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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

NO. 39779-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRAD CHRIS BROWER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable James Lawler, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred in denying appellant's motion to withdraw his *Alford*¹ plea to attempted indecent liberties.

2. Appellant's plea was not knowingly, intelligently and voluntarily entered because his attorney incorrectly advised him that Attempted Indecent Liberties is not a "most serious offense" ("strike" offense) under the Persistent Offender Accountability Act.

3. The trial court erred by denying appellant's motion to withdraw his *Alford* plea because his plea was not knowing, intelligent and voluntary because he was incorrectly advised him that Amended Indecent Liberties was not a "strike" offense and because he was not given adequate time to read the Statement of Defendant on Plea of Guilty and because he has difficulty reading.

4. The appellant assigns error to finding of fact 1.10.

5. The court erred in concluding that the omission of an element of the crime of Attempted Indecent Liberties in the Statement of Defendant on Plea of Guilty to Sex Offense does not result in a constitutional violation or amount to a manifest injustice.

6. Appellant assigns error to the conclusions of law 2.2, 2.3, 2.4, 2.5, and 2.6.

¹*North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in denying appellant's motion to withdraw his plea? Assignment of Error No. 1.

2. A criminal defendant has the constitutional right to effective assistance of counsel in deciding whether to accept the prosecutor's plea offer, and counsel is ineffective if he gives incorrect advice concerning the consequences of a guilty plea. Attempted Indecent Liberties is a "most serious offense" for purposes of the Persistent Offender Accountability Act. When the appellant entered his plea, he was told by his attorney that it was not a "strike" offense. He later was informed that Attempted Indecent Liberties is a "strike" under the POAA. Must the appellant be permitted to withdraw his plea because he did not receive effective assistance of counsel when his attorney gave him incorrect advice that he was not pleading guilty to a "most serious offense"? Assignments of Error No. 2, 3, and 6.

3. A guilty plea is not voluntary if the defendant is not able to understand the nature of the case against him, the constitutional rights he is waiving, or the consequences of the plea. When he entered his guilty plea, the appellant had not seen the change of plea form and had not seen the second amended information, was not given time to review either of the pleadings, and did not understand the information contained in the

Statement of Defendant on Plea of Guilty. Was the appellant's plea knowingly, voluntarily, and intelligently made? Assignments of Error No. 3, 4, and 6.

4. Should this Court vacate the appellant's conviction for Attempted Indecent Liberties and allow him to withdraw his plea where the record shows that he was informed of the elements of the offense in the second amended Information filed by the State and where the Statement on Plea of Guilty omitted elements of the offense? Assignments of Error No. 5 and 6.

C. STATEMENT OF THE CASE

1. Procedural history:

Brad Brower was charged by the Lewis County Prosecutor's Office by amended information with two counts of attempted rape in the second degree or alternatively, indecent liberties with forcible compulsion. Clerk's Papers [CP] 128-29.

Mr. Brower entered an *Alford* plea² to an amended charge of Attempted Indecent Liberties on May 22, 2009 pursuant RCW 9A.44.100(1)(f)(i) and RCW 9A.28.020(1). CP 23-36, 119-20, 106-118;

²An *Alford* plea permits a defendant to take advantage of a plea agreement without acknowledging guilt. *North Carolina v. Alford*, 400 U.S. 25, 36, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Washington adopted *Alford* in *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976).

2Reprot of Proceedings [RP] at 13-20.³

The second amended information stated in relevant part:

ATTEMPTED INDECENT LIBERTIES

By this Information the Prosecuting Attorney for Lewis County accuses the defendant of the crime of ATTEMPTED INDECENT LIBERTIES, which is a violation of RCW 9A.28.020(1) and RCW 9A.44.100(1)(f)(i), the maximum penalty for which is five years in prison and a \$10,000 fine, in that defendant on or about and between December 31, 2008, and January 02, 2009, in Lewis County, Washington, with specific intent to commit the crime of indecent liberties against Lynette Pemberton or, alternatively, Julia Hedges, to wit: knowingly causing a person who is not his spouse to have sexual contact with him or another when the victim is a frail elder or vulnerable adult and the perpetrator has a significant relationship with the victim; did an act which is a substantial step toward the commissioner of that crime; against the peace and dignity of the State of Washington.

CP 119-20.

a. Change of plea.

Mr. Brower appeared with counsel before Judge James Lawler on May 22, 2009 and entered an *Alford/Newton* plea to Attempted Indecent

³The record in this case consists of five volumes:

1RP March 26, 2009, arraignment;

2RP April 23, 2009, May 7, 2009, May 21, 2009, motion hearings; May 22, 2009, change of plea hearing; August 21, 2009, hearing on motion to withdraw plea; September 11, 2009, sentencing hearing;

3RP July 2, 2009;

4RP July 23, 2009;

5RP August 27, 2009.

Liberties. 2RP at 14-20. As part of a plea agreement, the State would recommend 30.75 months in the Department of Corrections. CP 110. Appendix A.

The Statement of Defendant on Plea of Guilty to Sex Offense contained the following language:

4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:

(a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me.

(b) I am charged with: Attempted Indecent Liberties
The elements are: on a date certain in Lewis County take substantial step toward committing indecent liberties i.e. attempt to cause another to have sexual contact.

CP 106. Appendix A.

Judge Lawler accepted the *Alford* plea and found that it was knowingly, intelligently, and voluntarily made with an understating of the charge and the consequences of the plea, and that there was a factual basis for the plea, and found that Mr. Brower guilty of Attempted Indecent Liberties. 2RP at 19.

b. Motion to withdraw plea.

Prior to sentencing, Mr. Brower moved through new counsel to withdraw the guilty plea. CP 82-86; 2RP at 22-91. In his declaration in support of motion to withdraw guilty pleas, Mr. Brower stated that he did not understand and was not properly advised of the direct consequences of

his guilty plea. CP 83, 84, 85, 86. Specifically, he stated that he was not given an opportunity to read the Statement of Defendant on Plea of Guilty, that he was under pressure to make a decision regarding the plea, that he is a slow reader and not given adequate time to read and assimilate the guilty plea statement. CP 85. He also stated that not all of the elements of the crime of Attempted Indecent Liberties were not listed in the plea statement, and that he did not have an opportunity prior to entry of the guilty plea to compare the second amended information with the elements in the guilty plea form. CP 85. He stated that after he had an opportunity to compare the two pleadings, he denies that he knowingly took a substantial step toward having sexual contact with either of the two complaining witnesses and denies that there is evidence that either of them is a frail elder or vulnerable adult and denies that he had a significant relationship with either of them.⁴ CP 85. Mr. Brower stated that he would not have entered the plea if he had understood that Attempted Indecent Liberties is a “strike” offense and that he was specifically advised by his attorney Don Blair that the offense was not a strike, and that Mr. Blair had told his mother the same thing. CP 86.

Mr. Brower’s mother testified that she was told by her son’s attorney that Attempted Indecent Liberties was not a “strike” offense. 2RP at 28. Mr. Brower testified that he was told by his attorney that the

⁴These elements are omitted from the Statement of Defendant on Plea of Guilty to Sex Offense. CP 106.

offense was not a strike. 2RP at 43. He stated that he was also told by his mother that she had spoke with his attorney and was told it was not a strike, and he relied on that advice. 2RP at 43, 44, 45, 58. Mr. Brower stated that he would not have entered a guilty plea if he had known that it was a strike and that he would have proceeded to trial. 2RP at 45. He also testified that he did not read the second amended information in the courtroom when it was filed on May 22. 2RP at 47-48. Mr. Brower testified that he had difficulty reading large words, that he reads slowly, and did not have time on May 22 to read over the eight page plea statement. 2RP at 59.

Mr. Brower also stated that he was not aware that the required elements for the offense included that the victim is “a frail, elder[ly], or vulnerable adult and the perpetrator has a significant relationship with the victim.” 2RP at 48. He noted that the Statement on Plea of Guilty does not contain that language regarding that element Attempted Indecent Liberties. 2RP at 49.

At the hearing on Mr. Brower’s motion to withdraw his guilty plea, his attorney Don Blair stated he had spent considerable time with Mr. Brower, meeting with him in the jail more than five times and talking on the phone with him multiple times, and that he discussed the discovery and potential witnesses with Mr. Brower. 2RP at 63. Mr. Blair said that

he and the deputy prosecutor “agreed” that Attempted Indecent Liberties was not a strike offense, and that he also told Mr. Brower’s mother that it was not a strike. 2RP at 69. He also stated that he showed a copy of the second amended information to his client in court when it was filed on May 22, but did not know if he read it. 2RP at 72. He also testified that he did not discuss section 6(p) of the change of plea form because “we had already talked about the fact that it wasn’t a strike. . . .” 2RP at 74.

c. Findings of Fact and Conclusions of Law.

