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**IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT TROY WHEELER, PETITIONER

Consolidated Appeal from the Superior Court of Pierce County  
The Honorable Elizabeth Martin and  
Personal Restraint Petition

No. 05-1-02167-7

**Consolidated Supplemental Brief of Respondent**

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ORIGINAL

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Whether the Court of Appeals properly decided there was no issue to review in Wheeler's improper direct appeal from the trial court's entry of a mandated correction to his judgment ..... 1

    2. Whether the Court of Appeals correctly determined that Wheeler's claim of pre-accusatorial delay should be dismissed as time barred under RCW 10.73.090(1) or whether it should be otherwise denied ..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT..... 3

    1. THE COURT OF APPEALS PROPERLY DECIDED THERE WAS NO ISSUE TO REVIEW IN WHEELER'S IMPROPER DIRECT APPEAL FROM THE TRIAL COURT'S MERE ENTRY OF A MANDATED CORRECTION TO HIS JUDGMENT ..... 3

    2. THE COURT OF APPEALS CORRECTLY DETERMINED THAT WHEELER'S CLAIM OF PRE-ACCUSATORIAL DELAY SHOULD BE DISMISSED AS TIME-BARRED UNDER RCW 10.73.090(1) ..... 8

D. CONCLUSION. ..... 20

## Table of Authorities

### State Cases

<i>In re Adams</i> , 178 Wn.2d 417, 423, 309 P.3d 451 (2013) .....	5, 6
<i>In re Clark</i> , 168 Wn.2d 581, 587, 230 P.3d 156 (2010) .....	6
<i>In re Coats</i> , 173 Wn.2d 123, 133-35, 143-44, 267 P.3d 324 (2011) .....	5, 6
<i>In re Crabtree</i> , 141 Wn.2d 577, 588, 9 P.3d 814 (2000) .....	10
<i>In re McKiernan</i> , 165 Wn.2d 777, 782, 203 P.3d 375 (2009) .....	6
<i>In re Mulholland</i> , 161 Wn.2d 322, 333, 166 P.3d 677 (2007) .....	4
<i>In re Personal Restraint of Cook</i> , 114 Wn.2d 802, 792 P.2d 506 (1990) .....	13, 18
<i>In Re Personal Restraint Petition of Waggy</i> , 111 Wn. App. 511, 518, 45 P.3d 1103 (2002) .....	18, 19
<i>In re Reise</i> , 146 Wn. App. 772, 192 P.3d 949 (2008) .....	10, 11, 12
<i>In re Runyan</i> , 121 Wn.2d 432, 853 P.2d 424 (1993) .....	4
<i>In re Snively</i> , 180 Wn.2d 28, 32, 320 P.3d 1107 (2014) .....	5, 6
<i>In re Stenson</i> , 174 Wn.2d 474, 486-87, 276 P.3d 286 (2012) .....	9
<i>In re Stockwell</i> , 179 Wn.2d 588, 601-02, 316 P.3d 1007 (2014) .....	6
<i>In re the Personal Restraint of Brown</i> , 143 Wn.2d 431, 453, 21 P.3d 687 (2001) .....	11
<i>In re Toledo-Sotelo</i> , 176 Wn.2d 759, 768, 297 P.3d 51 (2013) .....	5
<i>State ex rel. Schock v. Barnett</i> , 42 Wn.2d 404, 932-33, 259 P.2d 404 (1953) .....	4
<i>State v. Barberio</i> , 121 Wn.2d 48, 51, 846 P.2d 519 (1993) .....	3, 4
<i>State v. Dixon</i> , 114 Wn.2d 857, 792 P.2d 137 (1990) .....	19

<i>State v. Fortune</i> , 128 Wn.2d 464, 474-75, 909 P.2d 930 (1996).....	7
<i>State v. Gaut</i> , 111 Wn. App. 875, 881, 46 P.3d 832 (2002) .....	4
<i>State v. Gudgel</i> , 170 Wn.2d 656, 657, 224 P.3d 938 (2010).....	6
<i>State v. Kilgore</i> , 167 Wn.2d 28, 40, 216 P.3d 393 (2009) .....	3, 4
<i>State v. Macon</i> , 128 Wn.2d 784, 804, 911 P.2d 1004 (1996).....	12
<i>State v. Mahone</i> , 98 Wn. App. 342, 346, 989 P.2d 583 (1999).....	3, 4
<i>State v. Maynard</i> , 178 Wn. App. 413, 417, 315 P.3d 545 (2013).....	19
<i>State v. Newton</i> , 87 Wn.2d 363, 372, 557 P.2d 682 (1976).....	10
<i>State v. Oppelt</i> , 172 Wn.2d 285, 290, 257 P.3d 653 (2011).....	19
<i>State v. Parmelee</i> , 172 Wn. App. 899, 906-07, 292 P.3d 799 (2013).....	3
<i>State v. Rowland</i> , 160 Wn. App. 316, 328-29, 249 P.3d 635 (2011).....	3, 4
<i>State v. Salavea</i> , 151 Wn.2d 133, 86 P.3d 125 (2005).....	19
<i>State v. Saylor</i> s, 70 Wn.2d 7, 9, 422 P.2d 477 (1966) .....	10
<i>State v. Scott</i> , 150 Wn. App. 281, 294, 207 P.3d 495 (2009) .....	11, 13, 14, 15, 16
<i>State v. Williams</i> , 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981).....	12

