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SUPREME COURT
STATE OF WASHINGTON

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86001-7

No. 82204-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE RESTRAINT OF:

DANIEL J. STOCKWELL,

Petitioner.

SUPPLEMENTAL MEMORANDUM OF PETITIONER

Judgment in Pierce County Superior Court No. 86-1-00878-2
The Hon. Robert H. Peterson, Presiding

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ORIGINAL

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A. ISSUES RAISED IN SUPPLEMENTAL BRIEF

1. Does this Court's decision in *In re McKiearnan*, 165 Wn.2d 777, 203 P.3d 375 (2009), control the outcome of this case?

2. Is *McKiearnan* distinguishable on its facts?

B. ARGUMENT

1. *The Holding of McKiearnan*

This Court has asked for supplemental briefing on the issue of the impact of *In re McKiearnan, supra*, on this case. Order Dated July 6, 2009. In *McKiearnan*, the defendant was convicted of first degree robbery in 1987. The guilty plea form and judgment both stated the maximum sentence was "twenty (20) years to life imprisonment," when in fact the correct maximum was "life imprisonment." In 2007, Mr. McKiearnan filed a Personal Restraint Petition ("PRP"), and argued that the one year time limit of RCW 10.73.090 did not apply because the judgment was not valid on its face as it stated the wrong legal maximum. 165 Wn.2d at 780-81.

This Court held that the PRP was time-barred:

McKiearnan was convicted of a valid crime by a court of competent jurisdiction and was sentenced within the appropriate standard range. [Footnote omitted] He was aware of the standard range sentence he would receive and

that he could be sentenced up to a maximum term of life imprisonment. A sentencing court may deviate from the standard sentencing range if it finds there are "substantial and compelling reasons justifying an exceptional sentence." Former RCW 9.94A.120(2) (1987), *currently codified as* RCW 9.94A.535. In this case, pursuant to the provisions of former RCW 9.94A.120, had the sentencing court found a substantial and compelling reason to do so, it could have sentenced McKiearnan to a term within the standard range, to life imprisonment, or anywhere in between. The maximum was life in prison whether he was informed that the maximum sentence was 1 year to life, 10 years to life, or 20 years to life. To be facially invalid, a judgment and sentence requires a more substantial defect than a technical misstatement that had no actual effect on the rights of the petitioner. Even as misstated, McKiearnan was aware of the maximum amount of time he could serve in confinement.

165 Wn.2d at 782-83.

While there are some similarities between *McKiearnan* and Mr. Stockwell's case, the facts not only are distinguishable, but Mr. Stockwell's case involves many issues that were not raised or discussed in *McKiearnan*.

2. ***McKiearnan Has No Effect on the Primary Issues Raised in this Case***

Mr. McKiearnan simply argued that RCW 10.73.090 did not apply because the judgment was, in his view, facially invalid. Mr. McKiearnan did not advance any other reason why the time bar of RCW 10.73.090 did

not apply to his case. See *McKiearnan*, 165 Wn.2d at 781 (“McKiearnan does not claim that his petition meets any of the exceptions to the one year time bar listed in RCW 10.73.100.”). Mr. McKiearnan therefore never made any claim that the time bar of RCW 10.73.090 did not apply to him because the Department of Corrections failed to comply with the requirements of RCW 10.73.120 regarding the giving of notice of the time limits to individuals under DOC’s supervision.¹ Accordingly, there is no discussion in *McKiearnan* of cases such as *In re Runyan*, 121 Wn.2d 432, 853 P.2d 424 (1993) and *In re Vega*, 118 Wn.2d 449, 823 P.2d 1111 (1992).

In contrast, the evidence is undisputed that Mr. Stockwell was under the supervision of DOC on July 23, 1989, and that DOC failed to comply with the statutory mandate of attempting to provide him “[a]s soon as practicable” with notice of the time limits and exceptions set out in RCW 10.73.090 and RCW 10.73.100. RCW 10.73.120. Because of DOC’s failure to comply with RCW 10.73.120, RCW 10.73.090 simply does not apply to Mr. Stockwell, *In re Vega*, 118 Wn.2d at 450-51; *State*

¹ The decision in *McKiearnan* is silent on the subject of Mr. McKiearnan’s custody/supervision status on July 23, 1989.

v. *Golden*, 112 Wn. App. 68, 78, 47 P.3d 587 (2002), and *McKiearnan* has no relevancy to this case.

