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COURT OF APPEALS  
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STATE OF WASHINGTON  
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CLERK

No. 39849-4-II

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH EUGENE LAMB

Petitioner.

FILED  
OCT 17 2011  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
[Signature]

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON IN AND FOR  
THE COUNTY OF CLALLAM  
CAUSE NOS. 91-8-00025-0 & 09-1-00143-9

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**PETITION FOR REVIEW**

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### **IDENTITY OF PETITIONER**

COMES NOW, Loren D. Oakley, appointed counsel for the petitioner, and, pursuant to the Rules of Appellate Procedure 13.4, asks this Court to accept review of the Court of Appeals decision terminating review designated below.

### **COURT OF APPEALS DECISION**

The petitioner seeks review of the Court of Appeals' opinion of September 13, 2011 reversing the Juvenile Court's order granting the petitioner's motion to withdraw his plea of guilty and vacate the corresponding Judgment and Disposition, and orders denying the respondent's motion to file and amended information and dismissing ten counts of the information pending against the respondent. A copy of the decision of the Court of Appeals of September 13, 2011 is included in the appendix.

### **ISSUES PRESENTED FOR REVIEW**

I. Whether the Court of Appeals erroneously reversed the Juvenile Court's granting of the petitioner's Motion to Vacate the Order of Disposition and Withdraw Plea of Guilty by holding that:

A. The Juvenile Court erroneously applied the manifest injustice standard of CrR 4.2, and

B. The standard applicable to motions to withdraws plea of guilty brought post-judgment is "extraordinary circumstances that are fundamental, substantial irregularities in the court's proceedings or to irregularities extraneous to the court's actions" contrary to decisions of the Supreme Court and other decisions of the Court of

Appeals.

II. Whether the decision of the Court of Appeals erroneously concluded that the State had proved the Constitutional validity of the petitioner's pleas of guilty beyond a reasonable doubt.

III. Whether the Court of Appeals erroneously decided that the Superior Court erroneously granted the defense's motion to dismiss counts IV-XIII of the Amended Information and erroneously denied the State's motion to file a Second Amended Information.

#### **STATEMENT OF THE CASE**

On April 9, 2009, the State filed a thirteen (13) count information in cause 09-1-143-9 charging the petitioner with three (3) counts of Theft of a Firearm and ten (10) counts of Unlawful Possession of a Firearm in the Second Degree. (U.P.F.)<sup>1</sup> The U.P.F. counts were based the petitioner's adjudication in the Juvenile Division of the Superior Court of the State of Washington in and for the County of Clallam (Juvenile Court) for Burglary in the Second Degree.<sup>2</sup>

The petitioner was charged in Juvenile Court of April 1, 1991.<sup>3</sup> On June 5, 1991 the petitioner completed a Guilty Plea Statement (Statement) which the Juvenile Court accepted, and changed his plea to guilty.<sup>4</sup> The Juvenile Court immediately held disposition, entering an

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<sup>1</sup> CP 11 at Finding of Fact (F.O.F.) VI, 13 at Conclusion of Law (C.O.L.) V, 33, and 47-52.

<sup>2</sup> CP 11 at F.O.F. VI, 12 at F.O.F. IX and C.O.L. II, 13 at C.O.L. V, IRP 16-17.

<sup>3</sup> CP 62

<sup>4</sup> CP 58-61. IRP 16-18.

Order of Disposition (Disposition) which included five (5) days of detention, six (6) months of community supervision, twenty-four (24) hours of community service, and a fine of twenty-five dollars (\$25.00).<sup>5</sup> Nowhere do these documents include any mention that changing his plea to guilty or being adjudicated for this crime would affect, let alone terminate the petitioner's firearms rights.<sup>6</sup> The Juvenile Court's file contains nothing to indicate the petitioner was ever notified this adjudication would terminate or even affect his firearms rights.<sup>7</sup>

The petitioner has and had at the time of this adjudication a long family history of firearms and firearms usage.<sup>8</sup> The petitioner had been exposed to and used firearms since he was old enough to hold one, and went on family outings and picnics which included target shooting with his parents.<sup>9</sup> He has carried on that tradition with his own family.<sup>10</sup> The petitioner also uses and has used firearms for self-defense and defense of his family, as well as to teach his children gun safety.<sup>11</sup>

The petitioner's parents were involved with him during the pendency of this burglary charge; while he contemplated the prosecution's offer of settlement; and when he completed the Statement, changed his plea to guilty, and the Disposition was entered.<sup>12</sup> The petitioner's par-

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<sup>5</sup> CP 53-57.

<sup>6</sup> CP 10 at F.O.F. I, and 53-61.

<sup>7</sup> 1RP 48-49.

<sup>8</sup> 1RP 18-20, CP 43.

<sup>9</sup> *Id.*

<sup>10</sup> 1RP 20.

<sup>11</sup> *Id.* at 18-19. CP 43.

<sup>12</sup> 1RP 28-29.

ents recommended the petitioner accept the plea offer; however, they never discussed any ramifications being adjudicated for this offense would have on the petitioner's firearms rights because there was no indication that being adjudicated would affect those rights.<sup>13</sup> The petitioner's father would have at least mentioned that being adjudicated for this offense would affect the petitioner's firearms rights had there been any indication that was, would be, or would have been an issue.<sup>14</sup>

The petitioner considered this burglary charge weak.<sup>15</sup> The petitioner none the less changed his plea to guilty because he considered the recommendation, which contained no mention that such a disposition would affect or terminate his firearms rights, favorable or even lenient.<sup>16</sup> The petitioner never would have accepted the plea offer, completed or entered the Statement, or changed his plea to guilty had he known doing so would affect or terminate his firearms rights.<sup>17</sup>

Approximately six (6) years after being adjudicated, the petitioner went to a second hand store in Port Angeles, and purchased a rifle so he could go hunting.<sup>18</sup> The petitioner completed all necessary paperwork for the purchase and background check, waited the required period, and picked up the rifle without any problems.<sup>19</sup> Upon picking-up the

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<sup>13</sup> 1RP 28-30.

<sup>14</sup> 1 RP 30.

<sup>15</sup> 1 RP 18-19. CP 43.

<sup>16</sup> 1 RP 17, 18. CP 12 at F.O.F. VIII., and 43.

<sup>17</sup> 1 RP 17-18, CP 12 at F.O.F. IX, and 43.

<sup>18</sup> 1 RP 8-9, 23. CP 11 at F.O.F. V, 43, and 45.

<sup>19</sup> 1 RP 9-10, 23-24. CP 11 at F.O.F. V, 43, and 45.

rifle, the petitioner went to a Port Angeles-area supermarket to purchase a hunting license and deer tag.<sup>20</sup> The petitioner paid the required fee, accurately completed all necessary paperwork, and obtained the license and deer tag without any complications.<sup>21</sup>

Approximately six (6) years afterward, the petitioner went camping with friends.<sup>22</sup> A wildlife enforcement officer contacted them, and asked whether any of them had a weapon.<sup>23</sup> The petitioner answered that he did, and handed the officer a pistol and his identification.<sup>24</sup> The officer took the pistol and identification and appeared to use his patrol vehicle's radio to run a check.<sup>25</sup> After checking the petitioner's status, the officer returned the pistol and identification to the petitioner; said, "Have a nice day;" and sent the petitioner and his party on their way.<sup>26</sup> The petitioner has suffered no criminal or legal repercussions as a result of the contact with the wildlife officer or purchasing the rifle, hunting license, or deer tag.<sup>27</sup>

After his motion to dismiss under *State v. Knapstad* was denied in the pending Superior Court cause, the petitioner filed a Motion to Vacate Order of Disposition and Withdraw Plea of Guilty (Motion) in

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<sup>20</sup> 1 RP 9-10, 24-26. CP 11 at F.O.F. V, 43, and 45.

<sup>21</sup> *Id.*

<sup>22</sup> 1 RP 12, 21. CP 11 at F.O.F. V, 43, and 45.

<sup>23</sup> 1 RP 13, 21. CP 11 at F.O.F. V, 44, and 46.

<sup>24</sup> 1 RP 13, 21-22. CP at F.O.F. V, 44, and 46.

<sup>25</sup> 1 RP 13-14, 22-23. CP 11 at F.O.F. V, 44, and 46.

<sup>26</sup> 1 RP 13, 22-23. CP 11 at F.O.F. V, 44, and 46.

<sup>27</sup> 1 RP 9-10, 13, 15,23,24. CP 11 at F.O.F. V, 44, 45, and 46.

the Juvenile Court burglary case.<sup>28</sup> After response and reply briefs,<sup>29</sup> the Juvenile Court held a hearing on whether to grant the Motion.<sup>30</sup> After taking testimony and reviewing the documents, exhibits, and testimony; and arguments, the Juvenile Court granted the Motion because it concluded that failing to do so would constitute a gross miscarriage of justice and be fundamentally unfair in view of all the facts and circumstances of this case.<sup>31</sup>

One week later on September 30, 2009 the Juvenile Court entered Findings of Fact and Conclusions of Law; and Order Granting Motion to Vacate Order of Disposition and Withdraw Plea of Guilty (Findings and Conclusions).<sup>32</sup> Upon entering the Findings and Conclusions, the Court clarified its ruling, giving additional reasons for granting the Motion.<sup>33</sup> The respondent immediately filed a notice of appeal.<sup>34</sup>

On October 26, 2009 the State filed a Motion for Reconsideration and Memorandum in Support of Motion for Reconsideration (Reconsideration). The Juvenile Court denied the Reconsideration on November 18, 2009.

The petitioner then filed a motion in the pending Superior Court Cause 09-1-143-9 to dismiss counts IV through XIII of the Amended

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<sup>28</sup> CP 29-52.

<sup>29</sup> CP 21-27 and 16-20.

<sup>30</sup> CP 14.

<sup>31</sup> 1 RP 52-53. CP 14.

<sup>32</sup> 2 RP, CP 10-13, and 9.

<sup>33</sup> 2 RP 11-13.

<sup>34</sup> CP 4-8.

Information.<sup>35</sup> The Superior Court granted that motion.<sup>36</sup> The Superior Court also granted the petitioner's motion to deny the respondent's motion to file a second amended information re-instating the ten (10) counts of U.P.F. based on the petitioner's 1986 adjudication for Indecent Liberties in Juvenile Court.<sup>37</sup> The respondent then filed a notice of appeal to seek review of the Superior Court's granting of the petitioner's motion to dismiss the U.P.F. charges, and denial of the respondent's motion to file a second amended information.<sup>38</sup>

### ARGUMENT

A respondent may withdraw his plea of guilty.<sup>39</sup> A court may also grant relief from an Order for a variety of reasons.<sup>40</sup> Motions for with-

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<sup>35</sup> CP 8-9, 11-12, and RP (11/19/09) 7.

<sup>36</sup> CP 9, 12 RP (12/30/09) 4, and RP (/12/10).

<sup>37</sup> CP 8-9, 11-12.

