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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I 62290-1**

*In re the Personal Restraint Petition of*  
**JACQUELINE FLETCHER,**  
Petitioner.

NO. ~~81713-8~~  
PETITIONER'S SUPPLEMENTAL  
MEMORANDUM RE: FACIAL  
INVALIDITY AND APPLICATION  
OF TIME BAR

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STATE OF WASHINGTON  
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JUL 14 2009  
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**I. INTRODUCTION**

Ms. Fletcher filed a PRP challenging the validity of a conviction that was later used as a necessary predicate in a persistent offender finding. The conviction under attack was the result of a guilty plea where Ms. Fletcher was misinformed about a direct consequence of her plea—the maximum fine that could be imposed upon conviction. However, in order for this Court to consider the merits of that claim, Ms. Fletcher must show that the statutory “time bar” does not apply either because she was not properly notified or because her conviction is invalid on its face.

This Court previously called for additional briefing on these two related topics from the State, as well as inviting the Department of Corrections to intervene and file a response. This is Ms. Fletcher’s reply to those pleadings.

1 II. FACTS

2 This case involves disputed facts, although Petitioner contends those facts are  
3 immaterial. If this Court disagrees, it should remand this case to King County Superior  
4 Court for an evidentiary hearing. RAP 16.11 (b).  
5

6 The Department of Corrections' (DOC) *Response* contains a number of documents  
7 which were apparently produced for another case. Exhibits 3-5 were apparently prepared  
8 and filed in Ms. Runyan's case. These documents should not be considered because they  
9 are not "competent" evidence. *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).  
10  
11 Certainly, there is little question but that this Court would refuse to consider a declaration  
12 in support of a PRP that was written for another case. The same rule must apply to  
13 parties responding to a petition, either on the merits or on a procedural issue.  
14

15 The DOC did not present any document stating that Ms. Fletcher personally  
16 received the handbook and that it included a copy of the collateral attack notice.  
17  
18 Exhibit 2, which does constitute competent evidence and should not be considered,  
19 simply states that a handbook was provided to inmates in the routine course of business  
20 and, if complete, should have included notice about the collateral attack limitations.  
21

22 Ms. Fletcher's declaration, which Petitioner will forward when received, states  
23 that she does not recall whether that handbook was given to her; if it was provided, does  
24 not recall whether it included the memorandum on collateral attack rights; and does not  
25 recall any DOC staff explaining that particular memorandum to her.  
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1           However, what is still not in dispute is the trial court’s failure to provide Ms.  
2 Fletcher with notice of the collateral attack limitations at the time of sentencing—either  
3 orally or in writing.  
4

5           III.     ARGUMENT  
6

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

8           “Defendants sentenced after July 23, 1989, *will* have been advised by the  
9 sentencing court of the time limit for collateral attacks. RCW 10.73.110.” *In re Pers.*  
10 *Restraint of Runyan*, 121 Wn.2d 432, 453, 853 P.2d 424 (1983). The Supreme Court’s  
11 statement was not intended as hyperbole. Instead, the statement simply tracked the plain  
12 language of the statute: “*At the time judgment and sentence is pronounced in a criminal*  
13 *case, the court shall advise the defendant of the time limit specified in RCW 10.73.090*  
14 *and 10.73.100.*” RCW 10.73.110 (emphasis added).  
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18           Despite the statutory directive, the State argues that notice given by another person  
19 (a Dept. of Corrections employee, who presumably is neither a judge, nor an attorney) at  
20 some other time (prison intake, not sentencing) complies with the dictates of the statute.  
21 However, because the statute requires notice by a judge at sentencing the statute is not  
22 complied with when notice is given by a prison official at intake. If the Legislature  
23 believed such notice was sufficient, they certainly could have said so.  
24  
25

26           In fact, the Legislature did say so, albeit for a different category of offenders.  
27 RCW 10.73.120 provides that the Department of Corrections shall attempt to advise  
28 offenders of the collateral attack limitations. However, that statute, by its own terms,  
29  
30

1 applies only to individuals under sentence on July 23, 1989. Section 120 was designed to  
2 notify offenders convicted and sentenced *before* the enactment of the statute, that the  
3  
4 Legislature had enacted a statutory time limit on collateral attacks.

