Principles and Leading Cases on Procedures in Personal Restraint Petitions[1]

Michael Johnston
Commissioner

Walter Burton
Deputy Commissioner

Karl Triebel
Lead Staff Attorney

Washington State Supreme Court

2022

A. Introduction

The personal restraint petition is the procedure by which original actions are brought in the appellate courts of Washington to obtain collateral or postconviction relief from criminal judgments and sentences, and other forms of government restraint such as civil commitment and prison discipline. Tracing their common law origins to the great writs predating the Magna Carta, personal restraint petitions are governed by the procedures set forth in Title 16 RAP. *See In re Pers. Restraint of Coats*, 173 Wn.2d 123, 128, 267 P.3d 324 (2011) (discussing common law origins of personal restraint petitions). The personal restraint petition completely replaces in the appellate courts the relief that was formerly available by petition for writ of habeas corpus or other postconviction relief. RAP 16.3. It does not, however, replace habeas corpus as a form of relief in the superior court, which is governed by chapter 7.36 RCW. Furthermore, for the unfamiliar practitioner, it is important to note that a personal restraint petition is neither an appeal nor a substitute for an appeal. *In re Pers. Restraint of Haverty*, 101 Wn.2d 498, 504, 681 P.2d 835 (1984). It is a procedure that allows a person convicted of a crime or otherwise restrained, to obtain relief where a direct appeal is no longer available or was never available in the first instance. *See In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298-99, 88 P.3d 390 (2004) (explaining different standards applicable when petitioner has not had prior opportunity for judicial review).

[1] This document represents solely the authors' interpretation of the rules, statutes, and case law. It does not reflect the official view of the Washington State Supreme Court, and it has not been reviewed or approved by the court.

In practice, most actions for postconviction relief in the superior court are brought by motion for relief from the judgment and sentence under CrR 7.8. In certain circumstances, habeas corpus petitions and CrR 7.8 motions must be transferred to the appellate court for treatment as personal restraint petitions, but if a petition for a writ of habeas corpus or a CrR 7.8 motion is considered on the merits and denied by the superior court, the court's decision may be appealed. But such an appeal is not a personal restraint petition. The personal restraint petition is strictly an original action in the appellate courts, with both the Court of Appeals and the Supreme Court having concurrent original jurisdiction. RAP 16.3(c). The Supreme Court also recently clarified that the State may appeal from a superior court order granting a CrR 7.8 motion for relief from judgment. *State v. Waller*, 197 Wn.2d 218, 225, 481 P.3d 515 (2021).

B. Preliminary Procedures

1. How a Personal Restraint Petition Reaches the Appellate Court

All personal restraint petitions should be filed first in the Court of Appeals. RAP 16.5(a), (b). Although the Supreme Court has concurrent jurisdiction with the Court of Appeals over petitions, the Supreme Court will ordinarily exercise its jurisdiction by transferring a petition filed in that court to the Court of Appeals. RAP 16.3(c).

The division of the Court of Appeals in which an incarcerated petitioner files a petition is generally dictated by the division in which the petitioner was convicted or was otherwise ordered held in custody, not by the petitioner's present place of restraint. RAP 16.8(b). For example, a petitioner who was convicted in King County would file a petition in Division One, even if the petitioner is imprisoned in a facility located within the geographical boundaries of Division Three, such as the Washington State Penitentiary at Walla Walla. *Id*. If a petitioner is currently "not being held in custody on the basis of a decision," the petitioner may file in the division of his or her residence. *Id*. A petition may be transferred by the court in which it was filed. RAP 16.5(c). Transfer of a petition between the Supreme Court and the Court of Appeals may not be challenged by motion for reconsideration or, if the transfer is ordered by the clerk of the court, by motion to modify. *Id*.

As previously indicated, petitions can come to the appellate courts by transfer of postconviction motions filed in superior court. Under CrR 7.8, a motion under that rule *must* be transferred to the Court of Appeals for treatment as a personal restraint petition in certain circumstances. Specifically, a CrR 7.8 motion must be transferred *unless* (1) the motion is timely under the same time limit applicable to personal restraint petitions, *and* (2) either the defendant has made a substantial showing of entitlement to

relief or resolution of the motion requires a factual hearing. CrR 7.8(c)(2); *State v. Smith*, 144 Wn. App. 860, 862-63, 184 P.3d 666 (2008). Because the rule contemplates some preliminary review of the procedural and substantive basis for the motion, the superior court should explain the basis for the transfer, and a preprinted form with check boxes corresponding to CrR 7.8(c)(2) criteria can serve this purpose. *In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 639, n.3, 362 P.3d 758 (2015). Case law has made CrR 7.8 applicable to habeas corpus petitions in superior court, and thus such petitions are transferable to the appellate court under the circumstances explicated in CrR 7.8(c)(2). *Toliver v. Olsen*, 109 Wn.2d 607, 612-13, 746 P.2d 809 (1987). If the Court of Appeals determines that the superior court clearly erred in transferring a collateral challenge filed in that court, the Court of Appeals will remand the matter to the superior court. RAP 16.8 .1(c). The Court of Appeals should remand if the superior court failed to meaningfully engage in the analysis required by CrR 7.8(c)(2). *Ruiz-Sanabria*, 184 Wn.2d at 638-39; *Smith*, 144 Wn. App. at 864. A decision by the superior court to transfer a motion to the Court of Appeals for consideration as a personal restraint petition is not subject to direct review by the Supreme Court. RAP 16.14(a).

If a petition is defective in form, it may still be filed, and the clerk of the court will direct the petitioner to correct the petition within 60 days. RAP 16.8(c).

2. Consideration of Petition

The appellate court will conduct a preliminary review of any personal restraint petition it receives. RAP 16.8.1(a). In the Court of Appeals, this initial review is conducted by the chief judge or acting chief judge (referred to hereafter as the chief judge). RAP 16.11(a). If the petition is "clearly frivolous" or "clearly" barred procedurally under RCW 10.73.090 (untimely) or RAP 16.4(d) (raises ground for relief similar to that raised in prior petition without good cause shown), the court will dismiss it without requesting the State's response. RAP 16.8.1(b). If the petition started out in the superior court as a motion for postconviction relief and was improperly transferred by the superior court, the Court of Appeals will, as indicated, remand the matter. RAP 16.8.1(c). If the appellate court does not preliminarily dismiss or remand the petition, it will ask the State to file a response. RAP 16.8.1(d). A response is due 60 days after the request is made. RAP 16.9(a).

After the deadline for filing a reply to the State's response has expired, the chief judge first considers the petition without oral argument. If the issues presented are deemed "frivolous," the chief judge will dismiss the petition by way of a written order. RAP 16.11(b). "Frivolous" in this context means that the petition "fails to present an arguable basis for collateral relief either in law or in fact, given the constraints of the personal restraint petition vehicle." *In re Pers. Restraint of Khan*, 184 Wn.2d 679,

686-87, 363 P.3d 577 (2015); *see also In re Pers. Restraint of James*, 190 Wn.2d 686, 689, 416 P.3d 719 (2018); *In re Pers. Restraint of Caldellis*, 187 Wn.2d 127, 135, 385 P.3d 135 (2016); *In re Pers. Restraint of Gronquist*, 192 Wn.2d 309, 320, 429 P.3d 804 (2018) (*Gronquist II*). These "constraints" include reasons for dismissing a petition independent of the potential substantive merit of the issues raised, including untimeliness of the petition, failure to show the requisite prejudice necessary for collateral relief, or failure to justify reconsidering an issue raised and rejected on direct appeal. *Khan*, 184 Wn.2d at 686. If, as sometimes happens, the chief judge dismisses a petition as meritless without expressly stating that the petition is frivolous, the Supreme Court on review of the ruling will infer that the chief judge determined that the petition is frivolous. *Caldellis*, 187 Wn.2d at 135.

The chief judge's dismissal ruling is not subject to reconsideration by a panel of judges of the court. Rather, the ruling is subject to review only by motion for discretionary review in the Supreme Court. RAP 16.14(c).

If the chief judge determines that the petition is not frivolous and can be resolved solely on the record, the chief judge will refer the petition to a panel of judges for a decision on the merits. RAP 16.11(b). The panel then will ultimately decide whether to deny or grant the petition or direct some other action in a lower court.

If the petition cannot be resolved solely on the record (even if the issues raised are potentially meritless but not frivolous), the chief judge will transfer the petition to the superior court for a determination on the merits or for a "reference hearing" (an evidentiary hearing). *Id*. If the petition is transferred for a reference hearing, the chief judge upon receiving the superior court's findings may again dismiss the petition if the chief judge determines that it is frivolous in light of those findings. RAP 16.13.

If the chief judge erroneously finds a petition frivolous and on that basis dismisses the petition without referring it to a panel of judges for a decision on the merits, the remedy for a petitioner who seeks discretionary review in the Supreme Court is generally not to remand the petition to the Court of Appeals for reference to a panel of judges, but for the Supreme Court to consider the merits of the petition in relation to the motion for discretionary review. *Khan*, 184 Wn.2d at 687; *Caldellis*, 187 Wn.2d at 135; *Gronquist II*, 192 Wn.2d at 320. But if it appears to the Supreme Court that the chief judge did not fully consider the evidence presented by the petitioner, the court may remand the matter to the Court of Appeals for fuller consideration. *James*, 190 Wn.2d at 690.

