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CA 72620-0-1

Trial Court Number 12-1-02461-4 KNT
Judge Darvas

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IN THE COURT OF APPEALS OF WASHINGTON

DIVISION I SEATTLE, WASHINGTON

LAVELLE XAVIER MITCHELL, Appellant,

Vs.

STATE OF WASHINGTON, Respondent.

APPELLANT'S OPENING BRIEF

BY: LAVELLE X. MITCHELL,
Pro Se Appellant in Custody
DOC #375920
2321 West Dayton Airport Road
PO Box 900
Shelton, WA 98584

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Defense counsel provided ineffective assistance by allowing Mr. Mitchell to plea to the VUCSA without receiving official indictment or any formal charging document apprising him of the charges against him and without challenging the court’s jurisdiction where information was not before it on the basis that the state represented it was “going” to be amended but not ever amended formally 5

 A. Standard of Review 10

 B. Mr. Mitchell’s trial counsel provided ineffective assistance by advising client to take plea agreement for charges that didn’t exist nor had relationship to the formal charges before the court 8, 10, 11

 C. Trial court erred in accepting plea agreement that involved charges that had not been formalized and leaving Mr. Mitchell to testify against himself without being advised that anything he says will be used against him in a crime that he was not charged with but failed to do so and is reversible error 6, 11

 D. Mr. Mitchell raises challenge to jurisdiction for first time in 60(b) motion as pro se and was error for court not to consider the question of jurisdiction 7

CONCLUSION 13

Supplemental Caselaw 14-27

1 This is a pro se brief that may not meet the writing requirements for citing Caselaw. However,
2 appellant requests court to use the standard determined by the Supreme Court of the United States
3 of America that holds that pro se in custody are entitled to be given the latitude and assume the
4 proper connections with regard to issues of law and accept the spirit where the writing is poorly
5 syntaxes and grammar is lacking such that if there can be justice done, it should be.

6
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9
10 Issues Pertaining to Assignments of Error

11 **No. 1** ___ Counsel was ineffective as to the entire trial phase for failing to move for a dismissal
12 when state lacked evidence of Robbery and Assault charges.

13 **No. 2** ___ Trial Court erred allowing Mr. Mitchell to give colloquy with regard to charges that, as
14 a matter of law, did not exist against Mr. Mitchell and thus it was error when court granted and accepted
15 plea agreement that relieved state of the burden of proving all the elements of an alleged crime or filing
16 formal charges with regard to the unfiled charge of VUSCA.

17 **No. 3** ___ Trial erred in denying Mr. Mitchell's 60(b) motion as the motion challenged the court's
18 jurisdiction to find him acceptable to plea to a charge that was never filed.

19 **No. 4** ___ Trial court erred when it continued the action and the process that Mr. Mitchell was
20 due, a formal charging instrument, was not achieved denying the court jurisdiction over the person as to
21 the VUCSA.

22 **No. 5** ___ Mr. Mitchell was deprived of his Sixth and Fourteenth Amendment right to the
23 effective assistance of counsel in the post-conviction hearing conducted by Mitch Harrison, attorney for
24 defendant, when he failed to inform the court that the motion to withdraw did include the component of

1 ineffective assistance of counsel and thereby denied a meaningful opportunity for Mr. Mitchell to be
2 heard in a meaningful manner and at a meaningful time.

3 **No. 6** ___ Defense counsel unreasonably proposed that accepting a plea agreement without state
4 ever formally charging Mr. Mitchell relieved the prosecution of its burden to prove an essential element
5 of the charge as well as any elements of the charge when he refused to go forward on the only charges
6 before the court, Armed Robbery and Assault in the Second Degree and insisted that Mr. Mitchell take
7 the deal for possession as well as his brother, who was the owner of the car where the substance was
8 found.

9 **No. 7** ___ A criminal defense attorney provides ineffective assistance of counsel by proposing
10 that client take a plea instead of continuing to plead not guilty when the state informs him that the state's
11 case cannot go forward for lack of evidence and witnesses, thus defense counsel's action and advise
12 relieved the state of its burden of proof to the hurt and harm of his client.

