time-barred. *See State v. Hawkins*, COA No. 37945-7-II, Appendix G.

The current appeal, Hawkins's third, the court granted review after the State, at Hawkins's request, requested the trial court to make the ministerial change to the judgment and sentence the Court of Appeals ordered back in 1989. Because all three of the Lewis County Superior Court judges have previously recused, the hearing was set before Cowlitz County Superior Court Judge Stephen Warning, so he could act as a visiting judge, again. CP 96-98, 22. The docket notice clearly states that it was a motion to correct judgment and sentence. CP 22. A second docket notice was filed, striking the original hearing date and resetting it to May 7, 2010. CP 24-25. Hawkins filed an affidavit of prejudice against Judge Warning along with a motion and affidavit for recusal. CP 26-31. Hawkins also filed a motion to modify and/or vacate the sentence, citing CrR 7.8(b). CP 34-58.

Judge Warning held the hearing regarding the correction of the judgment and sentence on May 7, 2010. CP 60. Hawkins appeared telephonically and without counsel. RP 1-26. The deputy prosecutor stated "this case is being heard by a visiting judge because there is not a single judge left in Lewis County that

can hear this case.” RP 1. The deputy prosecutor further stated, “we are here today solely to make a ministerial correction to Mr. Hawkins’ judgment and sentence. This is being done expressly as set out in Mr. Hawkins’ direct appeal opinion, which was issued by the Court of Appeals in 1989 in 53 Wn. App. 598. . .we are not asking the Court to do anything that would involve discretion” RP 1-2. Hawkins brought up that he had filed a motion for Judge Warning to recuse, which was denied. RP 2, 23. Hawkins spoke at length about a number of issues he wished the court to address. RP 2-18. Judge Warning signed an order making the ministerial changes to the judgment and sentence. CP 61. Judge Warning also stated, “[a]nd I think that Mr. Hawkins was raising some other issues about representation of others that it [is] not before me now.” RP 23. Judge Warning made no rulings regarding the 7.8 motion Hawkins filed, simply noting for the record that those matters were not before him at this time. RP 23.

ARGUMENT

A. JUDGE WARNING HAD THE AUTHORITY TO PRESIDE OVER HAWKINS'S HEARING.

A currently elected superior court judge of one county may act as a visiting judge in another county. Const, art. IV, § 7. The constitutional provision states, "[t]he judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so." Const, art IV, § 7. The legislature has also recognized the necessity of superior court judges occasionally requesting a visiting judge preside over a case in a county different from their elected post. RCW 2.08.150. A superior court judge is allowed and empowered to hold court in another county upon request of the judge of that county and may rule upon the matters presented. RCW 2.08.150, RCW 2.08.200.

Judge Warning appeared and ruled on Hawkins's post-conviction motions in 2008. Judge Warning denied Hawkins's post-conviction motions and he appealed. In his appeal Hawkins's did not challenge Judge Warning's ability to hear his case as a visiting judge. See *State v. Hawkins*, COA No. 37945-7-II, Appendix G.

In 2010 when another hearing had to be set regarding Hawkins's case it was only logical to have Judge Warning, who was

familiar with Hawkins, make the ministerial correction to the judgment and sentence. Judge Warning did not just show up and hear Hawkins's case without being requested to do so by a Lewis County Superior Court judge. While Hawkins's is correct that the record is silent regarding the request, there is nothing in the constitutional provision that requires such a request to be in writing. Const. art IV, § 7. Hawkins misunderstands the docket notices that were sent to him in regards to the hearings set before Judge Warning. CP 22, 24-25. The deputy prosecutor simply includes the information in the docket notice so to give Hawkins the proper notice of the details of the hearing; it does not indicate that the hearing was set before Judge Warning simply on the deputy's request and without the permission and request of a Lewis County Superior Court judge. CP 22, 24-25. Judge Warning had the authority to preside over Hawkins's hearing as a sitting superior court judge visiting from another county and therefore the court should affirm the order modifying the sentence.

B. THE TRIAL COURT JUDGE WAS NOT REQUIRED TO ACCEPT HAWKINS'S AFFIDAVIT OF PREJUDICE.

Hawkins does not meet the required burden of showing under RCW 4.12.040 and RCW 4.12.050 that Judge Warning was

prejudiced against Hawkins, nor is Hawkins's affidavit of prejudice timely.

A party may seek to have a judge removed from their case by a showing that the judge is prejudiced against that party. RCW 4.12.040.

No judge of a superior court of the state of Washington shall sit to hear or try any action of proceeding when it shall be established as hereinafter provided that said judge s prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause.

RCW 4.12.040. The removal of a superior court judge is a right of the party that may be exercised once in a case and only with a timely filed motion and affidavit. *State v. Walters*, 93 Wn. App. 969, 974, 971 P.2d 538 (1999), *citing State v. Cockrell*, 102 Wn.2d 561, 565, 689 P.2d 32 (1984).

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving

discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: AND PROVIDED FURTHER, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

RCW 4.12.050(1). Prejudice is established if a party complies with the requirements of the statute. *State v. Walters*, 93 Wn. App. at 974. When prejudice is established a judge then becomes “divested of authority to proceed further into the merits of the action.” *Id. citations omitted*.