The court denied Mr. Brower’s motion in a Memorandum Decision filed August 25, 2009. CP 40-42. On September 11, 2009, the court entered the following relevant findings of fact:

1.3 The Court adopts and incorporates all facts outlined in the Memorandum Decision RE: Motion to Withdraw Plea entered on August 25, 2009.

1.4 On May 22, 2009, the Defendant entered an *Alford* plea of guilty to the Second Amended Information on the charge of Attempted Indecent Liberties, RCW 9A.44.100(1)(f)(i). The State filed the Second Amended Information as part of a plea deal between the Defendant and State. Prior to entry of the guilty plea, the Defendant reviewed the Second Amended Information with his defense attorney, Don Blair.

1.5 Prior to entry of the guilty plea, the defendant’s attorney incorrectly advised the defendant that the charge of Attempted Indecent Liberties, RCW 9A.44.100(f)(i), did not constitute a “strike” offense, or most serious offense as defined by RCW 9.94A.030.

1.6 In a phone conversation between the Defendant and his mother, Vickie Brower, on May 21, 2009, Vickie Brower relayed to the Defendant that his defense attorney

advised her that Attempted Indecent Liberties did not constitute a “strike” offense.

1.7 The Defendant testified that he would not have entered a plea of guilty to Attempted Indecent Liberties, RCW 9A.44.100(1)(f)(i), if he had understood that this charge was a most serious offense, *i.e.* a “strike” offense, under RCW 9.94A.030. The Defendant also testified that he plead guilty to Attempted Indecent Liberties, RCW 9A.44.100(1)(f)(i), to take advantage of the plea offer in order to receive less prison confinement than he faced as charged in the First Amended Information.

1.8 On May 22, 2009, prior to entry of the guilty plea, the defense attorney met with the Defendant in the Lewis County Jail on two occasions to discuss the potential plea agreement and to review the written Statement of Defendant on Plea of Guilty to Sex Offense. The defendant and his attorney did not discuss Paragraph 6(p) of that form.

1.9 Paragraph 4(b) of the Statement of Defendant on Plea of Guilty to Sex Offense omitted the element that the victim “is a frail elder or vulnerable adult and the perpetrator has a significant relationship with the victim.” The Second Amended Information contained the correct elements of the crime.

1.10 On May 22, 2009, during the Court’s colloquy with the Defendant at the time of entry of the guilty plea, the Defendant confirmed that he had reviewed the Second Amended Information and that he understood the elements of the offense, each of which the State would be required prove beyond a reasonable doubt at trial to convict the defendant. The defendant also confirmed that he understood the guilty plea form and reviewed the form with his attorney.

1.11 On July 22, 2009, the defendant filed a motion to withdraw his plea of guilty.

CP 37-38. Appendix B.

The court also entered the following relevant conclusions of law:

2.2 The consequence that Attempted Indecent Liberties,

RCW 9A.44.100(1)(f)(i), is a most serious offense and constitutes a “strike” offense is an “indirect” or “collateral” consequence as it flows not from the guilty plea itself but from additional proceedings; this consequence is not a “direct” consequence of the plea.

- 2.3 The misinformation provided to the defendant on the correct characterization of Attempted Indecent Liberties, RCW 9A.44.100(1)(f)(i), as a “non-strike” offense pertains to a collateral consequence of the defendant’s guilty plea.
- 2.4 The omission of an element of the crime of Attempted Indecent Liberties, RCW 9A.44.100(1)(f)(i), in the Statement of Defendant on Plea of Guilty to Sex Offense does not result in a constitutional violation or amount to a manifest injustice.
- 2.5 The defendant has failed to prove manifest injustice as required under CrR 4.2(f).
- 2.6 The Defendant’s Motion to Withdraw Guilty Plea is denied.

CP 39.

Mr. Brower was sentenced by Judge Lawler on September 11, 2009. Mr. Brower received a 30.75-month standard range sentence CP 26; 2RP at 103.

Timely notice of appeal was filed on September 11, 2009. CP 6.

This appeal follows.

D. ARGUMENT

1. MR. BROWER’S GUILTY PLEA WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY, AND HE DEMONSTRATED WITHDRAWAL OF THE PLEA WAS NECESSARY TO CORRECT A MANIFEST INJUSTICE.

A criminal defendant waives important constitutional rights when he enters a plea of guilty, and due process requires the plea be knowingly, intelligently and voluntarily entered. U.S. Const. amends. 5, 14; Wash. Const. art. 1 §§ 3, 22; *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1079, 23 L.Ed.2d 274 (1969); *Personal Restraint of Isadore*, 151 Wn.2d 294, 297-98, 88 P.3d 390 (2004). The State bears the burden of demonstrating a guilty plea is knowing, intelligent and voluntary. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

CrR 4.2 also governs guilty pleas, and sets forth procedural safeguards designed to insure that a defendant's constitutional rights are protected. *State v. Taylor*, 83 Wn.2d 594, 596-97, 521 P.2d 699 (1974). The rule requires the trial court to permit a defendant to withdraw his guilty plea to correct a "manifest injustice." CrR 4.2(f).⁵ The court shall allow a defendant to withdraw a plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. *Id.*

A "manifest injustice" is one that is "obvious, directly observable, overt, not obscure." *Ross*, 129 Wn.2d at 284, quoting *State v. Sass*, 118

⁵CrR 4.2(f) reads in full:

The court shall allow a defendant to withdraw the defendants [sic] plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after the judgment, it shall be governed by CrR 7.8.

Wn.2d 37, 42, 820 P.2d 505 (1991). The Washington Supreme Court has identified four non-exclusive situations that meet the “manifest injustice” standard: (1) ineffectiveness of trial counsel; (2) a plea not ratified by the defendant, (3) an involuntary plea; and (4) the prosecutor’s breach of a plea bargain. *Taylor*, 83 Wn.2d at 597. On appeal, this Court reviews the denial of a motion to withdraw a guilty plea for abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001).

Mr. Brower asserts the trial court should have granted his motion to withdraw his guilty plea because (1) he did not receive effective assistance of counsel in deciding whether to accept the prosecutor’s plea agreement when he was given incorrect advice as to whether he was pleading guilty to a “most serious offense,” (2) his plea was not valid because he did not have time to read the forms and did not understand the consequences of his guilty plea, and that (3) the change of plea form omitted essential elements of the offense of Attempted Indecent Liberties.

- a. **Mr. Brower’s guilty plea was not knowing, intelligent, and voluntary because he did not receive effective assistance of counsel.**

Mr. Brower had the constitutional right to effective assistance of counsel. The federal and state constitutions provide a criminal defendant with the right to representation of counsel and to due process of law. U.S.

Const. amends. 6, 14;⁶ Wash. Const. art. 1, §§ 3, 22.⁷ The right to counsel necessarily includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Representation of a criminal defendant entails numerous duties, including advocating the defendant's case, consulting with him on important decisions, and keeping him informed of developments during the course of the prosecution. *Strickland*, 466 U.S. at 688. The right to the effective assistance of counsel is not met simply because an attorney is present in court; the attorney must actually assist the client and play a role in ensuring the proceedings are adversarial and fair. *Id.* at 685. When a defendant alleges he did not receive effective assistance of counsel, the appellate court must determine (1) whether the attorney's performance fell below objective standards of reasonable representation and, if so, (2) did counsel's deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

⁶The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The Fourteenth Amendment provides in part, ". . . nor shall any State deprive any person of life, liberty or property without due process of law . . ."

⁷ Article 1, § 22 provides in part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ." Article 1, § 3 states simply, "No person shall be deprived of life, liberty, or property, without due process of law."

In reviewing the first prong, courts presume counsel's representation was effective. *Strickland*, 466 U.S. at 689; *Thomas*, 109 Wn.2d at 226. To show prejudice under the second prong, the defendant must show a reasonable probability that the deficient performance altered the outcome of the case. *Strickland*, 466 U.S. at 693-94; *Thomas*, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of fact and law reviewed *de novo*. *Strickland*, 466 U.S. at 698.

The period between charging and trial, including the plea bargaining process, is a critical stage of the criminal proceeding where the defendant is entitled to counsel. *Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932); *United States v. Fuller*, 941 F.2d 993, 995 (9 Cir. 1991); CrR 3.1(b)(2). Defense counsel is obligated to investigate his client's case, discuss plea negotiations with the client, and provide the client with sufficient information to make an informed decision on whether or not to plead guilty. *Von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S.Ct. 316, 92 L.Ed.2d 309 (1948) (plurality); *Personal Restraint of McCready*, 100 Wn.App. 259, 263, 996 P.2d 658 (2000).

