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## II. ASSIGNMENTS OF ERROR AND ISSUES

### A. Assignment of Error

1. The judgment entered on Appellant's August 21, 2000, conviction on plea of guilty to attempted second degree murder is invalid on its face because it was taken by a commissioner in excess of his constitutional jurisdiction.<sup>1</sup>

### B. Issues Pertaining to Assignments of Error

1. Does the Washington State Constitution does not empower superior court commissioners to receive guilty pleas?

2. Can the state Legislature create jurisdiction for commissioners to accept guilty pleas pursuant to local court rule?

3. On August, 21, 2000, did Pacific County have a local court rule granting jurisdiction for a commissioner to receive a plea to a Class A felony?

4. Was Appellant's Motion to Vacate time-barred?

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<sup>1</sup> Counsel is indebted to the research and trial court pleadings filed by Malachi Ezekiel MacGregor-Reign.

### III. STATEMENT OF THE CASE

On August 21, 2000, in the Pacific County superior court, Jason Miles Christen, now known as Malachi Ezekiel MacGregor-Reign, entered an *Alford*<sup>2</sup> plea of guilty to attempted second degree murder. Superior Court Commissioner Douglas E. Goelz accepted the plea. CP 2-15; 8/21 RP.<sup>3</sup>

Based on that plea, Pacific County Superior Court judge Joel Pennoyer entered judgment and sentenced MacGregor-Reign to a standard range sentence. CP 27-36; 9/8 RP 14.

On September 24, 2009, MacGregor-Reign filed a Motion to Vacate Sentence. CP 39. Pacific County Superior Court Judge Michael S. Sullivan heard argument on October 9, 2009. 10/9 RP. MacGregor-Reign asserts that his August 21, 2000, plea and the associated judgment and sentence are facially invalid because Commissioner Goeltz's subject matter jurisdiction did not include taking felony pleas. 10/9RP 5-11. The court was persuaded by the State's contrary arguments and denied the motion. CP 81-82.

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<sup>2</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27L. Ed. 2d 162 (1970), adopted in Washington by *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

<sup>3</sup> The transcribed proceedings are in a single volume tabbed by proceeding and date. Each hearing is separately paginated. This brief designates each hearing by date.

MacGregor-Reign appealed. CP 83. This Court accepted his direct appeal and appointed counsel. Letter, January 27, 2010.

IV. **ARGUMENT**

MacGregor-Reign's conviction on plea of guilty is facially valid only if Commissioner Goelz had jurisdiction to accept the plea. The question whether the commissioner had jurisdiction raises the following issues:

1. Can jurisdiction for commissioners to accept pleas be found in the Washington State Constitution?

2. Can jurisdiction for commissioners to accept pleas be found in statute and court rule? That is:

(a) Did Pacific County have in place a local court rule empowering its commissioners to accept guilty pleas to a Class A felonies? AND:—

(b) If so, does RCW 2.24.040(15), which purports to authorize counties to enact local court rules empowering commissioners to accept pleas, exceed the constitutional power of the legislature?

MacGregor-Reign contends that jurisdiction to accept his plea was lacking and that his judgment and sentence are facially invalid.

1. UNLESS COMMISSIONER GOELZ HAD JURISDICTION TO ACCEPT A FELONY GUILTY PLEA, MACGREGOR-REIGN'S CONVICTION IS INVALID ON ITS FACE.

The rule is well settled that, if the court from which an appeal is taken had no jurisdiction of the subject-matter, its judgment is absolutely void, and the appellate court must reverse the judgment. *State v. Superior Court of King County*, 9 Wash. 369, 370, 37 P. 489 (1894). Either a constitutional court has jurisdiction or it does not. Jurisdiction cannot be conferred by agreement or stipulation. If the court does not have jurisdiction, any judgment it enters is void *ab initio* and is, in legal effect, no judgment at all. *People v. Sturtevant*, 9 N.Y. 263, 269, 59 Am. Dec. 536 (1853).

A Judgment and Sentence is facially invalid if the defect is apparent without further elaboration. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). A judgment that exceeds the court's jurisdiction is invalid on its face. *Id.* Both constitutional and nonconstitutional errors can invalidate a judgment and sentence. *Goodwin*, 146 Wn.2d at 866; *In PRP of Scott*, 149 Wn. App. 213, 220, 202 P.3d 985 (2009).

Here, MacGregor-Reign's guilty plea is invalid under the state Constitution, Washington statutes, and Pacific County court rule.