In the case of a successive petition filed by the same petitioner in the same case, the Court of Appeals in certain circumstances (discussed below) must transfer a petition

filed in that court to the Supreme Court. When it does so, the Supreme Court commissioner serves essentially the same function as the chief judge in the Court of Appeals. RAP 16.5(b). Like the chief judge, the commissioner[2] will dismiss the petition by written ruling if it is found to be frivolous or procedurally barred, or the commissioner will refer the petition to the justices if it is deemed not frivolous or otherwise barred. *See* RAP 17.2(b) (commissioner may refer a motion to the justices for their determination). A commissioner's ruling dismissing a personal restraint petition may be challenged by way of a motion to modify, which is referred to the justices for de novo review of the commissioner's ruling. RAP 17.7; *see also State v. Rolax*, 104 Wn.2d 129, 133, 702 P.2d 1185 (1985) (describing motion to modify in relation to a Court of Appeals commissioner's ruling).

In practice, the commissioner, unlike the chief judge in the Court of Appeals, ordinarily does not determine that a petition will be retained for a decision by the justices on the merits. Rather, if the commissioner determines that the petition may have merit or raises debatable issues, the commissioner usually will refer the petition to a department of the court, which will then decide whether the court should hear the petition on the merits or dismiss it. It is also usually left to the justices to decide whether a petition should be referred to the superior court for a reference hearing.

As indicated, the Supreme Court justices are organized into two departments, each comprised of the Chief Justice and four associate justices in alternating orders of seniority. Under the court's internal procedure rules, a department must unanimously agree whether to retain a petition for review before it for a decision on the merits or some other form of relief, or whether to grant a motion to modify a commissioner's ruling. If there is no unanimous agreement, the petition or motion to modify is continued to an en banc conference at which a majority of the court controls disposition of the matter.

3. Successive Petitions

If a petitioner previously filed a personal restraint petition, the Court of Appeals (and only the Court of Appeals) is barred from considering the petition in two circumstances: the petitioner raises "similar grounds" to those raised in the previous petition, or the petitioner raises a new ground for relief and fails to show good cause for not having raised the new ground in the previous petition. RCW 10.73.140; *In re Pers. Restraint of Bell*, 187 Wn.2d 558, 562, 387 P.3d 719 (2017). A successive petition seeks "similar relief" if it renews claims heard and determined on the merits in a previous

[2] For purposes of this memorandum, the term "commissioner" refers also to the Supreme Court's deputy commissioner, who has the power to perform the same acts as the commissioner while under the commissioner's supervision. SAR 15(l).

petition. *In re Pers. Restraint of Martinez,* 171 Wn.2d 354, 362, 256 P.3d 277 (2011); *In re Pers. Restraint of VanDelft,* 158 Wn.2d 731, 738, 147 P.3d 573 (2006). An issue will not be deemed to have been "heard and determined on the merits" if it was not sufficiently argued to command judicial consideration and discussion, and there is no reasonable basis to conclude that the merits were reviewed. *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 700, 9 P.3d 206 (2000).

The successive petition bar of RCW 10.73.140 also applies to forms of collateral challenge that are filed in superior court, including habeas corpus petitions, motions to vacate judgments, motions to withdraw guilty pleas, and motions for a new trial. *In re Pers. Restraint of Becker*, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). Thus, if a motion to vacate a plea is brought in superior court and denied, a subsequent petition for writ of habeas corpus will be summarily dismissed if it is based on the same grounds for relief or is based on frivolous new grounds. *Id*. at 498. If a petitioner files a personal restraint petition and the petition is dismissed, they may not thereafter file a motion in the superior court for a new trial based on similar grounds for relief. *State v. Brand*, 120 Wn.2d 365, 370, 842 P.2d 470 (1992).

But where a collateral challenge is first made in superior court, the first personal restraint petition filed thereafter is not subject to summary dismissal if it raises at least one nonfrivolous issue. *Becker*, 143 Wn.2d at 498; *In re Pers. Restraint of Bailey*, 141 Wn.2d 20, 27-28, 1 P.3d 1120 (2000). A nonfrivolous issue is a significant legal issue not previously raised and adjudicated. *Becker*, 143 Wn.2d at 499.

RCW 10.73.140 does not apply to the Supreme Court. *State v. Brown*, 154 Wn.2d 787, 794, 117 P.3d 336 (2005); *In re Pers. Restraint Stoudmire*, 141 Wn.2d 342, 351-52, 5 P.3d 1240 (2000). Thus, a successive petition filed directly in the Supreme Court seeking relief similar to that of a previous petition is not automatically barred, but under the appellate rules the petitioner must demonstrate "good cause" for reconsidering the similar ground for relief. RAP 16.4(d); *Martinez*, 171 Wn.2d at 362. A successive petition in the Supreme Court raising a new ground for relief will be barred only if the new petition constitutes an abuse of the writ. *Stoudmire*, 141 Wn.2d at 351-52; *In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 492, 789 P.2d 731 (1990). It is an abuse of the writ if the petitioner was represented by counsel throughout postconviction proceedings and the new issue was available but not relied upon in the prior petition due to inexcusable neglect. *In re Pers. Restraint of Turay,* 153 Wn.2d 44, 48, 54, 101 P.3d 854 (2004); *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 145, 102 P.3d 151 (2004). Thus, for instance, it is not an abuse of the writ if the new petition is based on newly discovered evidence or an intervening material change in the law. *Turay*, 153 Wn.2d at 49; *Stenson*, 153 Wn.2d at 145.

RCW 10.73.140 is jurisdictional, but the Court of Appeals has the power to decide its jurisdiction, and if it determines it has no jurisdiction, it ordinarily must transfer the petition to the Supreme Court. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 566 n.3, 933 P.2d 1019 (1997). Thus, when a successive petition in the Court of Appeals is barred under the statute because it raises a new ground for relief and the petitioner demonstrates no good cause for having not raised the issue previously, the court must transfer the petition to the Supreme Court. *Bell*, 187 Wn.2d at 562; *Martinez*, 171 Wn.2d at 362; *In re Pers. Restraint of Perkins*, 143 Wn.2d 261, 266-67, 19 P.3d 1027 (2001). If the successive petition is barred because it raises a similar ground for relief, the Court of Appeals will transfer it to the Supreme Court if it determines that RAP 16.4(d) (allowing similar grounds for relief to be raised in the Supreme Court for "good cause") might apply. *Bell*, 187 Wn.2d at 563; *Johnson*, 131 Wn.2d at 566; *Perkins*, 143 Wn.2d at 267. But if a petition is barred in the Court of Appeals because it is both successive *and* untimely, the court must dismiss the petition as untimely rather than transfer it to the Supreme Court. *Bell*, 187 Wn.2d at 564; *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 87, 74 P.3d 1194 (2003). If the Court of Appeals erroneously dismisses a successive petition that it should have transferred to the Supreme Court (*e.g.*, dismisses the petition as successive without also finding the petition is untimely), the Supreme Court on review of the dismissal order may transfer the petition to the Supreme Court and address the petition, either deciding it on the merits or dismissing it if it determines it is untimely. *Bell*, 187 Wn.2d at 564.

When a personal restraint petition is properly transferred to the Supreme Court, the commissioner will review it to determine whether the petitioner is potentially entitled to relief or whether the petition should be dismissed outright. RAP 16.11(b). As discussed above, the petitioner may challenge a ruling dismissing a petition by way of a motion to modify. RAP 17.7.

"Good cause," either for advancing the same ground for relief in the Supreme Court or for raising a new ground for relief in the Court of Appeals, is shown when there has been a significant and material intervening change in the law. *Brown*, 154 Wn.2d at 794; *Johnson*, 131 Wn.2d at 567.

When a petitioner raises a similar ground for relief in a successive petition, claiming that newly discovered evidence now supports relief on that ground, the petition will be barred by RCW 10.73.140 as being based on "similar grounds" unless the current evidence is significantly different in either quantum or quality from the evidence presented in the previous petition or collateral attack. *Brand*, 120 Wn.2d at 370.

4. Superior Court Proceedings

As indicated previously, a personal restraint petition may be referred to the superior court in two distinct ways. First, the appellate court may refer the matter to the superior court solely to make findings on factual disputes. At a reference hearing, the parties on motion are permitted reasonable discovery and have the right to subpoena witnesses, and the petitioner has the right to be present, the right to cross-examine witnesses, and the right to counsel to the extent authorized by statute. RAP 16.12. The rules of evidence apply. *Id*. Once the superior court makes its findings and forwards them to the Court of Appeals, the chief judge will dismiss the petition if, based on the findings, the issues presented are determined to be frivolous. If the petition is not frivolous, the chief judge will refer the petition to a panel of judges for a determination on the merits. RAP 16.12, 16.13. As indicated, in practice the justices of the Supreme Court ordinarily determine whether a reference hearing should be held for petitions considered originally by the Supreme Court. If the justices order a reference hearing, they will evaluate the superior court's findings following the hearing.

As an alternative to a reference hearing solely to determine facts, the appellate court may refer a petition to the superior court to both resolve factual disputes and determine the merits of the petition. The superior court will then enter findings of fact and conclusions of law and an order deciding the petition. RAP 16.12. The superior court's decision on the merits is then subject to an ordinary appeal to the appellate courts. RAP 16.14(b).

