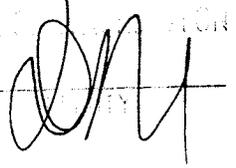


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COURT OF APPEALS

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

STATE OF WASHINGTON  
BY 

NO. 40379-0-II

[Consolidated with COA No. 39849-4-II]

STATE OF WASHINGTON,

Appellant,

vs.

KENNETH EUGENE LAMB,

Respondent.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY  
CAUSE NO. 09-1-00143-9

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**REPLY BRIEF OF APPELLANT**

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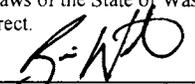
SERVICE	<p>Mr. Loren D. Oakley 516 E. Front Street Port Angeles, WA 98362</p>	<p>This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: July 27, 2010 at Port Angeles, WA </p>
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**I. ARGUMENT:**

THE JUVENILE ADJUDICATION FOR INDECENT LIBERTIES MAY SERVE AS A PREDICATE FELONY FOR UNLAWFUL POSSESSION OF A FIREARM.

Mr. Lamb presents several arguments in an effort to persuade this Court why his juvenile adjudication for indecent liberties cannot serve as the predicate felony for unlawful possession of a firearm (UPF). *See* Brief of Respondent (43079-0-II) at 4-8. This Court should hold that each of Mr. Lamb's arguments are without merit.

1. Mr. Lamb's indecent liberties adjudication may serve as the predicate felony pursuant to the savings statute.

Mr. Lamb appears to argue that his juvenile adjudication for indecent liberties cannot serve as a predicate felony for UPF because "[t]hat crime, or that definition of Indecent Liberties, not only no longer exists; the acts alleged have not constituted a crime since June 9, 1988." *See* Brief of Respondent (43079-0-II) at 4. While the legislature has amended the indecent liberties statute since 1986, RCW 10.01.040 requires that Mr. Lamb remain accountable for his criminal conduct.

In 1986, the legislature defined indecent liberties as follows:

- (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:
  - (a) By forcible compulsion; or

- (b) When the other person is less than fourteen years of age; or
- (c) When the other person is less than sixteen years of age and the perpetrator is more than forty-eight months older than the person and is in a position of authority over the person; or
- (d) When the person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

RCW 9A.44.100 (1986) (Laws of 1986 ch. 131 § 1). The State charged Mr. Lamb with indecent liberties pursuant to RCW 9A.44.100(1)(b) (1986). *See* CP 87.<sup>1</sup> Mr. Lamb subsequently pleaded guilty to the offense, and the trial court entered its disposition. *See* CP 88-90.<sup>2</sup>

Two years later, the legislature amended the indecent liberties statute to read:

- (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:
  - (a) By forcible compulsion; or

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<sup>1</sup> This particular cite to the record references the Appellant's Supplemental Clerk's Papers filed under Superior Court Cause No. 91-8-00025-0 and Court of Appeals No. 39849-4-II.

<sup>2</sup> This particular cite to the record references the Appellant's Supplemental Clerk's Papers filed under Superior Court Cause No. 91-8-00025-0 and Court of Appeals No. 39849-4-II.

- (b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

RCW 9A.44.100 (1988) (Laws of 1988 ch. 146 § 10). While the amended statute deleted the language under which Mr. Lamb committed his indecent liberties, the amendment did not declare a legislative intent to excuse the conduct it criminalized prior to 1988. *See* RCW 9A.44.100 (1988).

RCW 10.01.040 presumptively saves all offenses already committed, and all penalties already incurred, from being affected by the amendment or repeal of a criminal or penal statute:

Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, *unless a contrary intention is expressly declared in the amendatory or repealing act ....*

RCW 10.01.040 (emphasis added). This savings clause requires the trial courts to give effect to convictions/adjudications that existed prior to any statutory amendment. *Rivard v. State*, 168 Wn.2d 775, 780-82, 231 P.3d 186 (2010) (applying savings clause to affirm defendant was eligible for restoration of firearm rights because previous conviction for vehicular homicide was a class B felony despite amendment classifying crime as a class A felony).