Competent defense counsel is aware of the sentencing law applicable to his client's case. *State v. Saunders*, 120 Wn.App. 800, 825, 86 P.3d 232 (2004) (counsel deficient for not making same criminal conduct argument supported by case law); *McCready*, 100 Wn.App. at

263 (counsel deficient for not informing defendant of applicable maximum and minimum sentences prior to accepting plea offer). A defendant cannot make an informed decision about whether to accept a plea offer if he is not accurately informed of the sentencing consequences of accepting and rejecting the offer. *McCready*, 100 Wn.App. at 263; *United States v. Blaylock*, 20 F.3d 1458, 1465 (9 Cir. 1994). Competent counsel is expected to actually and substantially assist his client in deciding whether or not to plead guilty. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). When a defendant alleges he did not receive effective assistance of counsel in deciding whether to plead guilty, the defendant must show there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Personal Restraint of Riley*, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993).

Here, Mr. Brower's attorney Don Blair gave him incorrect advice about the possible three-strike consequences of his guilty plea. The Persistent Offender Accountability Act (POAA), RCW 9.94A.570, provides for a mandatory sentence of life without the possibility of parole for an offender convicted of a "most serious offense" who has two prior separate convictions for "most serious offenses." RCW 9.94A.030(29);

RCW 9.94A.505(2)(v); RCW 9.94A.570.

In this case, the court found that Attempted Indecent Liberties is a “most serious offense.” Finding of Fact 2.2. CP 39. Mr. Brower told the court that his attorney misinformed him and his mother about whether the offense was a “strike” offense, and his prior counsel acknowledged having done so. 2RP at 69.

Mr. Brower was prejudiced by his attorney’s incorrect advice. Defense counsel was responsible for accurately informing his client of the direct consequences of his guilty plea. While defense counsel is not required to inform a defendant of all indirect consequences of entering a guilty plea, misrepresenting indirect consequences is ineffective assistance of counsel. *State v. Patel*, 280 Ga. 181, 626 S.E.2d 121, 123 (Ga. 2006) (attorney provided incorrect information concerning effect of conviction on defendant’s participation in federal health care programs); *United States v. Kwan*, 407 F.3d 1005, 1008 (9 Cir. 2005) (counsel gave defendant incorrect advice about immigration consequences of a guilty plea); *United States v. Couto*, 311 F.3d 179, 183-84 (2 Cir. 2002) (attorney gave inaccurate advice about immigration consequences of guilty plea).

Mr. Brower’s decision to plead guilty could not but be influenced by whether the offense fit the definition of “most serious offense.” This Court should find Mr. Brower did not receive effective assistance of

counsel in making his decision to enter a guilty plea. Mr. Brower did demonstrate a manifest injustice requiring the withdrawal of his guilty plea, and this Court should reverse the superior court order denying that motion.

2. **MR. BROWER'S GUILTY PLEA WAS NOT VOLUNTARY BECAUSE HIS READING DEFICIENCY AND TIME CONSTRAINT IN COURT WHEN HE WAS PRESENTED WITH THE CHANGE OF PLEA FORM PREVENTED HIM FROM UNDERSTANDING THE CONSEQUENCES OF THE PLEA**

Mr. Brower's guilty plea was not voluntary because his reading deficiency prevented him from understanding the consequences of the plea, and prevented him from reading the form in the time allocated in court. Mr. Brower explained that at the time he entered his guilty plea, he was given very little time to see the documents and that he is a slow reader who has difficulty with big words. Due to these factors, Mr. Brower did not understand everything contained in the guilty plea statement.

A defendant's guilty plea is not voluntary if he is not competent to enter the plea. *Marshall*, 144 Wn.2d at 281; *Osborne*, 102 Wn.2d at 98. To be competent to stand trial, a defendant must have "the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Godinez v. Moran*,

509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), quoting *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975). Additionally, a defendant who enters a plea of guilty must be able to knowingly, intelligently and voluntarily waive the constitutional rights at issue. *Moran*, 113 S.Ct. at 2687. With a plea where the defendant does not admit guilty, as is the case here, the guilty plea must also be “a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Osborne*, 102 Wn.2d at 98, quoting *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The critical period for determining the defendant’s competency is at the time of the entry of the guilty plea. *Osborne*, 102 Wn.2d at 98, quoting *State v. Ashley*, 16 Wn.App. 413, 416, 558 P.2d 302 (1976).

Washington’s SRA is complicated, and it may be difficult to determine much less explain the sentencing consequences of a felony guilty plea. *Personal Restraint of LaChapelle*, 153 Wn.2d 1, 6-7, 100 P.3d 805 (2004); *State v. Jones*, 118 Wn.App. 199, 210-11, 76 P.3d 258 (2003). Given the short time he had to look at the documents and Mr. Brower’s poor reading skills, it is unlikely he would be able to understand both the nature of the charge against him and the sentencing consequences of entering the guilty plea or of going to trial.

Accordingly, this Court must vacate Mr. Brower’s conviction. As

noted in section 1 *supra*, Mr. Brower's guilty plea was not knowing, intelligent and voluntary because he did not receive effective assistance of counsel. In addition, Mr. Brower's reading comprehension at the time he entered the plea prevented him from understanding the consequences of the plea. This Court must reverse the order denying Mr. Brower's motion to withdraw his guilty plea.

3. **WAS MR. BROWER'S PLEA VOLUNTARY, KNOWING, OR INTELLIGENT WHERE THE SECOND AMENDED INFORMATION CORRECTLY RECITED THE ELEMENTS OF ATTEMPTED INDECENT LIBERTIES BUT WHERE THE STATEMENT OF PLEA OMITTED THE ELEMENTS THAT THE VICTIM IS A FRAIL ELDER OR VULNERABLE ADULT AND THE PERPETRATOR HAS A SIGNIFICANT RELATIONSHIP WITH THAT PERSON, WHICH ARE REQUIRED ELEMENTS OF THE OFFENSE?**

In addition to an understanding of the facts of the case, for a plea to be knowing, intelligent, and voluntary, a defendant must have adequate notice and understanding of the elements of the charges against him. *In re Hews*, 108 Wn.2d 579, 590-91, 741 P.2d 983 (1987). Here, the second amended information filed by the State on May 22, 2009, containing the elements of Attempted Indecent Liberties "knowingly causing a person who is not his spouse to have sexual contact with him or another when the victim is a frail elder or vulnerable adult and the

perpetrator has a significant relationship with the victim” CP 119. The Statement of Plea of Guilty to Sex Offense, however, omitted the elements that the victim is a frail elder or vulnerable adult, and that the perpetrator has a significant relationship with the victim. CP 106.

Mr. Brower notes that the second amended information provides an accurate recitation of the elements of the offenses. Given the missing elements from the change of plea statement, however, Mr. Brower could not knowingly and intelligently appraise the State's evidence against him. Once he learned of the elements, Mr. Brower denied that either alleged victim is frail elder or vulnerable adult, and that he had a significant relationship with either of them. CP 85.

The crucial part of a defendant’s oral or written acknowledgment of the conduct that makes him guilty in establishing the validity of the guilty plea was explained by the United States Supreme Court in the context of Federal Rule of Criminal Procedure 11:

A defendant who enters [a guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464,58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). Consequently, if a defendant’s guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a

guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. Thus, in addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." [Fed. Rule Crim Proc. 11, Notes of Advisory Committee on Criminal Rules.] Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." [Id.]

McCarthy v. United States, 394 U.S. 459 466-67, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) (emphasis added, footnoted omitted).

In *Santobello v. New York*, the United States Supreme Court noted:

However important plea bargaining may be in the administration of criminal justice, our opinions have established that a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, to confront one's accusers, *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, to present witnesses in one's defense, *Washington v. Texas*, 388 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, to present witnesses in one's defense, *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019, to remain silent, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, and to be convicted of proof beyond all reasonable doubt, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368. Since *Kercheval v.*

United States, 274 U.S. 220, 47 S. Ct. 582, 71 L.Ed. 1009, this Court has recognized that “unfairly obtained” guilty pleas in the federal courts ought to be vacated.

404 U.S. 257, 264, 92 S.Ct. 495, 500, 30 L.Ed.2d 427 (1971) (Douglas, J., concurring).

Because Mr. Brower’s plea was not voluntary or intelligently made, he was denied due process and his conviction must be reversed. *In re Hews*, 108 Wn.2d at 590.

F. CONCLUSION

Mr. Brower respectfully requests this Court reverse the trial court’s denial of his motion to withdraw his plea because it was not knowing, voluntary and intelligent and because he was denied effective assistance of counsel.

DATED: February 18, 2010.

Respectfully submitted,

THE TILLER LAW FIRM

Two handwritten signatures in black ink. The first signature is a stylized 'PB' inside a circle. The second signature is a more complex, cursive signature, also inside a circle.

PETER B. TILLER-WSBA 20835
Of Attorneys for Brad Brower

APPENDIX A

Received & Filed
LEWIS COUNTY, WASH
Superior Court

MAY 22 2009

Kathy A. Brack, Clerk

By  Deputy

SCANNED

Superior Court of Washington
for

State of Washington _____

Plaintiff

vs.