<sup>38</sup> CP 4-6.

<sup>39</sup>**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.

CrR 4.2(f).

<sup>40</sup>**RELIEF FROM JUDGMENT OR ORDER**

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**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

drawal of pleas after judgment must be brought under CrR 7.8.<sup>41</sup> The Juvenile Court granted the Motion because it found that not to would be fundamentally unfair and constitute a manifest injustice under all the facts and circumstances.<sup>42</sup> In reversing the Juvenile Court's decision, the Court of Appeals held that the Juvenile Court abused its discretion because although manifest injustice is a ground for granting a motion to withdraw a plea of guilty under CrR 4.2 it is not under CrR 7.8. Thus the Court of Appeals held that the entry of judgment renders "manifest injustice" irrelevant to whether to grant a motion to withdraw a plea of guilty. In other words, the Court of Appeals held that the manifest injustice standard does not survive judgment and transmittal to CrR 7.8 regardless of the injustice in enforcing the plea.

To reach this decision, the Court of Appeals held that relief can be granted under CrR 7.8(b)(5) only for "extraordinary circumstances' that are 'fundamental, substantial irregularities in the court's proceedings or to irregularities extraneous to the court's actions.'" As authority for this reasoning the Court of Appeals relied on *State v. Olivera-Avilla*, and *State v.*

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(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

CrR 7.8.

<sup>41</sup> CrR 4.2(f).

<sup>42</sup> CP 13, at C.O.L. V.

*Aguirre*.<sup>43</sup> To so hold, the Court of Appeals rejected the holdings of Division III's *State v. Zavala-Reynoso* and *State v. Cortez* which held that motions to withdraw pleas of guilty where the "interests of justice most urgently require."<sup>44</sup> Since *Zavala-Reynoso* and *Cortez* followed the Supreme Court's holding in *State v. Shove* for their decisions, the Court of Appeals' decision is also contrary to a decision of the Supreme Court.<sup>45</sup>

Furthermore, these authorities do not support this decision of the Court of Appeals. The only issue in *Olivera-Avila* was whether the one-year statute of limitations on collateral attacks barred Mr. Olivera-Avila's motion to withdraw his plea.<sup>46</sup> This statute of limitations was irrelevant to this decision of the Court of Appeals because the State conceded that the petitioner was never advised of the limitation.

*Cortez* reversed the trial court's order granting Mr. Cortez's motion to withdraw his plea of guilty because granting it Unconstitutionally violated the doctrine of separation of powers.<sup>47</sup> Separation of powers is irrelevant to this case. Furthermore, the State is free to prosecute the respondent for this burglary.

Whether to grant a motion to withdraw a plea of guilty or grsnt

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<sup>43</sup> *State v. Olivera-Avila*, 89 Wn.App. 313, 319 (1997); and *State v. Aguirre*, 73 Wn.App. 682, 688, *rev.den.*, 124 Wn.2d 1028 (1994).

<sup>44</sup> *State v. Zavala-Reynoso*, 127 Wn.App. 119, 122-23 (2005); and *State v. Cortez*, 73 Wn.App. 838, 841-42 (1994).

<sup>45</sup> *State v. Shove*, 113 Wn.2d 83, 88 (1989).

<sup>46</sup> *Olivera-Avila*, *supra* n. 43, at 317 (citing RCW 10.73.090 and CrR 7.8 (b)(1)).

<sup>47</sup> *Aguirre*, *supra* n. 43, at 688.

relief from an order is within the trial court's sound discretion.<sup>48</sup> The Supreme Court has held that a motion to withdraw a plea of guilty is addressed to the trial court's sound discretion which should be exercised liberally in favor of life and liberty.<sup>49</sup> The Court of Appeals reversed the Juvenile Court's granting of the Motion without even mention the line of authority culminating in *State v. Hensley*; thus its decision is contrary to the Supreme Court's decision in *Hensley* and the precedents on which it relies.

For a plea of guilty to satisfy due process and be constitutional, it must be knowing, voluntary, and intelligent.<sup>50</sup> A plea of guilty is not voluntary unless it was made voluntarily, competently, and with an understanding of the charges and consequences of the plea.<sup>51</sup> "A plea is not knowing, voluntary, or intelligent unless [the respondent] correctly understands its direct sentencing consequences.<sup>52</sup> Sentencing consequences are direct if they will have a definite, immediate, and largely automatic effect on the range of punishment.<sup>53</sup> A mistake about the direct conse-

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<sup>48</sup> *Aguirre, supra* n. 43, at 686.

<sup>49</sup> *State v. Hensley*, 20 Wn.2d 95, 101 (1944) (citing *State v. Cimini*, 53 Wash. 268 (1909); *State v. Wilmot*, 95 Wash. 326 (1917); *State v. Lindskog*, 127 Wash. 647 (1923); *State v. Roberts*, 136 Wash. 359 (1925); *State v. Danhof*, 176 Wash. 573 (1934); *State v. McKeen*, 186 Wash. 127 (1936); *State v. McDowell*, 197 Wash. 323 (1938); and *State v. Wood*, 200 Wash. 37 (1939)).

<sup>50</sup> *Personal Restraint of Mayer*, 128 Wn.App. 694, 704 (2005) (citing *State v. Taylor*, 83 Wn.2d 594, 598 (1974); and *State v. McDermond*, 112 Wn.App. 239, 243 (2002)).

<sup>51</sup> *State v. Zumwalt*, 79 Wn.App. 124, 128 (1995) (citing *State v. Saas*, 118 Wn.2d 37, 42 (1991)).

<sup>52</sup> *State v. Kisse*, 88 Wn.App. 817, 821 (1997) (citing *State v. Ross*, 129 Wn. 2d 279, 283 (1996)).

<sup>53</sup> *Kisse, supra* n. 52, at 821-22 (citing *Ross, supra* n. 52, at 284; *State v. Ward*, 123 Wn.2d 488, 512 (1994); and *State v. Olivas*, 122 Wn.2d 73, 96 (1993)).

quences of disposition renders a plea not knowing, intelligent, and voluntary, entitling the respondent to withdraw it.<sup>54</sup> The prosecution, defense, and court sharing a mistake strengthens the basis for granting a motion to withdraw a plea.<sup>55</sup>

It was not until 1992, after the petitioner changed his plea and the Disposition was entered, that juvenile adjudications terminated or even affected respondents' rights to bear, keep, own, or possess firearms.<sup>56</sup> Two years later, the State required that everyone adjudicated or convicted of a qualifying case be specifically warned that his rights to bear, keep, own, or possess firearms was terminated and any subsequent possession of a firearm would be felony.<sup>57</sup> Failure to give this required warning prevents subsequent prosecution, adjudication or conviction, or punishment.<sup>58</sup> The remedies for violating this notice requirement are strict: subsequent prosecutions or adjudications or convictions for Unlawful Possession of a Firearm must be reversed or dismissed.<sup>59</sup> The petitioner never

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<sup>54</sup> *Kissee, supra* n. 52, at 822.

<sup>55</sup> *Id.*

<sup>56</sup> Laws of 1992, ch. 205, § 118.

<sup>57</sup> At the time a person is convicted or found not guilty by reason of insanity of an offense making the person ineligible to possess a firearm, or at the time a person is committed by court order under RCW 71.05.320, \*71.34.090, or chapter 10.77 RCW for mental health treatment, the convicting or committing court shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record. For purposes of this section a convicting court includes a court in which a person has been found not guilty by reason of insanity...

Laws of 1994, ch. 7, § 404 (Sp.Sess.) (codified at RCW 9.41.047).

<sup>58</sup> *State v. Minor*, 162 Wn.2d 796, 804 (2008).

<sup>59</sup> *Id.*

received these warnings because at the time of the adjudication they were not required and juvenile adjudications did not affect firearms rights.

The uncontroverted evidence is that the petitioner did not know that his adjudications affected his firearms rights: he was unaware of a direct consequence of his adjudications. Thus his plea is unconstitutional because it does not satisfy due process. Furthermore by selling the petitioner a gun and a hunting license and returning his gun to him, the State misled him into believing his firearms rights were intact. The Court of Appeals incorrectly decided that the State had proved the Constitutionality of the petitioner's plea beyond a reasonable doubt.

The authorities upon which the Court of Appeals relied do not support its decision because they were decided before the United States Supreme Court decided *Heller v. District of Columbia* and *McDonald v. Chicago*, and the Supreme Court of Washington decided *State v. Sieyes*.<sup>60</sup> *Heller*, *McDonald*, and *Sieyes* each held the right to bear, keep, own, and possess firearms is fundamental and personal.<sup>61</sup> In this case the State terminated the petitioner's fundamental Constitutional right to bear, keep, own, or possess firearms retroactively and without notice. The decision of the Court of Appeals sanctions terminating a fundamental

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<sup>60</sup> *Heller v. District of Columbia*, 554 U.S. \_\_\_, 128 S.Ct. 2783, 171 L.Ed. 2d 637 (2008); *McDonald v. Chicago*, 561 U.S. \_\_\_, 130 S.Ct. 3020, \_\_\_ L.Ed. 2d \_\_\_ (2010); and *State v. Sieyes*, 168 Wn.2d 276 (2010).

<sup>61</sup> *Heller*, *supra* n. 60, 128 S.Ct. at 2817 and 2818; *McDonald*, *supra* n. 60, 130 S.Ct. at 3050; and *Sieyes*, *supra* n. 60 at 296.

right without applying strict scrutiny review to the termination.<sup>62</sup>

The respondent was convicted of Indecent Liberties based on acts occurring in April 1986 for having sexual contact with someone less than fourteen (14) years of age even though the respondent was less than twelve (12) years of age at the time the crime occurred.<sup>63</sup> That crime, or that definition of Indecent Liberties, not only no longer exists;<sup>64</sup> the acts alleged have not constituted a crime since June 9, 1988.<sup>65</sup> Not until 2001 did any version of Indecent Liberties constitute a class A felony.<sup>66</sup>

In 1983 the State amended the law to add Indecent Liberties to the list of offenses convictions for which terminated one's right to possess short firearms' or pistols, leaving intact such persons' right to possess rifles.<sup>67</sup> This statute made it impossible for one convicted of Indecent Liberties to ever possess a short firearm or pistol but left unaffected his right to possess rifles.<sup>68</sup> This statute for the first time created a mechanism for those convicted of qualifying offenses to re-instate their right to possess short firearms.<sup>69</sup> This statute forbid those convicted of Indecent Liberties from ever reinstating their right to possess short firearms, but did not apply to the

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<sup>62</sup> *Harris v. Charles*, 171 Wn.2d 455, 462 (2011) (citing *State v. Harner*, 153 Wn.2d 228, 235-36 (2004)).

<sup>63</sup> CP 59, 87-90.

<sup>64</sup> "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...(b) when the other person is less than fourteen years of age..." Laws of 1975, ch. 260, §9A. 88.100 (1st ex.sess.).