The question presented is whether, on August 21, 2000, Commissioner Douglas E. Goelz of the Pacific County Superior Court had jurisdiction to accept a plea of guilty to a Class A felony. He did not, and the remedy is to reverse the conviction and allow MacGregor-Reign to withdraw his guilty plea.

2. THE WASHINGTON STATE CONSTITUTION  
DOES NOT EMPOWER SUPERIOR COURT  
COMMISSIONERS TO ACCEPT PLEAS  
IN CRIMINAL PROSECUTIONS.

Washington became a state and adopted its constitution in 1889. The constitution established original jurisdiction in all felony criminal cases in the superior courts. Const. art. 4, § 6 (amendment 28); *State v. Bowman*, 69 Wn.2d 700, 703, 419 P.2d 786 (1966).

The Constitution empowered the superior court to appoint commissioners:

There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have **authority to perform like duties as a judge of the superior court at chambers**, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

Const. art. 4, § 23 (emphasis added.)

Thus, constitutional jurisdiction for commissioners to take pleas must be found in the term “like duties as a judge of the superior court at chambers.”

Despite Const. art. 4, § 23, however, the framers of the constitution eliminated any continuing distinction between the acts of judges sitting in court or at chambers. Const. art 4, § 6 opened the superior courts for business every day except for a few nonjudicial days. This limits the definition of the territorial “in-chambers” powers that art. 4, § 23 used as a yardstick in conferring jurisdiction on post-constitution court commissioners to those in effect before the Constitution was adopted. When Const. art 4, § 6 eliminated court sessions, it made the concept of in-chambers functions obsolete. Therefore, when art. 4, § 23 talks about powers of a judge at chambers, it can only refer to those powers as they existed before the Constitution was adopted. *In re Olson*, 12 Wn. App. 682, 687, 531 P.2d 508 (1975).

The Legislature of the time defined this term, so the Courts must resort to statutory construction in interpreting Const. art 4, § 23.

Construction of statutes is a question of law. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 876-877, 215 P.3d 162 (2009). The goal is to determine legislative intent, which is derived from the language of the statute alone when the meaning is plain, as well as from “the context of

the statute in which that provision is found, the related provisions, and the statutory scheme as a whole.” *Id.* Where potentially conflicting statutes can be harmonized, each is construed to maintain the integrity of the other. *Rothwell*, 166 Wn.2d at 877. But if a conflict is irreconcilable, the more recent statute takes priority. *Id.*

In the years leading to the adoption of the Constitution, two potentially conflicting statutes articulated the powers of superior court judges “at chambers.”

In 1881, the Legislature defined powers “at chambers” as follows:

The several judges of the district courts in this territory, and each of them in their respective districts, may, at chambers, in vacation, entertain, try, hear and determine, all actions, causes, motions, demurrers and other matters not requiring a trial by jury; . . .

§ 2138 of the Code of 1881, p. 368. This reflects the fact that pre-statehood and pre-constitution territorial courts were not always open but instead would sit for specific terms or sessions. Between terms, when the court was not in session, it was “in vacation.” The individual judges then had powers “at chambers” to perform some, but not all, judicial acts. A judge’s chambers are still defined as private rooms where the judge does business when “he [or she] is not holding a session of the court.” Such “chambers business” consists of:

[A]ll such judicial business as may properly be transacted by a judge at his chambers or elsewhere, as distinguished from such as must be done by the court in session.

Black's Law Dictionary Sixth Ed. at 230 (emphasis added). But, to be effective, judgments, decrees and orders can only be issued by the court in session. Const. art. 4, § 5.

In 1891, the Legislature clarified the definition. This statute distinguished powers that are inherent in the body and institution of the court from powers that individual judges can exercise out of court, or at chambers:

A judge may exercise out of court all the powers expressly conferred upon a judge as contradistinguished from a court and not otherwise.'

Laws 1891, p. 91, c. 54.<sup>4</sup> Unlike the 1881 version, this bright-line distinction is still on the books. "A judge may exercise out of court all the powers expressly conferred upon a judge as contradistinguished from a court and not otherwise." RCW 2.28.050, Laws 1891 c 54 § 5; RRS § 56.

The later definition of at-chambers powers is more precise than the earlier version. In civil matters, however, the distinction can be ignored, because both versions render identical results regarding commissioner jurisdiction. The 1891 definition necessarily excludes all powers excluded

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<sup>4</sup> Section 5 of the act of February 26, 1891 (Laws 1891, p. 92, c. 54).

in 1881, because all matters requiring a jury lie exclusively within the jurisdiction of the court, not the individual judges.