5. Appointed Counsel

There is generally no constitutional right to appointed counsel in postconviction proceedings. *In re Pers. Restraint of Bonds*, 165 Wn.2d 135, 143, 196 P.3d 672 (2008); *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999). But there is a statutory right to appointed counsel in specified circumstances: (1) when the chief judge determines the personal restraint petition is not frivolous and refers it to the judges for a decision on the merits or for a reference hearing in superior court, (2) when the offender responds to a collateral challenge filed by the State or responds to or prosecutes an appeal from a collateral challenge that was filed by the State, and (3) when the Supreme Court grants discretionary review of a Court of Appeals decision on a petition. RCW 10.73.150 (4), (5), (7). (There is also a statutory right to counsel in death penalty cases, which is no longer a consideration in Washington.) There is no statutory right to counsel to prosecute a second or subsequent collateral challenge to the same judgment and sentence. RCW 10.73.150(4). But by rule, the appellate court may also appoint counsel at public expense for indigent petitioners and provide for other expenses, such as preparation of the record if necessary. RAP 16.15(h). The filing fee is also waived for indigent petitioners. RAP 16.8(a). Despite the absence of a statutory right to counsel in a second or subsequent collateral challenge, it has been the Supreme Court's general

practice to appoint counsel for any petitioner whose petition is fully considered on the merits with oral argument.

C. Grounds for Relief

As the name of the action implies, a personal restraint petition is designed to obtain relief from "unlawful restraint." A person is under "restraint" if the person has limited freedom because of a court decision in a criminal or civil proceeding, if the person is confined or is subject to imminent confinement, or if the person "is under some other disability resulting from a judgment or sentence in a criminal case." RAP 16.4(a). An offender incarcerated in a correctional facility is necessarily "confined" and thus under "restraint" for purposes of this rule. *In re Pers. Restraint of Stuhr*, 186 Wn.2d 49, 52, 375 P.3d 1031 (2016); *Kozol v. Dep't of Corr.*, 185 Wn.2d 405, 409, 379 P.3d 72 (2016). Travel restrictions imposed on an offender serving a term of community custody is another form of restraint. *In re Pers. Restraint of Winton*, 196 Wn.2d 270, 275, 474 P.3d 532 (2020). The "other disability" provision allows the filing of a personal restraint petition to challenge a conviction for which the petitioner is no longer confined or a conviction that, even if overturned, would not result in release due to the existence of a valid concurrent sentence, in recognition of the fact that a conviction alone can impose a "disability" on a convicted person in terms of future consequences. *Martinez,* 171 Wn.2d at 363-64; *In re Pers. Restraint of Powell,* 92 Wn.2d 882, 887-88, 602 P.2d 711 (1979). Also, for example, a person may no longer be confined but may remain subject to legal financial obligations. *In re Pers. Restraint of Clements*, 125 Wn. App. 634, 640 n.2, 106 P.3d 244 (2005). A claim that the State is unlawfully taking money from an inmate's account may be raised by personal restraint petition. *In re Pers. Restraint of Pierce*, 173 Wn.2d 372, 377, 268 P.3d 907 (2011). But a personal restraint petition is not a proper action for seeking the return of money claimed to have been unlawfully taken. *In re Pers. Restraint of Sappenfield*, 138 Wn.2d 588, 595, 980 P.2d 1271 (1999).

Subject to the standards of review applicable to personal restraint petitions (to be discussed below), and subject to the proviso that the restraint must be a result of government action, restraint is "unlawful," and the petitioner is entitled to relief, if (1) the decision under which the restraint was imposed was entered without jurisdiction over the petitioner, (2) the conviction was entered or the sentence was imposed in violation of the federal constitution or the constitution or laws of Washington, (3) there is newly discovered evidence that requires vacation of the conviction or sentence, (4) there has been a significant change in the law material to the case that for good reason should retroactively apply to the case, (5) other grounds exist to collaterally challenge a criminal judgment or sentence or civil order of restraint, (6) the conditions or manner of restraint violate the federal constitution or the constitution or laws of Washington, or

(7) other grounds exist to challenge the legality of the restraint. RAP 16.4(c). In relation to subsections (2) and (6), the laws of Washington include the Washington Administrative Code, such as those regulations governing prison discipline. *Kozol*, 185 Wn.2d at 410; *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 149 n.6, 866 P.2d 8 (1994). As will be discussed, some of these grounds for relief also allow a petitioner to avoid the time limit on seeking collateral relief.

Like other forms of extraordinary relief, a court will grant relief by personal restraint petition only if other available remedies, such as direct appeal, are inadequate under the circumstances. RAP 16.4(d). Under this rule, a petitioner is not entitled to relief by personal restraint petition if intervening legislation provides effective relief. *State v. Scott*, 190 Wn.2d 586, 601, 416 P.3d 1182 (2018); *In re Pers. Restraint of McNeil*, 181 Wn.2d 582, 590-93, 334 P.3d 548, 554 (2014). A person civilly committed as a sexually violent predator may not be entitled to relief by personal restraint petition if they fail to show that statutory commitment review procedures are inadequate as applied. *In re Pers. Restraint of Meirhofer*, 182 Wn.2d 632, 648-51, 343 P.3d 731 (2015).

D. Standards of Review

With few exceptions, the standards applied on direct appeal for determining whether an error merits relief do not apply to personal restraint petitions and other collateral challenges. Different standards apply depending on the type of restraint being challenged or the nature of the grounds for relief.

1. Petitions Challenging Trial Court Error

Collateral relief from a conviction is an extraordinary remedy that seeks to disturb a final judgment; therefore, a personal restraint petitioner must meet a high standard to obtain relief. *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 506, 301 P.3d 450 (2013); *Coats*, 173 Wn.2d at 132-33. When claiming relief on the basis of trial court error, the personal restraint petitioner in most cases must demonstrate that they were actually and substantially prejudiced as a result of constitutional error or that the trial suffered from a fundamental defect of a nonconstitutional nature that inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Swagerty*, 186 Wn.2d 801, 807, 383 P.3d 454 (2016); *Finstad*, 177 Wn.2d at 506; *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). The petitioner must make this showing by a preponderance of the evidence. *Yates*, 177 Wn.2d at 17; *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). A showing of actual and substantial prejudice requires that there be an error of substance, not merely of procedure. *State v. Buckman*, 190 Wn.2d 51, 68, 409 P.3d 193 (2018). Thus, in contrast to direct appeal,

where the State bears the burden of showing that constitutional error is harmless beyond a reasonable doubt, a personal restraint petitioner bears the burden of demonstrating prejudice: that more likely than not they were prejudiced by the error. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 539, 309 P.3d 498 (2013). In conducting this inquiry, the court considers the totality of circumstances. *Id*.

In practice, the initial inquiry is whether an error occurred at all. To make this threshold determination, direct appeal review standards ordinarily apply. For example, a claim of prosecutorial misconduct is reviewed in much the same way in a collateral challenge as on direct appeal. *See In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). If there is no error, the petitioner is not entitled to relief. However, if the petitioner shows error, the query shifts to whether the error is constitutional or nonconstitutional in nature and whether the petitioner has shown the corresponding prejudice. *See Martinez*, 171 Wn.2d at 363, 368-69 (personal restraint petitioner's conviction vacated because of insufficient evidence).

No case defines precisely what a "fundamental defect" of a nonconstitutional nature consists of, but an example is an erroneous sentence if the sentence imposed is longer than it should have been. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002); *In re Pers. Restraint of Carrier*, 173 Wn.2d 791, 818, 272 P.3d 209 (2012).

There are certain constitutional errors that on appeal automatically require reversal. But an error that would be per se prejudicial on direct appeal usually is not per se prejudicial on collateral review. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992). Again, actual prejudice must be shown. *Buckman*, 190 Wn.2d at 61. A defective charging document, for example, is not per se prejudicial on collateral review. *Id*. And an error in the jury instructions that would be presumptively prejudicial on direct appeal is subject to the actual and substantial prejudice standard on collateral review. *Brockie*, 178 Wn.2d at 539. Moreover, a personal restraint petitioner seeking to withdraw a guilty plea based on a misstatement of the sentence must demonstrate actual and substantial prejudice from a plea rendered involuntary by such misinformation. *Buckman*, 190 Wn.2d at 60; *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 602-03, 316 P.3d 1007 (2014). In that context, the petitioner must show that more likely than not they would have refused to plead guilty and insisted on a trial had they not been misinformed. *Buckman*, 190 Wn.2d at 65. Prejudice must be shown when a petitioner claims that their right to a public trial was violated. *In re Pers. Restraint of Rhem*, 188 Wn.2d 321, 329, 394 P.3d 367 (2017). A timely and meritorious claim that appellate counsel was ineffective in not making a valid public trial argument on direct appeal entitles a petitioner to relief. *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804,

814, 100 P.3d 291 (2004). But a claim of ineffective assistance of appellate counsel is not meritorious where the public trial violation was invited at trial. *In re Pers. Restraint of Salinas*, 189 Wn.2d 747, 764-65, 408 P.3d 344 (2018). Among the constitutional errors for which relief is automatically available on collateral review are double jeopardy violations. *In re Pers. Restraint of Moi*, 184 Wn.2d 575, 579, 360 P.3d 811 (2015); *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007).

Finally, a petitioner claiming ineffective assistance of trial or appellate counsel necessarily establishes actual and substantial prejudice if the petitioner meets the standard of prejudice applicable on direct appeal: that but for counsel's deficient performance there is a reasonable probability the outcome would have been different. *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 538, 397 P.3d 90 (2017) (trial counsel); *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012) (trial counsel); *In re Pers. Restraint of Netherton*, 177 Wn.2d 798, 801, 306 P.3d 918 (2013) (appellate counsel).