13 **No. 8** ___ An attorney that proposes to criminal defendant that they should plead guilty to charge
14 where the state has failed to establish a prima facie case against the client, and more troubling is that this
15 advice came at the time of trial, and after being told that the state does not have any witnesses to produce
16 or evidence of the charges by information, Robbery and Assault, and thus wanted defense counsel to
17 assist it where it had failed to file a proper information informing the defendant and his counsel of the
18 charges and nature against him, as required by statute to commence a criminal case and if counsel had not
19 made such a recommendation the defendant, Mr. Mitchell would have been released and freed as a matter
20 of law with regard to a subsequent search warrant issuing that authorized, "with particularity, the place
21 and the things" to be seized. It is impossible for the state to have requested a search warrant that said they
22 believe evidence of illegal drugs were going to be found in the abandoned car NOT OWNED BY MR.
23 MITCHELL.

24 **No. 9** ___ Under the circumstances, the law and the record of this case was Mr. Mitchell's
counsel effective within the meaning of Sixth and Fourteenth Amendments where he failed at every

1 junction to protect his clients rights, and not to encourage the waiving of rights necessary to maintain
2 justice in the judicial branch of government?

3 No. 10 ___ Does the constitution allow that the state to fail in criminal procedures, violate the
4 law, and still gain, get a conviction in face of such failure.

5 No. 11 ___ Does not the court owe a duty to the law and not a particular party, as in this case the
6 state, based on defendant curing the failure of the adherence to law of the state?

7 No. 12 ___ Is the position of any court that where government fails to conform and comply with
8 the law the court may simply act to favor a favorable verdict for the state or is that an indication that the
9 court has a bias toward one party over the other and thereby violate the "fair" mandate of both
10 constitutions?

11 No. 13 ___ Under the circumstances where a citizens is denied rights in the viewing of the
12 courts, prosecuting attorney and defense counsel and no one comes to the aid of the law is that not a
13 violation of the principle that government is restricted and prohibited from acting with a bias and entitles
14 such a person to an order of dismissal with prejudice?

15 Statement of the Case

16 This matter began as a criminal action for Armed Robbery and Assault against co-defendants and
17 twin brothers. The defendant, Lavelle Mitchell, was charged with his twin brother of being at and
18 participating in an armed robbery and assault on June 3, 2012. Mr. Mitchell was not arrested at the
19 "scene" of any crime but was subsequently arrested and charged as expressed in the record and above.

20 After a series of pretrial motions with regard to suppression related to the Armed Robbery and
21 Assault, the matter became moot as there was, in fact, no evidence to suppress linking either brother to a
22 robbery and assault and the matter proceeded to trial on January 22, 2013, an additional 59 days past trial
23 expiration.
24

1 On January 22, 2013 the trial court allowed defendant Lavelle Mitchell to plead guilty to a lesser
2 included charge or in the absence of a lesser included, a completely unfiled charge: to wit violation of the
3 uniformed controlled substance act, possession.

4 The state had obtained a search warrant for the car to look for evidence of the Robbery and
5 Assault of a car described as the "suspect" vehicle that had been abandoned or had the appearance of
6 abandonment. Defendant did not know the basis for the warrant to search for drugs and did not consider it
7 relevant always having pleaded not guilty to Armed Robbery and Assault. Moreover, it was not Mr.
8 Mitchell's car barring any evidence of robbery could not have any impact on the case at bar and the state
9 did not give him nor his counsel a copy of the warrant or inventory as everything found in an abandoned
10 automobile but to the owner of the vehicle, which was Mr. Brown's vehicle. In addition, the search
11 produced evidence related to the crime of VUCSA, to wit, a package that contained a white substance that
12 was field tested and showed positive for cocaine, which the statute requires challenge to be presented by
13 his counsel. Counsel did not challenge the VUCSA. His client had not been charged with such violation
14 though the alleged substance was found in 2012 search of the vehicle.