Over the years, several civil cases have cited the “not requiring a jury” language from 1881. *See, e.g., Peterson v. Dillon*, 27 Wash. 78, 83, 67 P. 397 (1901); *State ex. rel. Lockhart v. Claypool*, 132 Wash. 374, 375, 232 P. 351(1925); *Olson*, 12 Wn. App. at 686; *State v. Karas*, 108 Wn. App. 692, 701-702, 32 P.3d 1016 (2001). Because of the nature of the jurisdictional challenge at issue, the less precise definition yielded a correct result.

In *Peterson*, for example, a commissioner conducted a trial, foreclosed on a lien, and ordered the sheriff to execute on the Dillons’ property. *Peterson*, 27 Wash. at 79. Mrs. Dillon moved to set aside the commissioner’s orders because her community interest had not been joined. The commissioner refused, and Ms. Dillon challenged the commissioner’s jurisdiction to render a judgment. *Id.* at 80-82. On appeal the Court opined that powers “at chambers” probably conferred jurisdiction to conduct all proceedings not requiring a jury (as suggested by the legislature.) But the Court did not commit to this interpretation, flagging it as dictum and holding that commissioners could enter civil defaults and judgments. *Peterson*, 27 Wash. at 83-84, citing *Winsor*, 24 Wash. at 547.

Likewise, *Lockhart* concerns a commissioner's power to modify a divorce decree. 132 Wash. at 374.

The question presented in *Karas* was statutory — whether RCW 2.24.040, which enumerates commissioners' duties, empowered them to issue permanent protection orders (a civil procedure), even though RCW 2.24.040 only specifies temporary orders. The Court cited to the constitution's broad grant of powers for commissioners to perform "like duties as a judge of the superior court at chambers" and to "perform such other business connected with the administration of justice as may be prescribed by law." *Karas*, 108 Wn. App. at 702, quoting Wash Const. art 4, § 23. *Karas* then quotes the holding of *Lockhart*, that the duties of territorial judges "at chambers" included the power to hear and determine any matter that did not require a trial by jury. *Karas*, 108 Wn. App. at 702, quoting *Lockhart*, 132 Wash. at 375.<sup>5</sup>

The State relied heavily on these civil cases below. CP 75-76. But they are not dispositive in criminal prosecutions. Relying on the old, less precise, definition works in civil matters because matters requiring a jury necessarily are also powers inherent in the court, not the judges thereof. Thus the 1881 and 1891 statutes do not conflict. Both would produce the

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<sup>5</sup> To the extent that *In re Olson*, 12 Wn. App. 682, 686, 531 P.2d 508 (1975), focuses solely on the jury aspect to the exclusion of the distinction between powers of courts and powers of judges, it is wrongly decided. Please see page 14 of this brief.

same result in the challenges to the commissioner's civil jurisdiction in those cases.

The converse is not true, however. Some matters do not require a jury but nevertheless can be performed only by the court in session, not by an individual judge between sessions. In such cases, where the old statutes do conflict, the Court correctly has applied the later one.

*Rothwell*, 166 Wn.2d at 877.

This is seen most clearly in *State ex rel. Romano v. Yakey*, 43 Wash. 15, 85 P. 990(1906).

Romano was convicted and sentenced to 14 years. He claimed he had been wrongly convicted on perjured testimony. He applied to Yakey, a superior court judge, for a writ of mandamus ordering a perjury complaint to be filed against the State's witnesses. Judge Yakey refused, and Romano appealed. In ruling against Romano, the Court expounded upon the constitutional distinction between the powers of the court and the personal powers of judges. The Court held that this constitutional distinction, though arguably inconvenient, was nevertheless binding:

In jurisdictions where there are fixed terms of court, and where the courts are powerless to act out of term time, it is necessary to maintain the distinction between the powers of the court and the powers of the judge, but with us, where the superior courts are always in session, there seems to be no good reason for any such distinction. It would perhaps avoid confusion if every judicial act of a superior judge

were declared to be the act of the court itself. But however this may be, the distinction is clearly recognized in the Constitution and laws of this state, and this court is not at liberty to disregard it. Thus section 6 of article 4 of the Constitution declares that the superior courts and their judges shall have authority to issue certain writs, and section 23 of the same article provides that court commissioners shall have the same authority as judges of superior courts at chambers. Section 5 of the act of February 26, 1891 (Laws 1891, p. 92, c. 54), provides that a judge may exercise out of court all the powers expressly conferred upon a judge, as contradistinguished from a court, and not otherwise.