5         On the other hand, RCW 10.73.110, which requires judge notification at  
6 sentencing, applies to every offender sentenced after that date. Ms. Fletcher was  
7 convicted and sentenced after that date. Therefore, the DOC notification statute does not  
8 apply in this case.  
9  
10

11         The Washington Supreme Court rejected an argument raised by a Section 120  
12 Petitioner that he did not get actual notice from DOC by holding that the plain language  
13 of the statute controls. Because the statute only requires attempted notice, any argument  
14 regarding the failure to provide actual notice requires the Court to read in language not  
15 placed in the statute by the Legislature. “We have already determined that the language  
16 of RCW 10.73.120 is not ambiguous.” *In re Vega*, 118 Wash.2d 449, 450, 823 P.2d 1111  
17 (1992). The Court continued:  
18  
19

20                 Had the Legislature intended the Department to provide actual notice, it certainly  
21 would have said so.  
22

23 *Id.* Of course, the Legislature *did* say so in RCW 10.73.110.

24         This Court should not create an exception to RCW 10.73.110 allowing for notice  
25 by DOC for individuals sentenced after July 23, 1989, where the language of the statute  
26 is plain and where the Legislature adopted DOC attempted notification for those  
27 individuals sentenced before that date, but not for individuals sentenced after that date.  
28

29 *Sandona v. Cle Elum*, 37 Wn.2d 831, 226 P.2d 889 (1951); *Insurance Co. of North*  
30

1 *America Companies v. Sullivan*, 56 Wn.2d 251, 352 P.2d 193 (1960). In short, this  
2 Court should not create an exception where the Legislature decided no exception should  
3 apply.  
4

5 Applying the plain language of the statute, the notice required by RCW 10.73.110  
6 was not provided to Ms. Fletcher in this case—an uncontested point.  
7

8 There are additional reasons why this Court should not read into the statute an  
9 exception that is not there.  
10

11 When Petitioner’s have sought to avoid the plain language of the statute,  
12 Washington courts have “strictly construed” RCW 10.73.090 in light of the legislative  
13 intent to control the flow of post-conviction collateral relief petitions and to uphold the  
14 principles of finality of litigation. *See, e.g., In re Pers. Restraint of Bonds*, 165 Wash.2d  
15 135, 196 P.3d 672 (2008) (“We are reluctant to apply exceptions to legislative time  
16 limits. Adopting a rule for equitable tolling in the criminal context that mirrors the  
17 predicates in the civil context is consistent with the purposes of RCW 10.73.090 and this  
18 court's rather strict adherence to the statute of limitation in *Benn* and *Carlstad*. Applying  
19 equitable tolling to Bonds's situation, however, would undercut finality of judgments,  
20 encourage untimely filing and amendments to collateral attacks, and unjustifiably  
21 expand the narrow equitable tolling exception.”); *Shumway v. Payne*, 136 Wash.2d 383,  
22 397-98, 964 P.2d 349 (1998) (only exceptions to one-year statute of limitations are those  
23 listed in RCW 10.73.100); *In re Personal Restraint of Well*, 133 Wash.2d 433, 441-42,  
24 946 P.2d 750 (1997) (motion to withdraw insanity plea).  
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1           There is no reason, and none is offered by the State, to support a conclusion that  
2 the courts should strictly construe the post-conviction statutes when they require a  
3  
4 Petitioner to do some act, but liberally construe the notification statute, which requires a  
5 judge to take certain action. Indeed, it makes no sense to hold a *pro se* litigant, untrained  
6  
7 in the law and without the right to assistance by counsel, to a strict standard, while  
8 simultaneously excusing a judge from complying with the plain letter of the law.  
9  
10 Besides, the statutory requirement imposed on a judge is simple and easy to fulfill.

11           There are strong policy reasons, in addition to the application of principals of  
12 statutory construction, supporting Petitioner's argument. Faced with a large number of  
13  
14 prisoners with differing degrees of education, some with mental impairments, and many  
15 whom do not speak English, judicially removing the requirement notice by the court at  
16 the time of sentencing is a recipe for disaster. Likewise, our Supreme Court has taken  
17  
18 judicial notice of the limited resources available to prisoners for *pro se* legal work. *State*  
19 *v. Theobald*, 78 Wash.2d 184, 185-86, 470 P.2d 188 (1970). Thus, it makes perfect sense  
20  
21 to require notice to be given in court at sentencing, where the Court can only proceed if  
22 the defendant is competent, where she is constitutionally entitled to counsel (and the  
23 assistance of an interpreter, if necessary) and where reliable answers can be given if  
24  
25 questions arise. It is important to note that, as the Washington Supreme Court has  
26  
27 already done, that "(i)n imposing the time limitations at issue in these cases, the  
28 Legislature limited an individual's ability to challenge the legality of his or her criminal  
29 conviction and sentence." *Runyan, supra*. Because these limitations have an impact on  
30

1 an individual's liberty interest, this Court should keep the burden of providing notice on  
2 the person designated by the Legislature—a judge.  
3