Here, the savings clause precludes Mr. Lamb's argument that his indecent liberties "no longer exists". Mr. Lamb committed indecent liberties in violation of the laws as they existed in 1986. CP 87-90<sup>3</sup>; *See* RCW 9A.44.100(1)(b) (1986). When the Legislature amended the statute two years later, it included zero language expressing intent to relieve a person of a penalty/disability that followed an adjudication pursuant to the statute's previous language. *See* RCW 9A.44.100 (1988). As such, the prior adjudication is valid, and the trial court was required to give effect to all penalties and disabilities that result from Mr. Lamb's indecent liberties. RCW 10.01.040; *Rivard*, 168 Wn.2d at 780-82.

Mr. Lamb cannot possess a firearm because he is an adjudicated sex offender.<sup>4</sup> RCW 9.41.040(4) (2009). *See also State v. Hunter*, 147 Wn. App. 177, 183-85, 195 P.3d 556 (2008); *Smith v. State*, 118 Wn. App. 464, 470, 76 P.3d 769 (2003); 13B SETH A. FINE & DOUGLAS J. ENDE, WASHINGTON PRACTICE: CRIMINAL LAW § 2810, at Sup. 110 (2007). Thus, this Court should hold that the trial court erred when it (1) denied the State's motion to amend the information against Mr. Lamb, and (2) granted Mr. Lamb's motion to dismiss the several UPF charges.

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<sup>3</sup> This particular cite to the record references the Appellant's Supplemental Clerk's Papers filed under Superior Court Cause No. 91-8-00025-0 and Court of Appeals No. 39849-4-II.

<sup>4</sup> In 1986, the legislature determined indecent liberties was both a class B felony and a sex offense. RCW 9A.44.100 (1986); RCW 9.94A.030(23) (1986).

2. Mr. Lamb's indecent liberties adjudication may serve as the predicate felony because he never moved to seal the juvenile file.

Mr. Lamb asserts “[t]he crime of Indecent liberties with which [he] was charged, to which he pled guilty, and for which he was adjudicated no longer exists.” See Brief of Respondent at 7. If this statement implies Mr. Lamb moved to seal/expunge the juvenile adjudication, the record does not support the claim.

RCW 13.50.050 authorizes a trial court to seal/expunge juvenile proceedings and treat them “as if they never occurred.” *Nelson v. State*, 120 Wn. App. 470, 475-76, 85 P.3d 912 (2004). See also *State v. T.K.*, 139 Wn.2d 320, 335, 987 P.2d 63 (1999). When a trial court seals/expunges a juvenile record, the adjudication cannot serve as a predicate felony for purposes of UPF violation. *Nelson*, 120 Wn. App. at 480.

Here, Mr. Lamb never moved to seal/expunge his adjudication for indecent liberties. Compare *T.K.*, 139 Wn.2d at 324-25; *Nelson*, 120 Wn. App. at 473. The adjudication remains on Mr. Lamb’s record. Thus, this Court should hold that Mr. Lamb’s adjudication for indecent liberties may still serve as a predicate felony for a UPF violation.

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3. Mr. Lamb's legislative history regarding the classification of indecent liberties is a red herring.

Mr. Lamb states that “[n]ot until 2001 did any version of Indecent Liberties constitute a class A felony.” *See* Brief of Respondent at 4-5. This is a red herring. The State does not argue that Mr. Lamb’s adjudication for indecent liberties resulted in a firearm disability because it is a class A felony. The State’s position is that Mr. Lamb’s adjudication precludes his firearm possession/ownership because it involved a sex offense. *See argument above.*

4. Mr. Lamb misidentifies the operative section of the UPF statute.

Mr. Lamb notes that the 1992 amendments to the UPF statute, which expanded the scope of predicate felonies to include juvenile adjudications, did not include corrective language to RCW 9.41.040(5) (1992) – the provision that banned individuals who committed indecent liberties from ever possessing a firearm. *See* Brief of Respondent at 5-6. According to Mr. Lamb, this absence proves that the State did not intend juvenile adjudication for indecent liberties to result in a lifetime ban on the possession of a firearm. *See* Brief of Respondent at 6. However, Mr. Lamb’s argument is flawed. First, he applies the incorrect version of the

statute. Second, he fails to read the statute in its entirety. This Court should hold that Mr. Lamb's argument fails.