*Yahey*, 43 Wash. at 22. Thus, the Court concluded that the superior court would have had jurisdiction to issue Romano's writ but Judge Yahey did not. *Yahey*, 43 Wash. at 22-23.

Shortly after *Yahey*, the Court decided *State v. Philip*, 44 Wash. 615, 87 P. 955 (1906). *Philip* is binding, dispositive authority in MacGregor-Reign's case

In *Philip*, a criminal defendant was arraigned and his guilty plea for attempted homicide accepted by a commissioner. The Court reversed for lack of subject matter jurisdiction. Invoking the power-of-the-court language from the 1891 statute, the Court ruled the Constitution did not empower commissioners to accept felony pleas, because criminal defendants have the right to appear and plead in open court. *Philip*, 44 Wash. at 617:

[A] plea of guilty can only be put in by the defendant himself in open court. ... [T]he court must render judgment where the defendant is found guilty. In the face of these mandatory provisions of the statute judges at chambers and court commissioners are alike powerless.

*Philip*, 44 Wash. at 617-618 (emphasis added), citing Ballinger's Ann. Codes & St., § 6884. The Court saw "no reason why the 1891 statute is not controlling." *Philip* is still good law, and court commissioners are still constitutionally powerless to accept pleas.

The "court" in this context is the superior court, which the constitution established as a court of record. Const. art. 4, § 11; RCW 2.08.030. The judicial power of the State of Washington is "vested in courts of record." Const. art 4, § 1; *Sackett v. Santilli*, 146 Wn.2d 498, 511, 47 P.3d 948 (2002).

To be a "court of record" means that the proceedings are recorded and a transcript is available for review. *Bennett v. Board of Adjustment of Benton County*, 23 Wn. App. 698, 700-701, 597 P.2d 939 (1979). Const. art, 1, § 22 entitles every criminal defendant to a "record of sufficient completeness" to allow appellate review of potential errors. *State v. Classen*, 143 Wn. App. 45, 54, 176 P.3d 582, *review denied* 164 Wn.2d 1016 (2008), quoting *State v. Larson*, 62 Wn.2d 64, 66, 381 P.2d 120 (1963).

Since a plea hearing must take place in a court of record, a territorial judge could not have accept a guilty plea to a felony charge in chambers, and neither can a commissioner do so pursuant to his constitutional jurisdiction set forth in Const. art 1, § 23.

“The word ‘court’ must mean something more than the judge who tried the cause. The judges change, but the court continues[.]” *Gunderson v. Cochrane*, 3 Wash. 476, 478, 28 P. 1105 (1892). The difference is that individual judges can refuse to exercise powers inherent in their office, whereas the powers of the court supersede and can be invoked independently of the judge. *Id. See, e.g., Santilli*, 146 Wn.2d at 505 (the right to be tried to the court ensures the proceedings are not governed by “the views of the particular judge who presided over the tribunal.”)

This result is also consistent with Const. art. 1, § 22, which guarantees every criminal defendant the right to a jury. This eliminates the 1881 definition of at-chambers powers from consideration. There is a difference between a civil action that may be tried by jury if a party requests a jury, and a criminal proceeding in which the defendant’s right to trial by jury is inviolate unless the right is affirmatively waived. The former is an action “triable by jury” for which a jury is optional and is deemed waived unless affirmatively requested. CR 38(b) & (d); *Santilli*, 146 Wn.2d at 507. A criminal prosecution, by contrast is a proceeding in

which a jury is required unless the defendant relieves the court of the constitutional mandate to provide a jury either by waiving the right or pleading guilty. Const. art. 1, § 22. The fact that the defendant – not the court — may waive his constitutional right to a jury does not change the nature of the proceeding to one that a territorial judge could conduct in chambers.

Today, in addition to RCW 2.28.050, the historical bona fides of legislative and judicial unanimity regarding the right to a jury in criminal proceedings is reflected in CrR 4.2(d) regarding the taking of guilty pleas: “The court shall not accept a plea without first determining... etc.” “The court shall not enter judgment upon a plea of guilty unless it satisfied... etc.” CrR 4.2(d). And the constitution requires the judge to engage in a colloquy with the defendant on the record of the plea hearing, informing him that, as of that moment, his right to a jury is intact. Thus, a plea hearing is solely within the jurisdiction of the court, not the judge.

