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

In re the Personal Restraint Petition of
ARMONDO RAY SEPULVEDA,
Petitioner.

NO. 62395-8-I
PETITIONER'S REPLY TO STATE
AND DOC'S RESPONSE

I. INTRODUCTION

Armondo Sepulveda attacks his 1989 King County conviction for rape and robbery, both in the first degree. In his original petition, Sepulveda contended in part that his PRP was timely because his judgment was facially invalid. In light of *In re PRP of McKiearnan*, 165 Wn.2d 777, 203 P.3d 375 (2009), Sepulveda now abandons that argument.

However, Mr. Sepulveda's PRP is timely for another reason—because he was not informed at sentencing of the one year post-conviction time limit. The Attorney General's argument that Mr. Sepulveda may have been later informed by prison officials should be rejected because it is not a legislatively prescribed means of providing notice. In the alternative, this Court should reject the Attorney General's proof because it is based entirely on declarations prepared for another case over 17 years ago; does not

Reply Brief--1

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1 constitute competent evidence; and fails to establish whether Mr. Sepulveda personally
2 received notice or not.

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4 Turning then to the merits of his claim, Sepulveda's guilty plea was invalid
5 because he was misinformed about a direct consequence—the maximum possible
6 sentence. Sepulveda was told that a judge had the discretion to cap the maximum
7 possible term of incarceration at 20 years. This was clearly incorrect. Further,
8 *McKiearnan* does not control on this point since the Court in that case did not review the
9 merits of McKiearnan's claim, but instead reached only the issue of facially invalidity.
10 To the contrary, *McKiearnan* suggests, albeit in dicta, that it would have invalidated the
11 plea if it had reached that issue.
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15 II. RESPONSE TO DOC'S APPENDED DECLARATIONS

16 Petitioner contends that this Court should not consider the documents appended to
17 DOC's pleading.
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19 The Department of Corrections's (DOC) *Response* contains a number of
20 documents written and signed over 17 years ago for another case. DOC does not explain
21 why they could not obtain current declarations written for and applicable to this case.
22

23 These documents should not be considered because they are not "competent"
24 evidence. *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Certainly, there is
25 little question but that this Court would refuse to consider a declaration in support of a
26 PRP that was written and signed for another case almost two decades ago, even if the
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1 declaration had some relevance to the current proceeding. The same rule must apply to
2 parties responding to a petition, either on the merits or on a procedural issue.
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4 Even if this considers those declarations, the declarations do not establish that Mr.
5 Sepulveda actually received notice of his collateral attack rights in prison. The
6 declarations address a general policy at issue in Runyan. They do not touch on the
7 specifics of Mr. Sepulveda's case. As a result, none of the declarants apparently has any
8 personal knowledge of what information, if any, Mr. Sepulveda was given by unnamed
9 prison officials.
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12 Finally, even considering the declarations, none contradict Mr. Sepulveda's claim
13 that he did not receive notice of the collateral attack limitations at the time of
14 sentencing—either orally or in writing.
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16 III. ARGUMENT 17

18 A. The Statute Requires Notice by the Court at Sentencing

19 “Defendants sentenced after July 23, 1989, *will* have been advised by the
20 sentencing court of the time limit for collateral attacks. RCW 10.73.110.” *In re Pers.*
21 *Restraint of Runyan*, 121 Wn.2d 432, 453, 853 P.2d 424 (1983). The Supreme Court's
22 statement was not intended as hyperbole.
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25 Instead, the statement simply tracked the plain language of the statute: “*At the time*
26 *judgment and sentence is pronounced* in a criminal case, the court *shall* advise the
27 defendant of the time limit specified in RCW 10.73.090 and 10.73.100.” RCW 10.73.110
28 (emphasis added).
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1 Despite the statutory directive, the DOC argues that notice given by another
2 person (a Dept. of Corrections employee, who presumably is neither a judge, nor an
3 attorney) at some other time (prison intake, not sentencing) complies with the dictates of
4 the statute. However, because the statute requires notice by a judge at sentencing the
5 statute is not complied with when notice is given by a prison official at intake. If the
6 Legislature believed such notice was sufficient, they certainly could have said so.
7