2. Petitions Raising Issues Not Previously Subject to Judicial Review

Petitioners who had no prior opportunity for direct judicial review of a claimed error are excepted from the heightened standards of review discussed above. *Stuhr*, 186 Wn.2d at 52; *In re Pers. Restraint of Lain*, 179 Wn.2d 1, 10, 315 P.3d 455 (2013); *Pierce*, 173 Wn.2d at 377; *Isadore*, 151 Wn.2d at 299; *Gronquist II*, 192 Wn.2d at 319. This may occur, for instance, when a term is added to a sentence after the time for direct appeal has passed. *Isadore,* 151 Wn.2d at 299-300. Other cases in which the heightened standards of review do not apply include: (1) decisions of the governor on parolability, *Lain*, 179 Wn.2d at 13-25; (2) decisions of the Indeterminate Sentence Review Board on minimum sentences and parolability, *In re Personal Restraint of Brooks*, 197 Wn.2d 94, 98-99, 480 P.3d 399 (2021); *Cashaw*, 123 Wn.2d at 149; (3) administrative decisions revoking good conduct credits for failure to participate in prison programs, *In re Personal Restraint of Garcia*, 106 Wn. App. 625, 629, 24 P.3d 1091, 33 P.3d 750 (2001); (4) Department of Corrections sanctions for community custody violations, *In re Personal Restraint of Dalluge*, 162 Wn.2d 814, 817, 177 P.3d 675 (2008); (5) prison disciplinary decisions, *Stuhr*, 186 Wn.2d at 52, *In re Personal Restraint of Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285 (2010); (6) inmate risk reclassification decisions affecting eligibility to earn early release credits, *In re Personal Restraint of Pullman*, 167 Wn.2d 205, 209, 218 P.3d 913 (2009); (7) calculation of inmate release dates, *Gronquist II*, 192 Wn.2d at 321-26; (8) conditions of confinement, *In re Personal Restraint of Williams*, 198 Wn.2d 342, 353, 496 P.3d 289 (2021); and (9) claims that the Department of Corrections has unlawfully taken funds from inmate accounts. *Pierce*, 173 Wn.2d at 377. In such cases the petitioner need only show that their restraint

is unlawful under one or more of the criteria listed in RAP 16.4(d). *Williams*, 198 Wn.2d at 352; *Stuhr*, 186 Wn.2d at 52; *Lain*, 179 Wn.2d at 10.

The heightened standard that must be met for collateral relief also does not apply where the ground for relief that the petitioner raises could not have been presented on direct appeal because the facts supporting that ground for relief were not in the record. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). In this circumstance, the personal restraint petition is effectively the first opportunity to obtain appellate review of the claimed error. *Id*.

To specifically establish the unlawfulness of a prison disciplinary action that implicates a protected liberty interest (such as the loss of early release credits already earned), the petitioner must show that the action was so arbitrary and capricious as to deprive the petitioner of a fundamentally fair proceeding to his prejudice. *Grantham*, 168 Wn.2d at 215; *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999) (*Gronquist I*). A fundamentally fair disciplinary proceeding requires notice, an opportunity to provide evidence and call witnesses when not unduly hazardous to facility safety and correctional goals, and receipt of a written statement of the evidence relied upon and the reasons for the disciplinary sanction. *Grantham*, 168 Wn.2d at 215-16; *Gronquist I*, 138 Wn.2d at 396-97. The disciplinary decision must be supported by some evidence. *Grantham*, 168 Wn.2d at 216. These fundamental due process protections apply only to disciplinary actions that implicate a protected liberty interest. *Kozol*, 185 Wn.2d at 409-10. But even where no liberty interest is implicated, a disciplinary action may be challenged by personal restraint petition on other grounds, such as violation of regulations governing disciplinary proceedings. *Id*. at 410-11.

3. Factual and Evidentiary Standards

The personal restraint petitioner bears the burden of proving they are under unlawful restraint. *Brooks*, 197 Wn.2d at 99. The petitioner must state the "facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations." RAP 16.7(a)(2). Thus, a petitioner must state with particularity facts that, if proven, would entitle the petitioner to relief. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). This means that the petitioner is not required to actually present evidence but must at least identify the existence of material evidence and where it can be found. *Ruiz-Sanabria*, 184 Wn.2d at 641. A petitioner may support a petition by relating material facts within the petitioner's personal knowledge, even if the petitioner's version of the facts are self-serving. *Id*. But bald assertions and conclusory allegations are not sufficient. *Rice*, 118 Wn.2d at 886; *Yates*, 177 Wn.2d at 18. And arguments made only in broad general terms are insufficient. *Rhem*, 188 Wn.2d at 327. If the petitioner's allegations are based on matters

outside the existing record, the petitioner must demonstrate that they have competent, admissible evidence supporting the allegations. *Yates*, 177 Wn.2d at 18. If the evidence is based on knowledge in the possession of others, the petitioner must present their affidavits, with admissible statements, or other corroborative evidence. *Id*. If facts are in court records, the petitioner must identify the records needed for review, which the appellate court may order transmitted to the court. RAP 16.7(a)(3). Factual allegations must be based on more than mere speculation, conjecture, or inadmissible hearsay. *Yates*, 177 Wn.2d at 18Only by showing that the petitioner has admissible evidence supporting the facts stated in the petition may the petitioner obtain a reference hearing in the event of factual disputes. *Id*. Entitlement to a reference hearing is basically determined by the summary judgment standard; that is, if with competent evidence the petitioner can show there is a genuine disputed issue of material fact, a reference hearing may be ordered. Discovery is allowed at public expense in personal restraint petitions only in "rare circumstances" where the petitioner can show a substantial likelihood that discovery will lead to evidence compelling relief. *Gentry*, 137 Wn.2d at 392. As indicated, however, when a petition is referred to the superior court for a reference hearing, the parties will be granted reasonable pretrial discovery. RAP 16.12.

If the appellate court asks the State to file a response, the State must respond directly to the petitioner's factual allegations. RAP 16.9(a). If the State has relevant records in its possession, it should produce them in support of its response. *Id*. The State should also identify all material disputing questions of fact. *Id*. After passage of the 60-day period for filing a response, the court may ask the State to admit or deny specific allegations. RAP 16.9(b). But the State will not be asked to respond to a petition if it can be determined without a response that the petition is clearly frivolous or clearly procedurally barred. RAP 16.8.1(b).

E. Petitions Raising Grounds for Relief Raised on Direct Appeal

A personal restraint petitioner may not renew a ground for relief that was raised and rejected on direct appeal unless the interests of justice require reconsideration of that ground. *In re Pers. Restraint of Knight*, 196 Wn.2d 330, 341, 473 P.3d 663 (2020); *Yates*, 177 Wn.2d at 17. A ground for relief was "raised and rejected on direct appeal" if the same ground presented in the petition was determined adversely to the petitioner on appeal and the prior determination was on the merits. *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755 (1986). A "ground" is a distinct legal basis for granting relief. *Id*. at 688. If there is doubt about whether two grounds are different or the same, the doubt should be resolved in the petitioner's favor. *Id*.

The interests of justice are served by reconsidering a ground for relief if there has been an intervening material change in the law or some other justification for having

failed to raise a crucial point or argument on appeal. *Yates*, 177 Wn.2d at 17; *Gentry*, 137 Wn.2d at 378. Newly discovered evidence also may justify renewing an issue considered and rejected on appeal. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 886, 952 P.2d 116 (1998). Besides demonstrating the materiality of the evidence and the probability of its effect on the result, the petitioner must show that the evidence could not have been discovered in time to be included in the record on direct appeal. *Id*.

This is a narrow exception to the general rule against relitigation, and any change in the law must be clearly established. *See In re Pers. Restraint of Knight*, 196 Wn.2d 330, 342, 473 P.3d 663 (2020) (Court of Appeals decision on double jeopardy claims was not an intervening change of law). A "new" ground for relief is not created merely by supporting a previous ground with different factual allegations or different legal arguments, or by couching the claim in different language. *Yates*, 177 Wn.2d at 17; *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 329, 868 P.2d 835 (1994); *Jeffries*, 114 Wn.2d at 488. For example, a petitioner generally may not renew a previously determined issue simply by recasting it as a claim of ineffective assistance of counsel. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001); *Benn*, 134 Wn.2d at 906. But even if a petitioner made a claim of ineffective assistance of counsel on direct appeal, the petitioner may assert ineffective assistance on a different basis on collateral review. *Khan*, 184 Wn.2d at 688-89.

F. Statute of Limitations

1. Principles of Finality

Petitioners challenging a judgment and sentence have one year from the time the judgment and sentence becomes final to file a personal restraint petition, but this time limit also applies to other forms of collateral challenge, such as petitions for writs of habeas corpus, motions to vacate or modify judgments, and motions to withdraw guilty pleas. RCW 10.73.090(1), (2).

A judgment is "final" for purposes of triggering the one-year time limit when a judgment is filed with the clerk of the trial court if the judgment is not appealed, when an appellate court issues its mandate disposing of a timely direct appeal, or when the United States Supreme Court denies a timely petition for certiorari to review a decision affirming a conviction on direct appeal, whichever is latest. RCW 10.73.090(3); *see State v. Kilgore*, 167 Wn.2d 28, 35-36, 216 P.3d 393 (2009). Although, as discussed above, CrR 7.8 proceedings in superior court are not personal restraint petitions, the time bar applies to all post-conviction proceedings, including post-conviction matters addressed initially in the superior court. *State v. Molnar*, 198 Wn.2d 500, 508, 497 P.3d 858 (2021). Both the courts and the litigants should review whether the time bar applies

to such superior court proceedings, and if so whether any exemption applies, as discussed below. *See Id.* at 509-10 (postconviction motion addressed on merits in superior court should have been transferred to Court of Appeals for consideration as personal restraint petition and then dismissed as untimely).