**Federal and Other Jurisdictions**

<i>Gonzales v. Thaler</i> , __ U.S. __. 132 S.Ct. 641, 655, 181 L. Ed. 2d 619 (2012).....	7
<i>Jimenez v. Quarterman</i> , 555 U.S. 113, 129 S.Ct. 681, 172 L. Ed. 2d 475 (2009).....	7
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).....	10
<i>U.S. v. Lovasco</i> , 431 U.S. 783, 790, 97 S.Ct. 2044 (1977) .....	19

**Constitutional Provisions**

28 U.S.C. § 2244(d)(1)(A).....7

**Statutes**

RCW 10.70.090 .....6  
RCW 10.73.090 .....2, 4, 5, 6  
RCW 10.73.090(1) .....i, 1, 2, 8, 9, 17  
RCW 10.73.090(3)(a) .....8  
RCW 10.73.100 .....8, 9  
RCW 10.73.100(1) .....8, 11, 13, 17

**Rules and Regulations**

CR 26 .....9  
CrR 4.7 .....9  
CrR 7.8(c)(2) .....5  
ER 401 .....13  
ER 402 .....13  
RAP 1.1 (h).....5  
RAP 1.1(c) .....6  
RAP 1.1(g).....5  
RAP 10.3(a)(6) .....9  
RAP 12.2 .....4, 5  
RAP 16(d).....5  
RAP 16.4 (d).....6

RAP 2.5 .....4, 5, 6, 7  
RAP 2.5(b)(3) .....5, 6  
RAP 2.5(c) .....4, 5

**Other Authorities**

Antiterrorism and Effective Death Penalty Act of 1996 .....7

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

1. Whether the Court of Appeals properly decided there was no issue to review in Wheeler's improper direct appeal from the trial court's entry of a mandated correction to his judgment.
2. Whether the Court of Appeals correctly determined that Wheeler's claim of pre-accusatorial delay should be dismissed as time barred under RCW 10.73.090(1) or whether it should be otherwise denied.

B. STATEMENT OF THE CASE.

Wheeler was charged with first degree child rape and first degree child molestation after his 18th birthday for offenses that, although committed when he was 13 or 14, were not revealed until he was 17 and a half. Appendix A, p. 1-2.<sup>1</sup> He pleaded guilty as charged in adult court. Appx A, p. 1-2. The judgment became final April 17, 2006, when he was sentenced under the Special Sex Offender Sentencing Alternative (SSOSA). Appx. A, p. 2.

The SSOSA was revoked for noncompliance in 2009. Appx. A, p. 2. Wheeler admitted that he was aware of the delayed filing of his charges at that time. Appx. A, p. 2.

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<sup>1</sup> Appendix (Appx) A contains a copy of the unpublished Court of Appeals decision challenged in Wheeler's petition for discretionary review (2014 WL 2547756).

In 2010, he filed a personal restraint petition (PRP) to withdraw his plea based on the judgment's misstatement of the maximum potential sentences of his offenses. Appx. A, p.1. The Court of Appeals ruled RCW 10.73.090's time limit precluded the withdrawal since the judgment remained facially valid despite the errors, which were remanded for correction. Appx. B.<sup>2</sup>

The trial court corrected the judgment according to the mandate without exercising independent discretion. RP (10-12-13) 1-6. Despite controlling authority which makes such a correction unappealable, Wheeler filed a direct appeal that raised a previously unasserted challenge to his plea. CP 40; Dir.App., p. 1.

The Court of Appeals ruled there was no issue for review. Appx. A. It also dismissed Wheeler's consolidated PRP as untimely because it found that he had "fail[ed] to demonstrate that his collateral challenge f[e]ll within the newly discovered evidence exception" to the RCW 10.73.090(1) time bar. Appx. A, p. 5-7.

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<sup>2</sup> Appx. B contains a copy of the Court of Appeals ruling in petitioner's first PRP.

C. ARGUMENT.

1. THE COURT OF APPEALS PROPERLY DECIDED THERE WAS NO ISSUE TO REVIEW IN WHEELER'S IMPROPER DIRECT APPEAL FROM THE TRIAL COURT'S MERE ENTRY OF A MANDATED CORRECTION TO HIS JUDGMENT.

There is no issue for review when a trial court corrects a judgment according to an appellate court order without exercising independent discretion. *State v. Kilgore*, 167 Wn.2d 28, 40, 216 P.3d 393 (2009)(citing *State v. Mahone*, 98 Wn. App. 342, 346, 989 P.2d 583 (1999); *State v. Rowland*, 160 Wn. App. 316, 328-29, 249 P.3d 635 (2011); *State v. Barberio*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993). This rule promotes judicial economy by preventing repetitive appeals following remand. *State v. Parmelee*, 172 Wn. App. 899, 906-07, 292 P.3d 799 (2013).

The trial court accurately corrected Wheeler's judgment according to the Court of Appeals order, without addressing any other issues. *Id.* at 5. Wheeler acknowledged the correction conformed to the mandate, and assured the court there was nothing else for it to address, so Wheeler's contention the court manifested confusion about its discretion is not credible. *Id.* at 3, 5. Compare with *In re Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677

(2007)(court erroneously concluded it did not have discretion).

Wheeler nonetheless improperly filed a direct appeal to litigate a time-barred motion to withdraw his plea despite the appreciable absence of an appealable issue. *See Kilgore*, 167 Wn.2d at 40; *Barberio*, 121 Wn.2d at 51; *Mahone*, 98 Wn. App. at 346; *Rowland*, 160 Wn. App. at 328-29. In doing so, he indefensibly attempted to convert a non-existent right to appeal from the mandated correction into an appeal of his plea. *See Id.*; *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). The Court of Appeals correctly ruled there was no issue to review.

