SUPREME COURT NO. 1006233
COURT OF APPEALS NO. 37661-3-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OLAJIDE ADEL FLETCHER,

Petitioner.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION FOR REVIEW

Kevin J. McCrae
Prosecuting Attorney
WSBA #43087
Attorneys for Respondent

PO BOX 37
EPHRATA WA 98823
(509)754-2011

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES

Page

State Cases

TABLE OF AUTHORITIES (continued)

Page

State Cases (continued)

TABLE OF AUTHORITIES (continued)

Page

State Cases (continued)

TABLE OF AUTHORITIES (continued)

Page

State Cases (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Page

Statutes and Other Authorities (continued)

A. IDENTITY OF RESPONDING/ CROSS PETITIONING PARTY

The State of Washington, respondent/cross petitioner, seeks the relief designated in part B.

B. COURT OF APPEALS DECISION

The State asks the Court deny Mr. Fletcher's petition for review. The State seeks review of the portion of the Court of Appeals decision finding Mr. Fletcher's judgment and sentence invalid on its face. A copy of the Court of Appeals decision is attached to Mr. Fletcher's petition for review.

C. ISSUES PRESENTED FOR REVIEW

1. Mr. Fletcher's issues.

a. Does RCW 10.73.140 apply to CrR 7.8 motions brought in Superior Court?

b. Must a petitioner show good cause for a subsequent collateral attack when he was not represented by counsel in his first petition?

2. State's issues.

a. Is a mistake in miscalculating an offender score prior to imposing an exceptional sentence, where the sentence is not based on the offender score, a procedural or substantive error?

b. Does a procedural error render a judgment 'invalid on its face' where the sentence was within the Court's substantive authority?

D. STATEMENT OF THE CASE

Olajide Fletcher shot Alex Tauveve five times in the legs because Mr. Fletcher thought Mr. Tauveve stole a couple of TVs from him. CP 311, 314. Fletcher originally indicated Tauveve pulled the gun first and claimed self-defense. CP 314. This was contradicted by other witnesses and the sight found on Mr. Fletcher's gun that he purchased two days before the shooting. CP 311. Mr. Fletcher claimed he fled the area to the west side of the State and had thrown away the gun, and was not armed and dangerous. CP 314-15.

U.S. Marshalls found Mr. Fletcher and his girlfriend in Missoula, Montana. CP 318. Mr. Fletcher and his girlfriend got into their car as the Marshalls moved to arrest them. Mr. Fletcher used his vehicle to ram the Marshalls' car. An officer fired several rounds, but no one was hit. CP 327. In Mr. Fletcher's car officers found ammunition matching the ammunition used to shoot Mr. Tauveve, a handgun and a rifle. CP 320. The handgun had a sight on it. Mr. Fletcher bought the sight from a store in Moses Lake two days before the shooting. RP 316. Mr. Fletcher was interviewed about the incident, acknowledged the confrontation, but did not claim self-defense. CP 321.

Mr. Fletcher was charged with Assault in the First Degree. CP 1. The parties engaged in plea negotiations and Mr. Fletcher pled guilty to one count of Assault in the Second Degree, a firearm enhancement and one count of Unlawful Possession of a Firearm in the First Degree. CP 106-117. The

parties stipulated to an exceptional sentence upwards, with an agreed recommendation:

> That in lieu of and in consideration for my plea of guilty in this case, the prosecutor will recommend an exceptional sentence/incarceration of 84 months on count 1 (with a 3 year deadly weapon enhancement), 41 months on count 2 to run concurrent, for a total of 10 years. The prosecutor will file no more Washington charges based on this incident and will not charge Tia Kelly unless new information comes to light showing more involvement." CP 110.

This was an agreed recommendation of the parties. RP 6, 10, 14.