If a case on direct appeal is remanded for resentencing, the time limit generally does not begin to run until after the finality (including any direct appeal) of the amended judgment and sentence. *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 948-52, 162 P.3d 413 (2007); *State v. Contreras-Rebollar*, 177 Wn.2d 563, 565, 303 P.3d 1062 (2013). These principles of finality also generally apply when the finality of a judgment and sentence is delayed by post-judgment motions. *In re Pers. Restraint of Amos*, 1 Wn. App. 2d 578, 589-90, 406 P.3d 707 (2017). But for cases remanded after an appeal, current Court of Appeals case law holds that remand only to correct a scrivener's error and not to alter the sentence does not delay the finality of the original judgment and sentence for purposes of the time limit. *In re Pers. Restraint of Sorenson*, 200 Wn. App. 692, 699-707, 403 P.3d 109 (2017). The Supreme Court denied discretionary review of *Sorenson*.

If after finality of a judgment and sentence an offender successfully challenges their sentence by personal restraint petition, the resentencing does not restart the time limit on collateral review so as to allow the offender to assert otherwise untimely claims challenging the original judgment and sentence. *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 424-27, 309 P.3d 451 (2013).

A historically unique situation occurred in 2020, after the governor issued a proclamation (20-47) suspending RCW 10.73.090 for 30 days (April 14 to May 14, 2020) in response to disruptions in court and prison operations caused by the COVID-19 pandemic. Thus, a petition that ordinarily should have been filed during this period of suspension in order to make it timely was still timely if filed within the tolling period after the suspension was lifted.

Numerous offenders challenging long final judgments and sentences interpreted Proclamation 20-47 broadly as suspending RCW 10.73.090 with respect to all collateral challenges, making no petition subject to the time limit if filed during the suspension period. Two divisions of the Court of Appeals rejected that novel argument, holding that the proclamation preserved existing rights to file collateral challenges without resurrecting expired claims. *In re Pers. Restraint of Millspaugh*, 14 Wn. App. 2d 137, 141, 469 P.3d 336 (2020) (Div. Three); *In re Pers. Restraint of Blanks*, 14 Wn. App. 2d 559, 560-61, 471 P.3d 272 (2020) (Div. Two). Other untimely personal restraint petitions asserting this claim were dismissed by way of orders issued by the acting chief judges of the Court of Appeals. Motions for discretionary review of these decisions

have been denied by the Supreme Court, generally by way of deputy commissioner or commissioner rulings. Thus far the Supreme Court has not granted review of this issue.

2. Avoiding the Time Bar

a. Statutory Exemptions

A petitioner may not file a collateral challenge more than one year after a facially valid judgment and sentence was entered by a court with competent jurisdiction. RCW 10.73.090(1). Thus, by implication, the time limit may be avoided if the judgment and sentence is invalid on its face or was entered by a court without competent jurisdiction. *In re Pers. Restraint of Weber*, 175 Wn.2d 247, 255, 284 P.3d 734 (2012). Also, the limit does not apply if the petition is based *solely* on one or more of the statutory exceptions to the time limit listed in RCW 10.73.100. *Stoudmire*, 141 Wn.2d at 349-51. If an untimely petition is "mixed"—that is, it raises both untimely claims and claims that are exempt from the time limit under RCW 10.73.100—it must be dismissed. *In re Pers. Restraint of Thomas*, 180 Wn.2d 951, 953, 330 P.3d 158 (2014); *In re Pers. Restraint of Stenson*, 150 Wn.2d 207, 220, 76 P.3d 241 (2003); *In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 702, 72 P.3d 703 (2003). The court in this circumstance will not analyze all of the claims to determine which are timely and which are not, nor will it decide claims that are not time barred. *Hankerson*, 149 Wn.2d at 703. However, even if a petition is "mixed" in relation to the exemptions listed in RCW 10.73.100, the court will address challenges to the facial validity of the judgment and sentence or to the jurisdiction of the trial court pursuant to RCW 10.73.090(1). *Stenson*, 150 Wn.2d at 220; *Stoudmire*, 141 Wn.2d at 349-52.

Ordinarily, for a petition to be timely, it must be received by the appellate court within the time limit. RAP 18.6(c). But for prison inmates, a petition will be deemed timely if it is deposited in the prison mailing system by the deadline date. *Id.*; GR 3.1(a). An amendment or supplement to a petition may be filed, but the amendment itself must also be timely or exempt from the time limit to be considered. *Rhem*, 188 Wn.2d at 327; *Contreras-Rebollar*, 177 Wn.2d at 565; *In re Pers. Restraint of Haghighi*, 178 Wn.2d 435, 446, 309 P.3d 459 (2013). In other words, if the original petition was timely, an untimely amendment does not "relate back" to the original petition. *Haghighi*, 178 Wn.2d at 446. On this point, recent amendments to Rules of Appellate Procedure specifically require that amendments to petitions raising additional grounds for relief comply with the time requirements of RCW 10.73.090 and .100. RAP 16.8(e).

(i) Facial Invalidity

For purposes of the exception to the time limit for facially invalid judgments, a judgment is "invalid" if the trial court exercised power that it did not have, most typically by imposing a sentence not authorized by law. *In re Pers. Restraint of Flippo*, 187 Wn.2d 106, 110, 385 P.3d 128 (2016); *In re Pers. Restraint of Snively*, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014); *Stockwell*, 179 Wn.2d at 593; *Coats*, 173 Wn.2d at 136. For example, a sentence is facially invalid if it exceeds the duration allowed by statute. *In re Pers. Restraint of McWilliams*, 182 Wn.2d 213, 215 n.2, 340 P.3d 223 (2014); *In re Pers. Restraint of West*, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005); *In re Pers. Restraint of Tobin*, 165 Wn.2d 172, 176, 196 P.3d 670 (2008). Similarly, if the trial court included a "washed out" prior conviction in the offender score, the error may be challenged beyond the one-year time limit if the error affected the proper standard sentence range. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866-68, 50 P.3d 618 (2002). Another facial defect is a conviction for a nonexistent crime. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004); *In re Pers. Restraint of Knight*, 4 Wn. App. 2d 248, 252-53, 421 P.3d 514 (2018). An exceptional sentence imposed without required findings is also facially defective. *Finstad*, 177 Wn.2d 501.

The inquiry into whether a sentence is invalid on its "face" is not confined to the four corners of the judgment and sentence. Rather, documents outside the four corners of the judgment and sentence showing that the sentence imposed is erroneous may be consulted. *Coats*, 173 Wn.2d at 139-40; *Carrier*, 173 Wn.2d at 799-800. For example, the Supreme Court in *Carrier* determined that a persistent offender sentence was facially invalid because it was based in part on a prior conviction that had been dismissed, as revealed by the dismissal document. *Carrier*, 173 Wn.2d at 800, 818. The matters consulted, however, must be ones that show that the trial court exceeded its authority. *Id*. at 800. Documents like jury instructions and records of evidentiary rulings that simply show error in the conduct of a trial are not part of the "face" of a judgment and sentence demonstrating error exempt from the time limit on collateral relief. *Id*.; *Coats*, 173 Wn.2d at 140. The Supreme Court, however, has not settled on a bright line rule as to what matters may be consulted. *See In re Pers. Restraint of Scott,* 173 Wn.2d 911, 917, 922, 271 P.3d 218 (2012) (lead opinion of Chambers, J.; concurrent opinion of Stephens, J.) (disagreeing on whether jury instructions may ever be consulted). But a majority has agreed that verdict forms may be examined to show that the judgment and sentence does not conform to the jury's verdict. *Id*. at 917, 921-22, 924 (lead opinion of Chambers, J.; concurring opinion of Stephens, J.; dissenting opinion of C. Johnson, J.).

When the judgment is based on a guilty plea, the "face" of the judgment includes those documents signed as part of the plea agreement. *Stoudmire*, 141 Wn.2d at 353. But plea documents are relevant in this regard only where they may disclose invalidity in the judgment and sentence itself, not where they simply disclose a defect in the plea.

In re Pers. Restraint of Clark, 168 Wn.2d 581, 587, 230 P.3d 156 (2010); *In re Pers. Restraint of McKiearnan*, 165 Wn.2d 777, 781-82, 203 P.3d 375 (2009); *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 533, 55 P.3d 615 (2002). Generally, an invalid guilty plea is not alone a facial error exempt from the time limit. *Snively*, 180 Wn.2d at 32; *In re Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759, 770, 297 P.3d 51 (2013). Thus, for example, if a judgment facially imposes a correct community placement term, a petitioner may not assert that the judgment is facially invalid simply because the plea statement did not inform him of the correct community placement term. *Hemenway,* 147 Wn.2d at 532-33.

A judgment and sentence is not facially invalid if it contains a mere technical mistake that has no actual effect on the petitioner's rights or on the sentence. *Toledo-Sotelo*, 176 Wn.2d at 767. For example, the Supreme Court found no facial invalidity in a judgment and sentence that misstated the seriousness level and offender score of the crime where it otherwise recited the correct standard range and imposed a sentence within the correct range. *Id*. at 768. In a case where the judgment and sentence erroneously recited that the maximum sentence for the crime was 20 years to life instead of the correct maximum of simply life, the Supreme Court held that the mistake was a mere technical defect, since the judgment correctly stated the absolute maximum of life and the defendant was otherwise given a correct standard range sentence. *McKiearnan*, 165 Wn.2d at 782-83. Even if the judgment and sentence wholly misstates the maximum sentence, such as by stating that the maximum is life rather than the correct 10 years, the defect is not a facial one if the petitioner otherwise received a correct standard range sentence. *Coats*, 173 Wn.2d at 143. In such a case, the only remedy is correction of the error. *Id*. at 144; *State v. Wheeler*, 183 Wn.2d 71, 79, 349 P.3d 820 (2015). A petitioner in that instance may not claim the error as a basis for mounting an untimely challenge to a guilty plea. *Coats*, 173 Wn.2d at 144.