The statute bars a removal of judge without cause if the motion is not made timely. RCW 4.12.050(1), *State v. Belgrade*, 119 Wn.2d 711, 715, 837 P.2d 599 (1992). The judge must have not made a prior discretionary ruling in the party’s case for an affidavit of prejudice to be considered timely. RCW 4.12.050(1). The Court of Appeals has previously held that the use of the word “case” in RCW 4.12.050 is particularly significant in regards to the

meaning and intention of the statute. *State v. Clemons*, 56 Wn. App. 57, 59, 782 P.2d 219 (1989), *review denied* 114 Wn.2d 788 (1990). A case “involves pre-trial, trial, post-trial and appellate proceedings.” *Id.* An affidavit and motion must be filed prior to a discretionary ruling because it was not intended that “a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in a case he becomes fearful that the judge is not favorable to his view of the case.” *Id.* If a party fails to move for removal prior to a discretionary ruling being entered the party must demonstrate actual prejudice on the judge’s part. *In re Marriage of Farr*, 87 Wn. App. 177, 188, 940 P.2d 679 (1997), *citing* RCW 4.12.040 and *State v. Cameron*, 47 Wn. App. 878, 884, 737 P.2d 688 (1987). A party’s disagreement with a judge’s prior ruling does not establish prejudice. *In re Marriage of Farr*, 87 Wn. App. at 188.

Hawkins filed his motion and affidavit of prejudice against Judge Warning on April 14, 2010. CP 26-31. Judge Warning had previously made discretionary rulings in Hawkins’s case. See *State v. Hawkins*, COA No. 37945-7-II, Appendix G. Therefore, Hawkins’s motion and affidavit are not timely. RCW 4.12.050. The State respectfully disagrees with Hawkins’s reading of *State v.*

Torres, 85 Wn. App. 231, 932 P.2d 1986 (1997), as how it applies to his case. In *Torres* the state charged the defendant with first degree rape of child in October of 1993 but later dismissed the case without prejudice due to its unavailability of its witnesses. In a separate cause of action the state re-filed charges against Torres on May 18, 1994 and the defendant filed a motion and affidavit of prejudice for change of judge prior to any discretionary rulings in the new case. The court denied the defendant's motion. In *Torres*, the question on appeal was whether the defendant's motion was timely. A dismissal of a case without prejudice terminates the proceeding and is therefore a final order. *State v. Torres*, 85 Wn. App. at 233, *citing State v. Rock*, 65 Wn. App. 654, 658, 829 P.2d 232, *review denied* 120 Wn.2d 1004 (1993).

Hawkins's argues that the action of the Court of Appeals affirming Judge Warnings prior ruling and the filing of the mandate with Lewis County Superior Court abates the action. Brief of Appellant 12. Hawkins's reasons that when he filed his subsequent CrR 7.8 motion on April 29, 2010 he initiated a new action. Brief of Appellant 12, CP 34. Hawkins's interpretation of the plain meaning of RCW 4.12.050 is clearly erroneous. As clearly stated in *Clemons* a case includes all stages of proceedings, pre-trial

through post-trial and even appellate proceedings. *State v. Clemons*, 56 Wn. App. at 59, emphasis added. RCW 4.12.050 requires the motion to be filed prior to the judge making “any ruling whatsoever in the case. . .” Emphasis added.

The ministerial action taken by Judge Warning was a continuation of the original case filed in Lewis County Superior Court in 1986, case number 86-1-00213-2. The State has not dismissed and refiled against Hawkins. And, while the State is not agreeing that Judge Warning ruled upon Hawkins’s CrR 7.8 motion, even if he had, the filing of the motion did not constitute an initiation of new proceedings.

Since Hawkins’s motion and affidavit are not timely, he would only be able to succeed at removing Judge Warning if he could show actual prejudice. Hawkins’s assertion that Judge Warning was biased because Hawkins’s disagreed with Judge Warning’s prior rulings in his case do not establish prejudice. *In re Marriage of Farr*, 87 Wn. App. at 188, *State v. Clemons*, 56 Wn. App. at 59. Judge Warning stated, “I will deny Mr. Hawkins’ motion to recuse. There is no legitimate basis given merely the fact that I had ruled contrary to Mr. Hawkins’ desires or expectations previously isn’t a basis for me to withdraw from this case. . .” RP

23. Judge Warning's decision not to recuse falls squarely within the law and should therefore be upheld.

C. HAWKINS'S IS NOT ENTITLED TO BE REPRESENTED BY COUNSEL FOR A MINISTERIAL CORRECTION ON HIS JUDGMENT AND SENTENCE.

A person pending criminal prosecution has the right, under the Sixth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution to be represented by an attorney at every critical stage. *State v. Valentine*, 132 Wn.2d 1, 16, 935 P.2d 1294 (1997), *citations omitted*. "A stage is critical if it presents a possibility of prejudice to the defendant." *State v. Harell*, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996). A defendant is not entitled to an attorney in post-conviction proceedings, with the exception of the first direct appeal. *State v. Winston*, 105 Wn. App. 318, 321, 19 P.3d 495 (2001), *citations omitted*.

