

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

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. 91-8-00025-0

BRIEF OF APPELLANT

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CLERK OF COURT
PORT ANGELES, WA
DEC 17 2009
BY: [Signature]

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| SERVICE | Mr. Loren D. Oakley 516 E. Front Street Port Angeles, WA 98362 | 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: December 16, 2009 at Port Angeles, WA [Signature] |
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P.M. 12-16-2009

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I. INTRODUCTION

In 2009, KENNETH EUGENE LAMB (the Respondent) was charged with 13 separate offenses, including 10 counts of Unlawful Possession of a Firearm in the Second Degree, under cause number 09-1-00143-9.

In an effort to procure a defense at trial, Mr. Lamb sought to vacate an 18 year-old juvenile disposition for Burglary in the Second Degree under cause number 91-8-00025-0, which serves as a predicate offense for Unlawful Possession of a Firearm. Pursuant to Mr. Lamb's motion, the Clallam County Superior Court vacated the 18 year-old disposition and allowed the Respondent to withdraw his guilty plea under 91-8-00025-0.

The Honorable S. Brooke Taylor reasoned that (1) it was "fundamentally unfair" to subject Mr. Lamb to multiple counts of Unlawful Possession of a Firearm based upon a juvenile adjudication for Burglary in the Second Degree because the law, at that time, did not deprive him of his right to possess a firearm; (2) had Mr. Lamb learned that his juvenile conviction for second degree burglary imposed a disability on his right to possess a firearm, he would have taken the necessary steps to have his firearm rights restored; and (3) despite law to the contrary, the prohibition against felons possessing a firearm is a direct consequence of a guilty plea.

The State appealed the order of the Superior Court.

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II. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it took judicial notice of the presiding judge's desire to own a gun as a youth.
2. The Superior Court erred when he found that Mr. Lamb would have had his firearm rights restored had he learned of the disability imposed by his juvenile adjudication under 91-8-00025-0.
3. The Superior Court erred when it found that the firearm prohibition was a direct consequence of Mr. Lamb's pleading guilty to second degree burglary under cause number 91-8-00025-0.
4. The Superior Court erred when it found that to convict Mr. Lamb of 10 counts of unlawful possession of a firearm under 09-1-00143-9 would be a manifest injustice.
5. The Superior Court erred when it found that the withdrawal of Mr. Lamb's guilty plea under 91-8-00025-0 was necessary to correct a manifest justice.
6. The Superior Court erred when it allowed Mr. Lamb to withdraw his plea of guilty under cause number 91-8-00025-0.
7. The Superior Court erred when it vacated Mr. Lamb's disposition under cause number 91-8-00025-0.
8. The Superior Court erred when it refused to consider evidence and argument that showed Mr. Lamb was ineligible to have his firearm rights restored.
9. The Superior Court erred when it failed to find that Mr. Lamb's collateral attack was time barred.

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III. ISSUE STATEMENT

1. Did the Superior Court abuse its discretion when it granted the Respondent's motion to (i) withdraw an 18 year-old guilty plea, and (ii) vacate the disposition under 91-8-00025-0?

IV. STATEMENT OF THE CASE¹

FACTS

In 1986, Mr. Lamb, then a juvenile, was arrested for Indecent Liberties in violation of former RCW 9A.44.100 (1986).^{2, 3} See CP 87-90. Mr. Lamb pleaded guilty to the offense. CP 88. At disposition, the Clallam County Superior Court imposed an 8 to 12 week commitment with the

¹ The State cites to the verbatim Record of Proceedings (RP) as follows:
The hearing held on September 23, 2009 = 1RP
The hearing held on September 30, 2009 = 2RP

² Clallam County Superior Court cause number 1920.

³ RCW 9A.44.100 (1986) provides:

- (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. ...

- (2) Indecent liberties is a class B felony.

Laws of Washington 1986, ch. 131 § 1.

Department of Juvenile Rehabilitation (DJR). CP 89. At the time, the unlawful possession of a firearm statute made no reference to juvenile offenders.⁴

In 1991, Mr. Lamb, still a juvenile, committed the crime of Burglary in the Second Degree.^{5, 6} CP 62. In order to receive a lenient sentence, Mr. Lamb pleaded guilty to the offense. CP 58-61; IRP at 17, 29. The Clallam County Superior Court imposed the following sentence: 5 days detention, 6 months community supervision, 24 hours of community service, and a \$25.00 fine. CP 53-57. Again, at the time of disposition, the unlawful possession of a firearm statute made no reference to juvenile offenders.⁷

⁴ RCW 9.41.040 (1986) provides:

- (1) A person is guilty of the crime of unlawful possession of a short firearm or pistol, if, having previously been convicted in this state or elsewhere of a *crime of violence or of a felony in which a firearm was used or displayed*, the person has in his possession any short firearm or pistol.

Laws of Washington 1983, ch. 232, § 2 (emphasis added).

⁵ Clallam County Superior Court cause number 91-8-00025-0.

⁶ RCW 9A.52.030 provides:

- (1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.
- (2) Burglary in the second degree is a class B felony.

Laws of Washington 1989, ch 1, § 2 (2nd Ex. Sess.).

⁷ See RCW 9.41.040(1) (1991); Laws of 1983, ch. 232, § 2.

In 1992, the Legislature amended RCW 9.41.040, the unlawful possession of a firearm statute, to include juvenile adjudications as predicate offenses.^{8, 9} In 1994, the Legislature expanded the scope of the firearm prohibition to preclude any serious offender (adult and juvenile) from possessing a firearm;¹⁰ and it enacted RCW 9.41.047, which requires the notification at the time of conviction of the offender's ineligibility to possess a firearm.¹¹ In 1996, the Legislature expanded the scope of the firearm

⁸ See *State v. Semakula*, 88 Wn. App. 719, 723, 946 P.2d 795 (1997) (citing *State v. McKinley*, 84 Wn. App. 677, 682, 929 P.2d 1145 (1997) (citing Laws of 1992, ch. 205, § 118) (holding that juvenile adjudication of guilt constitutes a conviction for purposes of the unlawful possession of a firearm statute)).