Mr. Fletcher was sentenced on February 23, 2016. RP 14. He did not appeal. The parties believed he had eight points on the Assault in the Second-Degree charge. This consisted of one adult conviction for Theft 1, a juvenile conviction for Assault 2, and a juvenile conviction for two counts of Attempted-Assault 2. He also had a conviction for a Third Degree assault the parties agreed washed. CP 69. The parties believed that under *State v. Ashley*, 187 Wn. App. 908, 911, 352

P.3d 827, 829 (2015), *aff'd in part, rev'd in part,* 186 Wn.2d 32, 375 P.3d 673 (2016), the Attempted Assault Seconds did not wash and counted as two-point multipliers on the current offense of Assault in the Second Degree, giving Mr. Fletcher eight points for that crime (two points for the Assault in the Second Degree, four points for the two Attempted Assault in Second Degree, one point for the prior Theft in the First Degree, and one point for the other current offense of Unlawful Possession of a Firearm). This would give him a standard range of 53-70 months on the Assault in the Second Degree, plus the 36-month firearm enhancement. CP 70.

On March 18, 2016 Mr. Fletcher filed a motion to modify the judgment and sentence pursuant to CrR 7.8, seeking a standard-range sentence. CP 45. Mr. Fletcher's motion was denied, and after allowing him an opportunity to withdraw it, it was transferred to the Court of Appeals as a PRP. CP 47-50. The Court of Appeals called for an answer from the State, which had attached a copy of the judgment and sentence to its

answer and provided a copy to Mr. Fletcher as well as the court. The court then rejected his motion as frivolous in March of 2017. CP 52-54.

In July of 2019 Mr. Fletcher noted another CrR 7.8 motion in the trial court. CP 55-67. He cited *State v. Moeurn*, 170 Wn.2d 169, 171, 240 P.3d 1158, 1159 (2010), for the proposition that his Attempted Assault in the Second Degree convictions should have washed, and thus his offender score was miscalculated. CP 58-66. The State initially objected based on RCW 10.73.140 that this was a successive collateral attack without good cause shown, and because CrR 7.8(b) incorporates RCW 10.73.140, the trial court could not consider it. CP 94. The trial court initially concluded it should not hear the motion because Mr. Fletcher did not show good cause as to why he did not initially raise the issue in his first PRP. CP 126. Mr. Fletcher responded that his first motion was dismissed as frivolous, thus not decided on the merits, and that Mr. Fletcher did not receive his judgment and sentence from his defense

counsel, but instead received a copy from the State in response to his first PRP in July/August of 2016. CP 130-138. While the Court found that Mr. Fletcher's previous petition was on the merits, and thus he needed to show good cause, the Court ruled that Mr. Fletcher had shown good cause because of the delay in receiving his judgment and sentence. CP 163-64.

The State concedes that based on *State v. Moeurn*, 170 Wn.2d 169, 171, 240 P.3d 1158, 1159 (2010), Mr. Fletcher's offender score was incorrect. However, the State also raised the issues that Mr. Fletcher's motion was untimely and that he failed to show prejudice. CP 165-167, 210. The trial court ultimately ruled that Mr. Fletcher's judgment and sentence was facially invalid, and that he did show prejudice. CP 238, 473. The Court also allowed Mr. Fletcher to argue for a sentence other than what was in the plea agreement. RP 475. Mr. Fletcher was resentenced to 77 months, which was the high end of the standard range.

The State appealed the trial court's ruling on several grounds. The Court of Appeals reversed, holding the petition timely, but successive without good cause, and remanded for imposition of the original judgment and sentence. The Court did not reach all grounds argued by the State.

E. ARGUMENT WHY MR. FLETCHER'S ISSUES SHOULD BE DENIED AND THE STATE'S ISSUES SHOULD BE ACCEPTED

1. Mr. Fletcher's petition should be denied.

a. Mr. Fletcher confuses common-law abuse of the writ doctrine with the statutory requirements of RCW 10.73.140.