Hawkins's case was before the trial court for a ministerial correction to the judgment and sentence, as set forth in the 1989 decision from the Court of Appeals. See *State v. Hawkins*, 53 Wn. App 598. This case was not on for resentencing, which would have been a critical stage. The trial court did not entertain a post-

conviction motion and even if it had, Hawkins would not have been entitled to counsel. *State v. Winston*, 105 Wn. App. at 321.

Hawkins contends that the 1989 Court of Appeals decision “had the effect of vacating the trial court’s original indeterminate sentence, under the *Harell* decision, the defendant was entitled to appointment of counsel to represent him.” Brief of the Appellant 15. *Harell* is distinguishable from the current matter before the court. In *Harell*, the defendant had pleaded guilty but had not yet been sentenced when he moved to withdraw his guilty plea. The court allowed defense counsel to withdraw and testify in the hearing. The court did not appoint the defendant counsel to aid him in his motion to withdraw his guilty plea. The court denied the defendant’s motion to withdraw guilty plea, proceeded, without appointing Harell counsel, to judgment and sentenced Harell. The Court of Appeals vacated Harell’s sentence and remanded for rehearing.

In Hawkins’s case, the Court of Appeals did not remand for resentencing and specifically upheld his 600 month exceptional sentence. *State v. Hawkins*, 53 Wn. App at 608. The Court of Appeals stated the maximum and minimum designations were to be deleted from the judgment. *Id.* The State does not understand

how Hawkins's can now claim that the Court of Appeals in essence vacated his sentence when the Court specifically stated it was not remanding the case.

Hawkins is not entitled to counsel for the ministerial corrections to his judgment and sentence. The trial court was not exercising discretion. The amendment states the exact language from the Court of Appeals 1989 decision. CP 61.

Again, the State is not agreeing that the trial court made any rulings regarding Hawkins's CrR 7.8 motion, but for the sake of argument, even if the trial court did summarily deny Hawkins's motions, he is not constitutionally guaranteed the right to counsel in a CrR 7.8 motion. *State v. Robinson*, 153 Wn.2d 689, 695-97, 107 P.3d 90 (2005). CrR 7.8 motions are similar to PRPs and therefore have similar limitations and the appointment of counsel in post-conviction motions is not a constitutional right. *State v. Robinson*, 153 Wn.2d at 696; *State v. Winston*, 105 Wn. App. at 321. In *Robinson* the court ruled because the defendant was asserting the right to counsel for his CrR 7.8 motion, "the asserted error is a violation of a court rule (rather than a constitutional violation), it is governed by the harmless error test." *State v. Robinson*, 153 Wn.2d at 697, citing *State v. Templeton*, 148 Wn.2d 193, 220, 59

P.3d 632 (2002). Therefore, Hawkins must show that the error was prejudicial and that but for the error the outcome of the proceedings would have been materially affected. *Id.* Hawkins has not met such a standard and therefore reversal of the trial court's ruling is not appropriate.

D. HAWKINS'S EXCEPTIONAL SENTENCE SHOULD STAND BECAUSE, AS PREVIOUSLY DECIDED BY THE COURT, *BLAKELY* DOES NOT APPLY RETROACTIVELY TO HAWKINS.

The principle of *res judicata* is well established in our justice system. *Res judicata* requires a prior judgment have an agreement of identity with a subsequent action. *Rains v. State*, 100 Wn. App. 660, 663, 674 P.2d 165 (1983). "There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against who the claim is made." *Id.* citing *Seattle First Nat'l Bank v. Kawachi*, 91 Wn. 2d 223 (1978).

In the case at hand, Hawkins's has previously litigated the issue of retroactivity in regards to *Apprendi v. New Jersey* and *Blakely v. Washington*. Nothing in Hawkins's case has changed since the decisions were handed down. See, Appendix A and B, 27091-9-II Order Dismissing Petition (this Court found that *Apprendi* did not apply to Hawkins), 71386-3 Supreme Court's

Ruling Denying Review; Appendix D and E, 32231-5-II Order
Dismissing Petition (this Court found that *Blakely* did not apply
retroactively to Hawkins), 76494-8 Supreme Court's Ruling Denying
Review and Denying Motion. Therefore, based upon the principle
of *res judicata*, Hawkins's is barred from raising the issue again.

III. CONCLUSION

For the foregoing reasons, this court should reject Hawkins's
request for vacation of his sentence. This court should also reject
Hawkins's request for remand in regards to honoring his affidavit of
prejudice and resentencing within the standard range.

RESPECTFULLY submitted this 10th day of February, 2011.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by: 
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Attorney for Plaintiff

Appendix A

27091-9-II, Order Dismissing Petition

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RECEIVED

JUL 19 2001

LEWIS CO. PROS. ATTY.

STATE OF WASHINGTON
COURT OF APPEALS
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LEWIS COUNTY PROS. ATTORNEY

In re the
Personal Restraint Petition of

CHARLES DENNIS HAWKINS,

Petitioner.

