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

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STATE OF WASHINGTON  
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In re the Personal Restraint Petition of .

MONTGOMERY A. MANRO,  
Petitioner

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**REPLY BRIEF OF PETITIONER**

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ORIGINAL

**I. A CLOSER LOOK AT THE FACTS AND PROCEDURE.**

In arguing that Mr. Manro is now without a remedy for the error that he early, thoroughly, and repeatedly raised at every stage of the proceedings – pretrial, trial, post-trial, direct review, and post-conviction – the State disregards facts, procedure, and controlling law to create an absurdity.

We start here with the facts and procedure the State glosses over.

Montgomery Manro was born on October 13, 1984. On April 2, 2002, when he was seventeen and a junior in high school, Mr. Manro was arrested on suspicion of fourth degree assault and first degree assault. He had no prior convictions.

On April 5, 2002, the State filed an information that charged Mr. Manro with one count of first degree assault with a special deadly weapon allegation and one count of fourth degree assault, CP<sup>1</sup> 11-12,<sup>2</sup> which resulted in an automatic declination of juvenile jurisdiction on both

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<sup>1</sup> The CP references are to the Clerk's Papers filed in the direct appeal, COA No. 76707-6.

<sup>2</sup> The State also charged James Conley, Michael Gipson, and Adam Sigurdson with first degree assault and Gipson with fourth degree assault. The information was later amended to strike surplus language. CP 7-8 (Amended Information); 11/6/02 RP 4-5.

charges and transfer for prosecution as an adult.<sup>3</sup>

The complexity of the case<sup>4</sup> and the serious consequences of an adult conviction for first degree assault<sup>5</sup> prompted several continuance requests, so that counsel could be adequately prepared for trial. *See, e.g.*, CP 18-25 (Motion for a Meaningful Case Scheduling Conference); CP 31-61 (Conditional Motion to Continue); CP 26, 27, 28, 29, 30 (Orders Continuing Trial Date). As the case proceeded it became apparent that effective assistance of counsel could not be provided if a trial date were selected that would ensure the case be finished before Mr. Manro turned eighteen. As a result, Mr. Manro, pointing out the weakness of the State's case on first degree assault and arguing that the State was unlikely to

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<sup>3</sup> *See* RCW 13.04.030(1)(e)(v)(requiring automatic decline to adult court for seventeen-year-old charged with serious violent offense); RCW 9.94A.030 (characterizing first degree assault as a "serious violent offense"). *See also In re Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996) (holding in part that all other charged offenses are transferred to adult court along with those that are automatically declined). In this brief, offenses that result in an automatic declination of juvenile court jurisdiction are called "auto-decline offenses", and those that do not automatically require declination under this statute are called "non-auto-decline offenses." What the terms lack in elegance, they make up for in brevity.

<sup>4</sup> One judge called it "a fairly complicated case." 9/26/02 RP 24.

<sup>5</sup> First degree assault has a seriousness level of XII. RCW 9.94A.515. The standard sentence range for Mr. Manro, who had no prior convictions, was 93-123 months. RCW 9.94A.510. The deadly weapon allegation brought the standard range to 117-147 months. RCW 9.94A.533(4)(a). Because the State alleged that the assault was committed with "force and means likely to produce ... death", CP 11-12 (Information); CP 7-8 (Amended Information), there was a five year mandatory minimum. RCW 9.94A.540(1)(b). Mr. Manro also faced up to one year in jail on the fourth degree assault, a gross misdemeanor. RCW 9A.36.041. Thus, as charged, Mr. Manro faced 129-159 months in prison.

convict him of an auto-decline offense, several times asked the trial court to extend juvenile jurisdiction over the charged fourth degree assault and all of the lesser crimes included within the charged first degree assault.

See CP 31-61 (Motion to Dismiss or Continue and Remand to Juvenile Court; CP 1-6 (Motion to Extend Juvenile Jurisdiction); 9/26/02 RP 1-38; 10/3/02 RP 7-26; 10/9/02 RP 8-28.

The first judge to address the issue, the Honorable Michael Trickey, was concerned about what might happen if Mr. Manro were not convicted of an auto-decline offense, deemed the decision “a very tough call”, and surmised that, if the trial started before Mr. Manro turned eighteen, juvenile jurisdiction would be preserved. 9/26/02 RP 31-34. He “denied” the motion, but only to the extent that he stated that “the trial court is going to have to determine what remedies, if any, are going to be available to them if a jury comes back with a conviction that does not fall within the auto decline statute.” 9/26/02 RP 33. He did not address the factual merits of the request to extend juvenile jurisdiction. 9/26/02 RP *passim*; CP 28.

The second judge to address the issue, the Honorable Jeffrey Ramsdell, also deferred to the trial judge. 10/3/02 RP 24; CP 29. He did

not address the factual merits.

The trial judge, the Honorable Richard Jones, concluded that he was without authority to enter an order extending jurisdiction and therefore, without addressing the factual merits, denied the motion.