For the first time in his petition for review Mr. Fletcher argues that he is not bound by RCW 10.73.140 because he was not represented by counsel in his first petition. "This (the Supreme) court does not generally consider issues raised for the first time in a petition for review." *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350, 356–57 (1998). Thus, the court should not accept review of this issue.

Mr. Fletcher's argument also lacks merit. The abuse of the writ doctrine and RCW 10.73.140 are not the same thing. They are different restrictions with different elements. In *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 564, 243 P.3d 540, 544 (2010), the court analyzed the two separately. There the Court found RCW 10.73.140 did not apply to the Supreme Court, and the abuse of the writ doctrine did not apply because Adolph was not represented by counsel in his first PRP. These were separate reasons. "Under *either* RCW 10.73.140 (which applies only to the Court of Appeals) *or* RAP 16.4(d) (which applies to this court), a successive petition for similar relief must be dismissed absent good cause shown." *In re Pers. Restraint of VanDelft*, 158 Wn.2d 731, 737, 147 P.3d 573, 576 (2006)(emphasis added). The requirement to be represented in a previous petition is an element of abuse of the writ doctrine. It is not an element of RCW 10.73.140. The State has never claimed the subsequent petition was an abuse of the writ. It has consistently claimed it was a violation of RCW 10.73.140. The

Court of Appeals correctly analyzed the issue. The fact that Mr. Fletcher was not represented in his first petition is irrelevant under RCW 10.73.140. Mr. Fletcher seeks to add language to the statute that is simply not there.

b. Mr. Fletcher did not show good cause.

1) Mr. Fletcher's cause was not good.

Generally, good cause is found when there has been an intervening change in the law between a first and second petition. *In re Pers. Restraint of Flippo*, 191 Wn. App. 405, 409, 362 P.3d 1011, 1012 (2015), *aff'd*, 187 Wn.2d 106, 385 P.3d 128 (2016). Mr. Fletcher does not point to an intervening change in the law. Just conducting new research and finding cases that are new to the petitioner does not constitute good cause. *In re Pers. Restraint of Holmes*, 121 Wn.2d 327, 330, 849 P.2d 1221, 1223 (1993). Good cause can come from an "external objective impediment," which can establish good cause, but not from a "self-created hardship," which cannot. *State v. Crumpton*, 90 Wn. App. 297, 302, 952 P.2d 1100, 1103

(1998). In *Crumpton* the defendant argued that indigency and the fact that he was in prison made it difficult for him to hire an investigator to obtain evidence for his personal restraint petition. The Court ruled that these were self-created hardships. A defense attorney is not external to the defendant, thus the fact that the defense attorney may not have sent Mr. Fletcher his judgment and sentence is not an external hardship. Even if a defense attorney is considered external to the defendant, all Mr. Fletcher had to do was make a request to the Grant County Clerk's Office or submit a public records request to the Prosecutor's Office and his judgment and sentence would have been produced. Mr. Fletcher faced much less hardship in obtaining the information he needed than Mr. Crumpton, and thus the cause he asserts is not good.

2) Mr. Fletcher's good cause was not cause.

Mr. Fletcher filed his first petition in March of 2016, approximately one month after his judgment and sentence

became final. He claims he did not receive his judgment and sentence until the State attached it to its response to his petition, which occurred in late July or early August of 2016. Mr. Fletcher's one-year time for collateral attack ran on February 23, 2017. Mr. Fletcher had over six months after he acknowledged the impediment was removed in order to file an amended personal restraint petition raising this issue. "[A] petitioner can amend an initial PRP and raise new grounds for relief, without requesting a formal amendment, as long as the brief is timely filed and the new issue is adequately raised." *In re Pers. Restraint of Meredith*, 191 Wn.2d 300, 307, 422 P.3d 458, 462 (2018).