No. 27091-9-II

ORDER DISMISSING PETITION

Charles Dennis Hawkins seeks relief from personal restraint imposed following his 1987 conviction of first degree murder. He claims his restraint is unlawful because the sentencing court imposed a sentence outside the standard range for his offense when the State did not prove the factors the trial court relied on beyond a reasonable doubt. He relies on the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

But petitioner's claims rest on a faulty premise. In *Apprendi*, the Court declared that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. Our Supreme Court recently examined the *Apprendi* decision in face of a claim similar to petitioner's here in *State v. Gore*, 2001 WL 287370 (Docket No. 65376-3, filed April 6, 2001). There, the Court held that as long as an exceptional sentence did not exceed the statutory maximum for the crime committed, the State need only prove the supporting factors by a preponderance of the evidence:

AT

Accordingly, the factual determinations that support reasons for exceptional sentences upward fall within the *McMillan* type of case and not the *Apprendi* type. Aggravating factors neither increase the maximum sentence nor define a separate offense calling for a separate penalty. The state statutory scheme permits a judge to impose an exceptional sentence--still within the range determined by the Legislature and not exceeding the maximum--after considering the circumstances of the offense, and, as *McMillan* and *Apprendi* indicate, it may do so without the factual determinations being charged, submitted to a jury, or proved beyond a reasonable doubt.

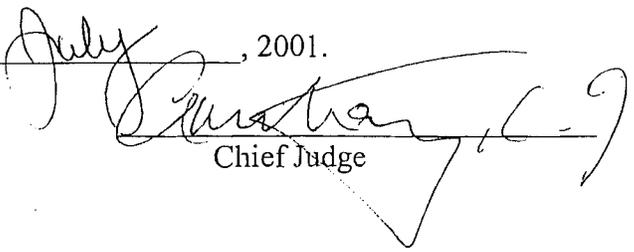
Here, petitioner's maximum sentence for his offense was life in prison. The sentencing court imposed an exceptional sentence of 600 months of incarceration. Thus, his sentence is less than the statutory maximum, it did not exceed the trial court's jurisdiction, and *Apprendi* does not apply.

But petitioner argues that his maximum sentence was not life in prison because this court previously held that RCW 9A.32.040 only applied to murders committed before July 1, 1984. *See State v. Hawkins*, 53 Wn. App. 598, 608, 769 P.2d 856 (1989). Petitioner misunderstands this court's decision. While the sentencing court was not obligated as it had been under the pre-SRA statutes to impose a life sentence, the maximum term of confinement was still life imprisonment. *See* RCW 9A.20.021(a).

This petition is untimely under RCW 10.73.090 and petitioner fails to show that any exception to this time bar applies. RCW 10.73.100. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 18 day of July, 2001.


Chief Judge

cc: Charles Dennis Hawkins
Lewis County Clerk
County Cause No(s). 86-1-00231-2
Jeremy Randolph

Appendix B

71386-3, Ruling Denying Review

THE SUPREME COURT OF WASHINGTON

FILED
SUPERIOR COURT
STATE OF WASHINGTON
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CLERK

In re the Personal Restraint
Petition of

CHARLES DENNIS HAWKINS,

Petitioner.

NO. 71386-3

RULING DENYING REVIEW

Charles Hawkins was convicted of first degree murder in 1987. The trial court imposed an exceptional "minimum" sentence of 50 years and a maximum sentence of life. On appeal, Division Two of the Court of Appeals determined that the statute which requires life sentences for persons convicted of first degree murder, RCW 9A.32.040, does not apply to offenders subject to the Sentencing Reform Act. *State v. Hawkins*, 53 Wn. App. 598, 608, 769 P.2d 856, review denied, 113 Wn.2d 1004, 777 P.2d 1052 (1989). Nonetheless, the court found that the aggravating factors the trial court cited were supported by the evidence and justified an exceptional sentence of 50 years. It therefore affirmed the exceptional sentence and ordered that the maximum life sentence and the reference to the 50-year term as a "minimum" sentence be deleted from the judgment. *Id.* at 609.

In February 2001, Mr. Hawkins filed a personal restraint petition in the Court of Appeals, again challenging his sentence. Relying on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Mr. Hawkins argued that the facts used to justify an exceptional sentence had to be proven to a jury beyond a reasonable doubt. The Chief Judge rejected this argument, and finding

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that Mr. Hawkins raised no grounds for review exempt from the one-year limit on personal restraint petitions, he dismissed the petition as untimely. *See* RCW 10.73.090(1); RCW 10.73.100. Mr. Hawkins now seeks this court's discretionary review of the Chief Judge's order. RAP 16.14(c); RAP 13.5.

Mr. Hawkins no longer makes an *Apprendi* argument.¹ Rather, he contends that, before imposing an exceptional sentence, the trial court first had to impose a sentence within the standard range. He cites no authority which supports this argument, however. He refers to RCW 9.94A.120(1), which generally requires the court to "impose a sentence within the sentence range for the offense," but the statute also says "[e]xcept as authorized" in other specified subsections of the statute. One of those is subsection (2), which permits the court to impose a sentence outside the standard range if it finds substantial and compelling reasons for doing so. RCW 9.94A.120(2). Mr. Hawkins seems to argue that the trial court must first *determine* the standard range, but the materials he provides show that the court was aware of the proper range in his case.

In any event, the trial court clearly acted within its jurisdiction in imposing an exceptional sentence. Mr. Hawkins's sentencing claim is therefore not exempt from the one-year limit on personal restraint petitions. *See* RCW 10.73.100(5) (claim that sentence imposed was in excess of court's jurisdiction not subject to time limit).