⁹ RCW 9.41.040 (1992) provides:

- (1) A person is guilty of the crime of unlawful possession of a short firearm or pistol, if, having previously been convicted *or, as a juvenile, adjudicated* in this state or elsewhere of a crime of violence or of a felony in which a firearm was used or displayed, the person owns or has in his possession any short firearm or pistol.

Laws of Washington 1992, ch. 205, § 118 (emphasis added).

¹⁰ RCW 9.41.040 (1994) provides:

- (1) A person, *whether an adult or juvenile*, is guilty of the crime of unlawful possession of a firearm if the person owns, has in his or her possession, or has in his or her control any firearm:
 - (a) After having previously been convicted in this state or elsewhere of a *serious offense*...

Laws of Washington 1994, 1st Sp. Sess. ch. 7, § 402 (emphasis added).

In addition, RCW 9.41.010 (1994) includes Indecent Liberties as a "serious offense." Laws of Washington 1994, ch. 7, § 401 (1st Sp. Sess).

¹¹ RCW 9.41.047(1)(a) provides:

- (1) (a) At the time a person is convicted of an offense making the person ineligible to possess a firearm, ... the convicting ... court *shall notify the person, orally and in writing, that the person may*

prohibition to prevent any felon (adult or juvenile) from possessing a firearm.¹² Because these amendments/enactments occurred after Mr. Lamb's conviction for Indecent Liberties and Burglary in the Second Degree, Mr. Lamb never received notice that his two prior juvenile adjudications had deprived him of his right to own and possess firearms. *See* CP 87-90; CP 92-95; CP 97-101.

Between 1992 and 2000, Mr. Lamb committed a series of misdemeanor offenses. In 1992, Mr. Lamb was convicted of driving a motor vehicle without a valid driver's license. CP 103-04. In 1993, Mr. Lamb was convicted of negligent driving. CP 106-08. In 1998, Mr. Lamb was convicted for failing to transfer title of a motor vehicle. CP 110-11. And in

not possess a firearm unless his or her right to do so is restored by a court of record.

Laws of 1994, 1st Sp. Sess. ch.7, § 404 (emphasis added).

¹² RCW 9.41.040(1) (1996) provides:

- (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 possession, or has in his or her control any firearm after having previously been convicted in this state or elsewhere of any serious offense as defined in this chapter.
- (b) A person, *whether an adult or juvenile*, is guilty of the crime of *unlawful possession of a firearm in the second degree*, if the person does not qualify under (a) of this subsection for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:
 - (i) *After having been convicted in this state or elsewhere of any felony...*

Laws of Washington 1996, ch. 295, § 2 (emphasis added).

2000, Mr. Lamb was convicted of driving while license suspended in the third degree. CP 113-15.

On June 16, 2009, the State charged Mr. Lamb with 13 alleged criminal violations, including 10 counts of unlawful possession of a firearm in violation of RCW 9.41.040 (2009).¹³ CP 117-22. The 13 charges were filed under Superior Court cause number 09-1-00143-9. *See* CP 117.

PROCEDURAL HISTORY

On July 31, 2009, Mr. Lamb filed a motion to withdraw his 18 year-old guilty plea and vacate the resulting disposition under cause number 91-8-00025-0. CP 29-33. Mr. Lamb submitted his motion pursuant to JuCR 1.4, CrR 4.2, and CrR 7.8. CP 29.

¹³ RCW 9.41.040(1) (2009) provides:

- (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 possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.
- (b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

RCW 9.41.040(2) provides:

- (a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, or has in his or her possession, or has in his or her control any firearm:
 - (i) After having previously been convicted ... in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) ...

Laws of Washington 2005, ch. 453, § 1.

On September 23, 2009, the parties appeared before the Honorable S. Brooke Taylor. Mr. Lamb argued that his guilty plea was not entered knowingly, intelligently, and voluntarily because he was not informed that the conviction would deprive him of his firearm rights. CP 29-33; CP 43-44; 1RP at 17. According to Mr. Lamb, the deprivation of his right to own and possess a firearm was a direct consequence of his plea, and the State had an obligation to advise him of this consequence. CP 16-20; CP 30-31; 1RP at 35. Thus, Mr. Lamb claimed that his plea was improvident, resulting in a manifest injustice, because had he known that he would lose his firearm rights, he would never have pleaded guilty to the offense 18 years ago. CP 16-20; CP 30-31; CP 43-44; 1RP at 17-21, 35-37.

Because the sole issue in dispute was whether Mr. Lamb's 18 year-old plea was made knowingly, intelligently, and voluntarily, the State did not introduce evidence that Mr. Lamb's criminal history prohibited the restoration of his firearm rights. *See* CP 21-27; 1RP at 37-41. Instead, the State confined its arguments to the fact that Mr. Lamb failed to establish a manifest injustice necessary to withdraw an 18 year-old guilty plea because (1) there was no duty to advise the Respondent that his juvenile adjudication would deprive him of his firearm rights because Washington did not treat a juvenile felony conviction as one that invoked the prohibition in 1991, (2) the resulting firearm prohibition was a collateral consequence of his guilty

plea, and (3) ignorance of the law is no defense. CP 21-27; 1RP at 37-41. The State, also, highlighted the fact that Mr. Lamb's motion was untimely under CrR 7.8. 1RP at 38.

The Superior Court granted Mr. Lamb's motion. CP 13; 1RP at 52-53. While Judge Taylor noted that the law in 1991 "did not treat a juvenile felony conviction as a conviction that invoked the felony firearm restriction," 1RP at 49, and that "ignorance of the law is no excuse," 1RP at 49, Judge Taylor reasoned as follows:

The problem that we have in this case is that Mr. Lamb is now looking at 13 felony counts, 10 of which are the unlawful possession of a firearm by a person previously convicted of a felony. Each of those carries a mandatory – or not a mandatory, a maximum 5 year prison term is the maximum penalty. Those are serious offenses. ...