4         What the State argues for is essentially a “substantial compliance” rule.  
5 Washington courts have declined to adopt a substantial compliance rule with the filing  
6 deadline, reasoning that there can be no substantial compliance with deadlines, which  
7 either are actually met or they are not. *State v. Robinson*, 104 Wash. App. 657, 666-67,  
8 17 P.3d 653 (2001). *See also State v. Dearbone*, 125 Wash.2d 173, 883 P.2d 303 (1983)  
9 (“We decline to graft the doctrine of substantial compliance onto RCW 10.95.040.”).  
10  
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12         In any event, an essential aspect of substantial compliance requires some level of  
13 *actual* compliance with the substance essential to the statute. *Petta v. Department of*  
14 *Labor and Industries*, 68 Wash.App. 406, 409, 842 P.2d 1006 (1992). “Noncompliance  
15 with a statutory mandate is not substantial compliance.” *Petta*, 68 Wash.App. at 407,  
16 409. In this case, the statutory mandate is for a *court to provide notice* to a defendant  
17 when she is sentenced. While the exact form of that notice can vary from case to case  
18 and may give rise to questions of whether compliance is substantial enough, where a  
19 court has utterly failed to provide any notice the statutory mandate has not been met.  
20  
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23         The State next argues that because Ms. Fletcher was given notice by a judge in  
24 another case several months earlier that the prior notice sufficed for all future cases.  
25 Once again, if the Legislature wanted to require notice of the time bar be given once in a  
26 lifetime (to those individuals who had not been previously given notice because they had  
27 not been sentenced in a felony case after July 23, 1989), the Legislature could have  
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1 easily said so. However, the fact that Ms. Fletcher was once told by one judge that a  
2 time bar existed, but was not given that same information when she was later sentenced  
3 by another judge could have easily been understood as an indication that the rule no  
4 longer existed. Silence does not necessarily mean that the *status quo* has not changed.  
5 It can just as easily mean the opposite. Further, a “once in a lifetime” rule would be  
6 unworkable as the statute may be amended from time to time.  
7

8  
9 Just as there should be no exception for DOC notice, this Court should not create  
10 an exception for individuals who received notice at an earlier date by a different judge in  
11 a different case.  
12

13  
14 B. Fletcher’s Judgment is Facially Invalid

15 A judgment and sentence is facially invalid if “the judgment and sentence  
16 evidences the invalidity without further elaboration.” *In re Pers. Restraint of Goodwin*,  
17 146 Wn.2d 861, 866, 50 P.3d 618 (2002) (citing *In re Pers. Restraint of Stoudmire*, 141  
18 Wn.2d 342, 5 P.3d 1240 (2000); *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 10  
19 P.3d 380 (2000)).  
20  
21

22 On its face, Fletcher’s judgment contains an obvious error regarding the maximum  
23 possible fine. The State does not dispute the error. Instead, the State first argues that Ms.  
24 Fletcher’s judgment begins on Section III of the document and that anything preceding  
25 that section is irrelevant. The State then argues that a facial invalidity is limited to an  
26 error on the judgment which affects the validity of the sentence itself. *State’s Supp.*  
27  
28 *Response*, p. 4. Caselaw belies both of the State’s arguments.  
29  
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1 Sections 2.3 and 2.4 of Ms. Fletcher’s judgment and sentence contain her  
2 “criminal history,” “offender score,” sentence “range,” and the “maximum term.” If the  
3 State is correct that an error regarding the maximum term does not constitute a facial  
4 invalidity, neither should an error regarding any of the other above-listed facts.  
5 However, prior cases have found that errors in these calculations appearing on the face of  
6 the judgment constitute a facial invalidity. For example, in *Pers. Restraint of Bradley*,  
7 165 Wn.2d 954, 205 P.3d 123 (2009), Petitioner’s offender score was miscalculated (at  
8 the time of the plea and sentencing) for one of his two crimes of conviction. The  
9 miscalculation on his judgment had no “actual effect” on his sentence because his  
10 offender score was correct on the more serious offense and Bradley’s lesser sentence (on  
11 the offense with the miscalculated offender score) ran concurrently with the greater  
12 sentence. Nevertheless, this Court accepted without comment a concession from *the*  
13 *same prosecuting agency* that the judgment was facially invalid because it contained an  
14 error obvious from the “face” of the document. The State fails to explain why they now  
15 seek to apply a different rule to Ms. Fletcher than the one they sought to apply to Mr.  
16 Bradley.  
17