Wheeler responds by asking this Court to rule RAP 2.5(c) and RAP 12.2 empower courts to circumvent RCW 10.73.090's bar to untimely claims, and then direct the trial court to consider his time-barred challenge to the validity of his plea. This Court should decline his invitation.

- a. Neither RAP 2.5 nor RAP 12.2 authorize trial courts to consider claims barred by RCW 10.73.090.

Trial courts are generally prohibited from reopening criminal judgments. *See In re Runyan*, 121 Wn.2d 432, 441-42, 853 P.2d 424 (1993); *see also State ex rel. Schock v. Barnett*, 42 Wn.2d 404, 932-33, 259 P.2d 404 (1953). Yet Wheeler contends

RAP 2.5(c) combines with RAP 12.2 to create an unprecedented super exception exempting trial courts from the time limit carefully crafted through the Legislature's enactment of RCW 10.73.090 and this Court's adoption of CrR 7.8(c)(2); RAP 16(d), as well as its holdings in *In re Coats*, 173 Wn.2d 123, 133-35, 143-44, 267 P.3d 324 (2011); *In re Toledo-Sotelo*, 176 Wn.2d 759, 768, 297 P.3d 51 (2013); *In re Adams*, 178 Wn.2d 417, 423, 309 P.3d 451 (2013); and *In re Snively*, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014). According to Wheeler, a trial court has discretion to consider untimely collateral attacks this Court consistently places beyond its own reach to honor "the interests of finality in situations where the legislature intended finality to carry the day." *Id.*; *Adams*, 178 Wn.2d at 426. The rules Wheeler misapplies to create the exception are limited by more specific rules that subordinate a trial court's discretion to RCW 10.73.090's collateral attack time limit. *See, e.g.*, CrR 7.8 (c)(2); RAP 1.1(g), (h), 2.5(b)(3), 16 (d). Wheeler has failed to support the extraordinary contention that this Court intended RAP 2.5 and RAP 12.2 to circumvent those rules, the statute they incorporate, and this Court's opinions in analogous cases.

- b. RAP 2.5 is likewise incapable of circumventing RCW 10.70.090 when asserted on appeal.

Wheeler incorrectly asserts RAP 2.5 empowered the Court of Appeals to consider his time-barred challenge to the validity of his plea. RAP 2.5 does not govern untimely PRPs, which is what Wheeler's challenge to the validity of his plea is despite his attempt to characterize it differently. *See In re Stockwell*, 179 Wn.2d 588, 601-02, 316 P.3d 1007 (2014); *State v. Gudgel*, 170 Wn.2d 656, 657, 224 P.3d 938 (2010); RAP 1.1(c). Such claims are controlled by RAP 16.4 (d), which makes RAP 2.5 subject to RCW 10.73.090. *See also* RAP 2.5(b)(3). Under that statute even "[a]n invalid plea agreement cannot ... overcome the one year time bar or render an otherwise valid judgment and sentence invalid." *Coats*, 173 Wn.2d at 141-42 (quoting *In re McKiernan*, 165 Wn.2d 777, 782, 203 P.3d 375 (2009)). Nor can Wheeler rely on the existence of the facial sentencing error corrected on remand to assert his time-barred claim. *See Snively*, 180 Wn.2d at 32 (citing *Adams*, 178 Wn.2d at 424-26; *In re Clark*, 168 Wn.2d 581, 587, 230 P.3d 156 (2010); *Coats* 173 Wn.2d at 144. The Court of Appeals accurately decided Wheeler's direct appeal from the

mandated correction of his judgment did not present an issue for review.

- c. Wheeler attempts to support his faulty conception of RAP 2.5 with irrelevant federal authority that has no bearing on the finality of Washington judgments.

Wheeler wrongly cites *Jimenez v. Quarterman*, 555 U.S. 113, 129 S.Ct. 681, 172 L. Ed. 2d 475 (2009) for the erroneous proposition his judgment ceased to be final at some unidentified point in the appellate process. *Jimenez* makes the commencement of the period for filing a federal habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (28 U.S.C. § 2244(d)(1)(A)) contingent on when the time for seeking discretionary review in a state's highest court actually expires. *Id.* at 655; *Gonzales v. Thaler*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 641, 655, 181 L. Ed. 2d 619 (2012). The case has nothing to do with Wheeler's inability to raise time-barred claims in state court. *See State v. Fortune*, 128 Wn.2d 464, 474-75, 909 P.2d 930 (1996)(a federal court's interpretation of federal law is not persuasive guide on subjects it does not squarely address). Wheeler's meritless interpretation of RAP 2.5 should be rejected.

2. THE COURT OF APPEALS CORRECTLY DETERMINED THAT WHEELER'S CLAIM OF PRE-ACCUSATORIAL DELAY SHOULD BE DISMISSED AS TIME-BARRED UNDER RCW 10.73.090(1).

The RCW 10.73.090(1) time limit bars appellate consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates (a) that the petition falls within an exemption to this time limit for facial invalidity or lack of jurisdiction, or (b) that it is based solely on one or more of the grounds listed in RCW 10.73.100. The first of the RCW 10.73.100 grounds is for "newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion." RCW 10.73.100(1).

In the present case, Wheeler's judgment became final on April 17, 2006, "[t]he date it [wa]s filed with the clerk of the trial court." RCW 10.73.090(3)(a); State's Response to Personal Restraint Petition (SRTPRP), Appendix C. However, the present petition was not filed until June 19, 2013, more than seven years later. Personal Restraint Petition (PRP), p. 1. It was, therefore, filed after the one-year time bar of RCW 10.73.090(1) and should be dismissed unless Wheeler can show either (1) that it was

facially invalid, or (2) that one of the exceptions to RCW 10.73.090(1) found in RCW 10.73.100 applies.