10/9/02 RP 26-27. He did not enter a written order.

After a jury trial that began on October 9, 2002,<sup>6</sup> when Mr. Manro was seventeen, and ended on December 16, 2002, when he was eighteen, Mr. Manro was convicted of only two counts of fourth degree assault. CP 62-64 (Judgment and Sentence). His three co-defendants were convicted of first degree assault.

Before sentencing, Mr. Manro moved to arrest judgment and/or for a new trial on the ground that the crimes of which he was convicted had been improperly transferred to adult court, which court therefore was without jurisdiction. CP 65-66 (Motion for Arrest of Judgment). Mr. Manro also moved for an order arresting judgment and dismissing with prejudice the crimes of conviction on the ground that, if he could not be treated as a juvenile, the Equal Protection Clause demanded that he not be treated as an adult. The trial court denied the motion. CP 69, 70-72.

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<sup>6</sup> A motion to exclude witnesses was made and granted on that date. 10/9/02 RP 14-15.

On February 14, 2003, the trial court, treating Mr. Manro as an adult on two counts of fourth degree assault, imposed a suspended – not a deferred – sentence and ordered that he be jailed for a total of eight months, with no opportunity for work-education release. CP 62-64 (Judgment and Sentence); 2/14/03 RP 21. If he had been sentenced as a juvenile, the standard range would have been 0 to 30 days detention on each count.<sup>7</sup>

Mr. Manro timely appealed and the trial court stayed the sentence pending appeal. On appeal, Mr. Manro challenged, in every way possible, the “auto-decline” provisions that forced him into adult court when all he had done was to commit a couple of fourth degree assaults.

This court rejected Mr. Manro’s arguments, and the Supreme Court denied review. After this court rejected Mr. Manro’s arguments, but before Supreme Court denied review and before the mandate issued, the Washington State Legislature adopted SHB 2061, which was signed by the Governor and became effective on July 24, 2005. Laws of 2005, Ch. 238. This bill was intended to clarify the law regarding juvenile jurisdiction,

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<sup>7</sup> Under RCW 13.40.0357 his standard range under "Option A" would have been "Local Sanctions", which includes 0-12 months community supervision, 0 to 150 hours community service 0 to \$500 fine, and 0 to 30 days detention.

and was intended to correct the misreading of the prior statute by the Court of Appeals in Mr. Manro's case. In this bill, the Legislature amended RCW 13.04.030, adding the following language to the auto-decline provisions:

(I) In such a case the adult criminal court shall have exclusive original jurisdiction, except as provided in (e)(v)(E)(II) of this subsection.

(II) The juvenile court shall have exclusive jurisdiction over the disposition of any remaining charges in any case in which the juvenile is found not guilty in the adult criminal court of the charge or charges for which he or she was transferred, or is convicted in the adult criminal court of a lesser included offense that is not also an offense listed in (e)(v) of this subsection. The juvenile court shall enter an order extending juvenile court jurisdiction if the juvenile has turned eighteen years of age during the adult criminal court proceedings pursuant to RCW 13.40.300. However, once the case is returned to juvenile court, the court may hold a decline hearing pursuant to RCW 13.40.110 to determine whether to retain the case in juvenile court for the purpose of disposition or return the case to adult criminal court for sentencing. . . .

*See also* SHB 2061, § 2 (amending RCW 13.40.300 to allow for extension of jurisdiction over lesser offenses upon which auto-decline was not based). Thus, under SHB 2061, Mr. Manro's convictions for assault in the fourth degree should have been sent to juvenile court for disposition, and jurisdiction in juvenile court should have been extended.

The legislative history for SHB 2061 makes it clear that the bill was intended to clarify what all thought was the law prior to the Court of Appeals' decision. Notably, there is no provision in this bill for prospective application only, as there is in another bill regarding juvenile jurisdiction adopted at the same time. *Compare* EHB 1187, Laws of 2005, ch. 437 (regarding mandatory minimums).

In December 2005, after the mandate issued, but before he entered jail, Mr. Manro filed a petition for a writ of habeas corpus in the superior court, hoping to obtain relief before he had to serve his sentence.

In his habeas petition, Mr. Manro noted that Division Three had then recently recognized that SHB 2061 was curative, intended to be remedial and was intended to apply retroactively. State v. Posey, \_\_\_ Wn. App. \_\_\_, 122 P.3d 914 (No. 23041-4-III, 11/4/05). However, the panel held that the Legislature could not “overrule” a decision of the Court of Appeals in Mr. Manro’s direct appeal and thus refused to apply the new bill retroactively.

Mr. Manro argued that the Posey panel was wrong and that the decision in his own case was not final, having not been mandated yet, nor was it binding on the superior court. “[U]ntil the Court of Appeals issues

its mandate pursuant to RAP 12.5, a decision of the Court of Appeals does not take effect. RAP 12.2.” Obert v. Environmental Research and Development Corp., 112 Wn.2d 323, 340, 771 P.2d 340 (1989).