<sup>65</sup> Laws of 1988, ch 145, § 10; Laws of 1988, ch. 146, § 2; and Laws of 1988, at ii.

<sup>66</sup> Laws of 2001, ch. 359, § 12 (2d Sp.Sess.).

<sup>67</sup> Laws of 1983, ch. 232, § 2(1) & (5).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, at (5).

respondent because it was not until at least 1992, after the respondent changed his plea and was adjudicated, that the law was amended to include juvenile adjudications within the offenses disqualifying one from possessing firearms, short or otherwise.<sup>70</sup> To include juvenile offenses in those disqualifying one from firearm possession, the State amended subsections one, three, and four to add “adjudicated”, “disposition”, and “fact-finding”.<sup>71</sup> These terms are the language of the Juvenile Justice Act.

Conspicuously absent from this statute was any amendment to subsection five which is the operative subsection because that is the subsection which includes Indecent Liberties among the offenses which prevent firearms rights from ever being restored.<sup>72</sup> This absence shows that the State intended juvenile adjudications not to create a life-time ban on the possession of short firearms because “fundamental fairness requires that a penal statute be literally and strictly construed in favor of the accused although a possible but strained interpretation in favor of the State might be found.”<sup>73</sup> The 1994 amendment corroborates this because it was that amendment which made it a crime for “an adult or juvenile”, to possess a firearm after having been “convicted” of a predicate offense.<sup>74</sup>

The 1992 and 1994 amendments occurred after the respondent changed his plea, was adjudicated, and the disposition was entered in the

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<sup>70</sup> Laws of 1992, ch. 205, § 118(1) & (5).

<sup>71</sup> *Id.*, at (1), (3), and (4).

<sup>72</sup> *Id.*, at (5).

<sup>73</sup> *State v. Wilbur*, 110 Wn.2d 16, 19 (1988) (quoting *State v. Hornaday*, 105 Wn.2d 120, 127 (1986)).

<sup>74</sup> Laws of 1994, ch. 7, § 402 (Sp. Sess.).

Indecent Liberties case. As before, the respondent was never advised that changing his plea or being adjudicated in the Indecent Liberties case would affect his firearms rights, let alone that it would permanently terminate those rights.

The restrictions on re-instatement of firearms rights which require compliance with the "wash-out" rules of the Sentencing Reform Act did not become effective until well after the respondent was adjudicated for Indecent Liberties. There is no showing that at the time respondent would have become eligible to re-instate his firearms rights, had he known he had any need to, he would not have been able to.

The respondent's plea to Indecent Liberties was not voluntary. He had no knowledge that changing his plea to guilty and being adjudicated for that offense would affect his firearms rights because it was not until afterwards that the adjudication terminated his firearms rights.

The crime of Indecent Liberties with which the respondent was charged, to which he pled guilty, and for which he was adjudicated no longer exists. More importantly, the act giving rise to that charge is no longer a crime, and has not been since 1988. Although Indecent Liberties was included in the offenses giving rise to terminating firearms rights when the respondent was adjudicated of that offense, that prohibition did not apply to him because when he was adjudicated juvenile offenses did not affect firearms rights. It was not until 1994, eight years after the respondent was adjudicated for Indecent Liberties, that his firearms rights were terminated despite never receiving notice of that fact. After 1994, the State

further conditioned re-instatement on compliance with the Sentencing Reform Act's "wash-out" rules.

### CONCLUSION

The Supreme Court will grant review of decision of the Court of Appeals only under limited circumstances.<sup>75</sup> The decision of the Court of Appeals reversing the Juvenile Court's granting of the Motion conflict's with this Court' decision in *State v. Shove*,<sup>76</sup> and other decisions of the Court of Appeals in *State v. Zavala-Reynoso* and *State v. Cortez*.<sup>77</sup> The decision of the Court of Appeals also seems to be in conflict with the Supreme Court's decision in *State v. Hensley* which encourages the liberal granting of motions to withdraw pleas of guilty to protect life and liberty.<sup>78</sup> This case presents an opportunity to clarify the standards governing motions to withdraw pleas of guilty.

This case squarely brings forth whether a plea of guilty entered before the requirement that everyone found guilty of a felony level offense be warned that his plea and conviction terminated his fundamen-

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<sup>75</sup> **Considerations Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

<sup>76</sup> *Shove*, *supra* n. 45.

<sup>77</sup> *Zavala-Reynoso*, *supra* n. 44; and *State v. Cortez*, *supra* n. 44.

<sup>78</sup> *Hensley*, *supra* n. 49.

tal rights to bear, keep, own, or possess firearms renders such a plea involuntary and allows him to withdraw such pleas. This case also squarely presents the issue whether the fundamental right to bear, keep, own, or possess firearms may be retroactively terminated when juvenile adjudications were not included in the law terminating the fundamental right to bear, keep, possess, or own firearms. These issues present significant questions of law under the United States and Washington State Constitutions as well as issues of substantial public interest which should now be determined by the Supreme Court.

For all these reasons, the Supreme Court should grant this Motion for Discretionary Review. After reviewing this case and the decision of the Court of Appeals, the Supreme Court should reverse the decision of the Court of Appeals, and re-instate the decision of the Juvenile Court granting the Motion, and the decisions of the Superior Court granting the defense's motion to dismiss counts IV-XIII of the Amended Information, and denying the State's Motion for a Second Amended Information.

DATED this Eleventh day of October, 2011.

  
LOREN D. OAKLEY WBA #18574  
Appointed Counsel for Petitioner

# APPENDIX

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
IDENTITY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Appellant,

v.

KENNETH EUGENE LAMB.

Respondent.

No. 39849-4-II  
Consolidated with 40379-0-II

PUBLISHED OPINION

QUINN-BRINTNALL, J. — This case concerns predicate offenses for unlawful firearm possession charges brought against Kenneth Lamb. In 2009, the Clallam County Superior Court allowed Lamb to withdraw a 1991 guilty plea in a juvenile second-degree burglary case and vacated the related disposition. The trial court explained that, at the time of his plea, Lamb did not have notice of the 1991 disposition's impact on his Second Amendment rights, even though our State's unlawful possession of a firearm statute did not preclude gun possession by juvenile felony offenders until 1992, a year after Lamb pleaded guilty. LAWS OF 1992, ch. 205, § 118. The trial court then refused the State's request to amend the charging documents to designate a different predicate offense for the unlawful firearm possession charges and dismissed the firearm charges with prejudice. All of the trial court's decisions were rooted in its subjective belief that allowing the present unlawful firearm possession charges to proceed based on the 1991 juvenile burglary adjudication would be manifestly unjust. The State appeals, alleging that the trial court

erred by (1) allowing Lamb to withdraw his 1991 guilty plea, (2) vacating the 1991 burglary disposition, (3) denying the State's pretrial motion to amend the charging information, and (4) dismissing the unlawful firearm possession charges with prejudice.

We hold that the trial court committed an error of law, and consequently abused its discretion, when it allowed Lamb to withdraw his 1991 guilty plea and when it vacated his 1991 plea-based disposition, because the juvenile court did not err by failing to advise Lamb of the then nonexistent collateral consequence of limiting his firearm possession rights. The trial court also improperly denied the State's motion to amend the charging document to allege a different predicate conviction which, if proved, would have prohibited Lamb's firearm possession as a matter of law. Last, we hold that the trial court abused its discretion when it dismissed Lamb's firearm possession charges. We reverse and remand for trial and other proceedings consistent with this opinion.

#### FACTS

In September 1986, the State charged Lamb in juvenile court with indecent liberties in violation of former RCW 9A.88.100 (1975), *recodified as* RCW 9A.44.100 (LAWS OF 1979, 1st Ex. Sess., ch. 244, § 17).<sup>1</sup> This charge resulted from an incident involving then 11-year-old Lamb who had sexual contact with a male victim, who was under the age of 14. In August 1987,

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<sup>1</sup> The State cites former RCW 9A.44.100 (1986) as the applicable version of the statute. But the legislature's 1986 amendments to the statute did not go into effect until June 11, 1986. LAWS OF 1986, at ii. Because Lamb's date of crime was in April 1986, the 1975 version of the indecent liberties statute applies. Former RCW 9A.88.100 states in relevant part, "(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: . . . (b) When the other person is less than fourteen years of age." This crime was a class B felony. Former RCW 9A.88.100(3).

Lamb pleaded guilty to this charge, and the trial court committed him to the Department of Juvenile Rehabilitation for 8 to 12 weeks.

In April 1991, the State charged then 16-year-old Lamb in juvenile court with second degree burglary, a class B felony, under RCW 9A.52.030. In exchange for a lenient sentence, Lamb pleaded guilty to the burglary charge. On June 5, 1991, Clallam County Juvenile Court accepted the guilty plea and sentenced Lamb to 5 days of detention, 24 hours of community service, 6 months of community supervision, and imposed a \$25 fine. No one advised Lamb that he would lose his ability to possess firearms as a result of this adjudication. A year later, the legislature extended the prohibition on possessing certain firearms to juveniles adjudicated of a crime of violence or certain felony offenses. LAWS OF 1992, ch. 205, § 118 (effective June 11, 1992); *State v. Semakula*, 88 Wn. App. 719, 722, 946 P.2d 795 (1997), *review denied*, 134 Wn.2d 1022 (1998).

Between 1992 and 2000, Lamb committed several misdemeanor offenses. Lamb pleaded guilty to driving a motor vehicle without a valid driver's license and negligent driving. And after pleading not guilty, Lamb was convicted of failing to transfer the title of a motor vehicle and third degree driving with a suspended license.

On June 16, 2009, the State charged Lamb with 3 counts of theft of a firearm, under RCW 9A.56.300(1); 10 counts of second degree unlawful possession of a firearm, under RCW 9.41.040(2)(a)(i);<sup>2</sup> and 1 count of manufacturing marijuana, under RCW 69.50.401.

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<sup>2</sup> RCW 9.41.040 states in relevant part,

(2)(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, has in his or her possession, or has in his or her control any firearm:

On July 31, citing JuCR 1.4, CrR 4.2, and CrR 7.8, Lamb moved to withdraw his 1991 burglary guilty plea and vacate the related disposition. On September 23, the trial court held a hearing to consider Lamb's motion. At the hearing, the trial court heard testimony from several witnesses despite the State's objection that the testimony was irrelevant because the legality of the plea-based conviction did not rest on factual findings.

Lamb testified at the hearing that no one informed him during the 1991 plea bargaining process that his juvenile burglary disposition could impact his firearm possession rights. If someone had informed Lamb the impact the adjudication would have on his firearm rights, Lamb stated that he would not have pleaded guilty because his firearm rights are "very important to [him]" and he thought the State had a "very weak" burglary case against him. Report of Proceedings (RP) (Sept. 23, 2009) at 18-19. Lamb testified that he first learned of his lost firearm possession rights in 2009 when the State filed the current unlawful firearm possession charges. He testified that he had used guns his entire life, since the age of five or six, for recreational and hunting purposes. And Lamb testified that he had a gun collection his father had given him that he hoped to pass on to his children.