BRAD Brower

Defendant

No. 09-1-200-7

Statement of Defendant on Plea of
Guilty to Sex Offense
(STDFG)

1. My true name is: BRAD Brower

2. My age is: 23

3. The last level of education I completed was 12

4. **I Have Been Informed and Fully Understand That:**

(a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me.

(b) I am charged with: ATTEMPTED INDECENT LIBERTIES
The elements are: ON A DATE CERTAIN IN LEWIS COUNTY TAKE SUBSTANTIAL STEP TOWARD COMMITTING INDECENT LIBERTIES I.E. ATTEMPT TO CAUSE ANOTHER TO HAVE SEXUAL CONTACT

5. **I Understand I Have the Following Important Rights, and I Give Them All Up by Pleading Guilty:**

(a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;

(b) The right to remain silent before and during trial, and the right to refuse to testify against myself;

(c) The right at trial to hear and question the witnesses who testify against me;



- (d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;
- (e) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty;
- (f) The right to appeal a finding of guilt after a trial.

6. **In Considering the Consequences of my Guilty Plea, I Understand That:**

- (a) Each crime with which I am charged carries a maximum sentence, a fine, and a **Standard Sentence Range** as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE: ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	TOTAL ACTUAL CONFINEMENT (standard range including enhancements)	COMMUNITY CUSTODY RANGE (Only applicable for crimes committed on or after July 1, 2000. For crimes committed prior to July 1, 2000, see paragraph 6(f).)	MAXIMUM TERM AND FINE
1	3	23.25-30.75 months	4	23.25-30.75 30.75 months	36-48mo	5yrs/0k
2						
3						

*(F) Firearm, (D) other deadly weapon, (SM) Sexual Motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9).

- (b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere.
- (c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.
- (d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.
- (e) In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration.

(f) For sex offenses committed prior to July 1, 2000: In addition to sentencing me to confinement, the judge may order me to serve up to one year of community supervision if the total period of confinement ordered is not more than 12 months. If the period of confinement is more than one year, the judge will order me to serve three years of community custody or up to the period of earned early release, whichever is longer. During the period of community custody, I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me.

For sex offenses committed on or after July 1, 2000 but prior to September 1, 2001: In addition to sentencing me to confinement, the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months. If the period of confinement is over one year, the judge will sentence me to community custody for a period of 36 to 48 months or up to the period of earned release, whichever is longer. During the period of community custody to which I am sentenced, I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me.

For sex offenses committed on or after September 1, 2001:

(i) Sentencing under RCW 9.94A.712: If this offense is for any of the offenses listed in subsections (aa) or (bb), below, the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense and a minimum term of confinement either within the standard range for the offense or outside the standard range if an exceptional sentence is appropriate. The minimum term of confinement that is imposed may be increased by the Indeterminate Sentence Review Board if the Board determines by a preponderance of the evidence that it is more likely than not that I will commit sex offenses if released from custody. In addition to the period of confinement, I will be sentenced to community custody for any period of time I am released from total confinement before the expiration of the maximum sentence. During the period of community custody I will be under the supervision of the Department of Corrections and I will have restrictions and requirements placed upon me, which may include electronic monitoring, and I may be required to participate in rehabilitative programs.

(aa) If the current offense is any of these offenses or attempt to commit any of these offenses:

Rape in the first degree	Rape in the second degree
Rape of a child in the first degree committed when I was at least 18 years old	Rape of a child in the second degree committed when I was at least 18 years old
Child molestation in the first degree committed when I was at least 18 years old	Indecent liberties by forcible compulsion
Any of the following offenses with a finding of sexual motivation:	
Murder in the first degree	Murder in the second degree
Homicide by abuse	Kidnapping in the first degree
Kidnapping in the second degree	Assault in the first degree
Assault in the second degree	Assault of a child in the first degree
Assault of a child in the second degree	Burglary in the first degree

(bb) If the current offense is any sex offense and I have a prior conviction for any of these offenses or attempt to commit any of these offenses:

Rape in the first degree	Rape in the second degree
Rape of a child in the first degree	Rape of a child in the second degree
Child molestation in the first degree	Indecent liberties by forcible compulsion
Any of the following offenses with a finding of sexual motivation:	
Murder in the first degree	Murder in the second degree
Homicide by abuse	Kidnapping in the first degree
Kidnapping in the second degree	Assault in the first degree
Assault in the second degree	Assault of a child in the first degree
Assault of a child in the second degree	Burglary in the first degree

(ii) If this offense is for a sex offense that is not listed in paragraph 6(f)(i), then in addition to sentencing me to a term of confinement, the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months. If the period of confinement is over one year, or if my crime is failure to register as a sex offender, the judge will sentence me to community custody for a period of 36 to 48 months or up to the period of earned release, whichever is longer. During the period of community custody to which I am sentenced, I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me, which may include electronic monitoring.

For sex offenses committed on or after March 20, 2006:

For the following offenses and special allegations, the minimum term shall be either the maximum of the standard sentence range for the offense or 25 years, whichever is greater:

- 1) If the offense is rape of a child in the first degree, rape of a child in the second degree or child molestation in the first degree and the offense includes a special allegation that the offense was predatory.
- 2) If the offense is rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation and the offense includes special allegation that the victim of the offense was under 15 years of age at the time of the offense.
- 3) If the offense is rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation and this offense includes a special allegation that the victim of the offense was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult.

Community Custody Violation:

If I am subject to a first or second violation hearing and the Department of Corrections finds that I committed the violation, I may receive as a sanction up to 60 days of confinement per violation. If I have not completed my maximum term of total confinement and I am subject to a third violation hearing and the Department of Corrections finds that I

committed the violation, the Department of Corrections may return me to a state correctional facility to serve up to the remaining portion of my sentence.

- (g) The prosecuting attorney will make the following recommendation to the judge:
30.75 mo DOC, 36-48 mo. Com COST
Court Costs, AFR, DOC Conditions
All conditions listed in P.D.P. sex. assault prot. order
sexual deviancy treatment.

The prosecutor will recommend as stated in the plea agreement, which is incorporated by reference.

- (h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:

- (i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.
- (ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.
- (iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.
- (iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

I understand that if a standard range sentence is imposed, the sentence cannot be appealed by anyone. If an exceptional sentence is imposed after a contested hearing, either the State or I can appeal the sentence.

- (i) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
- (j) I understand that I may not possess, own, or have under my control any firearm unless my right to do so is restored by a court of record and that I must immediately surrender any concealed pistol license. RCW 9.41.040.
- (k) I understand that I will be ineligible to vote until that right is restored in a manner provided by law. If I am registered to vote, my voter registration will be cancelled. Wash. Const. art. VI, § 3, RCW 29A.04.079, 29A.08.520.
- (l) Public assistance will be suspended during any period of imprisonment.

- (m) I will be required to register where I reside, study or work. The specific registration requirements are described in the "Offender Registration" Attachment.
- (n) I will be required to have a biological sample collected for purposes of DNA identification analysis. For offenses committed on or after July 1, 2002, I will be required to pay a \$100.00 DNA collection fee, unless the court finds that imposing the fee will cause me undue hardship.
- (o) I will be required to undergo testing for the human immunodeficiency (HIV/AIDS) virus.

Notification Relating to Specific Crimes. If Any of the Following Paragraphs *Do Not Apply*, They Should Be Stricken and Initialed by the Defendant and the Judge.

- (p) This offense is a most serious offense or strike as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the offense for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole. In addition, if this offense is (i) rape in the first degree, rape of a child in the first degree, rape in the second degree, rape of a child in the second degree, indecent liberties by forcible compulsion, or child molestation in the first degree, or (ii) murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree, with a finding of sexual motivation, or (iii) any attempt to commit any of the offenses listed in this sentence and I have at least one prior conviction for one of these listed offenses in this state, in federal court, or elsewhere, the offense for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.
- (q) Special sex offender sentencing alternative:

In addition to other eligibility requirements under RCW 9.94A.670, to be eligible for the special sex offender sentencing alternative, I understand that I must voluntarily and affirmatively admit that I committed all of the elements of the crime(s) to which I am pleading guilty. I make my voluntary and affirmative admission in my statement in paragraph 11.

For offenses committed before September 1, 2001: The judge may suspend execution of the standard range term of confinement under the special sex offender sentencing alternative (SSOSA) if I qualify under former RCW 9.94A.120(8) (for offenses committed before July 1, 2001) or RCW 9.94A.670 (for offenses committed on or after July 1, 2001). If the judge suspends execution of the standard range term of confinement, I will be placed on community custody for the length of the suspended sentence or three years, whichever is greater; I will be ordered to serve up to 180 days of total confinement; I will be ordered to participate in sex offender treatment; I will have restrictions and requirements placed upon me; and I will be subject to all of the conditions described in paragraph 6(e). Additionally, the judge could require me to devote time to a specific occupation and to pursue a prescribed course of study or occupational training. If a violation of the sentence occurs during community custody, the judge may revoke the suspended sentence.