Manro noted that the Posey panel’s analysis was flawed because the decision in Mr. Manro’s case was only a Court of Appeals’ decision, and was not even final at the time the Legislature adopted its amendments. Obert, supra. Decisions of the Court of Appeals are not “the law of the State of Washington,” which law is announced only by the Supreme Court of Washington. See State v. Elliott, 114 Wn.2d 6, 18-19, 785 P.2d 440 (1990) (not violation of *ex post facto* for Court of Appeals to depart from another division of Court of Appeals’ merger analysis). Division III’s Posey opinion elevated non-final decisions from the Court of Appeals to the level of final decisions emanating from the Supreme Court.

Manro further argued that what the Posey panel misunderstood as that legislative amendments adopted in response to lower court decisions are often retroactively applied, without any issues arising about separation of powers:

We often apply amendments retroactively "where an amendment is enacted during a controversy regarding the meaning of the law." Tomlinson v. Clarke, 118 Wn.2d 498, 511, 118 Wn.2d 498, 825 P.2d 706 (1992); *see also* State v.

Riles, 135 Wn.2d 326, 343, 957 P.2d 655 (1998). *Curative amendments adopted in response to lower court decisions have been applied retroactively.* Tomlinson, 118 Wn.2d at 510; Overton v. Econ. Assistance Auth., 96 Wn.2d 552, 558, 637 P.2d 652 (1981). The Legislature's intent to clarify a statute is manifested by its adoption of the amendment "soon after controversies arose as to the interpretation of the original act[.]" Johnson v. Cont'l W., Inc., 99 Wn.2d 555, 559, 663 P.2d 482 (1983) (quoting 1A C. DALLAS SANDS, STATUTORY CONSTRUCTION § 22.31 (4th ed. 1972)).

McGee Guest Home Inc. v. DSHS, 142 Wn.2d 316, 325, 12 P.3d 144 (2000) (emphasis added).

As argued in the habeas petition, Manro's position was that SHB 2061 is clearly a curative amendment, adopted before the Court of Appeals' decision in this case was even final, and was meant to be curative. Because no substantial rights of the State were at stake by the retroactive application of SHB 2061 to Mr. Manro's case, the amendments should be applied to Mr. Manro's case.

Thus, concluded the habeas petition, the superior court did not have the jurisdiction to sentence Mr. Manro for a the two assault convictions, which were not subject to the auto-decline provisions. This lack of jurisdiction should lead this court to vacate the judgments.

The superior court, not Mr. Manro, moved the matter to this court

for consideration as a personal restraint petition, where it has remained for two years, while Mr. Manro served his sentence. In the meantime, the Supreme Court decided State v. Posey, \_\_\_ Wn. 2d \_\_\_, 167 P.3d 560 (2007), which agreed with the arguments Mr. Manro had been making at every stage of the proceedings for years. The State's position is that this all comes too late to do any good for Mr. Manro, and that he raises mere technicalities, undeserving of any relief.

## **II. THE CONTROLLING AUTHORITY THE STATE FAILS TO CITE.**

The State argues that because Manro is now 23 years old and because he has served his sentence, he is without a remedy. The State gets to this conclusion by disregarding In re Pers. Restraint of Dalluge, 152 Wn.2d 772, 786 (2004). In Dalluge, the petitioner had been charged with an auto-decline offense, but the prosecutor later amended the information to charge a non-auto-decline offense. This, held the Supreme Court, retroactively invalidated the decline and required a transfer back to juvenile court for a decline hearing. Even though the petitioner was well beyond age 18, he was not without a remedy:

We conclude that where the defendant has since turned 18, the appropriate remedy for a trial court's failure to remand to juvenile court is remand to the adult criminal court for a

de novo hearing on whether declination would have been appropriate. If declination would have been appropriate, then the conviction stands, but if not, the defendant is entitled to a new trial.

152 Wn.2d at 786-787. This is what Manro has been requesting for years.

That Mr. Manro has served his sentence is meaningless, as this matter is a personal restraint petition, and he is under restraint as defined by RAP 16.4(b). See In re Davis, 142 Wn.2d 165, 170 n.2 (2000) (defendant still under restraint and could file PRP even if no longer incarcerated or under state supervision). That he is now an adult is also meaningless, since the remedy, should it be determined that declination would not have been appropriate for two first-time fourth degree assaults, is a new trial as an adult. In re Dillenburg v. Maxwell, 70 Wn.2d 331, 345 (1966).

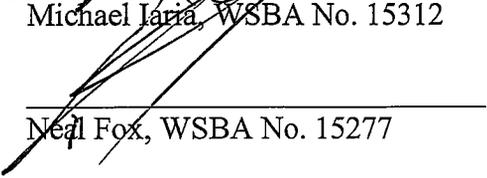
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Respectfully submitted,

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