Eugene Lamb, Lamb's father, also testified at the hearing that he advised his son to plead guilty in 1991 because of the proposed lenient sentence. Based on his experience as a law enforcement officer at the Port Townsend Police Department, Eugene Lamb believed that the juvenile court disposition would not impact his son's firearm rights. Eugene Lamb also verified that no one ever informed his son that the burglary disposition would impact his firearm rights.

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(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section.

Mike Crabb, one of Lamb's hunting friends, testified that around 1997, he went with Lamb to purchase a hunting rifle, license, and tag. Crabb testified that, based on his knowledge, Lamb had no problem securing the rifle, license, or tag. Lamb confirmed Crabb's testimony, stating that after submitting his background check paperwork and obtaining approval, he bought a rifle.

Lamb's friend, Darren Hyatt, testified that around 2003, he went on a camping trip with Lamb and another friend. During the trip, they came across a police roadblock set up to investigate "suspicious gunfire." RP (Sept. 23, 2009) at 13. The officer secured all three passengers, their identification documents (IDs), and a gun that Lamb admitted he had in the car. The officer took the items and "went back to his vehicle, got on his radio[ and] was there . . . quite a while." RP (Sept. 23, 2009) at 13. Hyatt believed that the officer "ran the weapon and everybody's ID" before he returned the gun and identification documents and let them go. RP (Sept. 23, 2009) at 13. Lamb confirmed Hyatt's testimony, stating that he believed the officer was a "federal . . . game warden." RP (Sept. 23, 2009) at 22.

Lamb argued that he did not knowingly, voluntarily, and intelligently enter his 1991 guilty plea because he was not informed that the resulting burglary disposition would terminate his firearm possession rights. Although he conceded that, in 1991, the State and trial court did not have a duty to inform him of a consequence that did not then exist, Lamb still claimed that he could not have knowingly, voluntarily, and intelligently entered a plea because he did not understand the consequences of his action. In the alternative, Lamb argued that enforcing the plea created a manifest injustice because the State changed the law after his plea and subsequent interactions with the State and other law enforcement officials led him to believe that he could legally possess firearms.

The trial court initially issued an oral ruling allowing Lamb to withdraw the 1991 burglary guilty plea because it believed that leaving the plea-based disposition in place would create a present day manifest injustice. In part, the trial court believed that Lamb would have qualified for and would have restored his firearm possession rights had he known they were revoked. The trial court stated, "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." RP (Sept. 23, 2009) at 53.

On September 30, 2009, the trial court entered formal findings of fact, conclusions of law, and an order granting the withdrawal of the 1991 guilty plea and vacating the related disposition. The trial court findings included that the unlawful possession of firearms statute did not apply to juveniles at the time of Lamb's 1991 plea agreement and disposition and that "ignorance of the law is no defense." Clerk's Papers (CP) at 11. But the trial court concluded that Lamb would have sought to restore his rights if he had known they had been terminated and that "[t]hose rights would have been restored because of the respondent's lack of criminal history subsequent to [the 1991 burglary disposition]." CP at 13. The trial court summarized its ruling as follows:

[Lamb] did not have actual knowledge that [the 1991 burglary disposition] had terminated his right to bear, keep, own, or possess firearms. Despite ignorance of the law not being an excuse, under the totality of the facts and circumstances in this case denying this motion to withdraw the plea of guilty and vacate the order of disposition would be fundamentally unfair and constitute a manifest injustice.

CP at 13. The State appealed the trial court's decision that same day.<sup>3</sup>

Lamb filed a motion to dismiss the 10 unlawful possession of a firearm charges, asserting that the State could not prove the predicate felony element of the offenses. The State moved to amend the charging information to change the predicate felony offense for five of the second degree unlawful possession of a firearm counts to Lamb's 1987 indecent liberties disposition, and leave the second degree burglary disposition as the predicate felony offense for the other five counts.<sup>4</sup> The State opposed Lamb's motion to dismiss the charges and argued that the burglary disposition, which existed on the date of the charged offense, could still serve as the predicate felony offense.

On February 12, 2010, the trial court entered an order denying the State's motion to amend the charging information and dismissing all 10 unlawful possession of a firearm charges with prejudice. The trial court's written memorandum opinion provided that, even if the State had raised the 1987 indecent liberties disposition as the predicate offense for the unlawful firearm possession charges earlier, moving forward with the current charges would be manifestly unjust because Lamb had no notice that juvenile dispositions could restrict his firearm rights.

Lamb did not request, and the trial court did not grant, an order vacating the 1987 indecent

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<sup>3</sup> The State filed a motion for reconsideration of the trial court's decision concerning Lamb's guilty plea withdrawal. The State highlighted evidence of Lamb's 1987 indecent liberties disposition and multiple misdemeanor convictions between 1992 and 2002, which it argued contradicted the trial court's belief that Lamb could have restored his firearm possession rights. The State also challenged the timeliness of Lamb's withdrawal request, claiming that CrR 7.8 and RCW 10.73.090 precluded this collateral attack of the guilty plea and disposition more than one year after their entry. The trial court denied the State's motion for reconsideration after refusing to consider Lamb's criminal history, believing that the State should have presented it at an earlier proceeding. The trial court did not address the State's timeliness argument.

<sup>4</sup> The State's motion to amend is not in the record on review, but it is referenced in a subsequent trial court hearing.

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liberties disposition or the associated guilty plea. The State filed an appeal of the February 12 order and we consolidated the State's two appeals.<sup>5</sup>

## DISCUSSION

### GUILTY PLEA WITHDRAWAL

In general, the parties dispute (1) the timeliness of Lamb's guilty plea withdrawal motion;<sup>6</sup> (2) whether the loss of Lamb's firearm rights is a collateral or direct consequence, which relates to whether Lamb knowingly, voluntarily, and intelligently entered his 1991 guilty plea; and (3) if the trial court erred when it refused to consider Lamb's criminal history when it found that Lamb's firearms rights could have been restored. All of the parties' arguments are disputes about whether the trial court abused its discretion by committing an error of law in its decision-making process under the applicable Superior Court Criminal Rules (CrRs). We hold that the trial court committed an error of law, and consequently abused its discretion, when it applied CrR 4.2's "manifest injustice" standard to Lamb's post-conviction plea withdrawal motion, which is governed by CrR 7.8 not CrR 4.2. And because the State proved the constitutional validity of the 1991 guilty plea and disposition beyond a reasonable doubt, we reverse the trial court's order allowing Lamb to withdraw his 1991 guilty plea, reinstate the 1991 disposition, and remand for further proceedings consistent with this opinion.

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<sup>5</sup> The status of the three firearm theft and manufacturing marijuana charges is unclear in the record. It appears that the State may have bifurcated the charges in the information and proceeded to trial on the theft and marijuana charges.

<sup>6</sup> The State also originally asserted that RCW 10.73.090 time barred Lamb's motion, but the State abandoned this argument in its reply brief. The State agreed with Lamb that it could not prove he was notified of the collateral attack time limitations, as required by RCW 10.73.110.

We review a trial court's decision on a defendant's motion to withdraw a guilty plea for an abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds; this standard is also violated when a trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)); *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). When we review whether a trial court applied an incorrect legal standard, we review de novo the choice of law and its application to the facts in the case. *State v. Haney*, 125 Wn. App. 118, 123, 104 P.3d 36 (2005); *State v. Welchel*, 97 Wn. App. 813, 817, 988 P.2d 20 (1999), *review denied*, 140 Wn.2d 1024 (2000); *see State v. Carlyle*, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996).<sup>7</sup>

Reviewing the parties' arguments under the framework established by the CrRs, we hold that the trial court committed an error of law by incorrectly applying CrR 4.2 legal theories to its ruling on a motion governed by CrR 7.8. As an initial matter, Lamb purported to request relief from his 1991 guilty plea and juvenile disposition under CrR 4.2 and CrR 7.8.<sup>8</sup> Here, if the

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<sup>7</sup> The distinctions in our standard of review cannot be overstated. Under an abuse of discretion standard, we defer to the decision of the trial court and will reverse only when the trial court's decision rests on untenable grounds. But we review de novo the trial court's choice of law, its interpretation, and its application to the facts of the case. *Welchel*, 97 Wn. App. at 817. Thus, to determine whether the trial court committed an error of law, which is included in the abuse of discretion standard, we review the alleged error of law itself de novo.

<sup>8</sup> Lamb also cited JuCR 1.4 in his motion. JuCR 1.4(b) provides that "[t]he Superior Court Criminal Rules shall apply in juvenile offense proceedings when not inconsistent with these rules and applicable statutes." JuCR 7.6 requires the taking of a juvenile offender's guilty plea in accord with CrR 4.2. Accordingly, we need only distinguish between CrR 4.2 and CrR 7.8 in our analysis.

criminal rules governed, the correct legal standard to apply would be CrR 7.8.<sup>9</sup> CrR 7.8 applies to *post-judgment* motions for relief while CrR 4.2(f) applies only to *pre-judgment* motions to withdraw a guilty plea. CrR 4.2(f) (stating that “[i]f the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8”). Thus, the trial court erred when it decided Lamb’s motion under standards set out in CrR 4.2.

CrR 7.8 states that a trial court *may* grant relief from a final judgment *only* for one of five enumerated reasons. CrR 7.8(b) allows a trial court to grant relief from a final judgment, order, or proceeding for the following five reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

Notably, “manifest injustice,” on which the trial court based its decision in this case, is not one of the five enumerated reasons for post-judgment relief under CrR 7.8(b). Washington court’s have limited the scope of CrR 7.8(b)(5)’s “[a]ny other reason justifying relief” to “extraordinary circumstances” that are “fundamental, substantial irregularities in the court’s proceedings or to irregularities extraneous to the court’s action.” *State v. Olivera-Avila*, 89 Wn. App. 313, 319, 949 P.2d 824 (1997); see *State v. Aguirre*, 73 Wn. App. 682, 688, 871 P.2d 616, review denied, 124 Wn.2d 1028 (1994).

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<sup>9</sup> We note that under CrR 7.8(b), a motion for relief from judgment must be filed within a year or a reasonable time, depending on the grounds asserted for relief, of the entry of a final judgment or order. See RCW 10.73.090 and .100. In this opinion, we do not evaluate the timeliness of Lamb’s motion under CrR 7.8.

Although Division Three of this court previously interpreted “extraordinary circumstances” to include circumstances “where the interests of justice most urgently require” correction, we are not persuaded that such a broad interpretation is appropriate. *See State v. Zavala-Reynoso*, 127 Wn. App. 119, 122-23, 110 P.3d 827 (2005) (quoting *State v. Cortez*, 73 Wn. App. 838, 841-42, 871 P.2d 660 (1994)). Division Three’s analysis in *Zavala-Reynoso* and *Cortez* relies on *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989). In *Shove*, our Supreme Court vacated judgments and cited only *generally* to several statutes and court rules, including CrR 7.8(b), noting that there are only “limited circumstances where the interests of justice most urgently require” vacating a final judgment. 113 Wn.2d at 88. But in *Shove*, our Supreme Court did not specifically analyze CrR 7.8(b)(5).

