

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Feb 24, 2016, 10:00 am  
BY RONALD R. CARPENTER  
CLERK

NO. 91268-8

RECEIVED BY E-MAIL

---

**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JERRY LEE SWAGERTY, PETITIONER

---

Appeal from the Superior Court of Pierce County  
The Honorable Kathryn Nelson

No. 12-1-01877-6

---

**SUPPLEMENTAL BRIEF OF RESPONDENT**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
BRENT J. HYER  
Deputy Prosecuting Attorney  
WSB # 33338

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

 ORIGINAL

**Table of Contents**

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

    1. Did the Court of Appeals exceed its authority when it raised statute of limitations sua sponte? ..... 1

    2. Was it error for the Court of Appeals to remand this case to vacate petitioner's convictions and allow the State to refile the original charges? ..... 1

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

C. ARGUMENT..... 3

    1. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY BY RAISING STATUTE OF LIMITATIONS SUE SPONTE BECAUSE IT WAS NOT NECESSARY TO DECIDE THE ISSUES RAISED BY PETITIONER ..... 3

    2. THE PROPER REMEDY IN THIS CASE IS TO VACATE PETITIONER'S CONVICTIONS AND REMAND TO THE TRIAL COURT FOR THE STATE TO REFILE ANY CHARGES FOR WHICH THE STATUTE OF LIMITATIONS HAS NOT YET EXPIRED ..... 8

D. CONCLUSION. .... 17

## Table of Authorities

### State Cases

<i>Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.</i> , 177 Wn.2d 136, 143, 298 P.3d 704, 707 (2013).....	4, 5
<i>Greengo v. Pub. Employees Mut. Ins. Co.</i> , 135 Wn.2d 799, 813, 959 P.2d 657, 663 (1998) .....	4
<i>Hanson v. City of Snohomish</i> , 121 Wn.2d 552, 852 P.2d 295 (1993).....	4
<i>In re Benn</i> , 134 Wn.2d 868, 952 P.2d 116 (1998).....	7
<i>In re Bonds</i> , 165 Wn.2d 135, 140, 196 P.3d 672 (2008) .....	7
<i>In re Bradley</i> , 165 Wn.2d 934, 205 P.3d 123 (2009).....	14
<i>In re Breedlove</i> , 138 Wn.2d 298, 309, 979 P.2d 417 (1999) .....	8
<i>In re Coats</i> , 173 Wn.2d 123, 138, 267 P.3d 324 (2011) .....	5
<i>In re Francis</i> , 170 Wn.2d 517, 242 P.3d 866 (2010).....	16
<i>In re Gardner</i> , 94 Wn.2d 504, 507, 617 P.2d 1001 (1980) .....	8
<i>In re Moore</i> , 116 Wn.2d, 30, 38, 803 P.2d 300 (2002).....	8
<i>In re Shale</i> , 160 Wn.2d 489, 158 P.3d 588 (2007) .....	14
<i>In re Stoudmire</i> , 141 Wn.2d 342, 5 P.3d 1240 (2000) .....	6, 7, 8, 9, 13
<i>In re Thompson</i> , 141 Wn.2d 712, 10 P.3d 380 (2000).....	10
<i>Simonson v. Fendell</i> , 101 Wn.2d 88, 93, 675 P.2d 1218 (1984).....	11
<i>State v. Aho</i> , 137 Wn.2d 736, 740-741, 975 P.2d 512 (1999) .....	4
<i>State v. Barber</i> , 170 Wn.2d 854, 874, 248 P.3d 494 (2011).....	11
<i>State v. Bisson</i> , 156 Wn.2d 507, 130 P.3d 820 (2006) .....	13, 15
<i>State v. Chambers</i> , 176 Wn.2d 573, 293 P.3d 1185 (2013).....	14