In addition, Mr. Fletcher waited just shy of three years after he received his judgment and sentence, from July or August of 2016 to July of 2019, before he filed his second petition. Other rules and laws that use the term "good cause" incorporate a due-diligence standard. *E.g. In re Pers. Restraint of Fowler*, 197 Wn.2d 46, 53, 479 P.3d 1164, 1168

(2021)(equitable extension of time limit due in RCW 10.73.090 due to attorney misconduct subject to due diligence requirement); *Sellers v. Longview Orthopedic Associates, PLLC*, 11 Wn. App. 2d 515, 520, 455 P.3d 166, 170, *review denied,* 195 Wn.2d 1017, 461 P.3d 1201 (2020)(the general rule is that [t]o establish good cause under CR 55, a party may demonstrate excusable neglect and due diligence); *State v. Tetreault*, 99 Wn. App. 435, 438, 998 P.2d 330, 332 (2000)(factor in considering good cause for extension of restitution timeline in criminal cases is diligence in procuring necessary evidence); *Bramall v. Wales*, 29 Wn. App. 390, 393, 628 P.2d 511, 513 (1981)(showing of good cause for continuance for failure to conduct discovery must be based on a showing of due diligence); *State v. Turner*, 16 Wn. App. 292, 296, 555 P.2d 1382, 1384 (1976)(good cause for continuance when due diligence has been shown to procure evidence).

A due-diligence requirement to show good cause under RCW 10.73.140 is logical. As in this case due diligence is

directly linked to causation. It is simply not credible that the cause of the delay in filing Mr. Fletcher's second petition was the failure to obtain his judgment and sentence, when it took him almost three years after he received his document to file his petition, and he could have easily amended his original petition to include it. Rather the delay was Mr. Fletcher suddenly coming up with a new legal theory. Due diligence is also in keeping with the purpose of the statute. "The principle underlying the rule barring successive collateral attacks is the need for judicial finality regarding claims that have already been adjudicated." *In re Pers. Restraint of Becker*, 143 Wn.2d 491, 496, 20 P.3d 409, 412 (2001). Allowing defendants to sit on their claims for as much time as they like disrupts the principles of finality.

It is clear that the delay in filing Mr. Fletcher's second petition was not caused by the delay in receiving his judgment and sentence. His failure to exercise due diligence for three years indicates the two are not causally related. The term "good

cause" includes a due-diligence requirement. If a five-month delay in obtaining a readily available document constitutes good cause to file a subsequent petition three years later, the good cause requirement for filing a subsequent PRP is meaningless. Mr. Fletcher failed to show good cause.

c. RCW 10.73.140 is made applicable to the Superior Courts by CrR 7.8.

RCW 10.73.140 states, in relevant part,

> If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition...

By its terms, the statute only applies to personal restraint petitions (PRP's) in the Court of Appeals. However, CrR 7.8(b) states that motions brought under that rule are "subject to RCW 10.73.090, .100, .130 and .140." Thus, the subsequent petition rule in RCW 10.73.140 applies to Mr. Fletcher's petition. *Also In re Pers. Restraint of Becker*, 143 Wn.2d 491, 496, 20 P.3d 409, 411 (2001). As a matter of policy, this is also correct. Defendants should not be able to get around procedural requirements by simply filing their petitions in a different court.

Mr. Fletcher incorrectly states that both parties agreed that the successive petition bar only applies in the Court of Appeals. Brief or Petitioner at 10. He does not cite to anywhere in the record that states that agreement. Indeed, the entire premise of the arguments in the lower courts is that it did apply, in accordance with the plain language of CrR 7.8(b). Mr. Fletcher misstates the law when he claims that RCW 10.73.140 does not apply when the petitioner was unrepresented in the prior PRP. The proper procedure upon

remand for an error is for the appellate court to place the parties in a position as near to the position they would be in if the error had not been made. Here, according to the Court of Appeals opinion, the trial court should have dismissed the petition for failure to show good cause pursuant to RCW 10.73.140. That is exactly what the Court of Appeals ordered.

d. There is no double-jeopardy issue and the State could not directly appeal the vacation of the judgment and sentence under then existing mandatory Court of Appeals precedent.