Wheeler did not contend in the present petition, that his judgment was facially invalid, *see* PRP, p. 1-5, and, as noted, the Court of Appeals has already found that his judgment was not invalid on its face. Appx. B.

Thus, unless Wheeler can establish that one of the RCW 10.73.100 exceptions applies, his petition must be dismissed under RCW 10.73.090(1). To this end, he argues that his "claim is based on newly discovered evidence of the State's delay –the product of a public disclosure request." PRP, p. 3.

The material he claims is "newly discovered evidence" consists of victim advocate notes and an unfiled information and declaration for determination of probable cause, both apparently drafted before Petitioner's eighteenth birthday. PRP, p. 2.<sup>3</sup>

Wheeler's claim that these constitute "newly discovered evidence" for purposes of the RCW 10.73.100(1) exception to the RCW 10.73.090(1) time bar fails for at least three reasons.

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<sup>3</sup> Wheeler indicates that the State failed to comply with its discovery obligations in not disclosing these documents earlier, though he does not explain why this is the case. *See* MFDR, p. 4-5. *Compare, e.g.,* RAP 10.3(a)(6). There is nothing in CrR 4.7 that required the State to disclose the unfiled information, declaration, or victim advocate notes in this case. Because these documents were either (1) entirely irrelevant to proof of the case, and hence, not exculpatory or impeaching, *see, e.g., In re Stenson*, 174 Wn.2d 474, 486-87, 276 P.3d 286 (2012), or (2) work product, *see* CR 26, they were not subject any obligation for disclosure through a procedure other than a public records request.

First, Wheeler waived his claim of newly discovered evidence by pleading guilty.

"[A] guilty plea... generally bars a later collateral attack based on newly discovered evidence." *In re Reise*, 146 Wn. App. 772, 783-84, 192 P.3d 949 (2008). See *In re Crabtree*, 141 Wn.2d 577, 588, 9 P.3d 814 (2000). "A valid plea waives or renders irrelevant all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea or to the government's legal power to prosecute regardless of factual guilt." *Reise*, 146 Wn. App. at 782 (citing, *inter alia*, *State v. Saylor*, 70 Wn.2d 7, 9, 422 P.2d 477 (1966)).

In the present case, Wheeler entered a straight guilty plea<sup>4</sup> to first degree child rape and first degree child molestation, in which he provided the factual basis for conviction of these crimes. SRTPRP, Appx. B. His statement of defendant on plea of guilty included the following relevant passage:

The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: Between December 2000 and December 2001 I had sexual intercourse (C[oun]t I) and sexual contact (C[oun]t II) with RLB + KAB who were less than 12 Y[ears ]O[f ]A[ge] and not

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<sup>4</sup> As distinguished from a plea based on *State v. Newton*, 87 Wn.2d 363, 372, 557 P.2d 682 (1976) (adopting *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)).

married to me, and while I was at least 36 months older than them.

SRTPRP, Appendix B (paragraph 11).

By so pleading, Wheeler "admit[ted] factual and legal guilt for the charged crime[s]," thus "provid[ing] a sufficient and independent factual basis for conviction and punishment," *Reise*, 146 Wn. App. at 782, and waived "[t]he right to appeal... other pretrial motions[.]" SRTPRP, Appendix B (paragraph (5)(f)). Therefore, he waived any claim of newly discovered evidence, and his petition was properly dismissed.

Second, even had Wheeler not waived the claim, his current claim does not involve the type of "evidence" contemplated by RCW 10.73.100(1).

To qualify for that exception, a petitioner must "establish[] 'that the evidence (1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.'" *State v. Scott*, 150 Wn. App. 281, 294, 207 P.3d 495 (2009) (quoting *In re the Personal Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (quoting *State v. Williams*, 96 Wn.2d 215, 222-23, 634

P.2d 868 (1981))). "A new trial may be denied if any one of these factors is absent." *State v. Macon*, 128 Wn.2d 784, 804, 911 P.2d 1004 (1996).

In other words, the exception contemplates substantive evidence that could be entered at a *trial*, not information that might lead one to make a procedural pre-trial motion. As the Court of Appeals recently noted, "[f]actors one through three and factor five" of the test for newly discovered evidence "presume or require that the challenged conviction was the result of a trial, not a guilty plea." *Reise*, 146 Wn. App. at 781. Even where that conviction is based on a guilty plea, a "newly discovered evidence claim essentially challenges the sufficiency of the potential trial evidence." *Id.* at 782-83. Wheeler cites no authority to the contrary.

In the present case, Wheeler's claim does not involve such substantive trial evidence, potential or otherwise. Rather, the material in question consists of an unfiled information and declaration and notes of victim advocates, mostly detailing their telephone calls with Wheeler's parents, who were also the victim's parents. Appendix to PRP. The majority of those notes appear to have been redacted, and what remains largely indicates only when

telephone calls were made to whom or where the prosecutor's file and/or filings were stored or sent. *See* Appendix to PRP. There is absolutely nothing in any of the documents that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. As a result, none of the materials would have been relevant under ER 401 or admissible at a trial under ER 402. Hence, they are not "evidence" within the meaning of RCW 10.73.100(1).

Third, even if Wheeler had not waived his claim and the material in question could be considered "evidence," he has not and cannot satisfy the five-part test for newly discovered evidence.