¹ The Chief Judge correctly rejected Mr. Hawkins's argument on this point. His sentence did not exceed the statutory maximum of life. RCW 9A.32.030(2); RCW 9A.20.021(a). Therefore, *Apprendi* does not apply. *State v. Gore*, 143 Wn.2d 288, 314-15, 21 P.3d 262 (2001) (*Apprendi* not applicable to exceptional sentence that does not exceed statutory maximum).

In sum, the Chief Judge did not err in dismissing the personal restraint petition, nor does Mr. Hawkins demonstrate any other grounds for review under RAP 13.5. Accordingly, the motion for discretionary review is denied.



COMMISSIONER

October 29, 2001

Appendix C

73792-4, Ruling Dismissing Personal Restraint Petition

RECEIVED

THE SUPREME COURT OF WASHINGTON JUL 01 2003

LEWIS CO. PROS. ATTY.

2003 JUN 30 P 1:41
BY C.J. [Signature]
CLERK
STATE SUPREME COURT
FILED

In re the Personal Restraint
Petition of

CHARLES D. HAWKINS,
Petitioner.

NO. 73792-4

RULING DISMISSING PERSONAL
RESTRAINT PETITION

Charles Hawkins was convicted of first degree murder in 1987. Division Two of the Court of Appeals affirmed the judgment and sentence on direct appeal, and this court denied review. *State v. Hawkins*, 53 Wn. App. 598, 769 P.2d 856, review denied, 113 Wn.2d 1004 (1989). Mr. Hawkins filed this personal restraint petition (his second) directly in this court on March 24, 2003. Now before me for determination is whether to dismiss the petition or refer it to the court for consideration on the merits. RAP 16.5(b); RAP 16.11(b).

The petition is clearly time barred. *See* RCW 10.73.090(1). Mr. Hawkins argues juror bias, but that is not a claim for relief exempt from the one-year limit on collateral attack. Nor is there any exemption for Mr. Hawkins's claim that defense counsel was ineffective in not adequately challenging biased jurors. Mr. Hawkins urges there has been a significant change in the law on the question of juror bias,

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see RCW 10.73.100(6), but the case he cites contains no change in law on this issue. *See United States v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000).

The personal restraint petition is dismissed.


COMMISSIONER

June 30, 2003

Appendix D

32231-5-II, Order Dismissing Petition

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RECEIVED

DEC 17 2004

LEWIS CO. PROS. ATTY.
NO. 32231-5-II

FILED
COURT OF APPEALS
DIVISION II
04 DEC 16 PM 2:01
STATE OF WASHINGTON
BY DEPUTY

In re the
Personal Restraint Petition of

CHARLES D. HAWKINS,

Petitioner.

ORDER DISMISSING PETITION

Charles D. Hawkins seeks relief from personal restraint imposed following his 1987 jury conviction of first degree murder, arguing that his 600-month exceptional sentence is invalid under *Blakely v Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004).¹ This petition must be dismissed as time barred.

RCW 10.73.090(1) 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.

A judgment and sentence is facially invalid if it evidences the invalidity without further elaboration. *See In re Goodwin*, 146 Wn.2d 861, 866 (2002).

Petitioner's judgment and sentence became final when his direct appeal mandated in 1989. *See* RCW 10.73.090(3)(b). Accordingly, when he filed his current petition in July 2004, more than one year had elapsed and the time bar potentially applies. Thus, this petition is time

¹ Petitioner originally filed this petition as a CrR 7.8 motion with the Lewis County Superior Court. The superior court transferred the motion to this court for consideration as personal restraint petition under CrR 7.8(c)(2).

barred unless petitioner can establish that one or more of the six exceptions to the time bar enumerated in RCW 10.73.100 applies.

The only exception that potentially applies here is RCW 10.73.100(6). RCW 10.73.100(6) provides that the time bar does not apply if petitioner's argument is based on:

a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

In *Blakely*, the Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the standard range must be submitted to a jury and proved beyond a reasonable doubt. *Blakely*, 124 S. Ct. at 2536-38 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). When petitioner committed his current offense on November 13, 1984, Washington law permitted the court to impose a sentence above the standard range if it found substantial and compelling reasons justifying an exceptional sentence. *See* former RCW 9.94A.120(2) (1984); former RCW 9.94A.390 (1984). Because *Blakely* invalidated this process, it clearly constitutes a significant change in the law. *Blakely* does not constitute an exception to the one-year time bar, however, unless it applies retroactively.

New rules apply to convictions that are already final on direct review under limited circumstances. *See Schriro v. Summerlin*, 124 S. Ct. 2519, 2522-23 (2004); *In re St. Pierre*, 118 Wn.2d 321, 326 (1992). Under federal law, new substantive rules generally apply retroactively, while new procedural rules do not. *Schriro*, 124 S. Ct. at 2522-23. Under state law, the controlling case regarding "new rule" retroactivity is established in *St. Pierre*. *St. Pierre*, 118 Wn.2d 321 (1992). The *St. Pierre* court relied on two United States Supreme Court cases for its retroactivity analysis: *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (new rule applies

retroactively to all cases pending on direct review or not yet final), and *Teague v. Lane*, 489 U.S. 288, 311 (1989) (new rule does not apply retroactively to cases on collateral review unless (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the concept of ordered liberty). *See St. Pierre*, 118 Wn.2d at 326.