<i>State v. Ermels</i> , 156 Wn.2d 528, 131 P.3d 299 (2006).....	13
<i>State v. Hodgson</i> , 108 Wn.2d 662, 666-67, 740 P.2d 848 (1987) .....	13
<i>State v. Hughes</i> , 166 Wn.2d 675, 212 P.3d 558 (2009).....	16
<i>State v. Johansen</i> , 69 Wn.2d 187, 193-94, 417 P.2d 844 (1966) .....	12
<i>State v. Knight</i> , 162 Wn.2d 806, 174 P.3d 1167 (2008) .....	16
<i>State v. League</i> , 167 Wn.2d 671, 223 P.3d 493 (2009) .....	16
<i>State v. Oestreich</i> , 83 Wn. App. 648, 651, 652, 922 P.2d 1369 (1996)....	12
<i>State v. Skiggn</i> , 48 Wn. App. 831, 838, 795 P.2d 169 (1990) .....	16
<i>State v. Studd</i> , 137 Wn.2d 533, 547 973 P.2d 1049 (1999).....	5
<i>State v. Sullivan</i> , 69 Wn. App. 167, 172, 847 P.2d 953 (1993).....	4
<i>State v. Turley</i> , 149 Wn.2d 395, 400, 69 P.3d 338 (2003).....	8, 9, 13
<i>State v. Vangerpen</i> , 125 Wn.2d 782, 793, 888 P.2d 1177 (1995) .....	10
<i>State v. Walsh</i> , 143 Wn.2d 1, 8, 17 P.3d 591 (2001).....	11
<i>State v. Weber</i> , 159 Wn.2d 252, 271-72, 149 P.3d 646, 656 (2006).....	4
Federal and Other Jurisdictions	
<i>Musacchio v. U.S.</i> , --- U.S. --- (Jan.25, 2016).....	6
<i>Wood v. Milyard</i> , 132 S. Ct. 1826, 1834, 182 L. Ed 733 (2012).....	5
Constitutional Provisions	
18 U.S.C. § 3282(a) .....	6
Statutes	
Laws of 2013, Ch.17, § 1.....	13

Laws of 2009, Ch. 61, § 1.....	12
RCW 10.73.090 .....	7
RCW 10.73.100 .....	7
RCW 9A.04.080(1)(c) .....	9, 12
RCW 9A.04.080(1)(h).....	9
Rules and Regulations	
RAP 1.2(c), 7.3 .....	4
RAP 12.1(b).....	4
RAP 16 .....	4
Other Authorities	
Restatement (First) of Contracts § 454 (1932) .....	15

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

1. Did the Court of Appeals exceed its authority when it raised statute of limitations sua sponte?
2. Was it error for the Court of Appeals to remand this case to vacate petitioner's convictions and allow the State to refile the original charges?

B. STATEMENT OF THE CASE.

On May 22, 2012, the petitioner in this personal restraint petition, Jerry Lee Swagerty ("petitioner"), was charged with one count of rape of a child in the first degree and one count of child molestation in the first degree. SR Appendix B. The date of violation for both charges was February 14, 2004. SR Appendix B.

As part of a negotiated plea bargain, petitioner ultimately pleaded guilty to one count of rape of a child in the third degree, one count of luring, one count of burglary in the second degree, and one count of intimidating a witness. SR Appendix C. Each of these crimes alleged the aggravating circumstance that the victim was particularly vulnerable and incapable of resistance. SR Appendix C. As part of the plea bargain, petitioner agreed to an exceptional sentence of 30 years in custody. SR Appendix C. This plea bargain allowed petitioner, who has prior

convictions for burglary in the first degree and robbery in the second degree among other crimes (SR Appendix A), to avoid the possible sentence of life in prison without the possibility of parole. SR Appendix C.

On February 8, 2013, the court sentenced petitioner to an exceptional<sup>1</sup> sentence of 30 years in custody. SR Appendix A.