Under the decisional law, the burden is on the petitioner to establish the factors of that test. *See, e.g., State v. Scott*, 150 Wn. App. 294. Wheeler made no showing of any of these factors in his personal restraint petition. *See* PRP, p. 1-5. The Court of Appeals could have dismissed the petition on this ground alone. *See, e.g., In re Personal Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990). Although Wheeler offers argument intended to refute the State's position with respect to the third prong of the test in his motion for discretionary review, MTDR, p. 3-5, he makes no

showing with respect to the remaining prongs. Again, his petition could be properly dismissed on this ground alone. *See Id.*

Perhaps more important, though, Wheeler cannot make the requisite showing under the newly discovered evidence test. Specifically, he cannot establish, *at least*, prong (3).

Prong (3) requires a petitioner to show that the evidence in question "could not have been discovered before the trial by the exercise of due diligence." *Scott*, 150 Wn. App. at 294. The "evidence" in question here was that of the State's delay in filing charges until after Wheeler's eighteenth birthday.

Wheeler, however, already had evidence that the State had drafted an information before his eighteenth birthday and failed to file it until after that birthday. The information that was filed in this case was originally dated three days before Wheeler's eighteenth birthday, but was not filed until 36 days after that birthday. *See SRTPRP*, Appendix A. This fact was obvious on the face of the information itself, which was filed with the superior court on May 4, 2005. *Id.* Hence, the charging document itself made Wheeler aware of a delay in filing until after he turned eighteen.

Indeed, Wheeler later indicated that he did in fact understand that there was a delay in filing the information until after his eighteenth birthday. *See* SRTPRP, Appendix E, p. 3.

Had this been a delay with which he was concerned, reasonable or due diligence would have dictated that he either further investigate that delay through such tools as a public records request, or file a motion based on the evidence of delay already evident in the record. A public records request would have revealed the prior drafted, but un-filed information and declaration, and the notes on which Wheeler now bases his present petition. Importantly, it would have revealed that information well before Wheeler pleaded guilty almost a year later on April 17, 2006.

Hence, Wheeler cannot show prong (3), that the materials in question "could not have been discovered before the trial," or, in this case, the guilty plea, "by the exercise of due diligence." *Scott*, 150 Wn. App. at 294.

In arguing for the contrary conclusion, Wheeler now asserts that evidence of delay in filing alone "does not make out a claim of intentional delay," that he must also "show that the State had no valid reason for delay," and that until he acquired the documents in question "which showed no investigatory reason for delay, [he]

could not surmount that burden." MFDR, p. 3-5. This argument fails for at least three reasons.

First, Wheeler's argument that evidence of delay in filing alone "does not make out a claim of intentional delay," MFDR, p. 3, is irrelevant. The question is not whether there was evidence sufficient to make out a successful claim of preaccusatorial delay, but whether there was information from which a reasonable defendant would have investigated further. *See. e.g., Scott*, 150 Wn. App. at 294.

Second, even were Wheeler correct in the applicable standard, he cannot show due dilligence here. Contrary to his present contention, one may not infer from the notes he acquired that there was "no investigatory reason for delay." MFDR, p. 4. There is nothing in any of the notes detailing referencing an investigation of Wheeler, ongoing or otherwise. *See PRP*, Appendix. Nor may one infer from these notes alone that there was no investigatory reason for delay. Given that they were intended to record contact between victim advocates and the victim's family, as well as prosecutor file locations, there is simply nothing they can say about the state of the law enforcement investigation of this case.

Third, even assuming *arguendo* that Wheeler could logically draw such an inference from these notes, he would not need them to do so. He could have inferred from fact that only the date was altered in the declaration that was filed in this case, that no additional investigation occurred between the original printed date and the subsequent filing date of that declaration. Thus, even if Wheeler were to have waited until he had what he believed to be sufficient information to make out a complete claim of prosecutorial delay, he could have done so, and filed that motion as soon as he received a copy of the information and declaration for determination of probable cause in 2005. He had no need to wait eight years until 2013.

The fact that he did shows that he failed to exercise due diligence. Therefore, Wheeler cannot show that the information in question was newly discovered evidence pursuant to RCW 10.73.100(1), and the Court of Appeals properly dismissed his petition as untimely under RCW 10.73.090(1).

However, even were this Court not to dismiss the petition as time-barred, it should deny it because Wheeler has failed to show a due process violation from preaccusatorial delay.

"A personal restraint petitioner has the burden of proving constitutional error that results in actual prejudice." *In Re Personal Restraint Petition of Waggy*, 111 Wn. App. 511, 518, 45 P.3d 1103 (2002) (citing *In re Personal Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)). "Bare allegations unsupported by citation of authority, references to the record, or persuasive reasoning cannot sustain this burden of proof," *Waggy*, 111 Wn. App. at 518-19, and "[a] petition that fails to meet this basic level of proof and argument may be dismissed summarily." *Waggy*, 111 Wn. App. at 519.

There is a 3-prong test for determining when preaccusatorial delay violates due process:

First, the defendant must show the charging delay caused prejudice. If the defendant shows prejudice, the court then examines the State's reasons for the delay. Finally, the court balances the delay against the defendant's prejudice to decide if the delay violates the "fundamental conceptions of justice."

*State v. Oppelt*, 172 Wn.2d 285, 290, 257 P.3d 653 (2011)  
(quoting *State v. Salavea*, 151 Wn.2d 133, 86 P.3d 125 (2005)  
(citing, *inter alia*, *U.S. v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct.  
2044 (1977)). "[A] defendant carries [the] burden of showing actual  
prejudice when a delay causes loss of juvenile court jurisdiction."  
*State v. Maynard*, 178 Wn. App. 413, 417, 315 P.3d 545 (2013)  
(citing *State v. Dixon*, 114 Wn.2d 857, 860-61, 792 P.2d 137  
(1990)).