In a footnote Mr. Fletcher alleges a double-jeopardy violation because the State appealed after the trial court entered the new judgment and sentence, rather than immediately after it vacated the old sentence. First, under *State v. Waller*, 12 Wn. App. 2d 523, 536, 458 P.3d 817, 824, *rev'd and remanded,* 197 Wn.2d 218, 481 P.3d 515 (2021), which was controlling law at the time the judgment was vacated, the State did not have the right to appeal until a new judgment and sentence was entered amending the old one. While the Court of Appeals rule was

later found by the Supreme Court to be erroneous, it was applicable at the relevant time.

The State had the right to appeal either under RAP 2.2(b)(1) final judgment, or 2.2(b)(3) arrest or vacation of judgment. There is no rule the State is aware of that required the State to appeal the first time one of these options becomes available, as long as it does so within 30 days of final judgment.

In addition, double jeopardy does not prohibit the State's appeal from an erroneous sentence. "The double jeopardy clause does not generally prohibit review of an allegedly erroneous sentence." *State v. Hardesty*, 129 Wn.2d 303, 310, 915 P.2d 1080, 1084 (1996). "The defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served, unless the defendant was on notice the sentence might be modified, due to either a pending appeal or the defendant's own fraud in obtaining the erroneous sentence." *Id.* at 312. Here the State timely appealed from the erroneous sentence. Mr. Fletcher never had an expectation of finality.

2. The Court should grant review and determine that Mr. Fletcher's petition was untimely.

a. State's Standing to Petition

Ultimately the State prevailed in the Court of Appeals based on the failure to show good cause for a successive petition. However, the Court of Appeals also reached the timeliness issue, which the State did not prevail on. Because the State has an interest in ensuring that it can enforce the time limits in RCW 10.73.090, the State is an aggrieved party within the meaning of RAP 3.1. *State v. Bergstrom*, __Wn.2d __, __P.3d__ (2022)(slip opinion at 10 n.10). The timeliness issue is also an alternative means of affirmance of the Court of Appeals opinion, should the Court grant Mr. Fletcher's petition.

b. The Court of Appeals decision conflicts with In re Personal Restraint of Flippo, In re Personal Restraint of Sargent, State v. Evans, State v. Buckman, and many others.

The Court of Appeals decision in holding that the rule announced in *State v. Parker*, 132 Wn.2d 182, 187, 937 P.2d

575, 578 (1997), was substantive conflicts with multiple holdings of the Washington State Supreme Court. *Parker* held that a court must correctly determine the standard sentencing range, even if the court imposes an exceptional sentence. However, *Parker* was a case on direct appeal. This case is an untimely PRP. For Mr. Fletcher to obtain relief he must establish that his judgment and sentence was facially invalid.

"Facial validity depends on whether the court exceeded its *substantive* authority." *In re Pers. Restraint of Flippo*, 187 Wn.2d 106, 110, 385 P.3d 128, 131 (2016)(emphasis added), "we have never found a judgment invalid merely because the error invited the court to exceed its authority when the court did not in fact exceed its authority. Only where the judgment and sentence was entered by a court without the authority to do so have we held the judgment invalid." *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 136, 267 P.3d 324, 331 (2011). "Procedural rules are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of*

determining' the defendant's culpability. Substantive rules set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *In re Pers. Restraint of Marshall*, 10 Wn. App. 2d 626, 641 455 P.3d 1163 (2019)(emphasis in original)(internal citations omitted).

In *Flippo* the petitioner argued that his judgment and sentence was invalid on its face because it revealed the Court did not conduct an individualized determination of his ability to pay legal financial obligations. *Flippo* contended "[i]f the trial court fails to engage in the required inquiries, it lacks authority to impose discretionary LFOs." *Flippo,* 187 Wn.2d at 110. The Court responded to this argument "This is not so; Flippo's argument erroneously conflates the substantive authority to impose discretionary LFOs with the proper procedure for doing so."