What I think is interesting here is that Mr. Lamb is not just a casual gun user. He has a family tradition of keeping and bearing arms which is a Constitutional right, he grew up around guns, he is a hunter and a recreational gun users. And I really wonder about the – our Appellate Courts' determination that the prohibition in having firearms after a felony conviction is not a direct consequence it's only a collateral consequence for people who are raised in this community and communities like it around the state where many, many if not a majority of households have guns in them and they're for hunting and recreational use as opposed to in the large urban areas where they're primarily for protection.

I can take judicial notice of the fact that I grew up in a neighborhood in central Port Angeles and I wanted to have a gun because every kid in my neighborhood had a gun, and their fathers had guns and they all hunted. My father didn't

have a gun, didn't want a gun, didn't want anything to do with them, but for me to be like the rest of the kids he thought it was appropriate that I had a .22 rifle. Which I have to this day.

There is something about the culture in the rural communities which makes the gun prohibition more serious than it is in other areas.

That being said, I'm not about to deviate from what our Appellate Courts have said and find that this is a direct consequence as opposed to a collateral consequence. I simply mention that because I think it's an important part of the totality of the circumstances in this particular case.

I am going to find that to deny the request to withdraw the guilty plea is fundamentally unfair. And the reason – there are many reasons, I tried to outline them, but the one that sticks in my mind is that from the testimony I've heard it is very clear to me that had Mr. Lamb been aware that he was prohibited from having firearms he would have had that right restored many years ago because he qualified to have that right restored. He has no felony convictions since 1991. He has only traffic offenses. He would qualify to have his rights restored and under the circumstances, for him to be a collector of guns and do so knowing that he was prohibited from having guns makes absolutely no sense at all.

It is my conclusion that had he been aware of this prohibition he would have – the first opportunity that he had he would have taken the steps to have his right to bear arms restored and we would not be here today on 10 of these charges. ...

So, bottom line is I think it would be a manifest injustice at this point to subject Mr. Lamb to 10 counts of being a felon in possession of a firearm based upon a plea to a single felony when he was 16 years old and had no idea at that time nor any idea since that he was not entitled like all citizens to keep and bear arms.

I will allow him to withdraw his plea under those circumstances.

1RP 49-52. Judge Taylor then instructed Respondent's counsel to prepare detailed findings of facts and conclusions of law reflecting the Superior Court's ruling. 1RP 53. *See* CP 10-13.

On September 30, 2009, Judge Taylor made the following clarifications to his ruling:

And I'd also like to supplement the record slightly in terms of my – the basis for my ruling. The most common criticism we get from the appellate courts is that the trial courts don't adequately explain their reasoning in their decisions. And that's because we're busy when we're making these decisions and we don't have days and law clerks to assist us in putting our reasoning into writing.

That having been said, this is one of those cases where I feel strongly that this is the correct decision but I have found it somewhat challenging to articulate, but I want the record to reflect this:

First, despite the case law to the contrary, it seems to me – and that case law that indicates that the prohibition against keeping and bearing arms is not punishment, it is not an enhancement of the punishment, it's not a direct consequence of the plea of guilty it's a collateral consequence, in this case I respectfully disagree.

And as I indicated in my oral ruling, for this [Respondent] growing up in this family, in this community where hunting and fishing and camping is what people do, the loss of the Constitutional right to keep and bear arms is a very serious consequence to a plea of guilty for a 16 year old Respondent in juvenile court.

Second, Mr. Lamb's record over the last 18 years since his juvenile court conviction would have permitted him to have his Constitutional right to bear arms restored years before his recent arrest had he only known about the prohibition. And the Court is satisfied that he would have in fact done so had he been aware of the prohibition.

Third, the prohibition against keeping and bearing arms came after his plea and conviction. He could not have been and would not have been warned and therefore could not have known on the day of the judgment and sentence that this was going to be a long-term impact arising out of his guilty plea.

Fourth, it's the Court's conclusion that to convict Mr. Lamb of 10 felony counts under these circumstances would be manifestly unjust.

And five, under Criminal Rule 4.2(f), allowing the withdrawal of the plea is "necessary to correct a manifest injustice."

2RP at 11-13. The Superior Court entered (1) findings of fact and conclusions of law, and (2) an order granting Mr. Lamb's "Motion to Vacate Order of Disposition and Withdraw Plea of Guilty." CP 10-13. The State then filed a notice of appeal. CP 04.

On October 26, 2009, the State filed a motion and supporting memorandum requesting that the Superior Court reconsider its ruling. CP 76-84; CP 130-33. The State submitted additional arguments and evidence in support of its motion for reconsideration. First, contrary to the Superior Court's findings, Mr. Lamb's criminal history prohibited the restoration of his firearm rights. CP 79-82. Second, Mr. Lamb's motion pursuant to CrR

7.8 was a collateral attack that was time barred under RCW 10.73.090. CP 82-84.

On October 27, 2009, the Clallam County Superior Court ordered Respondent's counsel to file a written response to the State's motion before the close of business on November 10, 2009. CP 75. Instead, Respondent's counsel served the Clallam County Prosecuting Attorney's Office with a "Motion to Strike" the motion for reconsideration and supporting memorandum. Despite the fact that Respondent's counsel never filed his motion to strike with the Superior Court, the State filed a written response on October 29, 2009. CP 72. The Respondent never filed a written response to the State's motion for reconsideration as ordered.

On November 19, 2009, the Superior Court denied the State's motion for reconsideration. CP 67-70. With respect to the State's argument that Mr. Lamb's criminal history prohibited the restoration of his firearm rights, Judge Taylor reasoned:

The State bases its motion on new evidence not previously presented to the Court, with no explanation for why this evidence was not presented previously for the Court to consider. The prior conviction in Juvenile Court from 1986 could have been discovered previously with the exercise of reasonable diligence, and should have been discovered and presented to the Court, and therefore will not be considered.