If the judgment and sentence does impose a facially incorrect sentence, again the only remedy is correction of the error or resentencing. *McWilliams*, 182 Wn.2d at 217-18. The existence of a facial sentencing error does not act as a "super exception" to the time limit that allows a petitioner to assert claims that are otherwise barred by the time limit, such as ineffective assistance of counsel. *Adams*, 178 Wn.2d at 426.

Finally, even if the petitioner demonstrates facial error, they still must establish that they were actually and substantially prejudiced by constitutional error or that the judgment and sentence suffers from a fundamental defect resulting in a complete miscarriage of justice. *In re Pers. Restraint of Yates*, 180 Wn.2d 33, 41, 321 P.3d 1195 (2014); *Finstad*, 177 Wn.2d at 506; *Carrier*, 173 Wn.2d at 818. As indicated earlier, an unlawful sentence can be a fundamental defect, as, for example, when the sentence is longer than lawfully allowed. *Carrier*, 173 Wn.2d at 818. In determining whether a

facial sentencing error is prejudicial, the court looks to the practical effects resulting from the error. *Yates*, 180 Wn.2d at 41. Thus, in *Yates*, the court found no practical effect of erroneously imposing a determinate sentence of 408 years rather than a correct indeterminate sentence of 408 years to life. *Id*. Where, for instance, the trial court commits facial error by failing to enter findings and conclusions in support of an exceptional sentence following a guilty plea, no prejudice or miscarriage of justice occurs requiring reversal of the sentence if the plea agreement was favorable to the petitioner and the sentence imposed is the one the petitioner knew the State would recommend as part of the plea agreement. *Finstad*, 177 Wn.2d at 509-10.

(ii) RCW 10.73.100

Under RCW 10.73.100, certain grounds for relief, if not "mixed" with other grounds for relief, may be asserted beyond the time limit. These exemptions are (1) newly discovered evidence uncovered with reasonable diligence, (2) facial or as applied unconstitutionality of the statute under which the petitioner was convicted, (3) double jeopardy, (4) insufficient evidence to support the conviction (if the petitioner pleaded not guilty), (5) a sentence in excess of the trial court's jurisdiction, and (6) a significant and material change in the law that applies retroactively. (It should be noted that a double jeopardy violation may also constitute a facial defect. *In re Pers. Restraint of Strandy*, 171 Wn.2d 817, 820, 256 P.3d 1159 (2011).)

Previous Supreme Court precedent indicated that the claimed exempt ground for relief must have merit for the exemption to apply. Thus, for instance, the court held that a claim of newly discovered evidence did not exempt a petition from the time limit because the evidence presented did not qualify as newly discovered. *Stenson*, 150 Wn.2d at 220. Similarly, the court held that a petition claiming insufficient evidence to support the conviction was time barred because there was no merit to the petitioner's claim that the evidence was insufficient. *Bell*, 187 Wn.2d at 565-66. But more recently, the court, before examining the merits, held that a petition raising a double jeopardy claim was exempt from the time limit because such a claim is exempt under RCW 10.73.100(3). *In re Pers. Restraint of Schorr*, 191 Wn.2d 315, 320, 422 P.3d 451 (2018). The court observed that the question of whether a claim is exempt "is a threshold inquiry; we do not have to decide whether the entire claim is completely meritorious in order to decide whether it fits within an exception to the time bar." *Id*.

In determining whether the exemption for newly discovered evidence has merit, the court employs the same standard as that applicable to motions for a new trial based on newly discovered evidence. *Lord*, 123 Wn.2d at 319-20. Specifically, the evidence (1) must be such that it would probably change the result of the trial, (2) must have been discovered since trial, (3) must not have been discoverable before trial by the exercise

of due diligence, (4) must be material, and (5) must not be merely cumulative or impeaching. *Id*. at 320; *Stenson*, 150 Wn.2d at 217. An issue that has been recognized but not squarely addressed is whether newly discovered evidence can be used as a gateway for seeking relief on otherwise time-barred grounds, such as preaccusatorial delay or ineffective assistance of trial counsel *See Wheeler*, 183 Wn.2d at 82 n.5 (taking note of the exemption applicability issue as it applied to a preaccusatorial delay claim, but not deciding the issue because the question was not properly before court); *In re Pers. Restraint of Yates*, 183 Wn.2d 572, 576, 353 P.3d 1283 (2015) (rejecting on the merits newly discovered evidence claim concerning effectiveness of trial counsel without adopting broad interpretation of exemption as applying to ineffectiveness claims).

Whether the statutory exemption for an unconstitutional statute of conviction under RCW 10.73.100(2) applies to sentencing statutes is a doubtful proposition in light of the Supreme Court's recent decision in *In re Personal Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021). The two petitioners in that case were 19 and 20 years-old when they committed aggravated first degree murder. The trial courts imposed mandatory sentences of life without the possibility of parole. RCW 10.95.030. Many years after the petitioners' judgments and sentences were final, they filed personal restraint petitions challenging the sentences. A five-justice majority of the Court granted relief but not on unified grounds. The four-justice lead opinion held the petition was exempt from the one-year time limit under RCW 10.73.100(2), broadening application of the exemption to a mandatory life sentencing statute it held to be unconstitutional as applied to defendants between the ages of 18 and 21. *Monschke* at 309-11, 326.

Writing separately, the Chief Justice agreed the petitioners were entitled to relief but rejected the lead opinion's application of RCW 10.73.100(2), agreeing with the four-justice dissent that the exemption did not apply to sentencing statutes. *Id*. at 329 (González, C.J., concurring). The Chief Justice expressed the view that the petitioners were entitled to relief under retroactive application of the young adult offender sentencing analysis explicated in *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). *Id*. But a majority of the Supreme Court previously held that *O'Dell* did not constitute a significant change in the law for purposes of RCW 10.73.100(6). *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 337-38, 422 P.3d 444 (2018). So far only four justices have adopted the view that RCW 10.73.100(2) applies to sentencing statutes. *Monschke* at 326. As Division Two of the Court of Appeals observed, after engaging in an extensive discussion of the Supreme Court's decision in *Monschke*, "five justices clearly agreed that the RCW 10.73.100(2) exception does not apply to sentencing statutes." *In re Pers. Restraint of Williams*, 18 Wn. App. 2d 707, 716, 493 P.3d 779

(2021) (citing *Monschke*, 197 Wn. 2d at 329 (González, C.J., concurring), 334-35 (Owens, J., dissenting)).[3]

Under the statutory exemption for sentences in excess of jurisdiction, RCW 10.73.100(5), "jurisdiction" refers to both personal and subject-matter jurisdiction, including sentences based on nonexistent laws. *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 441 n.5, 853 P.2d 424 (1993). A court has subject matter jurisdiction if it has the authority to adjudicate the type of controversy before it. *State v. Moen*, 129 Wn.2d 535, 545, 919 P.2d 69 (1996). A sentence is not jurisdictionally defective merely because it violates a statute or is based on a misinterpretation of a statute. *In re Pers. Restraint of Vehlewald*, 92 Wn. App. 197, 201-02, 963 P.2d 903 (1998). Thus, for instance, a sentence based on an erroneously calculated offender score stemming from a faulty "same criminal conduct" analysis, while it may be challenged in a timely personal restraint petition, is not a "jurisdictional" defect permitting a challenge beyond the time limit. *Id*. Note, however, that a sentencing error that is evident on the face of the judgment may be challenged beyond the time limit pursuant to RCW 10.73.090(1), as in the case, related above, of the facially erroneously inclusion of a "washed out" prior conviction in the offender score that affects the proper standard range. *In re Pers. Restraint of LaChapelle*, 153 Wn.2d 1, 6, 100 P.3d 805 (2004).

Under the statutory exemption for "significant change[s] in the law," RCW 10.73.100(6), a significant change in the law occurs if an intervening appellate opinion effectively overturns a prior appellate decision that was originally determinative of a material issue. *In re Pers. Restraint of Colbert*, 186 Wn.2d 614, 619, 380 P.3d 504 (2016); *In re Pers. Restraint of Domingo*, 155 Wn.2d 356, 366, 119 P.3d 816 (2005); *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005). A petitioner may assert this exemption even if they could have raised the change in law in a previous petition but failed to do so, and even if the change occurred before the one-year time limit expired. *Greening*, 141 Wn.2d at 698. The key is whether an argument was previously "available." The exemption from the time limit thus does not apply if the petitioner relies on an opinion that merely settles a point of law without overturning prior precedent, or that simply applies settled law to new facts. *Domingo*, 155 Wn.2d at 368; *Turay*, 150 Wn.2d at 83.

Even if an appellate decision signals a potential significant change in the law, it must be "material" to the petitioner's case for purposes of RCW 10.73.100(6). *In re Pers. Restraint of Garcia-Mendoza*, 196 Wn.2d 836, 846-47, 479 P.3d 674 (2021). In other words, the change must affect a materially determinative issue in the petition. *Turay*, 150 Wn.2d at 83; *Greening*, 141 Wn.2d at 697. For example, a new Supreme

[3] A motion for discretionary review of *Williams* is pending in the Supreme Court. No. 100222-0.

Court decision invalidating a pattern jury instruction on accomplice liability would not be material where petitioner's prosecution did not involve accomplices. But retroactive application of a United States Supreme Court decision requiring that a non-citizen defendant be informed of readily ascertainable immigration consequences can be material if the petitioner can prove counsel was ineffective in not providing such advice. *Garcia-Mendoza*, 196 Wn.2d at 847.