8
9 In fact, the Legislature did say so, albeit for a different category of offenders.
10 RCW 10.73.120 provides that the Department of Corrections shall attempt to advise
11 offenders of the collateral attack limitations. As the Court held in *Runyan*, “(w)hether
12 and how petitioners actually learned of the statute is not dispositive on this issue, as the
13 only duty placed on the Department was to attempt notification.” *Runyan*, 121 Wn.2d at
14 452. However, that statute, by its own terms, applies only to individuals under sentence
15 on July 23, 1989. Section 120 was designed to notify offenders convicted and sentenced
16 *before* the enactment of the statute that the Legislature had enacted a statutory time limit
17 on collateral attacks.
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22 Because the statute only requires attempted notice, any argument regarding the
23 failure to provide actual notice requires the Court to read in language not placed in the
24 statute by the Legislature. “We have already determined that the language of RCW
25 10.73.120 is not ambiguous.” *In re Vega*, 118 Wash.2d 449, 450, 823 P.2d 1111 (1992).
26
27 The Court continued: Had the Legislature intended the Department to provide actual
28 notice, it certainly would have said so. *Id.*; *Runyan, supra* (“As pointed out above, the
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1 statute only uses the language ‘attempt to advise.’ RCW 10.73.120. Had the Legislature
2 intended the Department to provide actual notice, it certainly would have said so.”).

3
4 Of course, the Legislature *did* say so in RCW 10.73.110.

5 RCW 10.73.110 requires judge notification at sentencing and applies to every
6 offender sentenced after that date. Mr. Sepulveda was convicted and sentenced after that
7 date. Therefore, the DOC attempted notification statute does not apply in this case.
8

9 Attempted notification sufficed for defendants sentenced before the date of
10 enactment. Actual notice by a sentencing judge is required for a defendant sentenced
11 after that date.
12

13 This Court should not create an exception to RCW 10.73.110 allowing for notice
14 by DOC for individuals sentenced after July 23, 1989, where the language of the statute
15 is plain and where the Legislature adopted DOC attempted notification for those
16 individuals sentenced before that date, but not for individuals sentenced after that date.
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18 *Sandona v. Cle Elum*, 37 Wn.2d 831, 226 P.2d 889 (1951); *Insurance Co. of*
19
20 *NorthAmerica Companies v. Sullivan*, 56 Wn.2d 251, 352 P.2d 193 (1960). In short, this
21 Court should not create an exception where the Legislature decided no exception should
22 apply.
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25 Applying the plain language of the statute, the notice required by RCW 10.73.110
26 was not provided to Mr. Sepulveda in this case—an uncontested point.
27

28 There are additional reasons why this Court should not read into the statute an
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1 exception that is not there. When Petitioners have sought to avoid the plain language of
2 the statute, Washington courts have “strictly construed” RCW 10.73.090 in light of the
3 legislative intent to control the flow of post-conviction collateral relief petitions and to
4 uphold the principles of finality of litigation. *See, e.g., In re Pers. Restraint of Bonds*, 165
5 Wn.2d 135, 196 P.3d 672 (2008) (“We are reluctant to apply exceptions to legislative
6 time limits. Adopting a rule for equitable tolling in the criminal context that mirrors the
7 predicates in the civil context is consistent with the purposes of RCW 10.73.090 and this
8 court's rather strict adherence to the statute of limitation in *Benn* and *Carlstad*. Applying
9 equitable tolling to Bonds's situation, however, would undercut finality of judgments,
10 encourage untimely filing and amendments to collateral attacks, and unjustifiably
11 expand the narrow equitable tolling exception.”); *Shumway v. Payne*, 136 Wn.2d 383,
12 397-98, 964 P.2d 349 (1998) (only exceptions to one-year statute of limitations are those
13 listed in RCW 10.73.100); *In re Personal Restraint of Well*, 133 Wn.2d 433, 441-42,
14 946 P.2d 750 (1997) (motion to withdraw insanity plea).

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21 There is no reason, and none is offered by either the State or DOC, to support a
22 conclusion that courts should strictly construe the post-conviction statutes when they
23 require a Petitioner to do some act, but liberally construe the notification statute, which
24 requires a judge to take certain action. Indeed, it makes no sense to hold a *pro se* litigant,
25 untrained in the law and without the right to assistance by counsel, to a strict standard,
26 while simultaneously excusing a judge from complying with the plain letter of the law.
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28 Besides, the statutory requirement imposed on a judge is simple and easy to fulfill.
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1 There are strong policy reasons, in addition to the application of principles of
2 statutory construction, supporting Petitioner’s argument. Faced with a large number of
3 prisoners with differing degrees of education, some with mental impairments, and many
4 whom do not speak English, judicially removing the requirement notice by the court at
5 the time of sentencing is a recipe for disaster. Likewise, our Supreme Court has taken
6 judicial notice of the limited resources available to prisoners for *pro se* legal work. *State*
7 *v. Theobald*, 78 Wash.2d 184, 185-86, 470 P.2d 188 (1970). Thus, it makes perfect sense
8 to require notice to be given in court at sentencing, where the Court can only proceed if
9 the defendant is competent, where she is constitutionally entitled to counsel (and the
10 assistance of an interpreter, if necessary) and where reliable answers can be given if
11 questions arise.
12