For offenses committed on or after September 1, 2001: The judge may suspend execution of the standard range term of confinement or the minimum term of confinement under the special sex offender sentencing alternative (SSOSA) if I qualify under RCW 9.94A.670. If the judge suspends execution of the standard range term of confinement for a sex offense that is not listed in paragraph 6(f)(i), I will be placed on community custody for the length of the suspended sentence or three years, whichever is greater. If the judge suspends execution of minimum term of confinement for a sex offense listed in paragraph 6(f)(i), I will be placed on community custody for the length of the statutory maximum sentence of the offense. In addition to the term of community custody, I will be ordered to serve up to 180 days of total confinement; I will be ordered to participate in sex offender treatment; I will have restrictions and requirements placed upon me, which may include electronic monitoring; and I will be subject to all of the conditions described in paragraph 6(e). Additionally, the judge could require me to devote time to a specific occupation and to pursue a prescribed course of study or occupational training. If a violation of the sentence occurs during community custody, the judge may revoke the suspended sentence.

- (r) If this is a crime of domestic violence, the court may order me to pay a domestic violence assessment of up to \$100.00. If I, or the victim of the offense, have a minor child, the court may order me to participate in a domestic violence perpetrator program approved under RCW 26.50.150.
- (s) If I am subject to community custody and the judge finds that I have a chemical dependency that has contributed to the offense, the judge may order me to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which I am pleading guilty.
- (t) ~~If this offense involves a motor vehicle, my driver's license or privilege to drive will be suspended or revoked.~~
- (u) The crime of _____ has a mandatory minimum sentence of at least _____ years of total confinement. ~~The law does not allow any reduction of this sentence. This mandatory minimum sentence is not the same as the mandatory sentence of life imprisonment without the possibility of parole described in paragraph 6[p].~~
- (v) I am being sentenced for ~~two or more serious violent offenses arising from separate and distinct criminal conduct and the sentences imposed on counts _____ and _____ will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.~~
- (w) I understand that the offense(s) I am pleading guilty to include a deadly weapon, firearm or sexual motivation enhancement. ~~Deadly weapon, firearm, or sexual motivation enhancements are mandatory, they must be served in total confinement, and they must run consecutively to any other sentence and to any other deadly weapon, firearm, or sexual motivation enhancements.~~
- (x) For crimes committed on or after July 22, 2007: I understand that if I am pleading guilty to rape of a child in the first, second, or third degree or child molestation in the first, second or third degree, and I engaged, agreed or offered to engage the victim in sexual intercourse or sexual contact for a fee, or if I attempted, solicited another, or conspired to engage, agree or offer to engage the victim in sexual intercourse or sexual contact for a

fee, then a one-year enhancement shall be added to the standard sentence range. If I am pleading guilty to more than one offense, the one-year enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to the enhancement.

7. I plead guilty to:

count I: Attempted Indecent Liberties
count _____
count _____
count second
in the Amended Information. I have received a copy of that Information.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: ATTEMPTED INDECENT LIBERTIES

Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

[Signature]
Defendant

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

[Signature]

Prosecuting Attorney
Colin Hayes

Defendant's Lawyer
[Signature]

Print Name _____ WSBA No. 35387

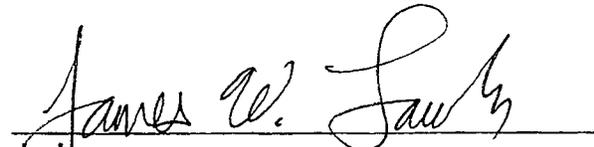
Print Name _____ WSBA No. _____

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]:

- (a) The defendant had previously read the entire statement above and that the defendant understood it in full;
- (b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full; or
- (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full. The Interpreter's Declaration is attached.

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Dated: 5/22/09



Judge

Case Name

Blair Bland

Cause No.

09-1-200-7

"Offender Registration" Attachment: sex offense, or kidnapping offense involving a minor as defined in RCW 9A.44.130. (If required, attach to Statement of Defendant on Plea of Guilty.)

1. General Applicability and Requirements: Because this crime involves a sex offense, or a kidnapping offense involving a minor as defined in RCW 9A.44.130, I will be required to register with the sheriff of the county of the state of Washington where I reside. If I am not a resident of Washington but I am a student in Washington or I am employed in Washington or I carry on a vocation in Washington, I must register with the sheriff of the county of my school, place of employment, or vocation. I must register immediately upon being sentenced unless I am in custody, in which case I must register at the time of my release with the person designated by the agency that has me in custody and I must also register within 24 hours of my release with the sheriff of the county of the state of Washington where I will be residing, or if not residing in the state of Washington, where I am a student, where I am employed, or where I carry on a vocation.

2. Offenders Who Leave the State and Return: If I leave this state following my sentencing or release from custody but later move back to Washington, I must register within three business days after moving to this state or within 24 hours after doing so if I am under the jurisdiction of this state's Department of Corrections. If I leave this state following my sentencing or release from custody, but later while not a resident of Washington I become employed in Washington, carry on a vocation in Washington, or attend school in Washington, I must register within three business days after attending school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if I am under the jurisdiction of this state's Department of Corrections.

3. Change of Residence Within State and Leaving the State: If I change my residence within a county, I must send signed written notice of my change of residence to the sheriff within 72 hours of moving. If I change my residence to a new county within this state, I must send signed written notice of the change of address at least 14 days before moving to the county sheriff in the new county of residence and I must register with the sheriff of the new county within 24 hours of moving. I must also give signed written notice of my change of address to the sheriff of the county where last registered within 10 days of moving. If I move out of Washington State, I must send written notice within 10 days of moving to the new state or foreign country to the county sheriff with whom I last registered in Washington State.

4. Additional Requirements Upon Moving to Another State: If I move to another state, or if I work, carry on a vocation, or attend school in another state I must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. I must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom I last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If I am a resident of Washington and I am admitted to a public or private institution of higher education, I shall, within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier, notify the sheriff of the county of my residence of my intent to attend the institution. If I become employed at a public or private institution of higher education, I am required to notify the sheriff for the county of my residence of my employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If my enrollment or employment at a public or private institution of higher education is terminated, I am required to notify the sheriff for the county of my residence of my

termination of enrollment or employment within 10 days of such termination. If I attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, I am required to notify the sheriff of the county of my residence of my intent to attend the school. I must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if I do not have a fixed residence, I am required to register. Registration must occur within 24 hours of release in the county where I am being supervised if I do not have a residence at the time of my release from custody. Within 48 hours, excluding weekends and holidays, after losing my fixed residence, I must send signed written notice to the sheriff of the county where I last registered. If I enter a different county and stay there for more than 24 hours, I will be required to register in the new county. I must also report in person to the sheriff of the county where I am registered on a weekly basis. The weekly report will be on a day specified by the county sheriff's office, and shall occur during normal business hours. I may be required to provide a list of the locations where I have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level and shall make me subject to disclosure to the public at large pursuant to RCW 4.24.550.

7. Reporting Requirements for Persons Who Are Risk Level II or III: If I have a fixed residence and I am designated as a risk level II or III, I must report, in person, every 90 days to the sheriff of the county where I am registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If I comply with the 90-day reporting requirement with no violations for at least five years in the community, I may petition the superior court to be relieved of the duty to report every 90 days.

8. Application for a Name Change: If I apply for a name change, I must submit a copy of the application to the county sheriff of the county of my residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If I receive an order changing my name, I must submit a copy of the order to the county sheriff of the county of my residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

Date: 5-22-09


Defendant's signature

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SUPERIOR COURT OF WASHINGTON STATE
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON,
Petitioner,

NO. 09-1-00200-7

v.

STIPULATION ON PRIOR RECORD
AND OFFENDER SCORE

BRAD CHRIS BROWER,
Defendant.