Mr. Lamb's argument presents an issue of statutory interpretation, so this Court's review is de novo. *Smith v. State*, 118 Wn. App. 464, 467, 76 P.3d 769 (2003). The fundamental objective of statutory construction is to ascertain and carry out the legislature's intent. *Id.* If the statute is plain and unambiguous, its meaning must be derived from the statute's words alone. *Id.* at 467-68. The courts need not discern an ambiguity by imagining a variety of alternative interpretations. *Id.* Finally, the appellate courts must refrain from an interpretation that renders an absurd result. *State v. Donaghe*, 152 Wn. App. 97, 106, 215 P.3d 232 (2009).

Because Mr. Lamb committed his UPF violations in 2009, this Court must apply the UPF statute that was in effect at the time of the offenses. *Rivard v. State*, 168 Wn.2d 775, 780-81, 231 P.3d 186 (2010) (citing RCW 9.94A.345 and RCW 10.01.040). RCW 9.41.040 (2009) provides, in relevant part:

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her control any firearm after having previously been convicted ... of any serious offense as defined in this chapter.

...

(3) Notwithstanding RCW 9.41.047 or any other provisions of law, as used in this chapter, a person has been “convicted”, whether in an adult court or adjudicated in a juvenile court, as such time as a plea of guilty has been accepted[.]

...

(4) Notwithstanding RCW subsection (1) or (2) of this section, a person convicted ... of an offense prohibiting the possession of a firearm under this section other than ... indecent liberties, ... shall not be precluded from possession of a firearm as a result of the conviction[.] ... Notwithstanding any other provision of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted ... of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section ... the individual may petition a court of record to have his or her right to possess a firearm restored.

A plain reading of this statute reveals that it is unlawful for a person who has been convicted of a serious crime, which includes indecent liberties, to possess a firearm. RCW 9.41.040(1)(a); *Smith*, 118 Wn. App. at 470. In subsection (3), the legislature states that its use of the word “convicted” applies to both convictions in superior court and adjudications in juvenile court. RCW 9.41.040(3); *State v. McKinley*, 84 Wn. App. 677, 686-87, 929 P.2d 1145 (1997) (holding amendments to the UPF statute reflect a legislative intent to include juvenile adjudications within the definition of “convicted”). In subsection (4), the statute specifically denies the right to possess a firearm to certain other offenders – those who commit indecent

liberties and/or a sex offense. Because Mr. Lamb was convicted/adjudicated of a serious offense, a sex offense, he does not have the right to possess/own a firearm. RCW 9.41.040(4) (2009); *Smith*, 118 Wn. App. at 470.

This Court should hold the UPF statute is unambiguous. The statute, when read plainly and in its entirety, reveals the legislature's intent to preclude an individual who commits indecent liberties or a sex offense, whether committed as an adult or a juvenile, from ever owning or possessing a firearm.

5. The resulting firearm disability was a collateral consequence of Mr. Lamb's guilty plea for indecent liberties.

Mr. Lamb argues that his adjudication for indecent liberties cannot serve as a predicate felony for UPF because he never received notice that his guilty plea would terminate his right to possess a firearm. *See* Brief of Respondent at 6-7. This Court should hold that Mr. Lamb's argument is without merit: (1) at the time of Mr. Lamb's guilty plea the law did not require that he receive a firearm prohibition notice, and (2) the lack of notice did not make his plea invalid because the resulting firearm disability was a collateral consequence of the plea.

The law is clear. Under both the federal and state constitutions, the right to bear arms is not absolute and is subject to reasonable regulation. *State v. Schmidt*, 143 Wn.2d 658, 676, 23 P.3d 462 (2001); *State v. Krzeszowski*, 106 Wn. App. 638, 641, 24 P.3d 485 (2001). One reasonable regulation is the prohibition of possessing firearms by convicted felons. *Krzeszowski*, 106 Wn. App. at 641. RCW 9.41.040 is such a restriction/regulation.