On January 24, 2014, petitioner filed this petition for review, which was timely. Petitioner based his petition on four grounds: 1) erroneous sentence; 2) ineffective assistance of counsel; 3) prosecutorial misconduct; and 4) judicial prejudice. Petition, 9-16. Petitioner requested an attorney and asked the Court of Appeals to vacate his sentences so that he could be resentenced to concurrent sentences or for the court to completely reverse his conviction. Petition, pg. 17.

On August 6, 2014, the Court of Appeals, in a sua sponte order, directed the State to file a supplemental response addressing the impact of the amended information on the statute of limitation for each offense charged. The State filed its supplemental response as ordered, conceding

---

<sup>1</sup> Petitioner had an offender score of 9+, giving him a standard range of 60 months on Count I, 0-12 months on Count II, 51-68 months on Count III, and 77-102 months on Count IV. Appendix A. The court imposed 60 months on Count I, 60 months on Count II, 120 months on Count III, and 120 months on Count IV, and ran all sentences consecutively to arrive at the stipulated sentence of 30 years. Appendix A.

that three of the four charges in the amended information were outside of the statute of limitations.

The Court of Appeals vacated petitioner's convictions and remanded this case to the trial court for an order of dismissal, but ruled that the State may refile charges for which the statute of limitation had not yet expired. The statute of limitations has not yet run on either of petitioner's charges, so the State could refile the original information. The Court of Appeals concluded that petitioner was not entitled to be resentenced on only the rape of a child in the third degree charge because the amended information was part of an indivisible package deal.

Petitioner sought discretionary review with this Court and asked the Court to modify the Court of Appeals decision to a "Published Decision of 'Dismiss with Prejudice and forever release Jerry Swagerty from any and all charges associated with this case....'" The Court accepted review and appointed counsel for the petitioner.

C. ARGUMENT.

1. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY BY RAISING STATUTE OF LIMITATIONS SUE SPONTE BECAUSE IT WAS NOT NECESSARY TO DECIDE THE ISSUES RAISED BY PETITIONER.

"[T]he appellate court has the authority to determine whether a matter is properly before the court, to perform those acts which are proper

to secure fair and orderly review, and to waive the rules of appellate procedure when necessary to ‘serve the ends of justice.’” *State v. Aho*, 137 Wn.2d 736, 740-741, 975 P.2d 512 (1999); *quoting* RAP 1.2(c), 7.3. The scope of a given appeal is determined by the notice of appeal, the assignments of error, and the substantive argumentation of the parties. *Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 143, 298 P.3d 704, 707 (2013).

The general rule is that an issue or theory which is not presented to the trial court will not be considered on appeal. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 557, 852 P.2d 295. There is great potential for abuse when a party does not object in the court below because “[a] party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.” *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646, 656 (2006), *quoting State v. Sullivan*, 69 Wn. App. 167, 172, 847 P.2d 953 (1993).

The Rules of Appellate Procedure allow appellate courts to raise issues sua sponte. RAP 12.1(b); *Greengo v. Pub. Employees Mut. Ins. Co.*, 135 Wn.2d 799, 813, 959 P.2d 657, 663 (1998). There is no corresponding provision in RAP 16, which governs personal restraint petitions.

Even in a direct appeal, where the rules specifically allow for the appellate court to raise issues sua sponte, this Court previously held:

Appellate adjudication of claims resolved below and not raised by the parties on appeal, when not necessary to properly resolving the claims that are raised by the parties on appeal, thwarts the finality of unchallenged stipulations and rulings, expends limited judicial resources, diminishes the predictability of adjudication, discourages the private settlement of disputes, and overlooks the need for zealous advocacy to facilitate appellate review.

*Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 143, 298 P.3d 704, 707 (2013). Appellate courts should reserve their use of sue sponte authority for use in exceptional cases, otherwise the appellate court discounts the trial court's labor and acts not as a court of review by as one of first view. *Wood v. Milyard*, 132 S. Ct. 1826, 1834, 182 L. Ed 733 (2012). The Court is "not in the business of inventing unbriefed arguments for parties sua sponte..." *In re Coats*, 173 Wn.2d 123, 138, 267 P.3d 324 (2011), quoting *State v. Studd*, 137 Wn.2d 533, 547 973 P.2d 1049 (1999).