CP 68. Judge Taylor's opinion continued with the following discussion:

The Court's observation that, in all probability, the [Respondent] would have petitioned to have his right to bear arms restored, was only one of several factors which the Court found to be important, and even if that finding is eliminated, the manifest injustice resulting from allowing that guilty plea entered at the age of 16 to constitute the predicate offense for 10 pending felony charges, 18 years later remains. The plain fact of the matter is that the [Respondent] was not warned in any way, or ever told, that his right to possess a firearm had been forfeited by the 1991 conviction (or by the earlier 1986 conviction, either). The Court is not inclined to reconsider it prior ruling, which is now the basis for the State's appeal.

As the [Respondent] has repeatedly and correctly pointed out, at the time of his conviction in 1991, juvenile offenses were not even included in the statutory definition for predicate offenses under the firearms prohibition. That explains why no warning was provided, either oral or written, because no warning was appropriate. ...

While the Court recognizes that existence of case law indicating that the later statutory changes do not amount to an "ex post facto" law, in the technical sense, this application to the facts at hand certainly has the same grossly unfair impact, and is therefore manifestly unjust.

CP 68-69. Judge Taylor never addressed the State's time bar argument under RCW 10.73.090. *See* CP 67-70.

V. ARGUMENT

A. STANDARD OF REVIEW

"A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should be overturned on appeal only if it plainly appears that it has abused that

discretion.” *State v. Quintero-Morelos*, 133 Wn. App. 591, 596, 137 P.3d 114 (2006) (quoting *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978)). This includes motions made under CrR 7.8. *Quintero-Morelos*, 133 Wn. App. at 596. A trial court abuses its discretion when it exercises discretion in a manner that is untenable or upon unreasonable grounds. *Quintero-Morelos*, 133 Wn. App. at 596 (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

In the present case, the Superior Court abused its discretion because its order that (1) allowed Mr. Lamb to withdraw an 18 year-old guilty plea, and (2) vacated the resulting disposition, was based upon untenable grounds or reasons. This Court should reverse and instruct the Superior Court to reinstate the guilty plea and disposition.

B. MR. LAMB’S MOTION WAS TIME BARRED.

If a motion to withdraw a guilty plea is made after a judgment is entered, it is governed by CrR 7.8. CrR 4.2(f). Under CrR 7.8(c)(2):

The court *shall* transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(Emphasis added). In the present case, the Superior Court failed to find expressly that Mr. Lamb's motion was timely under either CrR 7.8 or RCW 10.73.090. *See* CP 10-13; CP 67-70.

A motion to withdraw a guilty plea must be filed within a "reasonable time" and not more than one year after the judgment becomes final. RCW 10.73.090; CrR 7.8(b); *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 592, 80 P.3d 587 (2003). As a matter of law, a motion to withdraw a guilty plea may only be filed outside the one year window if an exception applies under RCW 10.73.090 and .100. *See* RCW 10.73.090; CrR 7.8(b).

RCW 10.73.090(1) allows a challenge to a judgment and sentence outside the prescribed one-year window only if the movant shows that the judgment and sentence is facially invalid or was not entered by a court of competent jurisdiction. Additionally, RCW 10.73.100 states that the one-year time bar does not apply if one of six specific exceptions applies.

Washington's courts do not have discretion to waive the limitation period in RCW 10.73.090 because the time limit is a mandatory and constitutional means of controlling the flow of post-conviction collateral relief, which "undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *In re Pers. Restraint of Schwab*, 141 Wn. App. 85, 90,

167 P.3d 1225 (2007) (quoting *In re Pers. Restraint of Cook*, 144 Wn.2d 802, 809, 792 P.2d 506 (1990)).

Under RCW 10.73.090(3)(a), Mr. Lamb's juvenile disposition under cause number 91-8-00025-0 became final on June 5, 1991. CP 53-57. Mr. Lamb filed his "Motion to Vacate Order of Disposition and Withdraw Guilty Plea" on July 31, 2009, which was 18 years, 1 month, and 26 days after the date his judgment became final. CP 29.

At the September 23 hearing, the State highlighted the gross tardiness of Mr. Lamb's attack on his disposition. 1RP at 39. The State's motion for reconsideration expressly presented the time bar argument for the Superior Court's consideration. CP 82-84. However, the Superior Court's oral ruling, written findings/conclusions, and the memorandum opinion regarding the motion for reconsideration did not address the State's arguments. *See* CP 10-13; CP 67-70; 1RP at 47-53.

Unless an exception to the time bar applies, this Court should hold that (1) the Respondent's motion was outside the one-year window allowed for said attacks by RCW 10.73.090 and CrR 7.8, and (2) the judge abused his discretion when he considered the merits of Mr. Lamb's motion and failed to transfer the motion to the Court of Appeals as a personal restraint petition.

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1. The disposition order was facially valid.

A motion to withdraw a guilty plea is considered a collateral attack. RCW 10.73.090(2). Under RCW 10.73.090(1), a collateral attack on a judgment and sentence may be brought at any time only if it is invalid on its face. *See also In re Pers. Restraint of Rowland*, 149 Wn. App. 496, 504, 204 P.3d 953 (2009). However, it is the petitioner who has the obligation to explain why the judgment and sentence is facially invalid. *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 81-82, 74 P.3d 1194 (2003); *Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 768, 183 P.3d 1127 (2008).