Notably absent in CrR 7.8 is a reference to manifest injustice, as understood in CrR 4.2(f). Accordingly, the manifest injustice basis cannot support relief from a final judgment in a CrR 7.8 motion. Thus, even assuming that CrR 7.8 was the proper framework for the trial court to consider Lamb’s motion, which for other reasons we do not hold,<sup>10</sup> the trial court committed a legal error when making its ruling by importing the manifest injustice standard of CrR 4.2(f) into CrR 7.8.<sup>11</sup>

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<sup>10</sup> The trial court and parties failed to observe that Lamb’s challenge to his 1991 disposition was a constitutional challenge to its current use, and that the State had the burden to prove its validity for that purpose beyond a reasonable doubt before the prior conviction could be admissible evidence in the current prosecution. *See, e.g., State v. Summers*, 120 Wn.2d 801, 810, 846 P.2d 490 (1993); *State v. Chervenell*, 99 Wn.2d 309, 312, 662 P.2d 836 (1983); *State v. Holsworth*, 93 Wn.2d 148, 159, 607 P.2d 845 (1980).

<sup>11</sup> We note that the trial court also failed to transfer Lamb’s motion to withdraw and vacate his 1991 plea to the appellate court as CrR 7.8(c)(2) requires. Under CrR 7.8(c)(2), the trial court *shall* transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition [(PRP)] *unless* the [trial] court determines that the motion is not barred by RCW 10.73.090 *and either* (i) the

In addition, Lamb's challenge below could also be considered a challenge to the constitutionality of his 1991 burglary disposition, because he was not aware that his guilty plea would result in losing his Second Amendment rights. *State v. Chervenell*, 99 Wn.2d 309, 312, 662 P.2d 836 (1983). But the extension of our State's unlawful possession of a firearm statute to juvenile felony dispositions did not occur until *after* Lamb's 1991 disposition and did not render his guilty plea unconstitutional as having been involuntary or unknowing. LAWS OF 1992, ch. 205, § 118 (effective June 11, 1992). Moreover, the trial court's duty to inform adult and juvenile defendant's of the loss of their firearm rights during guilty plea proceedings did not take effect until 1994. LAWS OF 1994, 1st Sp. Sess., ch. 7, § 404 (enacting RCW 9.41.047).

We previously held that providing notification to offenders of lost firearm rights due to post-1994 convictions but not pre-1994 convictions did *not* violate equal protection. *State v. Reed*, 84 Wn. App. 379, 386-87, 928 P.2d 469 (1997). The *Reed* court noted that providing "as many as possible" pre-1994 convictees notice of their revoked rights "is a worthwhile goal" but not constitutionally required. 84 Wn. App. at 386. Thus, there is no basis for finding that Lamb did not knowingly and voluntarily enter his 1991 burglary guilty plea, or his 1987 indecent liberties guilty plea if Lamb had also challenged it.

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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.) A trial court may only rule on the merits of a CrR 7.8 motion if the motion is timely filed *and* either of the two prerequisites is met; otherwise the trial court *must* transfer timely motions to this court. *State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666 (2008).

Here, there is nothing in the record indicating that the trial court addressed its authority to consider Lamb's motion. Absent a determination that it had authority to consider the CrR 7.8 motion's merits, the trial court was *required* to transfer Lamb's motion, assuming it was timely filed, to this court for our consideration as a PRP instead of addressing the motion's merits. *Smith*, 144 Wn. App. at 863.

Accordingly, the State rebutted Lamb's constitutionality challenges by proving beyond a reasonable doubt the knowing and voluntary nature of his 1991 guilty plea. The 1991 juvenile court had no duty to provide notice of Lamb's revoked firearm rights because the revocation law did not apply to juvenile dispositions at the time he entered that plea. In addition, the State did not have a duty to notify Lamb of the revocation of his firearm rights after the subsequent change in the law. *Reed*, 84 Wn. App. at 386. The trial court erred by revoking Lamb's 1991 guilty plea and vacating the corresponding disposition.<sup>12</sup> Accordingly, we reverse the trial court's decisions allowing Lamb to withdraw his 1991 guilty plea and vacating the corresponding disposition.<sup>13</sup>

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<sup>12</sup> Because neither the 1991 juvenile court nor the State had a duty, before 1994, to inform Lamb of his revoked firearm rights, we do not need to fully address the parties' arguments about whether the revocation of firearm possession rights is a collateral or direct consequence of a guilty plea and resulting sentence. But we note that several Washington courts have held or stated that the loss of firearm rights is a *collateral* consequence of a guilty plea. See, e.g., *State v. Schmidt*, 143 Wn.2d 658, 676, 23 P.3d 462 (2001); *In re Pers. Restraint of Ness*, 70 Wn. App. 817, 823-24, 855 P.2d 1191 (1993), *review denied*, 123 Wn.2d 1009 (1994). We are not persuaded by Lamb's arguments that *Schmidt* and *Ness* do not apply.

Our reversal of the trial court's order vacating the 1991 disposition for an error of law makes it unnecessary for us to evaluate any error in the trial court's decision that Lamb could have restored his firearm possession rights. But we note that, based on our review of the record, the State may not have had adequate notice and an ability to respond to the trial court's consideration of Lamb's ability to restore his firearm rights because this point was mentioned for the first time during the trial court's oral ruling. Moreover, we note that Lamb's indecent liberties adjudication is a sex offense. Under former RCW 9A1.040(4) (2009), "[I]f a person is prohibited from possession of a firearm . . . and *has not* previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership . . . the individual may petition a court of record to have his or her right to possess a firearm restored." (Emphasis added.)

<sup>13</sup> We do have concerns with the State's decision to prosecute without first notifying Lamb that it was unlawful for him to possess firearms. Lamb purchased a firearm in the mid-1990s after apparently passing a background check. The State's express authorization to purchase a firearm might collaterally estop the State from charging Lamb with unlawful possession of a firearm—at least insofar as the State allowed the purchase of the firearm in question.

At oral argument, the State suggested that *Schmidt* provided guidance on this issue. But in *Schmidt*, the question resolved by the court concerned whether statutory amendments to the types of firearms covered by the unlawful possession statute violated ex post facto principles.

AMENDING THE CHARGING INFORMATION

Next, the State challenges the trial court's denial of its request to amend the information. We hold that the trial court abused its discretion when it refused to allow amendments to the information to include Lamb's prior indecent liberties adjudication as the predicate offense for five of the unlawful firearm possession charges.

CrR 2.1(d) provides that a trial court may permit an amendment to an information at any time before a verdict or finding, if substantial rights of the defendant are not prejudiced. This rule permits the liberal amendment of an information *before* trial, but Washington's Constitution requires that a defendant be adequately informed of charges he is to face at trial. *State v. Pelkey*, 109 Wn.2d 484, 487-90, 745 P.2d 854 (1987); *State v. Hull*, 83 Wn. App. 786, 799-800, 924 P.2d 375 (1996), *review denied*, 131 Wn.2d 1016 (1997). We review a trial court's decision to allow the State to amend the charge for an abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 155, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996); *State v. Ziegler*, 138 Wn. App. 804, 808, 158 P.3d 647 (2007). An abuse of discretion occurs when the trial court's ruling is manifestly unreasonable or exercised on untenable grounds. *Dixon*, 159 Wn.2d at 75-76 (quoting *Rohrich*, 149 Wn.2d at 654).

Here, the State filed a pretrial motion to amend the information. The State did not seek to add or remove any charges; instead, the State sought to amend only the predicate felony offense evidence for five of the unlawful possession of firearm charges. Lamb had knowledge of the

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143 Wn.2d at 661. Although our Supreme Court remanded for the reinstatement of firearm charges against a defendant who had obtained concealed weapons permits, the court never addressed whether the State's issuing of the permits might collaterally estop the State from bringing the charges for possession of the licensed firearms. *Schmidt*, 143 Wn.2d at 665, 677-78. Thus, *Schmidt* does not resolve these concerns. Any such prohibition would not, of course, apply to firearms Lamb allegedly stole.

indecent liberties disposition that the State sought to use as the predicate offense because the indecent liberties disposition was referenced in the 1991 burglary disposition that Lamb challenged. The State did not seek to charge a different offense but only sought to amend the information pretrial to allege an alternate predicate offense to prove the original charge. Lamb had full knowledge of the charge and the new predicate offense and there is no possible prejudice to Lamb's fair trial rights in allowing a pretrial amendment to the information. The trial court abused its discretion by not permitting the State to amend the charging information because its decision was based on substituting the State's charging discretion with its own subjective belief that the charges created a manifest injustice.

#### DISMISSING OF THE CHARGES

Last, the State challenges the trial court's authority to dismiss the unlawful possession of firearm charges with prejudice. Lamb argues that the trial court properly dismissed the charges because the State could not prove the predicate offense element. We agree with the State's analysis.

We review a trial court's decision to dismiss criminal charges for an abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Dixon*, 159 Wn.2d at 75-76 (quoting *Rohrich*, 149 Wn.2d at 654); *Hudson*, 150 Wn. App. at 652. Dismissal of criminal charges is an extraordinary remedy that should be used only as a last resort. *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). A trial court may not dismiss charges under CrR 8.3(b) unless the defendant shows by a preponderance of the evidence (1) "arbitrary action or governmental misconduct" and (2) "prejudice affecting the defendant's right to a fair trial." *Rohrich*, 149 Wn.2d at 654 (quoting *Michielli*, 132 Wn.2d at 239-40).

Citing generally to CrR 8.3, Lamb filed a motion to dismiss, claiming that there is insufficient evidence to establish a prima facie case.<sup>14</sup> The trial court granted the motion but did not cite any legal authority it was relying on when it dismissed the charges. The trial court's written reason for dismissing the charges with prejudice was that

[t]here is no evidence that [Lamb] was ever warned, or had any way of knowing, that several years later the law would change in such a way that it would now be impermissible for him to use or possess a firearm. To now allow either of [the] childhood offenses to now serve as the predicate offense for unlawfully possessing a firearm would be manifestly unjust.

CP (No. 40379-0-II) at 11-12. Based on its reasoning, the trial court appears to have relied on CrR 8.3(b) when dismissing the charges. CrR 8.3(b) states that

[t]he court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

Here, assuming that it relied on CrR 8.3(b), the trial court's reasons for dismissing the charges exceeded its authority. The trial court dismissed the charges because of a perceived manifest injustice related to Lamb's notice of his revoked firearm possession rights. But CrR 8.3(b) allows for dismissal of charges related to arbitrary actions and/or governmental conduct that prejudices the defendant's right to a fair trial. Perception of a manifest injustice in a previous proceeding does not give the trial court authority to dismiss charges under CrR 8.3(b). Accordingly, the trial court's articulated reason for dismissing the charges is not a valid ground for its decision.