In this case, the Court of Appeals raised the issue of statute of limitations even though it was not argued by petitioner in the trial court or in his petition. In fact, none of the issues raised by petitioner implicated the statute of limitations in any arguable way. The Court of Appeals did not need to raise this issue in order to resolve the petition.

By raising this issue on behalf of the petitioner, the Court of Appeals ceased to be a court of review and became an advocate for the petitioner. By raising this issue for petitioner, the Court of Appeals allows petitioner to essentially renegotiate his plea bargain through the collateral attack process. This is problematic because petitioner's plea bargain was specifically negotiated so he could avoid a possible life sentence without the possibility of parole.

The Supreme Court of the United States recently held that statute of limitations is a defense and “becomes part of a case only if the defendant puts the defense in issue.” *Musacchio v. U.S.*, --- U.S. --- (Jan.25, 2016). “When a defendant does not press the defense, then, there is no error for an appellate court to correct – and certainly no plain error.” *Id.* In *Musacchio*, the Court is interpreting 18 U.S.C. § 3282(a), the general statute of limitations for federal offense, so the opinion was one of statutory interpretation, not a constitutional interpretation at issue. While this may imply that the Court did not read this as an issue of constitutional magnitude, the State understands that *Musacchio* may be read differently by this Court, especially considering this Court's holding in *In re Stoudmire*, 141 Wn.2d 342, 354-355, 5 P.3d 1240 (2000). The impact of this case will likely be litigated at another time, but it bears mentioning here because it illustrates the complexity of the issue involved and why the

Court of Appeals should not have raised this issue sue sponte in a response to a collateral attack where the petitioner has not raised the issue.

Another issue created by the Court of Appeals considering this issue sua sponte is that the issue was not raised within the one year after the conviction became final. RCW 10.73.090, .100. As this Court held in *In re Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998), a defendant cannot amend a personal restraint petition to include new issues after the one year time for collateral attacks. *Id* at 938-939. The time limit in RCW 10.73.090 acts as a statute of limitation. *Id.*; *In re Bonds*, 165 Wn.2d 135, 140, 196 P.3d 672 (2008). As ironic as this appears given the issues in this case, the Court of Appeals did not ask for supplemental briefing until August of 2014, which is five months after petitioner's conviction technically became final. The Court would likely conclude that the judgment and sentence is not valid on its face based on *Stoudmire*, but this again illustrates why the Court of Appeals should not have raised this issue sua sponte.

As this issue did not relate to any of petitioner's claims in his petition, the Court of Appeals should not have raised this issue on petitioner's behalf.

2. THE PROPER REMEDY IN THIS CASE IS TO VACATE PETITIONER'S CONVICTIONS AND REMAND TO THE TRIAL COURT FOR THE STATE TO REFILE ANY CHARGES FOR WHICH THE STATUTE OF LIMITATIONS HAS NOT YET EXPIRED.

Washington recognizes a strong public interest in enforcing the terms of plea agreements which are voluntarily and intelligently made. *In re Breedlove*, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). Plea agreements are regarded and interpreted as contracts and both parties are bound by the terms of a valid plea agreement. *Id.*

A trial court must treat a plea agreement as indivisible, a "package deal," when pleas to multiple counts or charges were made at the same time, described in one document and accepted in a single proceeding. *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). Whether a contract is considered separable or indivisible is dependent upon the intent of the parties, which is measured objectively. *Id.*

A plea agreement cannot exceed the statutory authority given to the courts. *In re Gardner*, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980); *In re Moore*, 116 Wn.2d, 30, 38, 803 P.2d 300 (2002). A sentencing court exceeds its authority to sentence a defendant on charges commenced after the period prescribed in the statute. *In re Stoudmire*, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000).