The inquiry into the validity of a judgment is directed to the judgment and sentence itself. *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002); *Rowland*, 149 Wn. App. at 504. In other words, the judgment and sentence must evidence the invalidity “without further elaboration.” *Hemenway*, 147 Wn.2d at 532; *Rowland*, 149 Wn. App. at 504. Where the judgment and sentence results from a plea, the phrase “on its face” includes the documents signed as part of the plea agreement, and such documents may be considered if relevant in assessing the facial validity of the judgment and sentence. *Hemenway*, 147 Wn.2d at 532; *Rowland*, 149 Wn. App. at 504. “[T]he relevant question in a criminal case is whether the judgment and sentence is valid on its face, not whether related documents,

such as plea agreements, are valid on their face.” *Turay*, 150 Wn.2d at 82; *Hemenway*, 147 Wn.2d at 533.

In the present case, Mr. Lamb’s sole challenge to his 1991 juvenile adjudication for Burglary in the Second Degree was that a manifest injustice arose because his guilty plea was involuntary due to the fact that he never received notice that a conviction under 91-8-00025-0 would deprive him of his right to possess firearms. CP 16-20; CP 29-52; 1RP at 28-37. There is no dispute that Mr. Lamb’s juvenile guilty plea and disposition do not include a “notification of conviction and firearm warning”. This is because former RCW 9.91.040 did not apply to juvenile convictions prior to 1992. *See* Laws of Washington 1983, ch. 232, § 2. *See also* Laws of Washington 1992, ch. 205, § 118; Laws of Washington 1994, 1st Sp. Sess. ch. 7, § 402; Laws of Washington 1996, ch. 295, § 2. The statute requiring the courts to notify offenders that a conviction prevented them from possessing a firearm was not enacted until 1994. *See* Laws of Washington 1994, ch. 7, § 404 (Sp. Sess.). Furthermore, the notice provision is limited, “only those convicted in Washington after July 1994 are required to receive notice of their right to possess a firearm.” *State v. Stevens*, 137 Wn. App. 460, 153 P.3d 903 (2007) (citing *State v. Reed*, 84 Wn. App. 379, 386, 928 P.2d 469 (1997)). This Court should find that the legislative enactments in 1992, 1994, and 1996 did not render Mr. Lamb’s 1991 juvenile disposition facially invalid.

Furthermore, this conclusion is supported by public policy and judicial economy. If this Court were to conclude that subsequent amendments to RCW 9.41.040, and the enactment of RCW 9.41.047, rendered previous judgments and sentences facially invalid, then a countless number of final convictions would be collaterally attacked. This would undermine the principles of finality, degrade the prominence of trial, and cost society the right to punish admitted offenders. *See Schwab*, 141 Wn. App. at 90.

2. The disposition was imposed by a court of competent jurisdiction.

In addition, the limitation period under RCW 10.73.090 applies if the judgment and sentence “was rendered by a court of competent jurisdiction.” RCW 10.73.090(1). *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 779, 100 P.3d 279 (2004).

Mr. Lamb does not challenge the disposition court’s jurisdiction in the present case. Because the 1991 burglary occurred in Clallam County, the Clallam County Superior Court had jurisdiction to impose the resulting judgment and sentence. *See* RCW 13.04.030. JuCR 1.2; CrR 5.1.

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3. The amendments to RCW 9.41.040 are not significant changes to the law that allowed the Superior Court to consider Mr. Lamb's motion.

RCW 10.73.100 states that the one-year time bar does not apply to a collateral attack if one of six specific exceptions applies. RCW 10.73.100(6) provides one such exception:

There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, *and* either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

(Emphasis added).

In the present case, the legislative amendments that expanded the scope of the firearm prohibition statute to include juvenile felonies is not a “significant change in the law” that would allow Mr. Lamb’s motion to be timely under RCW 10.73.100. As argued below, Washington’s appellate courts have repeatedly held that the legislative amendments to RCW 9.41.040 expanding the scope of the firearm prohibition are a collateral consequence of pleading guilty and they do not permit the withdrawal of a guilty plea. *See 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, 823-24, 855 P.2d 1191 (1993). Thus, this Court should

find that the Legislature's amendments to 9.41.040 after 1991, nor the enactment of RCW 9.41.047, do not constitute significant changes in the law and allow Mr. Lamb to collaterally attack his juvenile adjudication eighteen years after his conviction became final.

The Superior Court never considered the State's arguments pertaining to the timeliness of Mr. Lamb's collateral attack on his guilty plea and disposition under 91-8-00025-0. *See* CP 10-13; CP 67-70; IRP at 47-53. This constitutes an abuse of discretion as it (1) undermines the principles of finality in 91-8-00025-0, and (2) costs society the right to punish an admitted offender, one who likely cannot be re-tried due to the severe lapse of time.

As a result, this Court should hold that (1) the motion was time barred under RCW 10.73.090 and CrR 7.8, and (2) the Superior Court abused its discretion when it addressed the merits of Mr. Lamb's motion. This Court should reinstate the guilty plea and vacated disposition order.

C. THE FIREARM PROHIBITION IS A COLLATERAL
CONSEQUENCE OF MR. LAMB'S JUVENILE
DISPOSITION.

Mr. Lamb moved to withdraw his guilty plea as involuntary on the basis he was never informed of a direct consequence of his plea and resulting disposition. CP 16-20; CP 29-52; IRP at 28-37. This Court should find that the disability imposed by Mr. Lamb's juvenile adjudications is a

collateral consequence of his disposition under 91-8-00025-0. Thus, his 1991 guilty plea was made knowingly, intelligently, and voluntarily. No manifest injustice exists to support the withdrawal of the plea and vacation of the disposition.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences. *Isadore*, 151 Wn.2d at 298. While a defendant must be informed of all direct consequences of pleading guilty before the court accepts his plea, a defendant need not be advised of every possible collateral consequence of his plea. *Isadore*, 151 Wn.2d at 298 (citing *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)); *State v. Ness*, 70 Wn. App. 817, 822, 855 P.2d 1191 (1993) (citing *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)).