In order to be valid, a defendant's guilty plea must be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). A guilty plea is not made knowingly when it is based on misinformation of sentencing consequences. *Id.* at 298. While the court must inform a defendant of all the direct consequences of pleading guilty before it accepts a plea, the defendant need not receive notice of every possible collateral consequences of his plea. *Id.*

The distinction between direct and collateral consequences "turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A direct consequence is one that enhances the defendant's sentence or alters the standard of punishment. *Id.* at 285. However, and in the context of firearm regulations, Washington's appellate courts have repeatedly held that the loss of an

individual's right to possess firearms is a collateral consequence of a guilty plea because it does not amount to punishment, nor does it alter the standard of punishment imposed for past crimes. *State v. Schmidt*, 143 Wn.2d 658, 677, 23 P.3d 462 (2001); *State v. Watkins*, 76 Wn. App. 726, 732, 887 P.2d 492 (1995); *State v. Ness*, 70 Wn. App. 817, 823-34, 855 P.2d 1191 (1993). The fact that the UPF statute references past felony convictions does not change the fact that only future conduct involving firearm possession is penalized. *Krzeszowski*, 106 Wn. App. at 642.

The legislature expanded the scope of the UPF statute to include juvenile adjudications after Mr. Lamb pleaded guilty to indecent liberties.<sup>5</sup> RCW 9.41.040 (1992) (Laws of Washington 1992, ch. 205 § 118); RCW 9.41.040 (1994) (Laws of Washington 1994, 1st. Sp. Sess. ch. 7 § 402). These amendments apply retroactively and impose a collateral consequence – a firearm disability – on all applicable felony convictions/adjudications.<sup>6</sup> *Schmidt*, 143 Wn.2d at 677; *Reed*, 84 Wn. App. at 386-87; *Watkins*, 76 Wn. App. at 732; *Ness*, 70 Wn. App. at 823-

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<sup>5</sup> Additionally, the legislature did not require convicted/adjudicated felons to receive notice of their firearm disability until 1994, eight years after Mr. Lamb's guilty plea. RCW 9.41.047(1)(a) (1994) (Laws of Washington 1994, 1st Sp. Sess. ch. 7 § 404). See also *State v. Reed*, 84 Wn. App. 379, 386, 928 P.2d 469 (1997).

<sup>6</sup> Furthermore, knowledge that possession of a firearm is unlawful is not an element of the crime of unlawful possession of a firearm under the Washington Statute. The State does not have to prove that Mr. Lamb knew it was illegal to possess firearms. Ignorance of the law is no defense to a criminal prosecution. Moreover, no felon can reasonably assume that the possession of firearms is so innocent as to require notice before the crime can be prosecuted. See *Krzeszowski*, 106 Wn. App. at 642-44.

34. The fact Mr. Lamb never received notice that his plea to indecent liberties, which is both a serious offense and a sex offense, would result in a collateral firearm prohibition does not render that plea unknowing, involuntary, or unintelligent. *See Schmidt*, 143 Wn.2d at 677; *Reed*, 84 Wn. App. at 386-87; *Watkins*, 76 Wn. App. at 732; *Ness*, 70 Wn. App. at 823-34. This Court should hold that Mr. Lamb's juvenile adjudication for indecent liberties may serve as the predicate for the UPF charges.

## II. CONCLUSION:

The State has broad discretion whether to charge a crime. *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003). The due process clause does not permit a trial court to abort a criminal prosecution simply because it disagrees with a prosecutor's judgment. *Id.* at 226. The court's role is not to define due process in line with "personal and private notions" of fairness but rather to determine whether the State's conduct violates "fundamental conceptions of justice which lie at the base of our civil and political institutions." *Id.*

Here, the State attempted to file charges against Mr. Lamb in accordance with statutory and judicial precedent. The State acted in accordance with the law. Based upon the arguments presented above, and the arguments previously filed under COA No. 39849-4-II, the State

respectfully requests that this Court reverse the trial court order (1) denying the State's motion to amend the information, and (2) granting Mr. Lamb's motion to dismiss the UPF charges.

RESPECTFULLY SUBMITTED on July 27, 2010.

DEBORAH S. KELLY, Prosecuting Attorney

A handwritten signature in black ink, appearing to read "B. Wendt", written in a cursive style.

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Brian Patrick Wendt, WSBA No. 40537  
Deputy Prosecuting Attorney