Furthermore, for the change in law to qualify for the exemption, it must apply retroactively to the case at hand. RCW 10.73.100(6); *In re Pers. Restraint of Gentry*, 179 Wn.2d 614, 625, 316 P.3d 1020 (2014). When a change in law consists of an appellate decision, retroactivity comes into play only if the petitioner's judgment was final before the new appellate decision was issued. *See Kilgore,* 167 Wn.2d at 35-36; *State v. Evans*, 154 Wn.2d 438, 442, 114 P.3d 627, *cert. denied*, 546 U.S. 983 (2005). If the petitioner's judgment was not final or was still pending on direct appeal when the new appellate decision was issued, the new decision generally will apply. *Evans*, 154 Wn.2d at 444. A judgment that has been appealed remains pending, and therefore is not "final," until the availability of appeal in state court has been exhausted and the time for filing a petition for writ of certiorari in the Supreme Court (90 days) has elapsed or a petition for writ of certiorari has been finally denied. *Kilgore*, 167 Wn.2d at 35-36; *Skylstad*, 160 Wn.2d at 948-54; *St. Pierre*, 118 Wn.2d at 327.

In determining whether an appellate decision applies retroactively to final judgments for purposes of RCW 10.73.100(6), the Washington Supreme Court follows the analysis set forth in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). *In re Pers. Restraint of Ali*, 196 Wn.2d 220, 236, 474 P.3d 507 (2020); *Colbert*, 186 Wn.2d at 623-26; *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 100, 351 P.3d 138 (2015); *Haghighi*, 178 Wn.2d at 441-43. Under the *Teague* analysis, if an appellate decision did not announce a "new" rule, it applies to all timely cases on collateral review, but if the decision established a "new" rule of law it applies retroactively to previously final decisions only if it announced a substantive rule that places certain behavior beyond criminal law-making authority to proscribe, or if it announced a watershed rule of criminal procedure implied in the concept of ordered liberty. *Teague*, 489 U.S. at 311 (quotation marks removed); *Colbert*, 186 Wn.2d at 624. It should be noted, however, that the *Teague* analysis on watershed rules of criminal procedure is no longer operative as a matter of federal law in light of *Edwards v. Vannoy*, 141 S. Ct. 1547, 1559-60, 209 L. Ed. 2d 651 (2021), where the United States Supreme Court held that no new procedural rules, "watershed" or otherwise, apply retroactively on federal collateral review.

The *Teague* analysis is not binding on state courts except as to new substantive rules of federal constitutional law that control the outcome of a case, which must be

given retroactive effect. *Danforth v. Minnesota*, 552 U.S. 264, 280-81, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008); *Montgomery v. Louisiana*, 136 S. Ct. 718, 729, 193 L. Ed. 2d 599 (2016). But to date the Washington Supreme Court continues to apply federal retroactivity analysis in all cases. *See Colbert*, 186 Wn.2d at 623-26; *Haghighi*, 178 Wn.2d at 442-43. For instance, the court applied the *Teague* analysis to hold that *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), which articulated a lawyer's duty to inform a client of the immigration consequences of pleading guilty to a crime, constituted a significant change in the law in Washington for purposes of RCW 10.73.100(6), and that it applies retroactively to previously final judgments. *Yung-Cheng Tsai*, 183 Wn.2d at 100-07. More recently, the court applied the *Teague* analysis to hold that *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), which concerned juvenile sentencing, constituted a significant change in the law that was retroactively applicable for purposes of RCW 10.73.100(6). *Ali*, 196 Wn.2d at 236-42. But the question of whether an appellate decision announced a "new" rule for purposes of *Teague* retroactivity analysis is distinct from the question of whether the decision constitutes a "significant change in the law" for purposes of the exemption from the time limit. *Yung-Cheng Tsai*, 183 Wn.2d at 103-07 (holding that *Padilla* is not a "new" rule for *Teague* purposes and therefore applies to cases on collateral review, but that it does constitute a "significant change" in Washington law, making it also applicable to otherwise untimely collateral challenges); *see also In re Pers. Restraint of Garcia-Mendoza*, 196 Wn.2d 836, 846-47, 479 P.3d 674 (2021) (ineffective assistance for failure to advise of immigration consequences falls within exemption to time bar, but remanded for reference hearing to test evidence that counsel was constitutionally ineffective).

It should also be noted that a decision claimed to be a change in the law may be "retroactive" if the decision involves the interpretation of a statute, under the principle that construction of a statute by the state Supreme Court is deemed to relate back to the effective date of the statute. *Colbert*, 186 Wn.2d at 620.

As indicated, the Washington Supreme Court in *Schorr* stated that whether a ground for relief falls within an exemption from the time limit is a threshold question. *Schorr*, 191 Wn.2d at 320. But in a more recent case, the court took a different approach to the question whether a personal restraint petition was timely under the exemption for significant changes in the law. In *In re Pers. Restraint of Meippen*, 193 Wn.2d 310, 314-17, 440 P.3d 978 (2019), the then-unsettled issue was whether *Houston-Sconiers*, 188 Wn.2d 1, constituted a significant change in the law that applied retroactively to a previously final judgment for purposes of RCW 10.73.100(6). A five-justice majority avoided that question by holding that the petitioner could not make "a threshold, prima facie showing of actual and substantial prejudice" arising from the claimed constitutional error, and therefore the petitioner was not entitled to collateral relief in

any event. *Meippen*, 193 Wn.2d at 317. But the statute governing the timeliness of collateral challenges states that such a challenge may not be brought if a facially valid judgment and sentence is filed in a court of competent jurisdiction and the petitioner does not assert solely grounds for relief falling within RCW 10.73.100. RCW 10.73.090(1); *see also Coats*, 173 Wn.2d at 131. This statutory threshold requirement was noted in the four-justice dissent in *Meippen*, which took the position that the timeliness issue, particularly the applicability of *Houston-Sconiers* under RCW 10.73.100(6), had to be resolved before the court could consider whether the petitioner established prejudicial error on the merits of the petition. *Meippen*, 193 Wn.2d at 318-20 (Wiggins, J., dissenting).

Whether the *Meippen* analysis will be the prevailing approach is questionable. As discussed, the Supreme Court subsequently held that *Houston-Sconiers* does constitute a significant and retroactive change in the law for purposes of RCW 10.73.100(6). *Ali*, 196 Wn.2d at 233-42. In tackling the timeliness issue directly, the court clarified that the sequence it applied in *Meippen*—examining actual and substantial prejudice before discussing timeliness—is "not required," and instead adhered to the threshold timeliness analysis applied in *Schorr* and earlier decisions. *Ali*, 196 Wn.2d at 233, n.2.

The exemption in RCW 10.73.100(6) is analogous to the ground for relief listed in RAP 16.4(c)(4) for timely petitions. In a companion case to *Ali*, the Supreme Court held that *Houston-Sconiers* is a significant and retroactive change in the law that was material to a timely filed collateral challenge. *In re Pers. Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 262-67, 474 P.3d 524 (2020).

Moving on, it is important to note that the list of exemptions set forth in RCW 10.73.100 is exclusive; therefore, claims that do not fall within the confines of these exemptions (or do not reflect facial invalidity) will not be exempt from the time bar. Time-barred claims of this type include cruel and unusual punishment under the Washington Constitution, *Thomas*, 180 Wn.2d at 953; ineffective assistance of trial counsel, *Stoudmire*, 141 Wn.2d at 349; ineffective assistance of appellate counsel, *Haghighi*, 178 Wn.2d at 445; involuntariness of a guilty plea, *Snively*, 180 Wn.2d at 32; and violation of the right to a public trial. *In re Pers. Restraint of Erhart*, 183 Wn.2d 144, 147, 351 P.3d 137 (2015).

For the time limit to apply, the petitioner must have been notified of it when the judgment and sentence was entered or, for those who were incarcerated when the time limit statute was enacted, the Department of Corrections must have notified the petitioner. RCW 10.73.110, .120. If a petitioner who was incarcerated when the time limit was enacted claims that they were not notified of the time limit pursuant to

RCW 10.73.120, it need only be shown to defeat such a claim that the Department of Corrections made a good faith attempt to notify prisoners, not that the petitioner actually received notice. *Runyan*, 121 Wn.2d at 452-53. But if the petitioner was already released and was not under supervision, and thus did not have the opportunity to see posted notifications, the time limit does not apply. *Stockwell*, 179 Wn.2d at 594.