In addition, CrR 4.2(f) provides:

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.*

(Emphasis added). The defendant bears the burden of proving a manifest injustice, defined as "obvious, directly observable, overt, not obscure." *Ross*,

129 Wn.2d at 283-84. A defendant must meet this demanding standard to justify the withdrawal of his or her plea. *Ness*, 70 Wn. App. at 821 (citing *State v. Saas*, 118 Wn.2d 37, 41, 820 P.2d 505 (1991)). Under CrR 4.2(f), an involuntary plea produces a manifest injustice and permits withdrawal. *Isadore*, 151 Wn.2d at 298; *Ross*, 129 Wn.2d at 284.

Mr. Lamb argues that his guilty plea was involuntary because he was not advised of a consequence of his plea – *i.e.* that he would lose his firearm rights. CP 16-20; CP 29-52; 1RP at 28-37. Thus, the question concerns whether the disability imposed by Mr. Lamb’s juvenile adjudication was a direct or collateral consequence of his guilty plea. The Superior Court reasoned that the prohibition against Mr. Lamb’s possession and ownership of firearms was a direct consequence of his 1991 juvenile adjudication, expressly rejecting controlling case law to the contrary. CP 69; 1RP at 51-52; 2RP at 11-12.

The Washington Supreme Court has held that a defendant “need not make a special showing of materiality” in order for misinformation to render a guilty plea invalid, however, he or she must show that the misinformation concerned “a *direct* consequence of [the] guilty plea.” *Isadore*, 151 Wn.2d at 296 (emphasis added). The distinction between direct and collateral consequences of a plea “turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s

punishment’.” *Ross*, 129 Wn.2d at 284 (citing *Barton*, 93 Wn.2d at 305); *Ness*, 70 Wn. App. at 822. A direct consequence is one that enhances the defendant’s sentence or alters the standard of punishment. *Ross*, 129 Wn.2d at 285.

Washington’s appellate courts have repeatedly held that the loss of an individual’s right to possess firearms is a collateral consequence of pleading guilty. *Ness*, 70 Wn. App. at 823-24 (citing *Saadig v. State*, 387 N.W.2d 315, 325 (Iowa), *appeal dismissed*, 479 U.S. 878, 107 S.Ct. 265, 93 L.Ed.2d 242 (1986)). *See also 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).

In *State v. Schmidt*, the Supreme Court consolidated two appeals. In 1988, Mr. Schmidt was convicted of a second degree assault. *Schmidt*, 143 Wn.2d at 661. At that time, RCW 9.41.040 only prohibited individuals who had committed said offense from possessing short firearms and pistols, but not rifles. *Schmidt*, 143 Wn.2d at 662. In 1994, the Legislature amended RCW 9.41.040 to prohibit persons who commit any violent crime from owning or possessing any firearm. *Schmidt*, 143 Wn.2d at 662. Mr. Schmidt never received notice regarding these amendments. In 1997, Mr. Schmidt was arrested for possessing a hunting rifle. *Schmidt*, 143 Wn.2d at 662-63. In 1998, a jury found Mr. Schmidt guilty of an unlawful possession of a

firearm. *Schmidt*, 143 Wn.2d at 663. The Supreme Court affirmed the conviction. *Schmidt*, 143 Wn.2d at 675.

In the second case consolidated with *Schmidt*, Mr. Ayers was convicted of Theft in the First Degree in 1988. *Schmidt*, 143 Wn.2d at 664. At that time, RCW 9.41.040 did not prohibit a person convicted theft from owning or possessing a firearm. *Schmidt*, 143 Wn.2d at 664-65. In 1984, 1989, and 1993, Mr. Ayers applied and obtained a concealed weapons permit from his local police department. *Schmidt*, 143 Wn.2d at 665. In 1996, RCW 9.41.040 was amended to make it a crime for a person convicted of “any felony” to possess a firearm. *Schmidt*, 143 Wn.2d at 665-66. In 1998, the trial court issued a certificate that discharged the felony conviction. *Schmidt*, 143 Wn.2d at 666. However, local police also began investigating alleged firearm violations involving Mr. Ayers between 1997 and 1998. *Schmidt*, 143 Wn.2d at 667. The State ultimately charged Mr. Ayers with 7 counts of unlawful possession of a firearm. *Schmidt*, 143 Wn.2d at 667. The Supreme Court affirmed the State’s action, finding that the subsequent firearm prohibition did not increase the sentence or amount to punishment with regard to the prior theft conviction. *Schmidt*, 143 Wn.2d at 675.

The Supreme Court in *Schmidt* reasoned that subsequent amendments to RCW 9.41.040 did not alter the standard of punishment for

prior felony convictions. 143 Wn.2d at 675. While the prohibitions of the firearm statute impose a disability and presents a threat of criminal punishment, the prohibitions do not amount to punishment for a prior conviction, nor do they “alter the standard of punishment” applicable to those crimes. *Schmidt*, 143 Wn.2d at 675. Thus, the resulting firearm prohibition that followed the amendments to RCW 9.41 is a collateral consequence of any predicate felony.

In *State v. Watkins*, Mr. Watkins, a juvenile, was convicted of a felony violation of the uniform controlled substances act (VUCSA) in 1992. *Watkins*, 76 Wn. App. at 728, 731. In 1993, Mr. Watkins was found guilty of unlawful possession of a firearm. *Watkins*, 76 Wn. App. at 731. Between 1992 and 1993, the Legislature expanded the scope of RCW 9.41 to include Mr. Watkins previous juvenile VUCSA conviction, and thereby prohibited his possession of a firearm in the future. *Watkins*, 76 Wn. App. at 731-32. Although Mr. Watkins had committed the predicate offense before the amendment to RCW 9.41 became effective, the intermediate appellate court affirmed Mr. Watkins’ conviction for unlawful possession of a firearm, reasoning the amendment did not enhance the Respondent’s sentence because it did not alter or increase the punishment for an existing crime. *Watkins*, 76 Wn. App. at 732. Thus, the prohibition imposed via subsequent

amendments to RCW 9.41 is only a collateral consequence of a juvenile adjudication.