13 It is important to note that, as the Washington Supreme Court has
14 already done, that “(i)n imposing the time limitations at issue in these cases, the
15 Legislature limited an individual's ability to challenge the legality of his or her criminal
16 conviction and sentence.” *Runyan, supra*. Because these limitations have an impact on
17 an individual’s liberty interest, this Court should keep the burden of providing notice on
18 the person designated by the Legislature—a judge.
19

20 What the DOC argues for is essentially a “substantial compliance” rule.
21 Washington courts have declined to adopt a substantial compliance rule with the filing
22 deadline, reasoning that there can be no substantial compliance with deadlines, which
23 either are actually met or they are not. *State v. Robinson*, 104 Wash. App. 657, 666-67,
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1 17 P.3d 653 (2001). *See also State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1983)
2 (“We decline to graft the doctrine of substantial compliance onto RCW 10.95.040.”).
3
4 In any event, an essential aspect of substantial compliance requires some level of
5 *actual* compliance with the substance essential to the statute. *Petta v. Department of*
6 *Labor and Industries*, 68 Wash.App. 406, 409, 842 P.2d 1006 (1992). “Noncompliance
7 with a statutory mandate is not substantial compliance.” *Petta*, 68 Wash.App. at 407,
8 409. In this case, the statutory mandate is for a *court to provide notice* to a defendant
9 when he is sentenced. While the exact form of that notice can vary from case to case
10 and may give rise to questions of whether compliance is substantial enough, where a
11 court has utterly failed to provide any notice the statutory mandate has not been met.
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15 Because Mr. Sepulveda was not given the notice mandated by the statute, his
16 petition is timely.
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18 B. Sepulveda’s Guilty Plea is Invalid

19 McKiernan did not answer the question of whether a guilty plea which misstates
20 the maximum sentences as “20 to life,” when the maximum is instead “life,” constitutes
21 misinformation about a direct consequence of a guilty plea rendering the plea invalid.
22 Instead, the McKiernan court did not reach that question because the judgment in that
23 case was not facially invalid. “An invalid plea agreement cannot on its own overcome
24 the one year time bar or render an otherwise valid judgment and sentence invalid. The
25 plea documents are only relevant to help determine if the judgment and sentence itself is
26 facially invalid.” 165 Wn.2d at 782. The Court established an independent test for facial
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1 invalidity: “To be facially invalid, a judgment and sentence requires a more substantial
2 defect than a technical misstatement that had no actual effect on the rights of the
3 petitioner.” *Id.* at 783.

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5 However, dicta in *McKiernan* suggests that the Court would have found that the
6 guilty plea was invalid, if it had reached that question. The Court in that case noted the
7 plea form informed McKiernan that the maximum sentence for first degree robbery was
8 “twenty (20) years to life imprisonment and \$50,000 fine,” but then noted that the
9 maximum sentence for first degree robbery was “simply life imprisonment and not a
10 range of 20 years to life.” *Id.* at 780. “First degree robbery is, and was at the time,
11 classified as a class A felony.” “Under RCW 9A.20.021(1)(a), the statutory maximum
12 for a class A felony is and was life imprisonment. It appears that the misstatement of the
13 maximum sentence as a range stems from the transition to determinate sentencing that
14 occurred in 1984 after the adoption of the Sentencing Reform Act of 1981(SRA).” *Id.* at
15 780; 780 n.1.

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18 To explain, under pre-SRA law the maximum for certain crimes (including rape
19 and robbery) was set by the judge at sentencing. The maximum could be 20 years or it
20 could be life. While the ultimate term of imprisonment was indeterminate, the maximum
21 was a discretionary range. At sentencing, the judge set the maximum within that range.