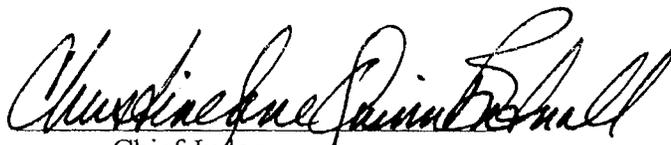
In *Schriro*, the United State Supreme Court also relied on the test set forth in *Teague* in holding that *Ring v. Arizona*, 536 U.S. 584 (2002) created a procedural rather than a substantive rule change that did not apply retroactively. *Schriro*, 124 S. Ct. at 2523-26. The Court had held in *Ring* that aggravating factors supporting the death penalty must be proved to a jury rather than to a judge under Arizona's capital sentencing scheme. *Ring*, 536 U.S. at 609 (citing *Apprendi*, 530 U.S. at 494 n.19).

These holdings compel the conclusion that *Blakely* is not retroactive. Petitioner's judgment and sentence was final before the United States Supreme Court issued *Blakely*. Thus, even if *Blakely* is relevant to the issues he now raises, his petition is untimely.

Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 16 day of December, 2004.


Christine Sue Pinnell
Chief Judge

cc: Charles D. Hawkins
Lewis County Clerk
County Cause No(s). 86-1-00213-2
Jeremy Randolph

Appendix E

76494-8, Order Denying Review and Denying Motion

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint
Petition of

CHARLES D. HAWKINS,

Petitioner.

FILED
SUPREME COURT
STATE OF WASHINGTON
2005 OCT - 6 A 8:47
BY CLERK
CLERK

NO. 76494

RULING DENYING REVIEW AND
DENYING MOTION

Charles Hawkins was convicted in 1987 of first degree murder. The court imposed an exceptional sentence of 600 months. Mr. Hawkins filed a motion for relief from the judgment in superior court in July 2004, arguing that his exceptional sentence was unlawful in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The superior court transferred the motion to Division Two of the Court of Appeals for consideration as a personal restraint petition. The Chief Judge then dismissed the petition as untimely. Mr. Hawkins filed a motion for reconsideration, which was forwarded to this court for treatment as a motion for discretionary review. I stayed consideration of the motion pending *State v. Evans*, 154 Wn.2d 438, 114 P.3d 627 (2005). *Evans* is now final, and the stay has been lifted.

Mr. Hawkins is not entitled to relief under *Blakely* and *Apprendi*. Those decisions do not apply retroactively to the judgment against him, which had previously become final. *Evans*, 154 Wn.2d at 447-48.

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Mr. Hawkins also moves to amend his original motion in superior court to add new arguments. But it is now too late to raise new grounds for relief in connection with this personal restraint petition.

The motion for discretionary review and the motion to add new arguments are denied.


COMMISSIONER

October 6, 2005

Appendix F

34878-1-II, Order Dismissing Petition

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
SUPERIOR COURT
LEWIS COUNTY, WASH

DIVISION II OCT 16 2006

SCANNED

By  Kathy A. Brack, Clerk
Deputy

No. 34878-1-II

ORDER DISMISSING PETITION

STATE OF WASHINGTON
DEPT. OF JUSTICE
06 OCT 18 AM 11:39
COURT OF APPEALS
DIVISION II

86-1-213-2

In re the
Personal Restraint Petition of

CHARLES D. HAWKINS,

Petitioner.

Charles D. Hawkins seeks relief from personal restraint imposed following his 1987 conviction of first-degree murder for which the court imposed a 600-month exceptional sentence. He claims that his restraint is unlawful because the sentencing court imposed an illegal indeterminate sentence.

This error, he claims, shows on the face of his judgment and sentence, making it invalid and making his petition neither untimely nor successive. Petitioner asserts that his case is an exception to the retroactivity analysis in *State v. Evans*, 154 Wn.2d 438, 114 P.3d 627 (2005) and, therefore, *Blakely v Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (2004), should apply to him. Petitioner presents documents and transcripts showing that the superior court purposely imposed an indeterminate sentence.

But we corrected this error in petitioner's direct appeal:

Hawkins finally contends that the trial court improperly imposed a maximum sentence of life imprisonment. He claims that the Sentencing Reform Act of 1981 (SRA), RCW 9.94A, impliedly repealed RCW 9A.32.040, which states: "[A]ny person convicted of the crime of murder in the first degree shall be sentenced to life imprisonment." The test for determining whether a later general statute has repealed an earlier specific statute is as follows:

(1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction.

Bellevue Sch. Dist. 405 v. Brazier Constr. Co., 103 Wn.2d 111, 122, 691 P.2d 178 (1984). Implied repeals of statutes are disfavored, and courts must interpret the statutes in a way that will give them effect. *Bellevue Sch. Dist. 405 v. Brazier Constr. Co.*, *supra*.

In enacting the SRA, the Legislature established a new system of determinate sentencing, effective July 1, 1984, and provided for the gradual phaseout of the former indeterminate sentencing system. The statutes under the former system were not repealed; they merely were made inapplicable to persons who commit felonies on or after July 1, 1984. RCW 9.95.900; *Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 730 P.2d 1327 (1986); *In re Rolston*, 46 Wn. App. 622, 625, 732 P.2d 166 (1987).