In the present case, Wheeler can introduce documents indicating that there was a delay in filing charges until after his eighteenth birthday. However, he has made no showing, as he is required to do, *see Waggy*, 111 Wn. App. 518-19, of either the reasons for delay or that balancing those reasons "against the [his] prejudice" demonstrates a "violat[ion of] the 'fundamental conceptions of justice.'" *Oppelt*, 172 Wn.2d at 290. *See* PRP, p. 1-5, MFDR, p. 1-5.

Therefore, even were his petition not dismissed, it should be denied.

D. CONCLUSION.

Based on the argument above, the Court of Appeals should be affirmed, and the personal restraint petition dismissed or denied.

DATED: DECEMBER 19, 2014.

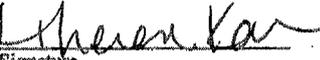
MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
Jason Ruyf  
Deputy Prosecuting Attorney  
WSB No. 38725

  
\_\_\_\_\_  
Brian Wasankari  
Deputy Prosecuting Attorney  
WSBA No. 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by US 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.

12-19-14   
Date Signature

**APPENDIX "A"**

Not Reported in P.3d, 181 Wash.App. 1018, 2014 WL 2547756 (Wash.App. Div. 1)  
(Cite as: 2014 WL 2547756 (Wash.App. Div. 1))

▶  
NOTE: UNPUBLISHED OPINION, SEE WA R  
GEN GR 14.1

Court of Appeals of Washington,  
Division 1.  
STATE Of Washington, Respondent,  
v.  
Robert T. WHEELER, Appellant.  
In the Matter of the Personal Restraint of Robert  
T. Wheeler, Petitioner.

No. 71642-5-I.  
June 2, 2014.

Appeal from Pierce County Superior Court; Honorable Elizabeth P. Martin, J.  
Jeffrey Erwin Ellis, Oregon Capital Resource Center, Portland, OR, for Appellant(s).

Jeffrey Erwin Ellis, Oregon Capital Resource Center, Portland, OR, for Petitioner(s).

Brian Neal Wasankari, Jason Eggertsen Ruyf, Pierce County Prosecuting Atty, Tacoma, WA, for Respondent(s).

UNPUBLISHED OPINION  
APPELWICK, J.

\*1 Wheeler brings a direct appeal challenging the validity of his guilty plea. He also brings an untimely personal restraint petition arguing that newly discovered evidence reveals that the State delayed charging him until after his eighteenth birthday. We affirm Wheeler's direct appeal and dismiss his PRP.

FACTS

On May 4, 2005, the State charged Robert Wheeler with one count of first degree child rape (Count I) and one count of first degree child molestation (Count II). The charges arose from an incident that occurred when Wheeler was 13 or 14,

but did not come to light until he was 17 and a half. The State charged him 36 days after his eighteenth birthday. Wheeler pleaded guilty to both counts.

On April 17, 2006, the trial court sentenced Wheeler under the Special Sex Offender Sentencing Alternative (SSOSA). The judgment and sentence listed the maximum sentence for child rape as "20yrs/\$50,000" and child molestation as "10yrs/\$20,000." The correct maximum sentence for such class A felonies, however, is life in prison and/or a \$50,000 fine. RCW 9A.20.021(1)(a). The trial court sentenced him to a 131.75 month standard range sentence for child rape and an 89 month standard range sentence for child molestation, most of which was suspended.

Wheeler's judgment became final when the trial court filed it in 2006.

On September 11, 2009, the trial court revoked Wheeler's SSOSA sentence for noncompliance and ordered him to serve the remainder of his sentence in custody. During the revocation hearing, the trial court stated:

Yeah. I remember this case, Mr. Wheeler, because I remember the State had waited until you were an adult to charge you. I don't think that was necessarily the fairest way to treat a 13-year old. Although maybe this didn't come to light. I think it still came to light when you were a minor.

Wheeler responded, "Yes."

Wheeler subsequently brought a personal restraint petition (PRP) seeking withdrawal of his guilty plea, because his judgment and sentence misstated the maximum sentences for both offenses. On July 3, 2012, this court concluded that, despite this error, the trial court did not exceed its statutory authority in sentencing Wheeler. Order Granting Pet. In Part, *In re Pers. Restraint of Wheeler*, No. 40489-3-M (Wash.Ct.App. July 3, 2012). Thus,

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based on *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 143, 267 P.3d 324 (2011), Wheeler's judgment and sentence was not facially invalid. *Wheeler*, No. 40489-3-II, at 2-3. We accordingly held that Wheeler was not entitled to withdraw his guilty plea. *Id.* at 3. We then remanded to the trial court for the sole purpose of correcting the misstated maximum sentences in Wheeler's judgment and sentence. *Id.*

On October 12, 2012, the trial court entered an order correcting the judgment and sentence. The court wrote that "[p]age 2 of the Judgment and Sentence, Section 2.3 reflects the maximum term as 20 years/\$50,000 for Count I and 10 years/\$20,000 for Count II and should note a maximum term of Life/\$50,000 for Count I and Life/\$50,000 for Count II." The court corrected the judgment and sentence accordingly. It further ordered that "[a]ll other terms and conditions of the original Judgment and Sentence shall remain in full force and effect."

\*2 Wheeler filed a direct appeal from the trial court's order correcting the judgment and sentence. He also filed a personal restraint petition. <sup>FN1</sup>

FN1. The direct appeal and the PRP were consolidated in Division II of this court. The consolidated case was then transferred to Division I.

## DISCUSSION

### I. Direct Appeal: Validity of Guilty Plea

In his direct appeal, Wheeler argues that his guilty plea was involuntary and invalid, because he was misinformed about the maximum sentence. He contends that under RAP 2.5(c)(1), we have discretion to consider this issue on appeal from remand, even though it was not the subject of an earlier appeal. He requests that we either review the merits of his claim or remand to the trial court with instructions to consider his claim.