In *State v. Ness*, the petitioner pleaded guilty to three counts of second degree burglary in 1988. *Ness*, 70 Wn. App. at 819. At that time, RCW 9.41 did not require the courts to give express notification of the resulting firearm prohibition, thus, Mr. Ness was never advised that his convictions prevented him from subsequently owning or possessing firearms. In 1990, Mr. Ness was charged by federal indictment with 2 counts of being a felon in possession of a firearm. *Ness*, 70 Wn. App. at 820. Mr. Ness was convicted of both counts. *Ness*, 70 Wn. App. at 820. In 1991, Mr. Ness moved to withdraw his 1988 guilty plea to the three counts of second degree burglary. *Ness*, 70 Wn. App. at 820. The Superior Court denied the motion, and Mr. Ness Appealed. *Ness*, 70 Wn. App. at 820. The Court of Appeals affirmed the trial court, reasoning:

Mr. Ness' federal conviction was not a direct consequence of his guilty plea in Washington state court, nor did his federal sentence represent a "definite, immediate and largely automatic effect on the range of the defendant's punishment" imposed by this State. ...

Clearly, that proceeding and its outcome was a collateral consequence the court had no duty to articulate. The loss of one's right to possess firearms is also a collateral consequence of pleading guilty.

Ness, 70 Wn. App. at 823-24 (internal citations omitted). Thus, the Court held that Mr. Ness's pleas were knowing, intelligent, and voluntary. *Ness*, 70 Wn. App. at 824.

The present case is controlled by the above cited case law, and *State v. Ness* should guide this Court's analysis. Like *Ness*, Mr. Lamb pleaded guilty to a felony that deprived him of his right to possess a firearm. CP 58. Like *Ness*, at the time of Mr. Lamb's disposition, the court had no obligation to inform Mr. Lamb of the resulting firearm prohibition. Laws of Washington 1983, ch. 232, § 2; Laws of Washington 1992, ch. 205, § 118; Laws of Washington 1994, ch. 7, §§ 402, 404. *See also* CP 10; CP 69; 1RP at 49; 2RP at 12. Like *Ness*, the subsequent proceeding that alleged 10 counts of an unlawful possession of a firearm was a collateral consequence of his earlier guilty plea. CP 117-22. And like *Ness*, Mr. Lamb now argues that his guilty plea was not made knowingly, intelligently, and voluntarily because he did not receive prior notice of the firearm disability imposed by his juvenile adjudication for second degree burglary. CP 16-20; CP 29-52; 1RP at 28-37. This Court should find, as did the *Ness* Court, that the resulting firearm prohibition is a collateral consequence of Mr. Lamb's juvenile adjudication and that failure to receive notice of said prohibition did not render the plea improvident. *See Ness*, 70 Wn. App. at 823-24.

Even though Mr. Lamb did not have knowledge that his 18 year-old juvenile adjudication for second degree burglary deprived him of the right to own/possess firearms, these facts do not create a manifest injustice. This is evident by the holdings by our Supreme Court and intermediate appellate courts cited above. Any prosecution under 09-1-00143-9 is collateral to Mr. Lamb's guilty plea and disposition under 91-8-00025-0. It was completely unreasonable for the Superior Court to allow Mr. Lamb to withdraw his guilty plea on the basis that it was involuntary due to laws that were enacted until after the time of the plea.

Furthermore, Mr. Lamb had the benefit of counsel in 1991. CP 58; 1RP at 17. Mr. Lamb parents encouraged him to plead guilty to the offense. 1RP at 29. Finally, Mr. Lamb, himself, understood that the sentence recommendation was lenient. 1RP at 17, 19. Based upon the law as it existed in 1991, Mr. Lamb knowingly, intelligently, and voluntarily pleaded guilty to the crime of second degree burglary.

Mr. Lamb is not entitled to withdraw his plea of guilty and vacate the disposition under 91-8-00025-0. The Superior Court abused its discretion when it ignored the controlling case law cited above. This Court should reverse the Superior Court and order that the guilty plea and disposition order under 91-8-00025-0 be reinstated.

D. MR. LAMB'S CRIMINAL HISTORY PROHIBITS THE RESTORATION OF HIS FIREARM RIGHTS.

This Court should find that Mr. Lamb's criminal history precludes the restoration of his firearm rights. Thus, this Court should hold that the Superior Court abused its discretion when it found that Mr. Lamb's record permitted him to have his firearm rights restored and refused to consider evidence and argument to the contrary.

1. Mr. Lamb's Indecent Liberties conviction prohibits the restoration of his firearm rights.

In 1986, the State charged Mr. Lamb with Indecent Liberties under RCW 9.94A.100. CP 87-90. Mr. Lamb pleaded guilty to Indecent Liberties to the offense and the Superior Court entered an order of disposition on August 14, 1987. CP 88. Mr. Lamb was sentenced to a commitment term of 8-12 weeks in the custody of the Department of Juvenile Rehabilitation (DJR). CP 89. Five years later, when Mr. Lamb pleaded guilty to second degree burglary, his prior conviction for indecent liberties was included in his criminal history. CP 59.

Mr. Lamb's conviction for Indecent Liberties is both a Class B felony and a sex offense. *See* RCW 9A.44.100 (1986); RCW 9.94A.030(23) (1986)¹⁴. Thus, RCW 9.41.040(4) applies in the present case:

¹⁴ RCW 9.94A.030(23) (1986) provides:

Notwithstanding any other provisions 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 or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership* under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored...

(Emphasis added). As a matter of law, RCW 9.41.040 specifically excludes sex offenders from ever owning or possessing a firearm. Mr. Lamb's indecent liberties conviction, which is a sex offense, prohibits the restoration of his firearm rights.