15 Mr. Mitchell nor his attorney had prepared to defend against the charge because it did not exist
16 until the day of the trial by way of the state announcing that in the absence of witnesses and evidence of
17 the original charges that they would be amending the information, which they did on January 23, 2013,
18 but the court accepted a plea of guilty on the charges that had not yet been filed. Nothing found on the
19 basis of the warrant that linked or would have linked Mr. Mitchell to any crime, including VUCSA as
20 there were no exigent circumstances that could have stretched the warrant to include Mr. Mitchell.

21 Nonetheless, Mr. Mitchell's attorney recommended that he plead guilty to the soon to be charged
22 VUCSA and take the offer of the state to plead guilty to the VUCSA.

23 Fatally, Mr. Mitchell took the irregular advice of counsel. After reviewing the case Mr. Mitchell
24 later found that such advice from his then counsel was ill-advised and detrimental to his case in chief,
according to Phil Mahoney, attorney at law, WSBA #1292. At that time, and acting as his own counsel

1 filed a motion to withdraw his plea of guilty. On May 2, 2013 defendant filed the first of his three
2 motions seeking to withdraw his guilty plea. The state finally filed a response to the motion to withdraw
3 his guilty plea on August 4, 2013. The court having not recognized Mr. Mitchell as pro se counsel caused
4 his grandmother to loan him the money to hire Mitch Harrison, WSBA # 43040, to conduct the motion
5 for relief to a hearing. Mr. Mitchell's motion for relief from guilty plea included the charge of ineffective
6 assistance of counsel and had not been ruled on by the court. Mr. Harrison filed an additional motion with
7 regard to the withdrawal, albeit, he never read the original motion and thus did not argue the proper point,
8 ineffective assistance of counsel by trial attorney, nor that the matter had been conducted irregularly and
9 without authority and the court simply rejected the motion solely based on the arguments made by
10 counsel that did not include the original claims of Mr. Mitchell's filing as a pro se that Mr. Mitchell had
11 not had advice of counsel prior to entering into the plea agreement for the VUCSA where there was any
articulable facts stated that would have compelled him to plead guilty.

12 At the hearing on the motion to withdraw plea of guilty the court said, "the motion to withdraw
13 the plea is predicated on something that the defense learned of, new information, regarding the underlying
14 charge, which was robbery. . . and that was the sole basis for the motion seeking relief" *See, VRP, at page*
15 *8, lines 2 thru 7*. Mr. Mitchell was barred from addressing the issues raised in his pro se motion though
16 he tried to inform the court that the motion filed by himself was "predicated" on "ineffective assistance of
17 counsel" but the court, off the record, advised him to speak through his counsel of record.

18 Moreover, the court admits that there was no "factual basis" for the charge of VUCSA and that
19 under the advice of counsel that Mr. Mitchell had "provided the factual basis" instead of the state
20 prosecutor doing so.

21 The court denied the motion to withdraw and Mr. Mitchell filed a 60(b) motion to vacate the
22 judgment on the grounds that it was void. The court heard the matter without oral arguments and denied
23 the motion. Appellant took this appeal and filed and served respondents with his notice of appeal and
24

1 certificate of service informing the state that he would be seeking this appeal with Court of Appeals
2 Division One, Seattle, Washington.

3 On October 17, 2014 Mr. Mitchell, again, pro se, filed a 60(b) motion. The court heard the
4 motion without response from the state or a hearing and denied that the motion was obtained in violation
5 of Washington State Court Rule 60(b)(1)(5) and (11). The court denied the motion without hearing or oral
6 arguments. Mr. Mitchell filed and served his notice of appeal on the state on October 20, 2014.