Contrary to Wheeler's argument, RAP 2.5(c)(1) does not automatically revive every issue not raised in an earlier appeal. *State v. Barberio*, 121 Wn.2d

48, 50, 846 P.2d 519 (1993). Only if the trial court on remand exercised its independent judgment to review and rule on an issue does the issue become appealable. *Id.*; see also *State v. Parmelee*, 172 Wn.App. 899, 905, 292 P.3d 799 (2013), review denied, 177 Wn.2d 1027, 309 P.3d 504 (2013). It is discretionary for the trial court to decide whether to revisit an issue that was not the subject of appeal. *Barberio*, 121 Wn.2d at 51. However, this discretion is limited by the scope of the appellate court's mandate. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). For instance, in *Barberio*, the trial court on remand made only corrective changes to the amended judgment and sentence. 121 Wn.2d at 51. Therefore, there was no issue for the appellate court to review. *Id.* at 52. This rule promotes judicial economy and encourages timely appeals. *Parmelee*, 172 Wn.App. at 906.

In his previous PRP, Wheeler argued that he was entitled to withdraw his plea, because his judgment and sentence misstated the maximum sentence for both offenses. *Wheeler*, No. 40489-3-II, at 1. We held that, because "the trial court did not exceed its statutory authority in sentencing [Wheeler], despite its error in setting forth the maximum sentence, his judgment and sentence was not facially invalid." <sup>FN2</sup> *Id.* at 2-3. We concluded that Wheeler was thus not entitled to withdraw his plea, but remanded to the trial court to correct the error. *Id.* at 3.

FN2. Our decision was based on *Coats*, in which the Washington Supreme Court held that a judgment and sentence is valid despite misstating the maximum sentence. *Wheeler*, No. 40489-3-M, at 2 (citing *Coats*, 173 Wn.2d at 125-26); see also *In re Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759, 767, 297 P.3d 51 (2013) ("[W]e have held that where the sentencing court misstated the maximum sentence but actually handed down a sentence within the SRA-mandated sentencing range, the sentencing court acted within its statutory

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(Cite as: 2014 WL 2547756 (Wash.App. Div. 1))

authority.”). Wheeler does not ask us to reconsider our earlier decision under RAP 2.5(c)(2).

On remand, the trial court entered an order solely correcting the identified error in the judgment and sentence. It took no other actions and considered no other issues. The trial court’s discretion in reviewing new issues was limited by our mandate that the only purpose of remand was to correct the misstated maximum sentences. Because the trial court did not independently review and rule on the validity of Wheeler’s guilty plea, there is no issue for us to review here. We therefore do not consider the validity of Wheeler’s guilty plea in his direct appeal.<sup>FN3</sup>

FN3. In the alternative, Wheeler argues that his counsel was ineffective in failing to ask the sentencing court to exercise its discretion and consider the voluntariness of his guilty plea on remand. Defense counsel has no duty to pursue arguments, like the one Wheeler makes here, that appear unlikely to succeed. *State v. Brown*, 159 Wn.App. 366, 371, 245 P.3d 776 (2011). As such, Wheeler cannot show deficient performance or prejudice on remand. *Id.*

## II. Personal Restraint Petition: Newly Discovered Evidence

In a consolidated PRP, Wheeler argues that the State either intentionally or negligently delayed filing charges against him, which resulted in the prejudicial loss of juvenile jurisdiction. Because Wheeler was only 13 or 14 years old when he committed the offenses, his case would not have been automatically transferred to superior court under RCW 13.04.030(1)(e)(v)(C).

\*3 Wheeler’s PRP is based on a claim of newly discovered evidence. Specifically, in 2013, Wheeler obtained documents via a public records request showing that the State originally drafted an information charging him in juvenile court. The State ar-

gues in response that Wheeler’s claim of preaccusatorial delay should be dismissed as untimely, because Wheeler failed to act with reasonable diligence in discovering the new evidence.

Generally, RCW 10.73.090 bars any PRP not filed within one year after final judgment. This one year time limit, however, does not apply to a PRP based solely on newly discovered evidence, so long as “the defendant acted with reasonable diligence in discovering the evidence and filing the petition.” RCW 10.73.100(1). Under this rule, the defendant must show that the new evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 319–20, 868 P.2d 835 (1994). When one factor is absent, we need not consider whether the other factors are present. *State v. Macon*, 128 Wn.2d 784, 803–04, 911 P.2d 1004 (1996).

Wheeler turned 18 on March 29, 2005. The State then charged him 36 days later, on May 4, 2005. However, the filed information contained an original typewritten date of March 26, 2005, three days before Wheeler’s birthday. This date was crossed out, with May 4 handwritten in its place. This should have alerted Wheeler to the possible delay. Nor does Wheeler assert a change in the Public Records Act, chapter 42.56 RCW, that made the State’s draft juvenile court charging document previously unavailable to him. This evidence could have been discovered with due diligence before Wheeler pleaded guilty almost a year later on April 17, 2006.

Furthermore, even if the May 4, 2005 information did not put Wheeler on notice, his conversation with the judge at the September 11, 2009 SSOSA revocation hearing should have. Yet, Wheeler did not file his public records request until March 2, 2013, nearly three and a half years later. Wheeler did not act with reasonable diligence in discovering the evidence and filing his PRP.

Not Reported in P.3d, 181 Wash.App. 1018, 2014 WL 2547756 (Wash.App. Div. 1)  
(Cite as: 2014 WL 2547756 (Wash.App. Div. 1))

Wheeler fails to demonstrate that his collateral challenge falls within the newly discovered evidence exception. Therefore, the one year time bar precludes any relief.