State v. Smith, 118 Wn. App. 464, 76 P.3d 769 (2003), is similar to the present case. In *Smith*, Division 3 addressed the petition of an individual, previously convicted of Indecent Liberties, who sought to have his firearm rights restored. In denying the petition, Division 3 stated:

In subsection (1), RCW 9.41.040 provides that it is unlawful for a person who has been convicted of a serious crime, which includes indecent liberties, to possess a firearm. In subsection (4), RCW 9.41.040 provides that people convicted of certain crimes may petition the court to have his or her right to possess a firearm restored. But, subsection (4) specifically denies this right to certain offenders. *Because Mr. Smith was convicted of a sex offense, he cannot have his firearm rights*

"Sex Offense" means a felony that is a violation of chapter 9A.44 RCW or RCW 9A.64.020 or 9.68A.090 or that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes.

Laws of Washington 1986, ch. 257, § 17.

restored. RCW 9.41.040(4). Finally in subsection (3), RCW 9.41.040 provides that Mr. Smith could have his firearm rights restored only if his conviction was pardoned, annulled, or he was issued a certificate of rehabilitation or its equivalent. As currently drafted, there is no provision in Washington statutes for the issuance of a certificate of rehabilitation. Thus, *the only way that Mr. Smith could have his firearm rights restored is by pardon or annulment of his conviction.*

Mr. Smith is not eligible to have his firearm rights restored. The court did not err by failing to hold a hearing to issue a certificate of rehabilitation or by denying Mr. Smith's motion to restore his firearm rights.

Smith, 188 Wn. App. at 470 (emphasis added). Like *Smith*, this Court should find that Mr. Lamb's previous conviction for Indecent Liberties statutorily precluded him from ever owning or possessing a firearm.

The Superior Court's finding that Mr. Lamb was eligible to have his firearm rights restored prior to the State's allegations under 09-1-00143-9 was erroneous. *See* CP 11, 13; 1RP at 52; 2RP at 12. Thus, the Superior Court abused its discretion when it refused to reconsider its ruling, despite the fact that (1) the Indecent Liberties conviction was referenced in the guilty plea filed under 91-8-00025-0, *see* CP 59; and (2) the State highlighted the untenable basis supporting the order allowing the disposition to be vacated. *See* CP 68; CP 79-80. This Court should reverse.

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2. Mr. Lamb's subsequent criminal history made him ineligible to have his firearm rights restored.

Even if Mr. Lamb had not been previously convicted of a sex offense, his misdemeanor criminal history made him ineligible to have his gun rights restored prior to the date that the State charged him with ten counts of unlawful possession of a firearm.

An individual's right to possess a firearm can only be restored if the predicate felony washes out of his offender score. *See* RCW 9.41.040(4)(b). RCW 9.41.040(4)(b)(i) allows an offender to have his firearm rights restored within 5 years of his conviction, so long as his 5 years in the community are free of any felony, gross misdemeanor, or misdemeanor convictions.

However, RCW 9.41.040(4)(b)(i) qualifies this rule with the following statement: "if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score in RCW 9.94A.525."

RCW 9.94A.525(2)(b) states:

Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, *the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.*

(emphasis added). Here, Mr. Lamb second degree burglary conviction is a Class B felony. RCW 9A.52.030. Thus, before his firearm rights could be restored, he had to reside in the community for 10 years without a felony, gross misdemeanor, or misdemeanor conviction.

Between 1992 and 2000, Mr. Lamb was convicted of a series of misdemeanor offenses: (1) a 1992 conviction for No Valid Drivers License; (2) a 1993 conviction for Negligent Driving; (3) a 1998 conviction for Failure to Transfer Title; and (4) a 2000 conviction for Driving While License Suspended in the Third Degree. *See* CP 103-04, 106-08, 110-11, 113-15. Thus, Mr. Lamb would not have been eligible for a restoration of his firearm rights until March of 2010.

Accordingly, the Superior Court's assumption – that Mr. Lamb would have had his firearm rights had he been aware of the disability imposed by his 1991 juvenile burglary conviction – was misplaced. *See* CP 11, 13; CP 68 1RP at 52; 2RP at 12. Mr. Lamb was ineligible to petition the Court to have his firearm rights restored before the State filed charges under 09-1-00143-9.

Judge Taylor refused to consider this information upon the State's "Motion for Reconsideration."

The State bases its motion on new evidence not previously presented to the Court, with no explanation for why this evidence was not presented previously for the Court to

consider. The prior conviction in Juvenile Court from 1986 could have been discovered previously with the exercise of reasonable diligence, and should have been discovered and presented to the Court, and therefore will not be considered.

CP 68. However, argument on September 23, 2009, was confined to the issue of whether the firearm prohibition was a direct or collateral consequence of a juvenile's 1991 guilty plea for second degree burglary. CP 29-52; CP 21-27; CP 16-20; 1RP at 31-47.

It was the Superior Court that first suggested Mr. Lamb was eligible to restore his firearm rights. *See* 1RP at 52; 2RP at 12. The State should be allowed to present additional evidence and argument to correct this erroneous assumption. When the Superior Court refused to consider the evidence that showed Mr. Lamb's criminal history prohibited the restoration of his gun rights, the order continued to be based, in part, upon an untenable basis. Thus, the Superior Court abused its discretion when it allowed Mr. Lamb to withdraw his plea of guilty.

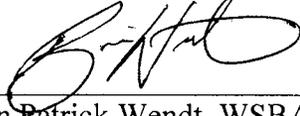
VI. CONCLUSION.

For the foregoing reasons, the Superior Court clearly abused its discretion when it granted Mr. Lamb's motion to withdraw his guilty plea and vacate the disposition under cause number 91-8-00025-0. This Court should reverse the Superior Court's order, and instruct the Superior Court to

- (1) reinstate Mr. Lamb's guilty plea under cause number 91-8-00025-0, and
- (2) reinstate Mr. Lamb's disposition under cause number 91-8-00025-0.

RESPECTFULLY SUBMITTED on December 16th, 2009.

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