7 Argument and Statement of the Case

8 *The judgment against Mr. Mitchell was obtained through irregularity and ignoring the rules of*
9 *procedures requirement for effective assistance of counsel, without any argument in response from the*
10 *state and without a hearing. The judgment was obtained in the absence of the process that Mr. Mitchell*
11 *was due, including, but not limited to, effective assistance of counsel at every stage of the process, by*
12 *surprise as the charge did not exist the state could produce any set of witnesses or evidence of a robbery*
13 *or assault. The process used in obtaining the judgment was done contrary to clear well established*
14 *principles of fairness and unbiased opining. The Court abused its discretion with regard to setting aside*
15 *the conviction on grounds that Mr. Mitchell did not argue correctly and appeared to know that he was*
16 *pleading guilty to a charge that the state could not have proved beyond a reasonable doubt. And the most*
17 *problematic, is the court determined the extent of legal counseling for pleading to the charge of VUSCA*
18 *and its flaws were cured by the fact that she allowed Mr. Mitchell to alloquite to the charge, essentially, to*
19 *say that he committed the violation of the uniformed controlled substance act though there was not*
20 *sufficient evidence before the court to even have tried Mr. Mitchell for the offense under the*
21 *circumstances known to the court at the time of the announcement that the state would be amending the*
22 *information. Thus, the information was amended to his colloquy, and not the other way around and*
23 *constitutes the most irregularity of all the others.*

24 *The Court decided to substitute Mr. Mitchell's colloquy as satisfaction of the statutory*
requirements for commencing a criminal action, RCW 10.16.110, which states in pertinent part that "It

1 shall be the duty of the prosecuting attorney of the proper county to inquire into and make full
2 examination of all the facts and circumstances connected with any case . . . provided by law,
3 touching the commission of any offense wherein the offender shall be committed to jail, or become
4 recognized or held to bail; and if the prosecuting attorney shall determine in any such case that an
5 information ought not to be filed, he or she shall make, subscribe, and file with the clerk of the
6 court a statement in writing containing his or her reasons, in fact and in law, for not filing an
7 information in such case, and such statement shall be filed at and during the session of court at
8 which the offender shall be held for his or her appearance: PROVIDED, That in such case such
9 court may examine such statement, together with the evidence filed in the case, and if upon such
10 examination the court shall not be satisfied with such statement, the prosecuting attorney shall be
11 directed by the court to file the proper information and bring the case to trial.” violated his right to

12 due process even at sentencing and plea phase of the criminal process. and legally falls upon the *State of*
Washington. King County Prosecuting Attorney. an elected official. under the CRIMINAL

13 PRECEDURE: to prove constructive possession the state must demonstrate that the defendant had
14 knowledge of, and control over, the drugs, see Johnson, 18 F. 3d at 647, all of which is known to the state
15 and subject to the laws of the State of Washington with regard to how official charges are process within
16 the meaning of the due process of law clauses for both constitutions. Therefore, when court asserted that
17 Mr. Mitchell's "colloquy" was sufficient to establish the elements necessary in lieu of the state meeting its
18 burden was a miscarriage of justice. The due process clauses are designed such that the state be limited
19 and prohibited from certain conduct and behavior in order to obtain a conviction. Clearly, the safeguards
20 failed in this matter at the point of granting a plea where there was no charge by information before the
21 court. Thus, the actions of the state and court were done in violation of the due process clause and
22 constitute a miscarriage of justice and should be reversed.

23 *The attorney for Mr. Mitchell, who the state acknowledged was not the owner of the abandoned*
car. knew or should have known, through reasonable investigation, that the intended conduct,

1 prosecuting Mr. Mitchell, was prohibited and not in the best interest of his client since the only manner in
2 which the state could have prevailed was that his counsel advised him against his own interest, not guilty.

3 Counsel for the defendant in this matter should have known that it is well established that **“Mere**
4 **presence as a passenger in a car from which the police recover contraband or weapons does not**
5 **establish possession” United States v Flenoid, 718 F. 2d 867, 868 (8th circuit court 1983)”,** is well
6 settled and controlling upon the issue of a prima facie criminal case against a “mere passenger” in an
7 abandoned automobile. Counsel's failure, on its face, constitutes ineffective assistance of counsel.
8 Moreover, the Court, did indeed, know that the owner of the car had already pleaded guilty to the
9 possession charge and that the state had no basis for connecting Mr. Mitchell to it and by allowing Mr.
10 Mitchell to colloquy to the charge was an abuse of discretion.