DOC did apparently post a notice in various DOC offices about the time limits. However, this notice was not posted until December 5, 1989, *State's Response to Personal Restraint Petition*, App. H, which was after Mr. Stockwell received the order of discharge on October 27, 1989. *Personal Restraint Petition*, Ex. 5 Thus, this attempt to provide notice did not comply with the statutory requirement that the notice be given "[a]s soon as practicable," which means "immediately." *State v. Trevino*, 127 Wn.2d 735, 744, 903 P.3d 447 (1995). This tardy posting also does not satisfy due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, because it was not reasonably calculated to apprise Mr. Stockwell, someone who was not on supervision at the time of the posting, of the time limits. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).²

² "[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315. Posting a notice on a bulletin board in a corrections office when a person is no longer on supervision is a mere gesture.

The State argues that this Court in *Runyan* has already held that DOC discharged its statutory and constitutional obligations by posting notices in December 1989. *Response to Motion for Discretionary Review*, at 6. However, the one defendant in *Runyan* who was under the supervision of DOC (Mr. Kelly) was on parole between
(continued...)

McKiernan has no bearing on the main procedural issues in Mr. Stockwell's case – the violations of RCW 10.73.120 and the violations of federal and state procedural due process under U.S. Const. amend. 14 under Wash. Const. art. 1, § 3. Review of Mr. Stockwell's case should therefore be granted under RAP 13.5A and RAP 13.4(b), because of the conflicts with this Court's past decisions, the conflict with past decisions of the Court of Appeals, the federal and state constitutional issues at stake, and the issues of public importance raised.

Moreover, because Mr. McKiernan never raised a claim that RCW 10.73.090 did not apply because of a violation of RCW 10.73.120, what was also not at issue in *McKiernan* was whether a defendant's subjective knowledge or lack of knowledge of the one year time limit was determinative of whether a PRP should be dismissed. In contrast, in Mr. Stockwell's case, the Acting Chief Judge of the Court of Appeals

²(...continued)

March 11, 1988, and December 11, 1990, and there was evidence that the notices remained posted until the offices moved or were remodeled. *Runyan*, 121 Wn.2d at 438. Thus, the posting of the notice in December 1989 was constitutionally adequate as to Mr. Kelly because "[p]robationers and parolees, such as Kelly, were provided notice through the posting of such notice in community corrections offices in December of 1989." 121 Wn.2d at 451. Presumably, Mr. Kelly could have read the notice on the wall when he waiting to see his parole officer. But, *Runyan* never held that posting a notice in an office was effective as to those who were on supervision on the critical date of July 23, 1989, but who were no longer on supervision when DOC tardily posted notices in offices many months later.

dismissed Mr. Stockwell's petition because Mr. Stockwell had not submitted evidence that he did not receive *actual notice* of the time-limits of RCW 10.73.090 from any source. Order Dismissing Petition at 3. This subjective knowledge standard is wrong and conflicts with this Court's holdings in *Runyan* and *Vega*.³ Moreover, the application of this new standard of subjective knowledge arbitrarily changed the rules in Mr. Stockwell's case, depriving him of due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3. *See Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L.Ed.2d 175 (1980) (violation of state criminal procedural rules can violate procedural due process). None of these issues were raised or discussed in *McKiearnan*.