Accordingly, the trial court erred in denying MacGregor-Reign’s Motion to Vacate for lack of constitutional commissioner jurisdiction to accept his guilty plea. The remedy is to reverse and allow MacGregor-Reign to withdraw his guilty plea.

2. THE LEGISLATURE HAS NOT CREATED  
JURISDICTION WHEREBY A COMMISSIONER  
COULD ACCEPT MACGREGOR-REIGN'S PLEA.

Under our constitutional system, only the courts, not the legislature interpret the constitution. Wash. Const. art. 4, § 1; *State v. Ladson*, 138 Wn.2d 343, 352, 979 P.2d 833 (1999). “The ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary.” *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978). Because a commissioner’s jurisdiction derives from the constitution, the legislature can neither expand nor restrict it. *Winsor v. Bridges*, 24 Wash. 540, 547, 64 P. 780 (1901) (the legislature cannot confer jurisdiction not granted by the constitution), citing *Marbury v. Madison*, 1 Cranch 137, 138, 2 L. Ed. 60 (1803) (the United States Supreme Court derives its jurisdiction from the United States constitution and it is not within the power of Congress to confer additional jurisdiction upon that court.)

If part of a statute is unconstitutional, then the Court will sever the invalid clause and give effect to the rest. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 878, 215 P.3d 162 (2009).

In modern times, the Legislature enumerated commissioners' duties in RCW 2.24.040.<sup>6</sup> The list of duties includes probate matters; default judgments; temporary restraining orders and injunctions; refereeing civil disputes and execution of civil judgments; adoption proceedings; corporate dissolutions; involuntary mental health commitments and commitments of minors; ex parte and uncontested civil matters; administration of adjournments, oaths, and attendance of witnesses; proofs of deeds and mortgages; taking affidavits and depositions; maintaining the official seal; collecting fees; hearing small claims appeals; and **in adult criminal cases**, presiding over arraignments, first appearances, extradition, and noncompliance hearings; appointing counsel; determining probable cause; setting release conditions; setting trial dates and authorizing continuances and speedy trial waivers. This statute also purports to empower commissioners **to accept pleas if authorized by local court rules**. RCW 2.24.040(15).

This purported grant of jurisdiction to accept pleas in criminal cases cannot be reconciled with the distinction under the Constitution and RCW 2.28.050 between court power and judge power. Except for RCW 2.24.040(15), all commissioners' powers listed in RCW 2.24.040 are

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<sup>6</sup> [2009 c 28 § 1; 2000 c 73 § 1; 1997 c 352 § 14; 1991 c 33 § 6; 1979 ex.s. c 54 § 2; 1963 c 188 § 1; 1909 c 124 § 2; RRS § 85. Prior: 1895 c 83 § 2.]

consistent with powers exercised by territorial judges as distinguished from powers of the court. But it appears that RCW 2.24.040(15) is facially unconstitutional insofar as it purports to empower commissioners to accept pleas. Accordingly, the Court should sever RCW 2.24.040(15).

3. **IRRESPECTIVE OF THE VALIDITY OF RCW 2.24.040(15), PACIFIC COUNTY HAS NEVER ADOPTED A COURT RULE EMPOWERING COMMISSIONERS TO ACCEPT CLASS A FELONY PLEAS.**

Even if RCW 2.24.040(15) were constitutional, however, Commissioner Goelz did not have jurisdiction to accept Mr. MacGregor-Reign's plea. The jurisdiction purportedly created by RCW 2.24.040(15) is conditioned on the County having adopted a local court rule. Pacific County never did that.

In August of 2000, Pacific County had no local rule authorizing commissioners to accept any pleas whatsoever. For the very first time in September, 2000, the County adopted a local rule authorizing commissioners to take pleas. LCrR 5 provides: "Constitutional Court Commissioners may take pleas in all cases except Class A felonies."

Thus, LCrR 5 is doubly irrelevant in this case. First, its effective date of September 1, 2000, was ten days after Commissioner Goelz accepted MacGregor-Reign's plea. Therefore, on August 21, RCW

2.24.040(15) did not confer statutory jurisdiction Commissioner Goelz to accept any sort of plea. Second, LCrR 5 would not have applied to MacGregor-Reign, even if it had been on the books, because he pleaded to a Class A felony, which the rule explicitly excludes.