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<sup>14</sup> Lamb did not cite to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), in his motion and cited only generally to CrR 8.3.

The trial court also erred if it relied on CrR 8.3(c)'s prima facie case grounds to support dismissing the charges with prejudice. The State asserted that the 1987 indecent liberties disposition could serve as the predicate offense for the unlawful firearm possession charges. Although the trial court suggested that it could vacate the 1987 indecent liberties disposition for the same reasons it vacated the 1991 burglary disposition, importantly Lamb never brought any motions challenging the validity of the 1987 indecent liberties guilty plea or asking for the 1987 disposition to be vacated. Thus, the State satisfied the prima facie evidence requirements for the case to proceed to trial. Moreover, under CrR 8.3(c)(4) and *Knapstad*, the trial court may only dismiss the charges *without* prejudice. See *State v. Vangerpen*, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995).

Lamb believes that his 1987 indecent liberties disposition cannot serve as a predicate offense for his current charges because the State no longer criminalizes the specific actions that resulted in his disposition. The law does not support his position.

RCW 10.01.040 prevents the amendment or repeal of a criminal statute from affecting all committed offenses and resulting penalties "unless a contrary intention is expressly declared in the amendatory or repealing act." This savings clause requires trial courts to give effect to dispositions according to the statutes in effect on the date of the committed crime unless the repealing act expresses contrary intent. See *Rivard v. State*, 168 Wn.2d 775, 781, 231 P.3d 186 (2010) (refusing to consider a prior vehicular homicide conviction, a class B felony at the time of the offense, as a class A felony when the legislature did not include retroactive application intent language in the amendatory process when elevating the felony status of the crime).

Lamb pleaded guilty and was convicted of indecent liberties under former RCW 9A.88.100(1)(b). In 1988, when the legislature substantially amended the indecent liberties

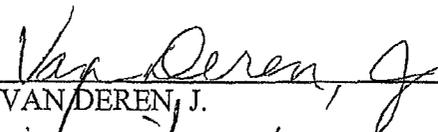
statute as part of extensive changes to the sex offense criminal statutes, the legislature declined to express an intent contrary to the savings clause and explicitly stated that it did *not* change or modify "any liability, civil or criminal, which is already in existence on July 1, 1988." LAWS OF 1988, ch. 145, § 25. Thus, Lamb's 1987 indecent liberties disposition could serve as the predicate offense for the current second degree firearm possession charges. See RCW 9A.1040(2)(a)(i); former RCW 9A.88.100(3).

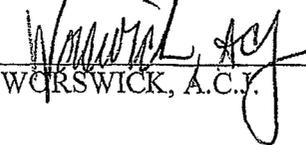
The trial court's asserted basis for its decision to dismiss the unlawful possession of firearm charges is an untenable ground. In addition, the trial court abused its discretion when it refused to recognize that Lamb's unchallenged 1987 indecent liberties disposition could serve as the predicate offense for the firearm charges. Thus, it abused its discretion when it improperly denied the State's pretrial motion to amend the information and exceeded its legal authority when it improperly dismissed the firearm charges.

We reverse the trial court's decisions (1) allowing Lamb to withdraw his 1991 guilty plea, (2) vacating Lamb's 1991 burglary disposition, (3) denying the State's motion to amend the information, and (4) dismissing the unlawful possession of firearm charges. We remand to the trial court for proceedings consistent with this opinion.

  
QUINN-BRINTNALL, J.

We concur:

  
VAN DEREN, J.

  
WORSWICK, A.C.J.

**CONSTITUTION OF UNITED STATES**

**AMENDMENTS**

*Current through 2010*

**Amendment II. Bearing Arms**

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

**CONSTITUTION OF UNITED STATES****AMENDMENTS**

*Current through 2010*

**Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection**

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

NEW SECTION. Sec. 9A.88.090. PERMITTING PROSTITUTION. (1) A person is guilty of permitting prostitution if, having possession or control of premises which he knows are being used for prostitution purposes, he fails without lawful excuse to make reasonable effort to halt or abate such use.

(2) Permitting prostitution is a misdemeanor.

NEW SECTION. Sec. 9A.88.100. INDECENT LIBERTIES. (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 incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section, "sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(3) Indecent liberties is a Class B felony.

#### CHAPTER 9A.92

#### LAWS REPEALED

NEW SECTION. Sec. 9A.92.010. ACTS OR PARTS OF ACTS REPEALED.

The following acts or parts of acts are each hereby repealed:

(1) Section 51, chapter 249, Laws of 1909 and RCW 9.01.010;

(2) Section 11, page 78, Laws of 1854, section 11, page 106, Laws of 1859, section 11, page 200, Laws of 1869, section 11, page 200, Laws of 1873, section 781, Code of 1881, section 1, chapter 249, Laws of 1909 and RCW 9.01.020;

(3) Section 125, page 98, Laws of 1854, section 124, page 129, Laws of 1859, section 134, page 229, Laws of 1869, section 140, page 213, Laws of 1873, section 957, Code of 1881, section 8, chapter 249, Laws of 1909 and RCW 9.01.030;

(4) Section 2, chapter 249, Laws of 1909 and RCW 9.01.040;

(5) Section 2, chapter 249, Laws of 1909 and RCW 9.01.050;

(6) Section 127, page 98, Laws of 1854, section 136, page 229, Laws of 1869, section 142, page 213, Laws of 1873, section 956, Code of 1881, section 10, chapter 249, Laws of 1909 and RCW 9.01.060;

(7) Section 30, page 185, Laws of 1873, section 1161, Code of 1881, section 12, chapter 249, Laws of 1909 and RCW 9.01.070;

(8) Section 1, chapter 233, Laws of 1927 and RCW 9.01.080;

(9) Section 784, Code of 1881, section 17, chapter 249, Laws of 1909 and RCW 9.01.090;

(10) Section 18, chapter 249, Laws of 1909 and RCW 9.01.100;

(11) Section 5, chapter 249, Laws of 1909 and RCW 9.01.111;

(12) Section 4, chapter 249, Laws of 1909 and RCW 9.01.112;

(13) Section 3, chapter 249, Laws of 1909 and RCW 9.01.113;

(14) Section 6, chapter 249, Laws of 1909 and RCW 9.01.114;

(15) Section 2, chapter 76, Laws of 1967 and RCW 9.01.116;

degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, rape in the second degree, kidnapping in the second degree, arson in the second degree, assault in the second degree, extortion in the first degree, burglary in the second degree, and robbery in the second degree;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, which is comparable to a felony classified as a crime of violence in subsection (2) (a) of this section; and

(c) Any federal or out-of-state conviction for an offense comparable to a felony classified as a crime of violence under subsection (2) (a) or (b) of this section.

(3) "Firearm" as used in this chapter means a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

(4) "Commercial seller" as used in this chapter means a person who has a federal firearms license.

Sec. 2. Section 4, chapter 172, Laws of 1935 as amended by section 3, chapter 124, Laws of 1961 and RCW 9.41.040 are each amended to read as follows:

~~((No person who has been convicted in this state or elsewhere of a crime of violence, shall own a pistol or have one in his possession or under his control. Such person upon being convicted of a violation of this section shall be guilty of a felony and punished by imprisonment in the state penitentiary for not less than one year nor more than ten years.))~~ (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 owns or has in his possession any short firearm or pistol.

(2) Unlawful possession of a short firearm or pistol shall be punished as a class C felony under chapter 9A.20 RCW.

(3) As used in this section, a person has been "convicted" at such time as a plea of guilty has been accepted or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing, post-trial motions, and appeals. A person shall not be precluded from possession if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(4) Except as provided in subsection (5) of this section, a person is guilty of the crime of unlawful possession of a short firearm or pistol if, after having been convicted of any felony violation of the uniform controlled substances act, chapter 69.50 RCW, or equivalent statutes of another juris-

equivalent statute of another jurisdiction, he owns or has a short firearm or pistol.

(5) Notwithstanding subsection (4), a person is not guilty of an offense other than multiple possession of a controlled substance if, in addition to the offense, the person has received a probationary sentence or a dismissal of the charge under subsection (4) (a) or (b) of this section.

Sec. 3. Section 7, chapter 158, Laws of 1961 are each amended to read as follows:

(1) The judge of a court or the sheriff of a county, in the application of any person issued a license while traveling. However, if the person has not been a resident of the issuing authority shall have the right to issue a license. Such license shall not be denied to him, unless

(a) Is ineligible to own a license (as now or hereafter amended by chapter 158, Laws of 1961 or of confinement permit); or

(b) Is under twenty-one years of age;

(c) Is subject to a court order under RCW 10.99.040, 10.99.041, or 10.99.042;

(d) Is free on bond or other security pending sentencing for a crime of violence;

(e) Has an outstanding warrant in any competent jurisdiction for the commission of a crime of violence.

The license shall be issued in triplicate, in duplicate, in which makes such a person ineligible to receive a license for a violation of this section shall be in triplicate, in duplicate, in the department of licensing, and

equivalent statute of another jurisdiction, or following a record of commitment pursuant to chapter 10.77 RCW or equivalent statutes of another jurisdiction, he owns or has in his possession or under his control any short firearm or pistol.

(5) Notwithstanding subsection (1) of this section, a person convicted of an offense other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401(a) and 69.50.410, who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from ownership, possession, or control of a firearm as a result of the conviction.

Sec. 3. Section 7, chapter 172, Laws of 1935 as last amended by section 1, chapter 158, Laws of 1979 and RCW 9.41.070 are each amended to read as follows:

(1) The judge of a court of record, the chief of police of a municipality, or the sheriff of a county, shall within thirty days after the filing of an application of any person issue a license to such person to carry a pistol concealed on his person within this state for ~~((two))~~ four years from date of issue, for the purposes of protection or while engaged in business, sport or while traveling. However, if the applicant does not have a valid permanent Washington driver's license or Washington state identification card or has not been a resident of the state for the previous consecutive ninety days, the issuing authority shall have up to sixty days after the filing of the application to issue a license. Such citizen's constitutional right to bear arms shall not be denied to him, unless he:

(a) Is ineligible to own a pistol under the provisions of RCW 9.41.040 (as now or hereafter amended or there exists a record of his prior court conviction of a crime of violence or of drug addiction or of habitual drunkenness or of confinement to a mental institution. PROVIDED, That such permit)); or

(b) Is under twenty-one years of age; or

(c) Is subject to a court order or injunction regarding firearms pursuant to RCW 10.99.040, 10.99.045, or 26.09.060; or

(d) Is free on bond or personal recognizance pending trial, appeal, or sentencing for a crime of violence; or

(e) Has an outstanding warrant for his or her arrest from any court of competent jurisdiction for a felony or misdemeanor.