The State recognizes that the Court of Appeals below utilized the wrong standard, but argues that because the "order below is not published . . . any faulty reasoning will not be adopted by other courts." *Response to Motion for Discretionary Review* at 6. However, unless corrected by this Court, the Court of Appeals' "faulty reasoning" will undoubtedly be repeated in future cases. The very nature of the gate-keeping function that

³ And, in any case, on October 9, 2008, Mr. Stockwell submitted to this Court a supplemental certification stating that he had no knowledge and was never given any notice by anyone of the requirements of RCW 10.73.090 and RCW 10.73.100 before July 24, 1990, the effective date of the statute.

the Chief Judge has under RAP 16.11, which results in the entry of unpublished orders, means that the erroneous application of legal standards for determining whether to dismiss a PRP will never be capable of being reviewed if the State's arguments are accepted. Review is therefore required to provide guidance as to the appropriate legal standards to apply under RCW 10.73. *See In re McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984) (even moot issues can be of public importance if there is a likelihood that the question will recur).

Review should therefore be granted under RAP 13.5A and RAP 13.4(b), because of the conflicts with this Court's past decisions, the federal and state constitutional issues at stake, and the issues of public importance raised. The holding of *McKiernan* does not effect these key issues raised in Mr. Stockwell's case.

3. **McKiernan Is Distinguishable on its Facts**

Mr. McKiernan argued that because the guilty plea form and judgment listed the maximum as "twenty (20) years to life imprisonment," the judgment was invalid on its face and RCW 10.73.090 did not apply. This Court held that because Mr. McKiernan was still informed that the maximum was "life," it did not matter if he was informed the maximum

was “1 year to life, 10 years to life, or 20 years to life. . . . Even as misstated, McKiearnan was aware of the maximum amount of time he could serve in confinement.” *In re McKiearnan*, 165 Wn.2d at 782-83.

In contrast, Mr. Stockwell was never informed of the proper maximum. Both the judgment and sentence and the guilty plea statement list the legal maximum as “twenty (20) years” or “20 years.” *Personal Restraint Petition*, Ex. 2 & 3. “Life” is never mentioned. Thus, unlike Mr. McKiearnan, Mr. Stockwell “was substantively misinformed as to the maximum sentence.” *McKiearnan*, 165 Wn.2d at 783.

Accordingly, *McKiearnan* is distinguishable on its facts. Indeed, because the judgment in Mr. Stockwell’s case did not state that the maximum was “life,” as the judgment in *McKiearnan* undisputably did, *McKiearnan* actually supports Mr. Stockwell’s position – that the judgment was invalid on its face.

Nothing in *McKiearnan* departed from past precedent holding that one of the essentials of a valid conviction is a citation to the proper legal maximum, whether or not the maximum stated was lower or higher than what the law required. *See State v. Weyrich*, 163 Wn.2d 554, 182 P.3d 965 (2008). In *McKiearnan*, the Court held that stating that the maximum

was "20 years to life" was not a significant mistake because the judgment (and guilty plea form) still stated the proper maximum. Here, though, the proper maximum was not set out.

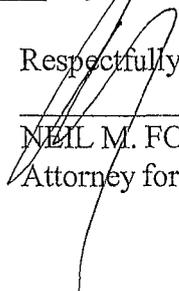
The judgment in this case was not valid on its face; RCW 10.73.090 does not apply; the guilty plea was not knowingly and voluntarily made; and, therefore, Mr. Stockwell's rights to due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3 were violated. Review should be granted under RAP 13.5A and RAP 13.4(b), because of the conflicts with this Court's past decisions, the federal and state constitutional issues at stake, and the issues of public importance raised.

C. CONCLUSION

For the foregoing reasons, and the reasons set out in the Motion for Discretionary Review, the Personal Restraint Petition and the Reply Brief of Petitioner, this Court should accept review and vacate the conviction in this case.

DATED this 27 day of July 2009.

Respectfully submitted,



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BY ROWEN BENTER
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF
DAN STOCKWELL,
Petitioner.

NO. 82204-2

CERTIFICATE OF SERVICE

I, Breanna Caldwell, certify and declare, that on the 27th day of July 2009, I deposited a copy of the "Supplemental Memorandum of Petitioner" into the United States Mail with proper first-class postage attached, addressed to:

Kathleen Proctor
Pierce County Prosecuting Attorney's Office
930 Tacoma Ave. South, Room 946
Tacoma WA 98402-2171

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

7/27/09 Seattle, WA
DATE AND PLACE

Breanna Caldwell
BREANNA CALDWELL