DOB: 02/03/1986

Upon the entry of a plea of guilty in the above cause number, the Defendant hereby agrees and stipulates that the following prior convictions are his/her complete FELONY CRIMINAL HISTORY for offender score purposes, and that the information in this Stipulation on Prior Record and Offender Score is correct, and furthermore that he/she is the person named in the convictions:

WASHINGTON STATE CONVICTIONS

<i>Crime</i>	<i>Date of Crime</i>	<i>Date of Sentence</i>	<i>Sentencing Court (county & state)</i>	<i>A or J Adult, Juv.</i>	<i>Type of Crime</i>
1 Luring	11/9/04	4/28/2005	Thurston County (Thurston, WA)	A	NV sex
2 Indecent Exposure to Person Under 14 Years of Age	11/9/04	4/28/2005	Thurston County (Thurston, WA)	A	Gross misd
3 Communicating with a Minor for Immoral Purposes	7/22/2004	4/28/2005	Thurston County (Thurston, WA)	A	Gross misd

The defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct and that none of the above-listed prior felony convictions have "washed out":

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Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
I	3	VII	23.25-30.75 months	n/a	23.25-30.75 months	5 years

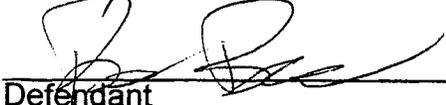
(F)Firearm, (D) Other deadly weapon, (V) VUCSA in a protected zone, (VH) Veh.Hom., See RCW 46.61.520, (JP) Juvenile present

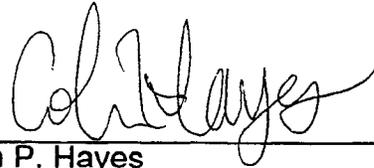
The defendant further stipulates:

- 1) That the defendant waives any right the defendant may have to have a jury decide the existence of the defendant's prior and current convictions beyond a reasonable doubt and agrees to a judicial fact-finding of prior and current convictions based on this stipulation;
- 2) That if any additional criminal history is discovered, the State of Washington may re-sentence the defendant using the corrected offender score and the Prosecuting Attorney's recommendation may increase without affecting the validity of the plea of guilty;
- 3) That if the defendant pled guilty to an information which did not include the totality of possible charges or highest provable degree as a result of plea negotiations, and if the plea of guilty is set aside due to the motion or petition of the defendant, the State of Washington is permitted to re-file and prosecute any charge(s) dismissed, reduced or withheld from filing by that negotiation, and speedy trial rules shall not be a bar to such later prosecution;

If sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above-stated criminal history and/or offender score calculation.

Stipulated to this 22 day of May, 2009.


 Defendant
 Brad Chris Brower


 Colin P. Hayes
 Deputy Prosecuting Attorney
 WSBA No. 35387


 Don Blair, WSBA# 24637
 Attorney for Defendant

APPENDIX B

SEP 11 2009

By Kathy A. Brack, Clerk
Deputy

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SCANNED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON,	NO. 09-1-00200-7
vs.	FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING
BRAD CHRIS BROWER,	DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA
Plaintiff,	
Defendant.	

On August 21, 2009, a hearing was held before the Honorable James Lawler regarding the Defendant's Motion to Withdraw Guilty Plea. The Defendant was present with his attorney of record, Ken Johnson. The State was represented by Deputy Prosecuting Attorney Colin P. Hayes. The Court considered the testimony of Don Blair, Mrs. Vickie M. Brower, Christine Brower, and the Defendant. This Court made the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

- 1.1 The Defendant has a date of birth of February 3, 1986.
- 1.2 The Defendant speaks, writes, and understands the English language.
- 1.3 The Court adopts and incorporates all facts outlined in the Memorandum Decision RE: Motion to Withdraw Plea entered on August 25, 2009.
- 1.4 On May 22, 2009, the Defendant entered an *Alford* plea of guilty to the Second Amended Information on the charge of Attempted Indecent Liberties, RCW 9A.44.100(1)(f)(i). The State filed the Second Amended Information as part of a

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1 plea deal between the Defendant and the State. Prior to entry of the guilty plea,
2 the Defendant reviewed the Second Amended Information with his defense
3 attorney, Don Blair.

4 1.5 Prior to entry of the guilty plea, the defendant's attorney incorrectly advised the
5 defendant y that the charge of Attempted Indecent Liberties, RCW
6 9A.44.100(1)(f)(i), did not constitute a "strike" offense, or most serious offense as
7 defined by RCW 9.94A.030.

8 1.6 In a phone conversation between the Defendant and his mother, Vickie Brower,
9 on May 21, 2009, Vickie Brower relayed to the Defendant that his defense
10 attorney advised her that Attempted Indecent Liberties did not constitute a
11 "strike" offense.

12 1.7 The Defendant testified that he would not have entered a plea of guilty to
13 Attempted Indecent Liberties, RCW 9A.44.100(1)(f)(i), if he had understood that
14 this charge was a most serious offense, i.e. a "strike" offense, under RCW
15 9.94A.030. The Defendant also testified that he plead guilty to Attempted
16 Indecent Liberties, RCW 9A.44.100(1)(f)(i), to take advantage of the plea offer in
17 order to receive less prison confinement than he faced as charged in the First
18 Amended Information.

19 1.8 On May 22, 2009, prior to entry of the guilty plea, the defense attorney met with
20 the Defendant in the Lewis County Jail on two occasions to discuss the potential
21 plea agreement and to review the written Statement of Defendant on Plea of
22 Guilty to Sex Offense. The defendant and his attorney did not discuss Paragraph
23 6(p) of that form.

24 1.9 Paragraph 4(b) of the Statement of Defendant on Plea of Guilty to Sex Offense
25 omitted the element that the victim "is a frail elder or vulnerable adult and the
26 perpetrator has a significant relationship with the victim." The Second Amended
27 Information contained the correct elements of the crime.

28 1.10 On May 22, 2009, during the Court's colloquy with the Defendant at the time of
entry of the guilty plea, the Defendant confirmed that he had reviewed the
Second Amended Information and that he understood the elements of the
offense, each of which the State would be required to prove beyond a reasonable
doubt at trial to convict the defendant. The defendant also confirmed that he
read and understood the guilty plea form. and reviewed the form with his
attorney.

1.11 On July 22, 2009, the defendant filed a motion to withdraw his plea of guilty.

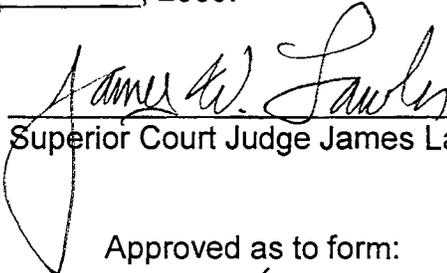
II. CONCLUSIONS OF LAW

2.1 The court has jurisdiction over the Defendant and the subject matter of this
action.

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- 2.2 The consequence that Attempted Indecent Liberties, RCW 9A.44.100(1)(f)(i), is a most serious offense and constitutes a "strike" offense is an "indirect" or "collateral" consequence as it flows not from the guilty plea itself but from additional proceedings; this consequence is not a "direct" consequence of the plea.
- 2.3 The misinformation provided to the defendant on the correct characterization of Attempted Indecent Liberties, RCW 9A.44.100(1)(f)(i), as a "non-strike" offense pertains to a collateral consequence of the defendant's guilty plea.
- 2.4 The omission of an element of the crime of Attempted Indecent Liberties, RCW 9A.44.100(1)(f)(i), in the Statement of Defendant on Plea of Guilty to Sex Offense does not result in a constitutional violation or amount to a manifest injustice.
- 2.5 The defendant has failed to prove manifest injustice as required under CrR 4.2(f).
- 2.6 The Defendant's Motion to Withdraw Guilty Plea is denied.

DONE this 11 day of Sept, 2009.


 Superior Court Judge James Lawler

Presented by:

 Colin P. Hayes, WSBA# 35387
 Deputy Prosecuting Attorney

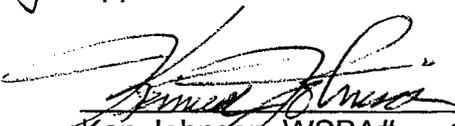
Approved as to form:

 Ken Johnson, WSBA# 60194
 Attorney for Defendant

EXHIBIT C

STATUTES AND COURT RULE

RCW 9A.28.020

Criminal attempt.

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

(3) An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree, murder in the second degree, arson in the first degree, child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, or rape of a child in the second degree;

(b) Class B felony when the crime attempted is a class A felony other than an offense listed in (a) of this subsection;

(c) Class C felony when the crime attempted is a class B felony;

(d) Gross misdemeanor when the crime attempted is a class C felony;

(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor.

RCW 9A.44.100

Indecent liberties.

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

- (a) By forcible compulsion;
 - (b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;
 - (c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:
 - (i) Has supervisory authority over the victim; or
 - (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;
 - (d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual contact occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual contact with the knowledge that the sexual contact was not for the purpose of treatment;
 - (e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or
 - (f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:
 - (i) Has a significant relationship with the victim; or
 - (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.
- (2)(a) Except as provided in (b) of this subsection, indecent liberties is a class B felony.
- (b) Indecent liberties by forcible compulsion is a class A felony.

RCW 9.94A.030

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Board" means the indeterminate sentence review board created under chapter 9.95 RCW.

(2) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department, means that the department, either directly or through a collection agreement authorized by RCW 9.94A.760, is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.

(3) "Commission" means the sentencing guidelines commission.

(4) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.

(5) "Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department.

(6) "Community protection zone" means the area within eight hundred eighty feet of the facilities and grounds of a public or private school.