11 Additionally, the Court pointed out that criminal defendants are to be afforded due process of law
12 and that includes the right see the charges and understand the nature of the charge before even entering a
13 plea let alone a plea agreement. The Court held that “Sixth Amendment guarantee that a defendant be
14 informed of the nature and cause of the accusation, **US v Willis, 89 F 3d 1371 (8th circuit court)**” was a
15 proper consideration for determining whether there was effective assistance of counsel or not.

16 The record will bear out that this is the accurate portrayal of the events that led the court to
17 subsequently denying Mr. Mitchell's 60(b) motion alleging that the judgment was void because the court
18 lacked jurisdiction over the person and subject matter because neither was properly before the court as a
19 matter of law. In essence, the Robbery and Assault charges, were before the court, but there was no
20 charges of VUSCA on the day of trial, January 22, 2013. And thus any subsequent charges to be filed
21 were done in the absence of any information and thus jurisdiction failed for lack of evidence. The
22 defendant did not have charges pending related to the original charges for which information was
23 subsequently filed because they did not exist.

24 Moreover, the charge of VUCSA is not a lesser included of the two formally charged offenses and
thereby not possible to be included as any type of bargaining tool of the state to assist them in getting

1 someone to plead guilty. At the very least, the citizen must be facing the charge that they are pleading to.
2 In other words, the state cannot "fairly" say, "we can't make the original charges stick so this is the deal
3 we will offer. We let you go home and not face the charges we cannot prove, if you plead guilty to a
4 charge that you were never charged with and there is no formal charges today, but after you get the judge
5 to believe that you committed a crime that is not charged against yourself, and where the prima facie case
6 for the VUCSA is made with regard to the owner of the car, you must convince the judge that not only is
7 the owner of the car guilty, he plead guilty to possession of the substance found in his car, but so are you,
8 and that you just wanted to testify to it in lieu of going free because that was "good". "effective assistance
9 of counsel" said it was the best thing for him to do.

10 On the basis of the above a subsequent trial was held to withdraw the guilty plea entered into
11 with the State of Washington through its King County Prosecuting Attorney. At that hearing Mr. Mitchell
12 was represented by Mitch Harrison. The court heard oral arguments from both counsels and denied the
13 motion to withdraw the guilty plea, essentially, she stated, because Mr. Mitchell confessed to the
14 possession charge, placed himself in the vehicle and admitted that what was found in a warrant under
15 someone else was his for the purpose of making the agreement. This was/is an unconscionable agreement
16 and unenforceable at law because it lacked mutual consideration and there was no meeting of the minds
17 between the effected parties. Torts, Law of Contracts 2d.

18 ARGUMENT

19 *State benefited from the ineddective assistance given Mr. Mitchell at the time of trial and when the*
20 *court failed to produce any witnesses to the alleged robbery and assault, DEFENSE COUNSEL*
21 *PROVIDED INEFFECTIVE ASSISTANCE BY PROPOSING TO CLIENT THAT ACCEPTING*
22 *THE PLEA AGREEMENT AND MAKING NO CHALLENGES TO THE STATE'S FAILURES TO*
23 *COMPLY WITH STATUTES THUS RELIEVING THE STATE OF ITS BURDEN TO PROVE THE*
24 *ELEMENTS OF THE CHARGES AGAINST HIM WAS THE MOST SOUND LEGAL POSITION*