First, this case was a “package deal” under *Turley*. The State and petitioner negotiated a plea agreement which would spare the victim the ordeal of testifying at trial in exchange for petitioner’s guilty plea and stipulation to 30 years in prison. This plea agreement allowed petitioner to avoid a potential third strike, which would have made him a persistent offender subject to a sentence of life in prison without the possibility of parole.

Unfortunately, in crafting this plea agreement, the parties failed to take into account that they were amending down from charges which had a statute of limitations that had been statutorily lengthened to allow for prosecution up to the victim’s 30<sup>th</sup> birthday (9A.04.080(1)(c)), to charges subject to only a three year statute of limitations (9A.04.080(1)(h)). This mistake, pointed out by the Court of Appeals, means that the trial court exceeded its authority to sentence the defendant under this plea agreement. *Stoudmire*, 141 Wn.2d at 355.

Second, the State is not asking this Court to enforce the plea bargain against the defendant. The State is asking this court to vacate the plea bargain to place the parties back to their original positions. The Court of Appeals correctly determined that petitioner’s convictions should be vacated and the case remanded to the trial court where the State could

recharge petitioner with any charges where the statute of limitations had not expired.

This case is similar to *In re Thompson*, 141 Wn.2d 712, 10 P.3d 380 (2000), where this Court ruled that the appropriate remedy was to vacate the convictions to “place the parties back in the positions they were in before they entered into the agreement.” *Id.* at 730. In *Thompson*, this Court allowed a collateral attack on a guilty plea where the petitioner pleaded guilty to an offense which occurred before the effective date of the statute creating the offense. *Id.* at 725. The Court noted that the proper remedy for a conviction based on a defective information is dismissal without prejudice to the State refileing the information. *Id.*, quoting *State v. Vangerpen*, 125 Wn.2d 782, 793, 888 P.2d 1177 (1995). This Court noted that the defendant “is subject to prosecution as long as prosecution is commenced within the period prescribed in the statute of limitation.” *Id.* at 730.

In this case, petitioner pleaded guilty to four offenses in an amended information. Three of the four offenses have violation dates which cause the offenses to be outside the statute of limitations. Due to this defect, the trial court did not have authority to sentence him as it did. As this plea was based on a defective information, the correct remedy – as the Court of Appeals found in this case – is to vacate petitioner’s

convictions and remand for an entry of an order of dismissal. The State may then refile any charges for which the statute of limitations has not yet expire.

Where a plea agreement is based on misinformation, the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). If specific performance is not available because the sentence would be contrary to law, the only remedy is withdrawal of the plea. *State v. Barber*, 170 Wn.2d 854, 874, 248 P.3d 494 (2011).

This would be the appropriate remedy under contract law principals as well. Petitioner agreed to plead guilty to four crimes with an agreed sentence of 30 years in prison. In exchange, the State amended the charges, which could have resulted in a life sentence. Based on a mutual mistake regarding the statute of limitations, this plea could not be effectuated. As such, the contract should be rescinded. “The general principle is that rescission contemplates restoration of the parties to as near their former position as possible or practice.” *Simonson v. Fendell*, 101 Wn.2d 88, 93, 675 P.2d 1218 (1984). To restore the parties to their former positions in this matter would be to vacate petitioner’s convictions and allow the State to refile the original charges.

Additionally, an amended information does not supersede the original when a defendant procures the filing of an amended information to facilitate a plea bargain, then successfully withdraws the associated guilty plea in a subsequent proceeding. *See State v. Oestreich*, 83 Wn. App. 648, 651, 652, 922 P.2d 1369 (1996)(citing *State v. Johansen*, 69 Wn.2d 187, 193-94, 417 P.2d 844 (1966)). In both *Oestreich* and *Johansen*, the defendants induced the State to file an amended information based on an agreement to plead guilty to the amended information, but did not follow through the plea agreements. In each case, the Court held that the State was entitled to return to the original information. This Court should allow the State to return to the original information in this case as well.