18 Likewise, a sentence, which was improperly calculated using previously “washed  
19 out” juvenile offenses, is invalid on its face. *In re Pers. Restraint of Goodwin*, 146 Wn.2d  
20 861, 865-67, 50 P.3d 618 (2002). While the incorrect inclusion of criminal history can  
21 (but does not necessarily) result in an increase to the sentence imposed, it is impossible to  
22 determine that a prior conviction washes out without referring to the criminal  
23

1 history/sentencing data portion of the judgment. Thus, under the State’s reasoning,  
2 *Goodwin* was incorrectly decided. If that is indeed the State’s position, then they should  
3  
4 admit that this Court must apply *Goodwin*, but indicate they will seek to have the  
5 Washington Supreme Court overrule that precedent.  
6

7       Indeed, in some “facial invalidity” cases no error whatsoever is immediately  
8 apparent from a review of the judgment. For example, in *Pers. Restraint of Richey*, 162  
9 Wn.2d 865, 175 P.3d 585 (2008), looking only at the judgment, Richey was convicted of  
10 murder. A conviction for “murder” is facially valid. Under the rule advanced by the  
11 State, that should have ended the inquiry. It did not. “The question remains whether  
12 Richey's judgment and sentence is, as Richey asserts, facially invalid in light of the fact  
13 that he was charged, alternatively, with attempted first degree felony murder and  
14 attempted first degree intentional murder.” *Id.* at 870. In other words, because Richey  
15 had raised the possibility of an error and because the judgment did not definitively  
16 answer the question of whether Richey was charged with felony-murder based on assault  
17 during the time that crime was not legislatively authorized, the facial invalidity inquiry  
18 permitted the reviewing court to examine additional documents.  
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23       *Richey* demonstrates that “facial invalidity” serves as a gateway allowing a court  
24 to examine an underlying error which otherwise would be time barred. *See also In re*  
25 *Pers. Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004). Thus, the facial  
26 invalidity is related to the underlying error which a Petitioner seeks to have corrected.  
27  
28 However, it is not the error itself—as the State incorrectly suggests. Further, the fact that  
29  
30

1 some facial invalidity cases concerns errors in the actual sentence imposed only serves to  
2 expand, not limit the class of available “facial invalidities.”  
3

4 *In re Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002), notes that documents  
5 “signed as part of a plea agreement” may be considered in determining facial invalidity  
6 when those documents are relevant in assessing the validity of the judgment and  
7 sentence. In this case, Ms. Fletcher’s judgment reveals an error regarding the maximum  
8 fine for the class of crime of conviction. That error serves as a gateway for this Court to  
9 examine whether her guilty plea was invalid. *See also In re Pers. Restraint of*  
10 *Stoudmire*, 141 Wn.2d 342, 5 P.3d 1240 (2000) (time bar did not apply where the  
11 “documents of the plea agreement show on their face” that some charges were filed after  
12 the statute of limitations had run); *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 10  
13 P.3d 380 (2000) (facial invalidity became apparent after reviewing the charging and plea  
14 documents which showed that the petitioner had been charged with an offense that did  
15 not become a crime until nearly two years after the offense was committed).  
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21 Ms. Fletcher concedes that the error on the face of a judgment challenged as  
22 facially invalid must reveal some underlying error which justifies relief. For that reason,  
23 an obvious misspelling of the word “King” could never constitute a facial invalidity.  
24 However, that is not the issue, here.  
25

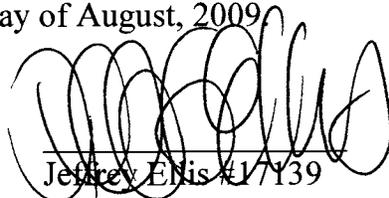
26 Because Ms. Fletcher’s judgment reveals—on its face—an error regarding one of  
27 the direct consequences of a guilty plea, this Court can reach that error, despite the fact  
28 that this conviction is more than one year old.  
29  
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1 IV. CONCLUSION

2 Based on the above, this Court should either remand for an evidentiary hearing on  
3 the "notice" issue or grant Ms. Fletcher's petition and remand with instructions allowing  
4 her to withdraw her guilty plea.  
5

6 DATED this 31<sup>st</sup> day of August, 2009

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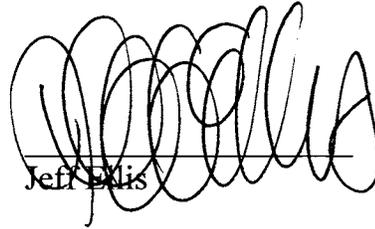
**CERTIFICATE OF SERVICE**

I, Jeff Ellis, certify that on August 31, 2009, I served the parties listed below with a copy of the *Supplemental Memorandum* by sending it attached as an email to:

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Date and Place

  
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