Here the Court of Appeals made the same mistake as the petitioner in *Flippo*. It conflated the substantive authority to

impose an exceptional sentence with the proper procedure for doing so. The substantive authority to impose an exceptional sentence was granted by the parties' stipulation per RCW 9.94A.535(2)(a). "The SRA provides the procedure by which a defendant's sentence may be imposed. The purpose of [the SRA] is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences. The SRA therefore provides some limitations on a sentencing court's determinations, but does not remove the court's discretion. Thus, the SRA is generally procedural in nature." *In re Pers. Restraint of Sargent*, 499 P.3d 241, 247 (Wash. Ct. App. 2021).

Perhaps most telling is the fact that the procedural rule announced in *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 2538, 159 L.Ed.2d 403 (2004), which requires a jury finding to impose aggravating factors that are not stipulated to,

was procedural, not substantive. *State v. Evans*, 154 Wn.2d 438, 442, 114 P.3d 627, 630 (2005).

Another formulation of the definition of procedural versus substantive is

> Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

State v. Boldt, __Wn. App. 2d __, __P.3d__ (February 22, 2022), citing *State v. Smith*, 84 Wn.2d 498, 527 P.2d 674 (1974). Under either definition determining an offender score before imposing a sentence that is not bound by that score is procedural, not substantive.

The Court of Appeals essentially ruled that following all procedures correctly was necessary to provide the Court with the substantive authority to do something. This holding completely eliminates the distinction between substantive and procedural rules. "Substantive rules ... set forth categorical

constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose" and include "'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" "Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *In re Pers. Restraint of Ali*, 196 Wn.2d 220, 237, 474 P.3d 507, 516 (2020), *cert. denied sub nom. Washington v. Ali*, 141 S. Ct. 1754, 209 L.Ed.2d 514 (2021)(internal citations omitted). Thus, the Court of Appeals decision conflicts with the numerous cases applying the procedural/substantive divide.

Nor do the cases the Court of Appeals relied upon dictate the result. The Court relied upon *State v. Chambers*, 176 Wn.2d 573, 584, 293 P.3d 1185, 1190 (2013), and *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618, 621 (2002). Neither case seriously examined facial validity. "In cases where a legal theory is not discussed in the opinion, that

case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000)(quoting *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994)(if a case fails to specifically raise or decide an issue, it cannot be controlling precedent for the issue)).

> Determining whether a judgment and sentence is invalid on its face and not subject to the one-year time bar has long troubled this court. Our jurisprudence has developed case by case. The term 'valid on its face' does not itself illuminate its meaning. In addressing the cases before us, we have not found it necessary in the past, nor do we now, to articulate an unyielding definition, and we hesitate to do so given the rich and complicated history of collateral challenges.

In re Pers. Restraint of Coats, 173 Wn.2d 123, 134, 267 P.3d 324, 330 (2011). "We have described the 'valid on its face' language of RCW 10.73.090(1) as 'a term of art that, like many terms of art, obscures, rather than illuminates, its meaning.'" *In*

re Pers. Restraint of Flippo, 187 Wn.2d 106, 110, 385 P.3d 128, 131 (2016). Given this history, it is not surprising that neither *Goodwin* nor *Chambers* addressed the procedural/substantive divide. While there were hints in earlier cases, the procedural/substantive test for facial invalidity did not really come into sharp focus until *Flippo*.

Indeed, in *Chambers* the Court held "There were no written findings of fact and conclusions of law setting forth the reasons for an exceptional sentence as required under former RCW 9.94A.120(3) (2000). Therefore, his sentence is invalid on its face and the one year time bar does not apply." *Id.* at 584. The Court then held, a few paragraphs later, "Here, the judge was authorized to impose an exceptional sentence, both because Chambers had multiple offenses that would go unpunished and because Chambers stipulated to the sentence in his agreement." *Id.* at 586. Under the reasoning in *Flippo,* these two holdings are contradictory. However, *Chambers* never considered the procedural/substantive issue, and it

predated *Flippo*. *Chambers* is not controlling simply because it never considered the issue.