(7) "Community restitution" means compulsory service, without compensation, performed for the benefit of the community by the offender.

(8) "Confinement" means total or partial confinement.

(9) "Conviction" means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and

acceptance of a plea of guilty.

(10) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

(11) "Criminal history" means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.

(a) The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.

(b) A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon.

(c) The determination of a defendant's criminal history is distinct from the determination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.

(12) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity. This definition does not apply to employees engaged in concerted activities for their mutual aid and protection, or to the activities of labor and bona fide nonprofit organizations or their members or agents.

(13) "Criminal street gang associate or member" means any person who actively participates in any criminal street gang and who intentionally

promotes, furthers, or assists in any criminal act by the criminal street gang.

(14) "Criminal street gang-related offense" means any felony or misdemeanor offense, whether in this state or elsewhere, that is committed for the benefit of, at the direction of, or in association with any criminal street gang, or is committed with the intent to promote, further, or assist in any criminal conduct by the gang, or is committed for one or more of the following reasons:

- (a) To gain admission, prestige, or promotion within the gang;
- (b) To increase or maintain the gang's size, membership, prestige, dominance, or control in any geographical area;
- (c) To exact revenge or retribution for the gang or any member of the gang;
- (d) To obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang;
- (e) To directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage for the gang, its reputation, influence, or membership; or
- (f) To provide the gang with any advantage in, or any control or dominance over any criminal market sector, including, but not limited to, manufacturing, delivering, or selling any controlled substance (chapter 69.50 RCW); arson (chapter 9A.48 RCW); trafficking in stolen property (chapter 9A.82 RCW); promoting prostitution (chapter 9A.88 RCW); human trafficking (RCW 9A.40.100); or promoting pornography (chapter 9.68 RCW).

(15) "Day fine" means a fine imposed by the sentencing court that equals the difference between the offender's net daily income and the reasonable obligations that the offender has for the support of the offender and any dependents.

(16) "Day reporting" means a program of enhanced supervision designed to monitor the offender's daily activities and compliance with sentence conditions, and in which the offender is required to report daily

to a specific location designated by the department or the sentencing court.

(17) "Department" means the department of corrections.

(18) "Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community custody, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

(19) "Disposable earnings" means that part of the earnings of an offender remaining after the deduction from those earnings of any amount required by law to be withheld. For the purposes of this definition, "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonuses, or otherwise, and, notwithstanding any other provision of law making the payments exempt from garnishment, attachment, or other process to satisfy a court-ordered legal financial obligation, specifically includes periodic payments pursuant to pension or retirement programs, or insurance policies of any type, but does not include payments made under Title 50 RCW, except as provided in RCW 50.40.020 and 50.40.050, or Title 74 RCW.

(20) "Drug offender sentencing alternative" is a sentencing option available to persons convicted of a felony offense other than a violent offense or a sex offense and who are eligible for the option under RCW 9.94A.660.

(21) "Drug offense" means:

(a) Any felony violation of chapter 69.50 RCW except possession of a controlled substance (RCW 69.50.4013) or forged prescription for a controlled substance (RCW 69.50.403);

(b) Any offense defined as a felony under federal law that relates to the possession, manufacture, distribution, or transportation of a controlled substance; or

(c) Any out-of-state conviction for an offense that under the laws of

this state would be a felony classified as a drug offense under (a) of this subsection.

(22) "Earned release" means earned release from confinement as provided in RCW 9.94A.728.

(23) "Escape" means:

(a) Sexually violent predator escape (RCW 9A.76.115), escape in the first degree (RCW 9A.76.110), escape in the second degree (RCW 9A.76.120), willful failure to return from furlough (*RCW 72.66.060), willful failure to return from work release (*RCW 72.65.070), or willful failure to be available for supervision by the department while in community custody (RCW 72.09.310); or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as an escape under (a) of this subsection.

(24) "Felony traffic offense" means:

(a) Vehicular homicide (RCW 46.61.520), vehicular assault (RCW 46.61.522), eluding a police officer (RCW 46.61.024), felony hit-and-run injury-accident (RCW 46.52.020(4)), felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)), or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)); or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a felony traffic offense under (a) of this subsection.

(25) "Fine" means a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specific period of time.

(26) "First-time offender" means any person who has no prior convictions for a felony and is eligible for the first-time offender waiver under RCW 9.94A.650.

(27) "Home detention" means a program of partial confinement available to offenders wherein the offender is confined in a private

residence subject to electronic surveillance.

(28) "Legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction. Upon conviction for vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in the conviction, subject to RCW 38.52.430.

(29) "Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies:

(a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;

(b) Assault in the second degree;

(c) Assault of a child in the second degree;

(d) Child molestation in the second degree;

(e) Controlled substance homicide;

(f) Extortion in the first degree;

(g) Incest when committed against a child under age fourteen;

(h) Indecent liberties;

(i) Kidnapping in the second degree;

(j) Leading organized crime;

(k) Manslaughter in the first degree;

- (l) Manslaughter in the second degree;
- (m) Promoting prostitution in the first degree;
- (n) Rape in the third degree;
- (o) Robbery in the second degree;
- (p) Sexual exploitation;
- (q) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;
- (r) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;
- (s) Any other class B felony offense with a finding of sexual motivation;
- (t) Any other felony with a deadly weapon verdict under RCW 9.94A.825;
- (u) Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection;
- (v)(i) A prior conviction for indecent liberties under **RCW 9A.88.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b), and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988;
- (ii) A prior conviction for indecent liberties under RCW 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988, if:
 - (A) The crime was committed against a child under the age of fourteen; or

(B) the relationship between the victim and perpetrator is included in the definition of indecent liberties under RCW 9A.44.100(1)(c) as it existed from July 1, 1988, through July 27, 1997, or RCW 9A.44.100(1) (d) or (e) as it existed from July 25, 1993, through July 27, 1997;

(w) Any out-of-state conviction for a felony offense with a finding of sexual motivation if the minimum sentence imposed was ten years or more; provided that the out-of-state felony offense must be comparable to a felony offense under Title 9 or 9A RCW and the out-of-state definition of sexual motivation must be comparable to the definition of sexual motivation contained in this section.

(30) "Nonviolent offense" means an offense which is not a violent offense.

(31) "Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. In addition, for the purpose of community custody requirements under this chapter, "offender" also means a misdemeanor or gross misdemeanor probationer convicted of an offense included in RCW 9.94A.501(1) and ordered by a superior court to probation under the supervision of the department pursuant to RCW 9.92.060, 9.95.204, or 9.95.210. Throughout this chapter, the terms "offender" and "defendant" are used interchangeably.

(32) "Partial confinement" means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

(33) "Pattern of criminal street gang activity" means:

(a) The commission, attempt, conspiracy, or solicitation of, or any prior juvenile adjudication of or adult conviction of, two or more of the following criminal street gang-related offenses:

(i) Any "serious violent" felony offense as defined in this section, excluding Homicide by Abuse (RCW 9A.32.055) and Assault of a Child 1 (RCW 9A.36.120);

(ii) Any "violent" offense as defined by this section, excluding Assault of a Child 2 (RCW 9A.36.130);

(iii) Deliver or Possession with Intent to Deliver a Controlled Substance (chapter 69.50 RCW);

(iv) Any violation of the firearms and dangerous weapon act (chapter 9.41 RCW);

(v) Theft of a Firearm (RCW 9A.56.300);

(vi) Possession of a Stolen Firearm (RCW 9A.56.310);

(vii) Malicious Harassment (RCW 9A.36.080);

(viii) Harassment where a subsequent violation or deadly threat is made (RCW 9A.46.020(2)(b));

(ix) Criminal Gang Intimidation (RCW 9A.46.120);

(x) Any felony conviction by a person eighteen years of age or older with a special finding of involving a juvenile in a felony offense under RCW 9.94A.833;

(xi) Residential Burglary (RCW 9A.52.025);

(xii) Burglary 2 (RCW 9A.52.030);

(xiii) Malicious Mischief 1 (RCW 9A.48.070);

(xiv) Malicious Mischief 2 (RCW 9A.48.080);

(xv) Theft of a Motor Vehicle (RCW 9A.56.065);

(xvi) Possession of a Stolen Motor Vehicle (RCW 9A.56.068);

(xvii) Taking a Motor Vehicle Without Permission 1 (RCW

9A.56.070);

(xviii) Taking a Motor Vehicle Without Permission 2 (RCW 9A.56.075);

(xix) Extortion 1 (RCW 9A.56.120);

(xx) Extortion 2 (RCW 9A.56.130);

(xxi) Intimidating a Witness (RCW 9A.72.110);

(xxii) Tampering with a Witness (RCW 9A.72.120);

(xxiii) Reckless Endangerment (RCW 9A.36.050);

(xxiv) Coercion (RCW 9A.36.070);

(xxv) Harassment (RCW 9A.46.020); or

(xxvi) Malicious Mischief 3 (RCW 9A.48.090);

(b) That at least one of the offenses listed in (a) of this subsection shall have occurred after July 1, 2008;

(c) That the most recent committed offense listed in (a) of this subsection occurred within three years of a prior offense listed in (a) of this subsection; and

(d) Of the offenses that were committed in (a) of this subsection, the offenses occurred on separate occasions or were committed by two or more persons.