The statute of limitations has not run on petitioner's original charges of rape of a child in the first degree and child molestation in the first degree. These crimes were committed in 2004. At the time, the statute of limitations allowed for prosecution of these crimes for three years after the victim's eighteenth birthday, or more than seven years after the commission of the crime. Former RCW 9A.04.080(1)(c). The statute of limitations for these crimes has been expanded a number of times over the years. In 2009, the statute of limitations was increased to allow for prosecution up to the victim's 28<sup>th</sup> birthday. Laws of 2009, Ch. 61, § 1.

The statute of limitation was expanded until the victim's 30<sup>th</sup> birthday in 2013. Laws of 2013, Ch.17, § 1. A new limitations period applies to an offense if the prior period has not yet expired. *State v. Hodgson*, 108 Wn.2d 662, 666-67, 740 P.2d 848 (1987). In this case, the victim's date of birth is July 11, 1993, so she will not turn thirty until July 11, 2023. The statute of limitations has not run on the charges of rape of a child in the first degree and child molestation in the first degree. This matter should be remanded to the trial court where the State can refile these charges.

Petitioner may argue that this case is similar to *In re Stoudmire*, 141 Wn.2d 342, 5 P.3d 1240 (2000), where the Court vacated two convictions for indecent liberties and remanded the matter to the trial court to dismiss those counts and resentence the defendant. However, *Stoudmire* was decided prior to *Turley*, so this Court had not decided that plea agreements are indivisible when the *Stoudmire* decision was rendered.

This Court has consistently upheld the indivisibility of plea agreements in the years following *Stoudmire*. See, e.g., *State v. Bisson*, 156 Wn.2d 507, 130 P.3d 820 (2006)(defendant can elect to withdraw his plea in its entirety, but not to the weapon enhancements alone); *State v. Ermels*, 156 Wn.2d 528, 131 P.3d 299 (2006)(defendant cannot challenge the validity of his exceptional sentence without challenging the validity of

the entire plea); *In re Shale*, 160 Wn.2d 489, 158 P.3d 588 (2007)(defendant cannot challenge only a portion of the plea agreement when it was part of an indivisible package deal); *In re Bradley*, 165 Wn.2d 934, 205 P.3d 123 (2009)(where defendant was misinformed about the direct consequences of one plea that was part of a package deal, he was entitled to withdraw both pleas); *State v. Chambers*, 176 Wn.2d 573, 293 P.3d 1185 (2013)(defendant entered into indivisible plea agreement that encompassed multiple charges over a period of time). The indivisibility of plea agreements prevents the parties from attempting to unilaterally change the plea agreement, which is exactly what petitioner is attempting to do in this case. Petitioner’s pleadings are replete with examples of him attempting to secure a better deal – petitioner requests a “new plea deal” where he should get the low end of 82 months<sup>2</sup>; petitioner demands a dismissal with prejudice<sup>3</sup>; petitioner requests to be resentenced to 60 months.<sup>4</sup> As the plea agreement contemplated petitioner avoiding a life sentence in exchange for stipulated agreement to 30 years, it would be a travesty of justice to allow defendant to now reduce his sentence to 5 years.

---

<sup>2</sup> Reply Brief, pg. 6, Filed 6/13/14

<sup>3</sup> Motion for Discretionary Review, pg. 19, Filed 2/23/2015

<sup>4</sup> Supplemental Brief & Written Oral Argument, pg. 5, Filed 2/23/2015.

In most of these cases, the plea agreement contains an ambiguity. For example in *Bisson*, the plea was ambiguous about whether the five deadly weapon enhancements were to run consecutively to one another. *Bisson*, 156 Wn.2d at 517. Here, the plea agreement contains an impossibility or a mutual failure of consideration:

While impossibility of performance thus precludes or discharges a promisor's duty, a party who has made a return promise in exchange for a promise performance of which is impossible, is likewise free of duty; since non-performance by one party, however innocent, involves a failure of consideration for the performance of the other party (see § 274). An analogous, though not identical case of failure of consideration occurs where, though performance of a promise by one party is still possible according to its literal terms, facts for which neither party is responsible prevent that performance from effecting the object or purpose which the parties, when they made the contract, assumed would be effected. There is frustration of this purpose. Generally it is the object of only one of the parties that is frustrated, but it is essential in order to preclude a duty on his part, that this purpose is understood by both parties as his basic purpose in entering into the contract (see § 288). Cases are possible where though the literal performance of the promise of each party is possible the object of each will be frustrated, in spite of such performance. There is then a mutual failure of consideration.