The license shall be revoked immediately upon conviction of a crime which makes such a person ineligible to own a pistol or upon the third conviction for a violation of this chapter within five calendar years. The license shall be in triplicate, in form to be prescribed by the ~~((state director))~~ department of licensing, and shall bear the name, address, and description, fingerprints and signature of the licensee ~~((and the reason given for desiring license)), and the licensee's driver's license number or state identification~~

WASHINGTON SESSION LAWS  
GENERAL INFORMATION

1. EDITIONS AVAILABLE.

- (a) *General Information.* The session laws are printed successively in two editions:
- (i) a temporary pamphlet edition consisting of a series of one or more paper bound pamphlets, which are published as soon as possible following the session, at random dates as accumulated; followed by
  - (ii) a permanent bound edition containing the accumulation of all laws adopted in the legislative session. Both editions contain a subject index and tables indicating code sections affected.
- (b) *Temporary pamphlet edition — where and how obtained — price.* The temporary session laws may be ordered from the Statute Law Committee, Legislative Building, Olympia, Washington 98504 at \$5.39 per set (\$5.00 plus \$.39 for state and local sales tax of 7.8%). All orders must be accompanied by payment.
- (c) *Permanent bound edition — when and how obtained — price.* The permanent bound edition of the 1988 session laws may be ordered from the State Law Librarian, Temple of Justice, Olympia, Washington 98504 at \$21.56 per volume (\$20.00 plus \$1.56 for state and local sales tax of 7.8%). All orders must be accompanied by payment.

2. PRINTING STYLE — INDICATION OF NEW OR DELETED MATTER

Both editions of the session laws present the laws in the form in which they were adopted by the legislature. This style quickly and graphically portrays the current changes to existing law as follows:

- (a) In amendatory sections
- (i) underlined matter is new matter.
  - (ii) ~~deleted matter is ((fined out and bracketed between double parentheses))~~.
- (b) Complete new sections are prefaced by the words NEW SECTION.

3. PARTIAL VETOES

- (a) Vetoed matter is *printed in italics*.
- (b) Pertinent excerpts of the governor's explanation of partial vetoes are printed at the end of the chapter concerned.

4. EDITORIAL CORRECTIONS. Words and clauses inserted in the session laws pursuant to the authority of RCW 44.20.060 are enclosed in brackets [brackets].

5. EFFECTIVE DATE OF LAWS

- (a) The state Constitution provides that unless otherwise qualified, the laws of any session take effect ninety days after adjournment sine die. The Secretary of State has determined the pertinent date for the Laws of the 1988 regular session to be June 9, 1988 (midnight June 8).
- (b) Laws which carry an emergency clause take effect immediately upon approval by the Governor. All Laws of the 1988 1st extraordinary session contained an emergency clause.
- (c) Laws which prescribe an effective date, take effect upon that date.

6. INDEX AND TABLES

A cumulative index and tables of the laws of the 1987 and 2nd and 3rd extraordinary sessions and all 1988 laws may be found at the back of this permanent bound edition.

who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in sexual intercourse with the victim.

(2) Sexual misconduct with a minor in the first degree is a class C felony.

<<+NEW SECTION.+>> Sec. 9. SEXUAL MISCONDUCT WITH A MINOR IN THE SECOND DEGREE. (1) A person is guilty of sexual misconduct with a minor in the second degree when the person has sexual contact with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in sexual contact with the victim.

(2) Sexual misconduct with a minor in the second degree is a gross misdemeanor.

#### WA ST 9A.44.100

Sec. 10. Section 9A.88.100, chapter 260, Laws of 1975 1st ex. sess. as amended by section 1, chapter 131, Laws of 1986 and RCW 9A.44.100 are each amended to read 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 other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) <<-For purposes of this section: (a) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.->>

<<-(b) "Person in a position of authority" means any person who is a parent or acting in the place of a parent and is charged with any of a parent's rights, duties, or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, education, or supervision of a child, either independently or through another, no matter how briefly, at the time of the act.->>

<<-(3)->> Indecent liberties is a class B felony.

#### WA ST 9.94A.030

Sec. 11. Section 3, chapter 137, Laws of 1981 as last amended by section 3, chapter 187, Laws of 1987, by section 1, chapter 456, Laws of 1987, and by section 1, chapter 458, Laws of 1987 and RCW 9.94A.030 are each reenacted and amended to read as follows:

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

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

(2) "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.

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

(4) "Community supervision" means a period of time during which a convicted offender is subject to crime-related prohibitions and other sentence conditions imposed pursuant to this chapter by a court. For first-time offenders, the supervision may include crime-related prohibitions and other conditions imposed pursuant to RCW 9.94A.120(5). For purposes of the interstate compact for out-of-state supervision of parolees and probationers, RCW 9.95.270, community supervi-

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WASHINGTON  
1988 REGULAR AND FIRST EXTRAORDINARY  
SESSION LAWS, JOINT RESOLUTIONS,  
AND INITIATIVE MEASURES

Fiftieth Legislature  
0666

Additions are indicated by <<+ UPPERCASE +>>  
Deletions by <<- Lowercase ->>  
Changes in tabular material are not indicated

CHAPTER 146  
S.H.B.No. 1302

SEX OFFENSES—DEVELOPMENTALLY DISABLED VICTIMS—PATRONIZING A PROSTITUTE

AN ACT Relating to sexual offenses; amending RCW 9A.44.050, 9A.44.100, and 9A.44.010; adding a new section to chapter 9A.88 RCW; prescribing penalties; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

WA ST 9A.44.050

Sec. 1. Section 5, chapter 14, Laws of 1975 1st ex. sess. as last amended by section 2, chapter 118, Laws of 1983 and RCW 9A.44.050 are each amended to read as follows:

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion; <<-or->>

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated<<+; OR+>>

<<+(C) WHEN THE VICTIM IS DEVELOPMENTALLY DISABLED AND THE PERPETRATOR IS A PERSON WHO IS NOT MARRIED TO THE VICTIM AND WHO HAS SUPERVISORY AUTHORITY OVER THE VICTIM+>>.

(2) Rape in the second degree is a class B felony.

WA ST 9A.44.100

Sec. 2. Section 9A.88.100, chapter 260, Laws of 1975 1st ex. sess. as last amended by section 10, chapter 145 (SHB 1333), Laws of 1988 and RCW 9A.44.100 are each amended to read 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 incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless<<+; OR+>>  
 <<+(C) WHEN THE VICTIM IS DEVELOPMENTALLY DISABLED AND THE PERPETRATOR IS A PERSON WHO IS NOT MARRIED TO THE VICTIM AND WHO HAS SUPERVISORY AUTHORITY OVER THE VICTIM+>>.  
 (2) Indecent liberties is a class B felony.

## WA ST 9A.44.010

Sec. 3. Section 1, chapter 14, Laws of 1975 1st ex. sess. as last amended by section 1, chapter ... (SHB 1333), Laws of 1988 and RCW 9A.44.010 are each amended to read as follows:

As used in this chapter:

- (1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and  
 (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and  
 (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.  
 (2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.  
 (3) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.  
 (4) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause<<-;->><<+. +>>  
 (5) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act<<-;->><<+. +>>  
 (6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped<<-;->><<+. +>>  
 (7) "Consent" means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse<<-;->><<+. +>>  
 (8) "Significant relationship" means a situation in which the perpetrator is:  
 (a) A person who undertakes the responsibility, professionally or voluntarily, to provide education, health, welfare, or organized recreational activities principally for minors; or  
 (b) A person who in the course of his or her employment supervises minors.  
 (9) "Abuse of a supervisory position" means a direct or indirect threat or promise to use authority to the detriment or benefit of a minor<<+. +>>  
 <<+(10) "DEVELOPMENTALLY DISABLED," FOR PURPOSES OF RCW 9A.44.050(1)(C) AND 9A.44.100(1)(C), MEANS A PERSON AS DEFINED IN RCW 71.20.016.+>>  
 <<+(11) "PERSON WITH SUPERVISORY AUTHORITY," FOR PURPOSES OF RCW 9A.44.050(1)(C) AND 9A.44.100(1)(C), MEANS ANY PROPRIETOR OR EMPLOYEE OF ANY PUBLIC OR PRIVATE CARE OR TREATMENT FACILITY WHO DIRECTLY SUPERVISES DEVELOPMENTALLY DISABLED PERSONS

- (1) "Short firearm" or "pistol" as used in this chapter means any firearm with a barrel less than twelve inches in length.
- (2) "Crime of violence" as used in this chapter means:
- (a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, rape in the second degree, kidnapping in the second degree, arson in the second degree, assault in the second degree, extortion in the first degree, burglary in the second degree, and robbery in the second degree;
- (b) Any conviction <<+or adjudication+>> for a felony offense in effect at any time prior to July 1, 1976, which is comparable to a felony classified as a crime of violence in subsection (2)(a) of this section; and
- (c) Any federal or out-of-state conviction <<+or adjudication+>> for an offense comparable to a felony classified as a crime of violence under subsection (2)(a) or (b) of this section.
- (3) "Firearm" as used in this chapter means a weapon or device from which a projectile may be fired by an explosive such as gunpowder.
- (4) "Commercial seller" as used in this chapter means a person who has a federal firearms license.
- Sec. 118. RCW 9.41.040 and 1983 c 232 s 2 are each amended to read as follows:

## &lt;&lt; WA ST 9.41.040 &gt;&gt;

- (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.
- (2) Unlawful possession of a short firearm or pistol shall be punished as a class C felony under chapter 9A.20 RCW.
- (3) As used in this section, a person has been "convicted <<+or adjudicated+>>" at such time as a plea of guilty has been accepted or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing <<+or disposition+>>, post-trial <<+or post-factfinding+>> motions, and appeals. A person shall not be precluded from possession if the conviction <<+or adjudication+>> has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted <<+or adjudicated+>> or the conviction <<+or disposition+>> has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
- (4) Except as provided in subsection (5) of this section, a person is guilty of the crime of unlawful possession of a short firearm or pistol if, after having been convicted <<+or adjudicated+>> of any felony violation of the uniform controlled substances act, chapter 69.50 RCW, or equivalent statutes of another jurisdiction, or after any period of confinement under RCW 71.05.320 or an equivalent statute of another jurisdiction, or following a record of commitment pursuant to chapter 10.77 RCW or equivalent statutes of another jurisdiction, he owns or has in his possession or under his control any short firearm or pistol.
- (5) Notwithstanding subsection (1) of this section, a person convicted of an offense other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401(a) and 69.50.410, who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from ownership, possession, or control of a firearm as a result of the conviction.