Likewise, *Goodwin* never considered the issue. *Goodwin* is a 2002 case that predates much of the evolving case law on facial invalidity, and the State conceded the issue. For those reasons alone, it would not be good precedent. *Goodwin* never informs the reader if the old standard ranges and the new standard ranges from the corrected offender score in the case were the same, but presumably they were not. Unlike *Goodwin,* the sentence in this case was never predicated on the standard range. The Court had authority, based on the parties' stipulation to go outside the range. In *Goodwin* the Court held "his sentence is as a matter of law in excess of what is statutorily permitted for his crimes given a correct offender score." *Id.* at 875-76. That is simply not the case for Mr. Fletcher. *Goodwin* does not control this outcome.

Nor is there a special category of PRP's for offender score errors. The Court had held that this was the case in *In re*

Pers. Restraint of Bradley, 165 Wn.2d 934, 940, 205 P.3d 123, 126 (2009), regarding the prejudice to be shown in withdrawing a plea agreement for an offender score error. However, the Court later disavowed *Bradley* as error in *State v. Buckman*, 190 Wn.2d 51, 63 n.9, 409 P.3d 193, 200 (2018).

The Court of Appeals decision conflicts with *Flippo*, *Evans*, *Sargent* and many other cases discussing the distinction between substantive and procedural rules. Review should be granted under RAP 13.4(a) and (b). In addition, the Court has worked to refine the definition of the term "valid on its face" over the course of multiple cases over the decades. This case represents a further opportunity to clarify that definition, and thus represents a significant issue of law that should be decided by the Supreme Court under RAP 13.4(c).

c. The Court of Appeals did not address all issues.

Given their decision, the Court of Appeals understandably did not address whether Mr. Fletcher demonstrated a complete miscarriage of justice under

Chambers, whether he demonstrated prejudice or whether the trial court appropriately allowed a partial withdrawal of the plea agreement. Depending on the outcome of later proceedings, these issues may still need to be addressed.

F. CONCLUSION

The Court of Appeals properly held that Mr. Fletcher's subsequent PRP was barred by RCW 10.73.140. His petition should be denied. However, the Court of Appeals decision conflicts with several cases regarding the facial validity issue, most notably *In Re Personal Restraint of Flippo*. Review should be granted on that issue and the petition dismissed as untimely. If the petition is not dismissed, there are several other issues the Court of Appeals declined to reach that must still be addressed.

//

//

This document contains 4,987 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 25th day of February 2022.

Kevin J. McCrae, WSBA #43087
Grant County Prosecuting Attorney
kjmccrae@grantcountywa.gov

CERTIFICATE OF SERVICE

On this day I served a copy of the Respondent's Answer to Petition for Review and Cross-Petition for Review in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Jeffrey Erwin Ellis
jeffreyerwinellis@gmail.com
ellis_jeff@hotmail.com

Dated: February 25, 2022.

Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

February 25, 2022 - 3:58 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,623-3
Appellate Court Case Title:	State of Washington v. Olajide Adel Fletcher
Superior Court Case Number:	15-1-00723-1

The following documents have been uploaded:

- 1006233_Answer_Reply_20220225155751SC884573_2998.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was ANSWER TO PETITION FOR REVIEW.pdf

A copy of the uploaded files will be sent to:

- ellis_jeff@hotmail.com
- jeffreyerwinellis@gmail.com

Comments:

Sender Name: Kaye Burns - Email: kburns@grantcountywa.gov
Filing on Behalf of: Kevin James Mccrae - Email: kjmccrae@grantcountywa.gov (Alternate Email:)

Address:
PO Box 37
Ephrata, WA, 98823
Phone: (509) 754-2011 EXT 3905

Note: The Filing Id is 20220225155751SC884573