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24 When the SRA was adopted, it eliminated judicial discretion over the “class of
25 crime” maximum (in most instances—certain drug cases contain alternative class of
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1 crime maximums). In other words, the “class of crime” maximum is a term of years that
2 cannot be altered at sentencing.
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4 Thus, when he pled guilty Sepulveda was told that a judge could exceed the
5 “standard sentence range” (this crime was pre-*Blakely*), but could not impose a sentence
6 above the maximum “class of crime” maximum. As a result of the mistaken “20 to life”
7 language, Sepulveda was told that the sentencing court could set the “class of crime”
8 maximum at 20 years. Thus, Sepulveda was told that the sentencing court could have
9 decided to limit its “exceptional sentence” authority to 20 years.
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12 It is important not to collapse the concepts of “standard range” and the maximum
13 for the “class of crime.” Sepulveda was told that two ranges existed and that two
14 decisions would be made at sentencing –or perhaps at some future, post-*Judgment* date.
15 The trial court had discretionary power over both ranges. Under this scenario, Sepulveda
16 was affirmatively misled to believe that a lesser class of crime maximum existed than
17 was permitted under the law.
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21 Further, the maximum initial term of incarceration is not the only consequence
22 that flows from the incorrect maximum. The “class of crime” maximum controls the
23 amount of time that can be imposed for probation violations. *See State v. McDougal*, 120
24 Wn.2d 334, 841 P.2d 1232 (1992) (Sentencing court had discretion to set drug crime
25 maximum at 5 or 10 years. “By violating the terms of his sentence, the Respondent
26 moved outside the initial protections of the SRA and subjected himself to other statutory
27 penalties, including the maximum penalty for the underlying offense.”). Thus, if
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1 Sepulveda's sentencing court actually had the power to cap the maximum at 20 years,
2 then 20 years would serve as the cap for probation revocation incarceration. In short,
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4 Sepulveda was misled because the sentencing court had no such power.

5 The class of crime maximum also affects post-*Judgment* remedies such as "wash
6 out" and "vacation" of a conviction. Thus, a petitioner who is told that the sentencing
7 judge holds the discretionary authority to set the class of crime maximum below what is
8 statutorily dictated is misled about the prospect of wash out or vacation.
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11 *McKiernan* did not disturb the holding in *State v. Weyrich*, 163 Wn.2d 554, 557,
12 182 P.3d 965 (2008):

13
14 The State concedes that Weyrich was misinformed that the statutory maximum for
15 the theft crimes was 5 years, rather than the correct 10 years. Weyrich did not
16 waive the error but timely moved to withdraw his pleas before sentencing. The
17 State's argument that the error did not actually affect Weyrich's decision to plead
18 guilty requires the sort of subjective hindsight inquiry into Weyrich's decision of
19 which *Mendoza* and *Isadore* disapprove. Accordingly, we adhere to our precedent
20 establishing that a guilty plea may be deemed involuntary when based on
21 misinformation regarding a direct consequence of the plea.

22 Because Weyrich was misinformed that the statutory maximum sentence for the
23 thefts was 5 years, he should have been allowed to withdraw his pleas.

24 (internal citations and quotations removed).

25 Because Sepulveda was told that his maximum term could be as little as 20 years,
26 when life was the only possible maximum, he was misinformed of the statutory
27 maximum and should now be allowed to withdraw his plea.
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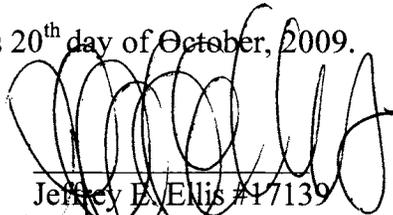
1 IV. CONCLUSION

2 The petitioners in *Runyan* claimed they did not receive actual notice of the PRP
3 statutory time bar. 121 Wn.2d at 437. The Washington Supreme Court found that claim
4 irrelevant. Only attempted notice, not actual notice, was required. Here, DOC proves
5 attempted notice. However, the statute requires actual notice given by a judge at
6 sentencing. Thus, proof of attempted notice by DOC is as irrelevant to the case at bar as
7 the petitioners's claimed lack of notice in *Runyan*.
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11 A guilty plea is invalid where the defendant is given misinformation about the
12 maximum possible sentence. In this case, Sepulveda was told that his maximum could be
13 as little as 20 years. This was an error—one that was repeated, not fixed, at the time of
14 sentencing.
15

16 Based on the above, this Court should grant Sepulveda's petition and remand to
17 allow him to withdraw his plea or, at a minimum, for a hearing on his choice of remedy.
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20 DATED this 20th day of October, 2009.

21 
22
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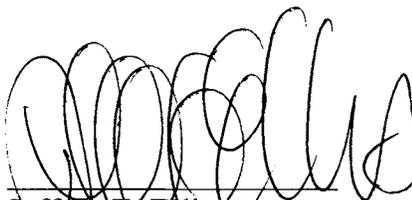
CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on October 20, 2009, I served the party listed below with a copy of the *Reply* by sending it via email to:

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10/20/09 Seattle, WA
Date and Place



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