Sec. 119. RCW 13.04.011 and 1979 c 155 s 1 are each amended to read as follows:

## &lt;&lt; WA ST 13.04.011 &gt;&gt;

For purposes of this title:

- (1) Except as specifically provided in RCW 13.40.020 and chapter 13.24 RCW, as now or hereafter amended, "juvenile,"

<<+(e) Indecent liberties;+>>  
 <<+(f) Leading organized crime;+>>  
 <<+(g) Promoting prostitution in the first degree;+>>  
 <<+(h) Rape in the third degree;+>>  
 <<+(i) Sexual exploitation;+>>  
 <<+(j) Vehicular assault;+>>  
 <<+(k) 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;+>>  
 <<+(l) Any other class B felony offense with a finding of sexual motivation, as "sexual motivation" is defined under RCW 9.94A.030;+>>  
 <<+(m) Any other felony with a deadly weapon verdict under RCW 9.94A.125; or+>>  
 <<+(n) Any felony offense in effect at any time prior to the effective date of this section that is comparable to a serious offense, 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 serious offense+>>.

Sections 402(1)(d) and (6) were vetoed by the Governor

Sec. 402. RCW 9.41.040 and 1992 c 205 s 118 and 1992 c 168 s 2 are each reenacted and amended to read as follows:

<< WA ST 9.41.040 >>

(1) A person<<+, whether an adult or juvenile,+>> 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 <<+or her+>> possession<<+, or has in his or her control+>> any <<-short->> firearm <<-or pistol->><<+,+>>  
 <<+(a) After having previously been convicted in this state or elsewhere of a serious offense, a domestic violence offense enumerated in RCW 10.99.020(2), a harassment offense enumerated in RCW 9A.46.060, or of a felony in which a firearm was used or displayed, except as otherwise provided in subsection (3) or (4) of this section;+>>  
 <<+(b) After having previously been convicted of any felony violation of the uniform controlled substances act, chapter 69.50 RCW, or equivalent statutes of another jurisdiction, except as otherwise provided in subsection (3) or (4) of this section;+>>  
 <<+(c) After having previously been convicted on three occasions within five years of driving a motor vehicle or operating a vessel while under the influence of intoxicating liquor or any drug, unless his or her right to possess a firearm has been restored as provided in section 404 of this act;+>>  
 <<VETOED MATERIAL<<+(d) After having previously been committed for mental health treatment, either voluntarily for a period exceeding fourteen continuous days, or involuntarily under RCW 71.05.320, 71.34.090, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in section 404 of this act; or+>> VETOED MATERIAL>>  
 <<+(e) If the person is under eighteen years of age, except as provided in section 403 of this act+>>.  
 (2) Unlawful possession of a <<-short->> firearm <<-or pistol shall be punished as->> <<+is+>> a class C felony<<+, punishable+>> under chapter 9A.20 RCW.  
 (3) As used in this section, a person has been "convicted <<-or adjudicated->>" at such time as a plea of guilty has been accepted or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-factfinding motions, and appeals. A person shall not be precluded from possession <<+of a firearm+>> if the conviction <<-or adjudication->> has been the subject of a pardon, annul-

ment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted <<-or adjudicated->> or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(4) <<-Except as provided in subsection (5) of this section, a person is guilty of the crime of unlawful possession of a short firearm or pistol if, after having been convicted or adjudicated of any felony violation of the uniform controlled substances act, chapter 69.50 RCW, or equivalent statutes of another jurisdiction, the person owns or has in his or her possession or under his or her control any short firearm or pistol.->>

<<-(5)->> Notwithstanding subsection (1) of this section, a person convicted of an offense other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401(a) and 69.50.410, who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from <<-ownership,->> possession<<-, or control->> of a firearm as a result of the conviction.

<<VETOED MATERIAL<<-(6)(a) A person who has been committed by court order for treatment of mental illness under RCW 71.05.320 or chapter 10.77 RCW, or equivalent statutes of another jurisdiction, may not possess, in any manner, a firearm as defined in RCW 9.41.010.->>VETOED MATERIAL>>

<<VETOED MATERIAL<<-(b) At the time of commitment, the court shall specifically state to the person under (a) of this subsection and give the person notice in writing that the person is barred from possession of firearms.->>VETOED MATERIAL>>

<<VETOED MATERIAL<<-(c) The secretary of social and health services shall develop appropriate rules to create an approval process under this subsection. The rules must provide for the immediate restoration of the right to possess a firearm upon a showing in a court of competent jurisdiction that a person no longer is required to participate in an inpatient or outpatient treatment program, and is no longer required to take medication to treat any condition related to the commitment. Unlawful possession of a firearm under this subsection shall be punished as a class C felony under chapter 9A.20 RCW.->> VETOED MATERIAL>>

<<+(5) In addition to any other penalty provided for by law, if a person under the age of eighteen years is found by a court to have possessed a firearm in a vehicle in violation of subsection (1) of this section or to have committed an offense while armed with a firearm during which offense a motor vehicle served an integral function, the court shall notify the department of licensing within twenty-four hours and the person's privilege to drive shall be revoked under RCW 46.20.265.+>>

<<+NEW SECTION.+>> Sec. 403. A new section is added to chapter 9.41 RCW to read as follows:

RCW 9.41.040(1)(e) shall not apply to any person under the age of eighteen years who is:

- (1) In attendance at a hunter's safety course or a firearms safety course;
- (2) Engaging in practice in the use of a firearm or target shooting at an established range authorized by the governing body of the jurisdiction in which such range is located or any other area where the discharge of a firearm is not prohibited;
- (3) Engaging in an organized competition involving the use of a firearm, or participating in or practicing for a performance by an organized group that uses firearms as a part of the performance;
- (4) Hunting or trapping under a valid license issued to the person under Title 77 RCW;
- (5) In an area where the discharge of a firearm is permitted, is not trespassing, and the person either: (a) Is at least fourteen years of age, has been issued a hunter safety certificate, and is using a lawful firearm other than a pistol; or (b) is under the supervision of a parent, guardian, or other adult approved for the purpose by the parent or guardian;
- (6) Traveling with any unloaded firearm in the person's possession to or from any activity described in subsection (1), (2), (3), (4), or (5) of this section;
- (7) On real property under the control of his or her parent, other relative, or legal guardian and who has the permission of the parent or legal guardian to possess a firearm;

- (8) At his or her residence and who, with the permission of his or her parent or legal guardian, possesses a firearm for the purpose of exercising the rights specified in RCW 9A.16.020(3); or
- (9) Is a member of the armed forces of the United States, national guard, or organized reserves, when on duty.

Sections 404(1)(b) and (4)(a)(i) were vetoed by the Governor

<<+NEW SECTION.+>> Sec. 404. A new section is added to chapter 9.41 RCW to read as follows:

(1)(a) At the time a person is convicted of an offense making the person ineligible to possess a firearm, or at the time a person is committed by court order under RCW 71.05.320, 71.34.090, or chapter 10.77 RCW for mental health treatment, the convicting or committing court shall notify the person, orally and in writing, that the person may not possess a firearm unless his or her right to do so is restored by a court of record.

The convicting or committing court also shall forward a copy of the person's driver's license or identicard, or comparable information, to the department of licensing, along with the date of conviction or commitment.

<<VETOED MATERIAL(b) Upon the expiration of fourteen days of treatment of a person voluntarily committed, if the period of voluntary commitment is to continue, the institution, hospital, or sanitarium shall notify the person, orally and in writing, that the person may not possess a firearm unless his or her right to do so is restored by a court of record.VETOED MATERIAL>>

<<VETOED MATERIALFollowing fourteen continuous days of treatment, the institution, hospital, or sanitarium also shall forward a copy of the person's driver's license or identicard, or comparable information, to the department of licensing, along with the date of voluntary commitment.VETOED MATERIAL>>

(2) Upon receipt of the information provided for by subsection (1) of this section, the department of licensing shall determine if the convicted or committed person has a concealed pistol license. If the person does have a concealed pistol license, the department of licensing shall immediately notify the license-issuing authority.

(3) A person who is prohibited from possessing a firearm by reason of having previously been convicted on three occasions of driving a motor vehicle or operating a vessel while under the influence of intoxicating liquor or any drug may, after five continuous years without further conviction for any alcohol-related offense; petition a court of record to have his or her right to possess a firearm restored.

(4)(a) A person who is prohibited from possessing a firearm, by reason of having been either:

<<VETOED MATERIAL(i) Voluntarily committed for mental health treatment for a period exceeding fourteen continuous days; orVETOED MATERIAL>>

(ii) Involuntarily committed for mental health treatment under RCW 71.05.320, 71.34.090, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, may, upon discharge, petition a court of record to have his or her right to possess a firearm restored.

(b) At a minimum, a petition under this subsection (4) shall include the following:

(i) The fact, date, and place of commitment;

(ii) The place of treatment;

(iii) The fact and date of release from commitment;

(iv) A certified copy of the most recent order, if one exists, of commitment, with the findings of fact and conclusions of law; and

(v) A statement by the person that he or she is no longer required to participate in an inpatient or outpatient treatment program, is no longer required to take medication to treat any condition related to the commitment, and does not present a substantial danger to himself or herself, to others, or to the public safety.

(c) A person petitioning the court under this subsection (4) shall bear the burden of proving by a preponderance of the evidence that the circumstances resulting in the commitment no longer exist and are not reasonably likely to recur.

Sec. 405. RCW 9.41.050 and 1982 1st ex. s. c 47 s 3 are each amended to read as follows:

**Sec. 358.** RCW 9A.44.096 and 1994 c 271 s 307 are each amended to read as follows:

<< WA ST 9A.44.096 >>

(1) A person is guilty of sexual misconduct with a minor in the second degree when<<+: (a) T+>>he person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in or cause another person under the age of eighteen to engage in sexual contact with the victim<<+; or (b) the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual contact with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student+>>.

(2) Sexual misconduct with a minor in the second degree is a gross misdemeanor.

<<+(3) For the purposes of this section, "school employee" means an employee of a common school defined in RCW 28A.150.020, or a grade kindergarten through twelve employee of a private school under chapter 28A.195 RCW, who is not enrolled as a student of the common school or private school.+>>

**Sec. 359.** RCW 9A.44.100 and 1997 c 392 s 515 are each amended to read as follows:

<< WA ST 9A.44.100 >>

(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 developmentally disabled and the perpetrator is a person who is not married to the victim and who has supervisory authority over the victim;

(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 mentally disordered or chemically dependent persons 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 has a significant relationship with the victim.

(2) Indecent liberties is a class B felony<<+, except that indecent liberties by forcible compulsion is a class A felony+>>.

**Sec. 360.** RCW 9A.76.—and 2001 c 287 s 1 are each amended to read as follows:

(1) A person is guilty of <<-escape by a->> sexually violent predator <<+escape+>> if<<-, having been committed to the department of social and health services as a sexually violent predator under chapter 71.09 RCW, he or she:->>

<<-(a) Escapes from custody;->>

<<-(b) Escapes from a commitment facility;->>

<<-(c) Escapes from a less restrictive alternative facility; or->>

<<-(d) While on conditional release and residing in a location other than at a commitment center or less restrictive alternative facility, leaves or remains absent from the state of Washington without prior court authorization->><<+;+>>

<<+(a) Having been found to be a sexually violent predator and confined to the special commitment center or another secure facility under court order, the person escapes from the secure facility;+>>