Although the SRA is a sweeping reform of the prior sentencing structure, it is not complete in itself, and it can be reconciled with the statute in question. RCW 9A.32.040 requires a trial judge to impose a life sentence on any person convicted of murder in the first degree. This mandate is consistent with the prior indeterminate sentencing system of minimum and maximum sentence boundaries. See RCW 9.95. Although the particular statute in question was not one of those listed in RCW 9.95.900 as not applying to postreform felonies, we find that it was intended to apply only to persons who committed felony offenses prior to the effective date of the SRA.

Thus, as the Couch murder was committed after July 1, 1984, RCW 9A.32.040 does not apply to Hawkins. We therefore need not address Hawkins's claim that the life sentence imposed by the trial court was clearly excessive. *In view of our decision regarding the propriety of the 50-year sentence, we need not remand this case for resentencing. The maximum life sentence and the designation "minimum" are deleted; the exceptional sentence of 600 months shall be enforced.*

Affirmed.

(Emphasis added.) *State v. Hawkins*, 53 Wn. App. 598, 607-09, 777 P.2d 1052, review denied, 113 Wn.2d 1004 (1989). Petitioner's claim of facial invalidity fails. This successive and untimely petition must be dismissed.¹ Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 13th day of October, 2006.

Van Deren, A.C.J.
Acting Chief Judge

cc: Charles D. Hawkins
Lewis County Clerk
County Cause No(s). 86-1-00213-2
Jeremy Randolph

¹ Both this court and the Supreme Court have already ruled that *Blakely* does not apply to petitioner. See *Order Dismissing Petition*, No 32231-5-11, filed December 16, 2004; and *Ruling Denying Review and Denying Motion*, No. 76494-8, filed October 16, 2005. See also RCW 10.73.090-.100 and RCW 10.73.140.

Appendix G

37945-7-II, *State v. Hawkins* unpublished opinion (2009)

Not Reported in P.3d, 151 Wash.App. 1008, 2009 WL 2031717 (Wash.App. Div. 2)
(Cite as: 2009 WL 2031717 (Wash.App. Div. 2))

HOnly the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

**This decision was reviewed by West editorial staff
and not assigned editorial enhancements.**

Court of Appeals of Washington,
Division 2.
STATE of Washington, Respondent,
v.
Charles Dennis **HAWKINS**, Appellant.

No. 37945-7-II.
July 14, 2009.

Appeal from Lewis County Superior Court; Honorable Stephen M. Warning, J.
Eric J. Nielsen, Dana M. Lind, Nielsen Broman & Koch PLLC, Seattle, WA, for Appellant.

Lori Ellen Smith, Lewis Co. Prosecuting Atty. Office, Chehalis, WA, for Respondent.

UNPUBLISHED OPINION

HOUGHTON, J.

***I** Charles Hawkins appeals from the denial of his CrR 8.3(b) motion to dismiss, arguing that the trial court failed to enter written findings of fact and conclusions of law. He also filed a pro se statement of additional grounds (SAG), raising multiple issues. Finding no error, we affirm the denial of his motions.^{FN1}

^{FN1}. A commissioner of this court initially considered Hawkins's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

FACTS

In October 1986, the State charged Hawkins and his brother, David,^{FN2} with first degree murder. During arraignment, the trial court appointed Jeremy Randolph to represent David. Randolph was not present at that time. After speaking with the prosecutor, Randolph learned that Dawn Edeburn, David's girl friend,

was a potential witness. Randolph had previously represented Edeburn in an unrelated matter. Because of the potential conflict, Randolph moved to withdraw from representing David on October 23, 1986. The trial court appointed a new attorney to represent David. At the time of removal, Randolph had not represented David in any way nor had he learned any confidential information. Randolph later became the elected prosecutor in Lewis County.

^{FN2}. For clarity, we refer to David by his first name.

A jury convicted Hawkins of first degree murder, and the trial court sentenced him to serve 600 months to life in prison. We affirmed his judgment and sentence but reduced his sentence to a determinate 600 months. State v. Hawkins, 53 Wn.App. 598, 608, 609, 769 P.2d 856 (1989). The Supreme Court denied review on June 28, 1989, State v. Hawkins, 113 Wn.2d 1004, 777 P.2d 1054 (1989), and we issued mandate on July 31, 1989.

In 2006 and 2007, Hawkins filed post-conviction motions for appointment of counsel to exclude Randolph and the entire Lewis County Prosecutor's Office from his case because of Randolph's alleged conflict of interest, for dismissal of his conviction for governmental misconduct under CrR 8.3(b) because of Randolph's participation in Hawkins' earlier post-conviction motions, and for a new trial based on an alleged incorrect jury instruction. On June 16, 2008, the trial court denied all of Hawkins's motions. He appeals.

ANALYSIS

Hawkins argues that we should remand the case to the trial court for entry of written findings and conclusions supporting the denial of his CrR 8.3(b) motion. Under CrR 8.3(b),

The court, in furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a

Not Reported in P.3d, 151 Wash.App. 1008, 2009 WL 2031717 (Wash.App. Div. 2)
(Cite as: 2009 WL 2031717 (Wash.App. Div. 2))

written order.