We affirm the order of the trial court and dismiss Wheeler's PRP as untimely.

WE CONCUR: LAU, DWYER, JJ.

Wash.App. Div. 1,2014.  
State v. Wheeler  
Not Reported in P.3d, 181 Wash.App. 1018, 2014  
WL 2547756 (Wash.App. Div. 1)

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**APPENDIX "B"**

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STATE OF WASHINGTON  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

In re the  
Personal Restraint Petition of  
  
ROBERT T. WHEELER,  
  
Petitioner.

No. 40489-3-II  
  
ORDER GRANTING PETITION  
IN PART

Robert T. Wheeler seeks relief from personal restraint imposed after he pleaded guilty in 2006 to first degree rape of a child and first degree child molestation. Wheeler contends that he is entitled to withdraw his plea because his judgment and sentence misstates the maximum sentences for both offenses.

Personal restraint petitions challenging a judgment and sentence generally must be filed within one year after the judgment becomes final. RCW 10.73.090(1). The trial court sentenced Wheeler under the Special Sex Offender Sentencing Alternative (SSOSA) in 2006, and in doing so suspended most of his standard range sentences (131.75 months for the rape and 89 months for the molestation). *See* RCW 9.94A.760. The trial court revoked the SSOSA in 2009 and imposed the previously suspended time in total confinement.

Wheeler argues initially that his petition is timely because he filed it within one year after the SSOSA revocation. Wheeler's judgment became final, however, when the trial court filed it in 2006. RCW 10.73.090(3)(a); *see State v. Lilloupoulos*, 165 Wn. 197,

404893-II

199 (1931) (suspended sentence is final judgment); *State v. Collins*, 6 Wn. App. 922, 924 (1972) (fact that sentence is suspended does not affect its finality). We note further that Wheeler's petition challenges a notation in his original judgment and sentence and not any aspect of the SSOSA revocation.

Wheeler argues in the alternative that his judgment and sentence is invalid on its face because of the misstated maximum sentences. If he is correct in his facial invalidity claim, the one-year time limit does not apply to his petition. RCW 10.73.090(1).

Wheeler pleaded guilty to two class A felonies. *See* RCW 9A.44.073(2); RCW 9A.44.083(2). His judgment and sentence lists the maximum sentence for the rape count as 20 years and/or a fine of \$50,000, and the maximum for the molestation count as 10 years and/or a fine of \$20,000. The maximum sentence for class A felonies, however, is life in prison and/or a fine of \$50,000. RCW 9A.20.021(1)(a). Wheeler contends that the misstated maximum sentences render his judgment and sentence invalid and entitle him to withdraw his guilty plea.

Our Supreme Court recently considered a similar argument in *In re Pers. Restraint of Coats*, 173 Wn.2d 123 (2011). In *Coats*, the petitioner argued that his judgment and sentence was facially invalid because it misstated the maximum sentence, even though the trial court imposed a sentence well below that maximum. 173 Wn.2d at 125-27. The relief he sought was the withdrawal of his plea. *In re Coats*, 173 Wn.2d at 125. The Supreme Court held that a judgment and sentence is facially invalid under RCW 10.73.090(1) where the trial court has exceeded its authority and imposed an unlawful sentence. *In re Coats*, 173 Wn.2d at 135. Because the trial court did not exceed its statutory authority in sentencing the petitioner, despite its error in setting forth the

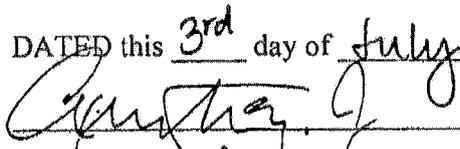
404893-II

maximum sentence, his judgment and sentence was not facially invalid. *In re Coats*, 173 Wn.2d at 143. Consequently, he was not entitled to withdraw his plea, and the only relief available was a remand for correction of the error under CrR 7.8(a). *In re Coats*, 173 Wn.2d at 144.

Recognizing that *Coats* controls the outcome here, Wheeler asserts that it was wrongly decided. We are bound by the decision in *Coats*, however, and we therefore grant this petition only for the purpose of remanding to the trial court for correction of the maximum sentences set forth in Wheeler's judgment and sentence. *See State v. Gore*, 101 Wn.2d 481, 486-87 (1984) (Court of Appeals is bound by decisions of Washington Supreme Court). Accordingly, it is hereby

ORDERED that this petition is granted in part, and the matter is remanded to the trial court for correction of the judgment and sentence.

DATED this 3rd day of July, 2012.

  
\_\_\_\_\_  
HT  
Van Dehen, J.

cc: Robert T. Wheeler  
Pierce County Clerk  
County Cause No. 05-1-02167-7  
Mark Lindquist, Pierce County Prosecuting Attorney  
Brian Wasankari, Deputy Prosecuting Attorney  
Jeffrey E. Ellis

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the  
aforementioned court do hereby certify that this foregoing instrument is  
a true and correct copy of the original now on file in my office.  
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said  
Court this 16 day of December, 2014



Kevin Stock, Pierce County Clerk

By /S/Tyler Wherry, Deputy.

Dated: Dec 16, 2014 8:59 AM



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Please see attached the State's Consolidated Supplemental Brief of Respondent in the below matter:

St. v. Wheeler  
No. 90367-1  
Submitted by: Brian Wasankari, WSB #28945 and Jason Ruyf, WSB #38725

Please call me at 253/798-7426 if you have any questions.

Therese Kahn  
Legal Assistant to J. Ruyf