Contrary to the State's argument below,<sup>7</sup> LCrR 5 did not merely introduce a limit of pre-existing constitutional plea jurisdiction to exclude Class A felonies. Rather, it created new jurisdiction to accept pleas where none existed previously. The State argued that the Legislature cannot take away jurisdiction that the Constitution has conferred. *Howard v. Hanson*, 49 Wash. 314, 318, 95 P. 265, 267 (1908). By the same token, as discussed above, the Legislature cannot expand jurisdiction beyond that given by the constitution. *Bridges*, 24 Wash. at 547; *Marbury*, 1 Cranch at 138. And the courts cannot contradict the state constitution by court rule. *Santilli*, 146 Wn.2d at 504-505. All judicial power in the State of Washington is vested in the courts designated by the constitution. *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). Court rules cannot diminish any substantive constitutional right. *Fields*, 85 Wn.2d at 130.

The State has cited to no criminal case that elevates the constitutional jurisdiction of commissioners to equal that of judges save only in matters decided by jury. 10/9RP 11. When no authority is cited,

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<sup>7</sup> 10/9RP at 14.

the Court may presume that counsel, “after diligent search, has found none.” *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000). To the contrary, *State v. Philip* is the governing law on this issue, and that case limits the powers of commissioners to those exercised by territorial judges when the court of record was not in session.

Accordingly, the judgment and sentence entered pursuant to the guilty plea taken by Commissioner Goelz on August 21, 2000, is invalid on its face on both constitutional and non-constitutional grounds. The remedy is to reverse and remand with instructions to allow MacGregor-Reign to withdraw his plea.

The State may argue that the holding of *Howard*, another civil case, suggests that the third clause of Const. art 4, § 23 may empower the Legislature to expand the jurisdiction of court commissioners, because it includes in commissioners’ constitutional powers taking depositions and performing “*such other business connected with the administration of justice as may be prescribed by law.*” *Howard*, 49 Wash. at 319. This language simply cannot translate to constitutional jurisdiction to take felony guilty pleas, however.

First, the word “such” in this clause limits the other authorized business to ministerial duties such as taking depositions. Second, the term “administration” is inherently limiting.

“Administration” refers to the “[m]anagement or conduct of an office or employment; the performance of the executive duties of an institution. . . . In public law, the administration of government means the practical management and direction of the executive department, or of the public machinery or functions, or of the operations of the various organs or agencies.”

Black’s Law Dictionary, 6<sup>th</sup> Ed. at page 44. Thus administrative business such as the taking depositions, as distinct from accepting guilty pleas, was an at-chambers function of territorial judges. And the right of criminal defendant’s to appear in open court renders the point moot in any event. *Philip*, 44 Wash. at 617.

4. THE MOTION TO VACATE WAS NOT TIME-BARRED.

In addition to disputing the commissioner jurisdiction issue, the State claimed MacGregor-Reign’s Motion to Vacate was barred under RCW 10.73.090(1). CP 74. This is wrong.

MacGregor-Reign claims the judgment and sentence based on the guilty plea on August 21, 2000, exceeded the court’s subject matter jurisdiction and is invalid on its face. Accordingly, Chapter 10.73 RCW does not preclude him from seeking redress.

“[L]ack of original jurisdiction to hear and determine a case meets the ‘exceptional circumstance’ rule, and that evidence of lack of jurisdiction may be received for the first time and considered in an

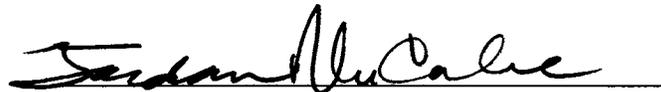
application for writ of habeas corpus.” *Wesley v. Schneckloth*, 55 Wn.2d 90, 93-94, 346 P.2d 657 (1959). A prisoner in custody may move the court to vacate an unlawful sentence at any time; there is no statute of limitations, no res judicata, and no doctrine of laches. *Heflin v. U.S.*, 358 U.S. 415, 420, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959).

Therefore, MacGregor-Reign’s motion was timely because he challenged the subject matter jurisdiction of the court to enter judgment on a felony guilty plea accepted by a commissioner.

V. CONCLUSION

For the forgoing reasons, the Court should vacate MacGregor-Reign’s guilty plea, reverse his conviction, vacate the judgment and sentence.

Respectfully submitted this 1<sup>st</sup> day of June, 2010.



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**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that she mailed this day,  
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