(34) "Persistent offender" is an offender who:

(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be

included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted; or

(b)(i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection (34)(b)(i); and

(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection. A conviction for rape of a child in the first degree constitutes a conviction under (b)(i) of this subsection only when the offender was sixteen years of age or older when the offender committed the offense. A conviction for rape of a child in the second degree constitutes a conviction under (b)(i) of this subsection only when the offender was eighteen years of age or older when the offender committed the offense.

(35) "Predatory" means: (a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was: (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, "school" does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; or (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a

member or participant of the organization under his or her authority.

(36) "Private school" means a school regulated under chapter 28A.195 or 28A.205 RCW.

(37) "Public school" has the same meaning as in RCW 28A.150.010.

(38) "Restitution" means a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs.

(39) "Risk assessment" means the application of the risk instrument recommended to the department by the Washington state institute for public policy as having the highest degree of predictive accuracy for assessing an offender's risk of reoffense.

(40) "Serious traffic offense" means:

(a) Nonfelony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502), nonfelony actual physical control while under the influence of intoxicating liquor or any drug (RCW 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run an attended vehicle (RCW 46.52.020(5)); or

(b) Any federal, out-of-state, county, or municipal conviction for an offense that under the laws of this state would be classified as a serious traffic offense under (a) of this subsection.

(41) "Serious violent offense" is a subcategory of violent offense and means:

(a)(i) Murder in the first degree;

(ii) Homicide by abuse;

(iii) Murder in the second degree;

(iv) Manslaughter in the first degree;

(v) Assault in the first degree;

- (vi) Kidnapping in the first degree;
- (vii) Rape in the first degree;
- (viii) Assault of a child in the first degree; or
- (ix) An attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious violent offense under (a) of this subsection.

(42) "Sex offense" means:

(a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(12);

(ii) A violation of RCW 9A.64.020;

(iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080; or

(iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;

(c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or

(d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

(43) "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

(44) "Standard sentence range" means the sentencing court's discretionary range in imposing a nonappealable sentence.

(45) "Statutory maximum sentence" means the maximum length of time for which an offender may be confined as punishment for a crime as prescribed in chapter 9A.20 RCW, RCW 9.92.010, the statute defining the crime, or other statute defining the maximum penalty for a crime.

(46) "Stranger" means that the victim did not know the offender twenty-four hours before the offense.

(47) "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

(48) "Transition training" means written and verbal instructions and assistance provided by the department to the offender during the two weeks prior to the offender's successful completion of the work ethic camp program. The transition training shall include instructions in the offender's requirements and obligations during the offender's period of community custody.

(49) "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.

(50) "Violent offense" means:

(a) Any of the following felonies:

(i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;

(ii) Criminal solicitation of or criminal conspiracy to commit a class A felony;

(iii) Manslaughter in the first degree;

(iv) Manslaughter in the second degree;

- (v) Indecent liberties if committed by forcible compulsion;
 - (vi) Kidnapping in the second degree;
 - (vii) Arson in the second degree;
 - (viii) Assault in the second degree;
 - (ix) Assault of a child in the second degree;
 - (x) Extortion in the first degree;
 - (xi) Robbery in the second degree;
 - (xii) Drive-by shooting;
 - (xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; and
 - (xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;
- (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection; and
- (c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.
- (51) "Work crew" means a program of partial confinement consisting of civic improvement tasks for the benefit of the community that complies with RCW 9.94A.725.
- (52) "Work ethic camp" means an alternative incarceration program as provided in RCW 9.94A.690 designed to reduce recidivism and lower the cost of corrections by requiring offenders to complete a comprehensive

array of real-world job and vocational experiences, character-building work ethics training, life management skills development, substance abuse rehabilitation, counseling, literacy training, and basic adult education.

(53) "Work release" means a program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school.

RCW 9.94A.505
Sentences.

(1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.

(2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:

(i) Unless another term of confinement applies, a sentence within the standard sentence range established in RCW 9.94A.510 or 9.94A.517;

(ii) RCW 9.94A.701 and 9.94A.702, relating to community custody;

(iii) RCW 9.94A.570, relating to persistent offenders;

(iv) RCW 9.94A.540, relating to mandatory minimum terms;

(v) RCW 9.94A.650, relating to the first-time offender waiver;

(vi) RCW 9.94A.660, relating to the drug offender sentencing alternative;

(vii) RCW 9.94A.670, relating to the special sex offender sentencing alternative;

(viii) RCW 9.94A.507, relating to certain sex offenses;

(ix) RCW 9.94A.535, relating to exceptional sentences;

(x) RCW 9.94A.589, relating to consecutive and concurrent sentences;

(xi) RCW 9.94A.603, relating to felony driving while under the

influence of intoxicating liquor or any drug and felony physical control of a vehicle while under the influence of intoxicating liquor or any drug.

(b) If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; a term of community custody under RCW 9.94A.702 not to exceed one year; and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement and a community custody term under RCW 9.94A.701 if the court finds reasons justifying an exceptional sentence as provided in RCW 9.94A.535.

(3) If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty days of confinement shall be served on consecutive days. Local jail administrators may schedule court-ordered intermittent sentences as space permits.

(4) If a sentence imposed includes payment of a legal financial obligation, it shall be imposed as provided in RCW 9.94A.750, 9.94A.753, 9.94A.760, and 43.43.7541.

(5) Except as provided under RCW 9.94A.750(4) and 9.94A.753 (4), a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

(6) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

(7) The court shall order restitution as provided in RCW 9.94A.750 and 9.94A.753.

(8) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

(9) In any sentence of partial confinement, the court may require the offender to serve the partial confinement in work release, in a program of

home detention, on work crew, or in a combined program of work crew and home detention.

RCW 9.94A.570

Persistent offenders.

Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death. In addition, no offender subject to this section may be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of release as defined under *RCW 9.94A.728 (1), (2), (3), (4), (6), (8), or (9), or any other form of authorized leave from a correctional facility while not in the direct custody of a corrections officer or officers, except:

- (1) In the case of an offender in need of emergency medical treatment; or
- (2) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree.

EXHIBIT C

STATUTES

RCW 9A.28.020

Criminal attempt.

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

(3) An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree, murder in the second degree, arson in the first degree, child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, or rape of a child in the second degree;

(b) Class B felony when the crime attempted is a class A felony other than an offense listed in (a) of this subsection;

(c) Class C felony when the crime attempted is a class B felony;

(d) Gross misdemeanor when the crime attempted is a class C felony;

(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor.

RCW 9A.44.100

Indecent liberties.

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

home detention, on work crew, or in a combined program of work crew and home detention.

RCW 9.94A.570

Persistent offenders.

Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death. In addition, no offender subject to this section may be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of release as defined under *RCW 9.94A.728 (1), (2), (3), (4), (6), (8), or (9), or any other form of authorized leave from a correctional facility while not in the direct custody of a corrections officer or officers, except: (1) In the case of an offender in need of emergency medical treatment; or (2) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree.

**RULE CrR 4.2
PLEAS**

- (a) Types. A defendant may plead not guilty, not guilty by reason of insanity, or guilty.
- (b) Multiple Offenses. Where the indictment or information charges two or more offenses in separate counts, the defendant shall plead separately to each.
- (c) Pleading Insanity. Written notice of an intention to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.
- (d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the

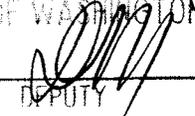
plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

- (e) **Agreements.** If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.
- (f) **Withdrawal of Plea.** The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.
- (g) **Written Statement.** A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty:

FILED
COURT OF APPEALS
DIVISION II

10 FEB 19 AM 11:27

STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRAD CHRIS BROWER,

Appellant.

COURT OF APPEALS NO.
39779-0-II

LEWIS COUNTY NO.
09-1-00200-7

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Brad Brower, Appellant, and Colin Hayes, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on February 18, 2010, at the Centralia, Washington post office addressed as follows:

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Deputy Prosecuting Attorney
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Mr. David Ponzoha
Clerk of the Court
Court of Appeals
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Tacoma, WA 98402-4454

CERTIFICATE OF
MAILING

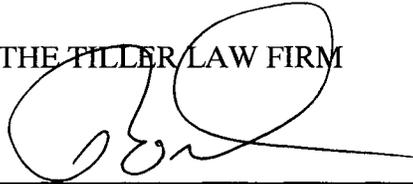
1

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Dated: February 18, 2010.

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PETER B. TILLER – WSBA #20835
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