But where a trial court fails to set forth written reasons for its decision on a CrR 8.3(b) motion, we do not remand solely to complete the formality of adding written reasons when the reasons are evident from the trial court's oral opinion. *State v. Wilson*, 149 Wn.2d 1, 9 n. 5, 65 P.3d 657 (2003). The trial court orally explained its reasons for denying Hawkins's motion,

THE COURT: All right. This case is one of the series of post convictions and motions brought after an unsuccessful appeal, homicide conviction. We are now well past the one-year time, and while Mr. Hawkins is perfectly correct in his statement in the briefs that he's entitled to retain counsel at any point that he wishes, there is no entitlement at this point in time to appointed counsel on this initial hearing on a post conviction restraint petition.

*2 The ADA does not implicate the right to appointed counsel for people who feel that they are not sufficiently intelligent or educated to represent themselves.

As to Mr. Randolph's alleged conflict, because he was briefly appointed to represent a co-defendant, that appointment is a ministerial function in and of itself does not create any sort of attorney/client relationship. It requires acceptance of the appointment by counsel, and contact with a defendant to create that relationship.

Mr. Randolph, in essence, chose not to accept the appointment for ethical reasons, came to the court, set those reasons forth on the record. The trial judge agreed. And it has not been established, in fact, it's been established to the contrary that there was no attorney/client relationship between Mr. Randolph and David Hawkins. And, therefore, there's no basis for any claim of an error because of his subsequent representation of the state in this matter.

It doesn't matter, really, what Mr. Randolph's reasons for withdrawing were, frankly, and whether or not those reasons were warrant sufficient. The plain and simple fact is, Mr. Randolph did not represent David Hawkins at any time, didn't have an attorney/client relationship with Mr. Hawkins.

Because there is no conflict of interest, there's no basis to exclude either Mr. Randolph or the Prosecutor's Office from these proceedings.

While it is true that Mr. Randolph had, prior to this case, represented somebody who turned out to be a witness, that information was known or easily could have been known; it's a matter of public record. We are well past the one-year time frame as to that issue. And, in addition, that fact in and of itself doesn't create any sort of conflict. Just the mere fact of representation wouldn't create any kind of a conflict of interest that would require Mr. Randolph's exclusion from the prior trial.

Lastly, as to the accomplice instruction, Mr. Hawkins misapprehended the Court of Appeals' opinion or just took part of a sentence that needed to represent-or re-address (phonetic). The accomplice instruction used in this case that references the crime rather than a crime is the specific instruction that has been approved by our Court of Appeals and Supreme Court. So there is no error there.

So, finding no error and no violations, I will deny Mr. Hawkins' motions.

Report of Proceedings (RP) at 7-9.

Hawkins does not argue the insufficiency of these findings and conclusions, only that the trial court should have entered them in writing. The trial court's reasons are evident from its oral ruling. *Wilson*, 149 Wn.2d at 9 n. 5. Hawkins's argument fails.

STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Hawkins argues that the trial court erred in denying his motion for appointed counsel because he is mentally disabled and the Americans with Disabilities Act (ADA) requires the appointment. But he fails to show that he has a qualifying disability under the ADA, or that the ADA requires the appointment of counsel in collateral review.

*3 Hawkins also argues in his SAG that (1) the trial court denied him a fair trial when it denied his motion, (2) we should recall mandate because we did so in his brother's case, (3) Randolph should not have participated in his post-conviction motions because he served as defense counsel to one of the trial witnesses,

Not Reported in P.3d, 151 Wash.App. 1008, 2009 WL 2031717 (Wash.App. Div. 2)
(Cite as: 2009 WL 2031717 (Wash.App. Div. 2))

and (4) the current Lewis County Prosecutor and his deputies should not participate due to Randolph's prior representation of a witness. A petitioner must move for collateral attack on a judgment and sentence within one year after the judgment becomes final unless the petitioner shows that a statutory exception applies under RCW 10.73.100; RCW 10.73.090(1). Hawkins's judgment became final on July 31, 1989, when we issued the mandate. RCW 10.73.090(3)(b). He fails to show that any exception applies. His collateral attacks on his judgment and sentence are therefore time-barred, and we do not review them further.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

We concur: QUINN, BRINTNALL, J., and PE-NOYAR, A.C.J.

Wash.App. Div. 2,2009.
State v. Hawkins
Not Reported in P.3d, 151 Wash.App. 1008, 2009 WL 2031717 (Wash.App. Div. 2)

END OF DOCUMENT

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
Respondent,)
vs.)
CHARLES D. HAWKINS,)
Appellant.)
_____)

NO. 40745-1-II

DECLARATION OF
MAILING

BY _____
DEPUTY
STATE OF WASHINGTON

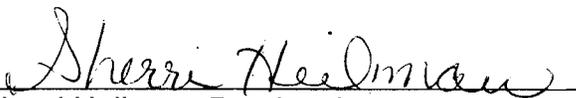
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COURT OF APPEALS
DIVISION II

Ms. Sherri Heilman, paralegal for Sara I. Beigh, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 10, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

JOHN A. HAYS
ATTORNEY AT LAW
1402 BROADWAY ST
LONGVIEW, WA 98632-3714

DATED this 10th day of February, 2011, at Chehalis, Washington.



Sherri Heilman, Paralegal
Lewis County Prosecuting Attorney Office