If the time allowed for collaterally challenging a conviction has expired, the time is generally not revived by the use of the conviction for sentencing purposes in a subsequent conviction. *Runyan*, 121 Wn.2d at 450-51. Thus, a petitioner who challenges the validity of a prior conviction that is used in a subsequent sentencing is barred from doing so if more than one year has elapsed since the prior conviction became final unless the petitioner raises grounds for relief exempt from the time limit. But a prior conviction of a juvenile in adult court may be challenged on the basis that the juvenile court improperly declined jurisdiction if that conviction is later used as a "strike" offense in finding the defendant to be a persistent offender, the reasoning being that such a conviction is not an "offense" for current offender score purposes if juvenile jurisdiction was not properly declined. *State v. Knippling*, 166 Wn.2d 93, 101-03, 206 P.3d 332 (2009). If a prior conviction constitutes an element of the current offense, it may be challenged on constitutional grounds notwithstanding that more than one year has passed since the prior conviction became final. *State v. Summers*, 120 Wn.2d 801, 810, 846 P.2d 490 (1993).

b. Equitable Exemptions

Since the time limit on personal restraint petitions and other forms of collateral relief is not jurisdictional, the limit may be equitably tolled. *In re Pers. Restraint of Fowler*, 197 Wn.2d 46, 53, 479 P.3d 1164 (2021); *Haghighi*, 178 Wn.2d at 447; *In re Pers. Restraint of Bonds*, 165 Wn.2d 135, 140, 196 P.3d 672 (2008); *In re Pers. Restraint of Hoisington*, 99 Wn. App. 423, 431, 993 P.2d 296 (2000); *State v. Littlefair*, 112 Wn. App. 749, 762, 51 P.3d 116 (2002). The Supreme Court has held that equitable tolling may be applied only "in the narrowest of circumstances and where justice requires." *In re Pers. Restraint of Carter*, 172 Wn.2d 917, 929, 263 P.3d 1241 (2011). More particularly, it was held that equitable tolling is allowed only if the petitioner shows that the failure to file a timely petition was the result of bad faith, deception, or false assurances, and the petitioner has exercised diligence in asserting their rights. *Haghighi*, 178 Wn.2d at 447-49. Under this reasoning, the doctrine is not applicable to more "garden variety" claims of neglect. *Id*. at 447-48. The strict standard applicable to equitable tolling raised on collateral review is based on recognition that the petitioner failed to take advantage of multiple opportunities to raise challenges on direct appeal and in timely personal restraint petitions. *Id*. at 448.

But more recently, the Supreme Court supplemented Washington's equitable tolling analysis by adopting the federal standard for that doctrine. *Fowler*, 197 Wn.2d at 53-54. Thus, a personal restraint petitioner relying on equitable tolling must show "(1) that they diligently pursued their rights and (2) that an extraordinary circumstance prevented a timely filing." *Id*. at 54 (citing *Lawrence v. Florida*, 549 U.S. 327, 336, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007); *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)). The court further clarified that the bad faith, deception, or false assurances standard articulated in *Haghighi*, 178 Wn.2d at 447-48, is not limited to malfeasance by the opposing party. *Fowler*, 197 Wn.2d at 55. In *Fowler*, the court held that egregious misconduct by petitioner's counsel was the type of extraordinary circumstance that justified equitable tolling and that the petitioner in that instance established they had diligently pursued their rights. *Id*. at 55-56.

As another form of equitable tolling, the Supreme Court in *Carter* recognized the "actual innocence" exemption. There, the court recognized the exemption in the context of a sentence challenge; specifically, whether the petitioner was "actually innocent" of being a persistent offender subject to a mandatory life sentence. In relation to sentencing generally, the petitioner seeking to avoid the time limit must show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the sentence imposed. *Carter*, 172 Wn.2d at 924. More specifically as to persistent offender sentences, the petitioner must show that, but for constitutional error, the petitioner would have been found factually innocent of a sufficient number of predicate offenses to render the persistent offender sentence unlawful. *Id.* at 934. Factual innocence of a predicate crime means that the petitioner was actually innocent of the crime, not that the crime was committed but is not comparable to a Washington offense. *Id*.

The Supreme Court has also recognized the actual innocence exemption in a challenge to a conviction. *Weber*, 175 Wn.2d at 256. But it adopted only the "gateway" exemption, meaning that if the petitioner meets the gateway actual innocence standard, the court will consider an otherwise untimely claim for relief based on constitutional error, such as ineffective assistance of counsel. *Id* at 259. Following United States Supreme Court precedent, the court held that the gateway actual innocence exemption applies to a conviction if in light of reliable new evidence it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. *Id.* at 258-59. "New evidence" in this context means "newly presented," not "newly discovered," since otherwise the petition would be exempt from the time limit under the "newly discovered evidence" exemption. *Id*.; RCW 10.73.100(1).

The court declined at that time to adopt a "freestanding" actual innocence exemption, under which a court may grant relief beyond the time limit on the basis of

actual innocence even when the trial suffered from no constitutional error. *Weber*, 175 Wn.2d at 262-63. But the court did not close the door to recognizing a freestanding claim.

Finally, the actual innocence exemption may be invoked only as a last resort. Under the "avoidance principle," a court must first consider possible statutory exemptions. *Carter,* 172 Wn.2d at 932-33; *Weber*, 175 Wn.2d at 256 n.6.

c. **Supreme Court's Inherent Power**

In *Fowler*, the Supreme Court held it has inherent power to waive the time limit under RCW 10.73.090, reasoning that such power flows from the court's plenary judicial power, which includes original jurisdiction over writs of habeas corpus under article IV, section 4 of the Washington Constitution. *Fowler*, 197 Wn.2d at 52. The court further held that while the legislature has the power to enact laws concerning habeas type challenges, it cannot "impinge on the writ's fundamental nature." *Id.* (citing Runyan, 121 Wn.2d at 443-44). The court similarly held that its inherent power "does not depend on the rules of appellate procedure." *Fowler* 197 Wn.2d at 53 (citing Wash. Const. art. IV, §§ 4, 6). More generally, the court held that it "may exercise its inherent power to consider a collateral attack even if it would normally be barred by the statutory time limit." *Fowler*, 197 Wn.2d at 53. The court thus signaled that in an appropriate case it may exercise its inherent authority to consider a personal restraint petition filed after expiration of the statutory time limit, even when no statutorily recognized exemption is available. The court held, however, that RAP 18.8, which permits waiver of rule-based time limits, does not give courts authority to waive RCW 10.73.090, and it did not hold that that the Court of Appeals has inherent authority to waive the statute, seemingly limiting that court's authority to equitable tolling. *Fowler*, 197 Wn.2d at 52-53.

G. Petitions Filed Directly in the Supreme Court

As mentioned at the outset, the appellate rules state that personal restraint petitions filed directly in the Supreme Court will "ordinarily" be transferred to the Court of Appeals. RAP 16.3(c). This is currently the practice of the court. RAP 16.5(b). If the Court of Appeals after transfer determines it has no jurisdiction under the successive petition rules, it will transfer the petition back to the Supreme Court unless it also determines the petition is untimely, in which case it must dismiss the petition. In light of RCW 10.73.140 and the successive petition rules discussed previously, three possible actions are available to the Court of Appeals on successive petitions that are filed in the Supreme Court and transferred to the Court of Appeals: (1) dismiss the petition if it is untimely or raises similar grounds for relief as a previous petition without good cause

shown for raising those grounds again, (2) consider and rule on the petition if it raises a new issue with good cause shown for having not raised the issue previously, or (3) transfer the petition back to the Supreme Court if it raises similar grounds for relief as a previous petition with a colorable claim of good cause or raises a new issue without good cause shown.

H. Discretionary Review in the Supreme Court

A Court of Appeals decision dismissing a personal restraint petition or deciding a petition on the merits is reviewable in the Supreme Court only by motion for discretionary review. RAP 16.14(c); RAP 13.5. But in deciding whether to grant review, the Supreme Court applies the considerations governing petitions for review listed in RAP 13.4(b). RAP 13.5A(a)(1), (b). Thus, the petitioner must demonstrate that the Court of Appeals decision conflicts with a decision of this court or with a published Court of Appeals decision, or that the petitioner is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b)(1)-(4). Under the appellate rules, the time limit for filing a motion for discretionary review is 30 days after the decision is filed. RAP 13.5(a). But the Supreme Court has held that when a party timely seeks reconsideration of a Court of Appeals decision on the merits of a petition, the 30-day time limit does not begin to run until the Court of Appeals rules on the motion for reconsideration. *In re Pers. Restraint of Fero*, 190 Wn.2d 1, 14, 409 P.3d 214 (2018).

The commissioner initially rules on motions for discretionary review. The ruling on such a motion, like all other commissioner's rulings, is subject to a motion to modify directed to the justices. RAP 17.7. When considering a motion to modify, the justices conduct a de novo review of the commissioner's ruling. *Rolax*, 104 Wn.2d at 133.

It is rare for the commissioner to grant a motion for discretionary review of a Court of Appeals decision on a personal restraint petition outright. *See Williams*, 198 Wn.2d at 351 (motion for discretionary review granted by commissioner). More commonly, if the commissioner determines that a motion for discretionary review potentially has merit, the commissioner will refer the motion to a department of the court to decide whether to grant review. *Cranshaw*, 196 Wn.2d at 328. As previously discussed, if the department cannot agree unanimously whether to grant or deny review, the case is continued to an en banc conference where a majority of the full court determines whether review is warranted. *See generally In re Pers. Restraint of Winton*, 196 Wn.2d 270, 474 P.3d 532 (2020) (motion for discretionary review granted at en banc conference).

In reviewing a Court of Appeals decision on a personal restraint petition, the Supreme Court generally will disregard any issue raised in the motion for discretionary review that was not raised in the Court of Appeals. *Tobin*, 165 Wn.2d at 175 n.1; *Lord*, 152 Wn.2d at 188 n.5. The Supreme Court will ultimately affirm or reverse the Court of Appeals decision or take some other action as the situation requires, such as remand to the Court of Appeals for reconsideration in light of controlling authority. If the case ultimately turns on few legal issues and there is no dispute as to the outcome, the Supreme Court may decide the case without oral argument by way of a per curiam decision without an identified author. *See*, *e.g.*, *Ruiz-Sanabria*, 184 Wn.2d at 636-42 (clarifying rules applicable to transfer of CrR 7.8 motions and initial consideration of personal restrain petitions); *Snively*, 180 Wn.2d at 31-32 (clarifying remedy for facial error); *Strandy*, 171 Wn.2d at 819-20 (holding double jeopardy violation constitutes facial error).