Restatement (First) of Contracts § 454 (1932). The plea agreement entered into by the State and the petitioner called for him to plead guilty to four crimes with a sentence of 30 years. The statute of limitations precludes this sentence. As such, the plea agreement should be withdrawn in its entirety.

In *State v. Skiggn*, the Court of Appeals noted that in certain circumstances, it would be unfair to the State and indeed, unjust to allow the defendant specific performance of a plea agreement. *State v. Skiggn*, 48 Wn. App. 831, 838, 795 P.2d 169 (1990). In *Skiggn*, the erroneous information was primarily the responsibility of the defense attorney. While in this case, it appears to be the fault of both counsel, the fair and just outcome in this case should be to withdraw the plea, which would still fully protect petitioner's rights. *Id.* at 839.

Alternatively, petitioner may argue that he is not seeking to withdraw his plea, but is only asking the Court to vacate the three convictions that were imposed outside of the statute of limitations, similar to defendant in *State v. Knight*, 162 Wn.2d 806, 174 P.3d 1167 (2008). However, *Knight* is limited to cases involving double jeopardy, where the defendant was being punished twice for a single crime. *Id.* at 813; *see also, State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009); *State v. League*, 167 Wn.2d 671, 223 P.3d 493 (2009); *In re Francis*, 170 Wn.2d 517, 242 P.3d 866 (2010). In this case, defendant's plea does not violate the principles of double jeopardy, so *Knight* is inapposite here.

The Court of Appeals did not err in vacating petitioner's convictions and remanding this case for the State to refile charges not outside the statute of limitations. Because this was a package deal, the

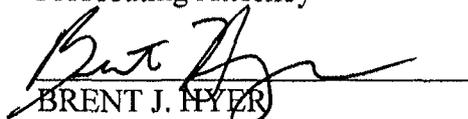
parties should be placed back to their original positions prior to the plea agreement. The Court should uphold the Court of Appeals decision.

D. CONCLUSION.

The Court should not allow petitioner to unilaterally improve his sentence through the collateral attack process. As the trial court could not sentence petitioner as it did under the plea agreement due to the statute of limitations, this Court should vacate petitioner's sentence and remand the entire case back to the trial court. At the trial court level, the State can then refile any charges still within the statute of limitations. This places both parties back to their original positions. The Court of Appeals was correct in its decision regarding the remedy in this case.

DATED: February 22, 2016.

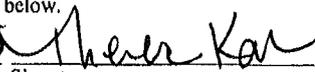
MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



BRENT J. HYER  
Deputy Prosecuting Attorney  
WSB # 33338

Certificate of Service:

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

2-24-16   
Date Signature

## OFFICE RECEPTIONIST, CLERK

---

**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Wednesday, February 24, 2016 10:02 AM  
**To:** 'Therese Nicholson-Kahn'  
**Cc:** John Sloane; nielsene@nwattorney.net  
**Subject:** RE: PRP of Swagerty, No. 91268-8

Rec'd 2/24/2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Therese Nicholson-Kahn [mailto:tnichol@co.pierce.wa.us]  
**Sent:** Wednesday, February 24, 2016 10:00 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** John Sloane <SloaneJ@nwattorney.net>; nielsene@nwattorney.net  
**Subject:** PRP of Swagerty, No. 91268-8

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

PPR of Swagerty  
No. 91268-8  
Submitted by: B. Hyer  
WSB #33338

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

Therese Kahn  
Legal Assistant to B. Hyer