1 *Kyllo, 166 Wn.2d at 871. "The statutory scheme for the elements of [VUCSA] includes the "*
2 *indispensable element" that the person first be arrested based on reasonable grounds to believe that s*
3 */he has committed [VUCSA]."* *Clement v. State Dept of Licensing, 109 Wn. App. 371, 375, 35 P. 3d*
4 *1171 (2001); RCW 46.20.308(1). As with all essential elements, the [defendant is entitled to the*
5 *same standard as a] jury and must be instructed on the state' s burden to prove an arrest based on*
6 *reasonable grounds to believe the accused person has committed VUCSA. Id.; Alleyne, - -- U.S. at*
7 *Mr. Mitchell' s trial attorney provided ineffective assistance by proposing that he take a plea agreement*
8 *that had nothing whatever to do with the charges he faced and of the charge his counsel instructed him to*
9 *plead guilty to counsel failed to tell Mr. Mitchell that the charges lacked or omitted this essential*
10 *elements that the law required the state to prove. Defense counsel had no valid strategic reason for*
11 *relieving the prosecution of its burden to prove each element of the [charges] ... beyond a reasonable*
12 *doubt. Kyllo, 166 Wn.2d at 871. Mr. Mitchell was prejudiced by his attorney's deficient performance. He*
13 *originally came to the officer's attention because he was being accused of robbery and looked exactly like*
14 *his twin brother. There was an alleged chase and the vehicle that was alleged to be the get away vehicle*
15 *was found abandoned. The vehicle identification lead to Mr. Mitchell's twin brother as the owner of the*
16 *abandoned vehicle. The evidence alleged was based solely on eye witnesses, the alleged victims, and*
17 *other unreliable sources. The jury could have concluded that the officer lacked reasonable grounds to*
18 *conclude that Mr. Mitchell had committed VUCSA at the time the breath test was offered. Mr. Mitchell's*
19 *attorney provided ineffective assistance of counsel by proposing jury instructions that relieved the state of*
20 *its burden of proof. Kyllo, 166 Wn.2d at 871. Mr. Mitchell' s sentence must be vacated and his case*
21 *dismissed with prejudice. A conviction should be reversed if it is based on jury instructions that relieve*
22 *the state of its burden to prove the essential elements of an offense (or enhancement). In re Winship, 397*
23 *U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The sole exception should be for cases in which the*
24 *error is harmless beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (*
1997). If Studd and the invited error rule bar Mr. Mitchell' s claim, he' ll be left without a remedy despite

1 the prejudicial violation of his constitutional rights. The invited error rule should not be applied in
2 circumstances such as these. It is fundamentally unfair to affirm a conviction obtained in violation of the
3 accused person's constitutional right to due process, solely because the error was brought about by
4 defense counsel.

5 CONCLUSION

6 For the reasons set forth above and those in the Opening Brief, Mr. Mitchell's conviction must be
7 reversed. And, consequently, he must be remanded for resentencing on the other matters that included
8 this conviction for the purpose of sentencing within the Sentencing Grid points, which are in error.

9 **Additional Cases In Support of Appeal In its Entirety Regarding Jurisdiction and** 10 **Procedural Bar which Appellant relies upon**

11 [1. 2]Generally, upon collateral review, a petitioner may raise a new error of constitutional
12 magnitude or a nonconstitutional error which constitutes a fundamental defect that inherently results in a
13 miscarriage of justice. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). Where
14 constitutional error or fundamental defect is alleged, the petitioner must show that he or she was actually
15 and substantially prejudiced by the error. *Id.* If a petitioner raises ineffective assistance of appellate
16 counsel on collateral review, he or she must first show that the legal issue that appellate counsel failed to
17 raise had merit. *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). Second, the
18 petitioner must show that he or she was actually prejudiced by appellate counsel's failure to raise the
19 issue. *Id.* This court must first address whether Mitchell's petition is procedurally barred.

20 RCW 10.73.090. If the petition is not time barred then we must also determine the proper remedy for the
21 trial court's failure to remand to King County Prosecuting Attorney for further action once the state
22 offered to drop Robbery in the First Degree and Assault in the Second Degree for lack of evidence court
23 lost jurisdiction automatically. Closely related to the question of the proper remedy for any trial court
24 error, we must determine whether Mr. Mitchell's post conviction counsel was ineffective when he failed
to raise the court's lack of jurisdiction on his post conviction motion.

1 Procedural Bar

2 "This court limited review to "the issues regarding the absence of a juvenile court decline hearing,
3 including whether trial or appellate counsel was ineffective." Order (Sept. 30, 2003). However, the Court
4 of Appeals chief judge declined to address the timeliness of the petition and disposed of the petition on its
5 merits. The State continues to argue that Dalluge's petition is time barred because he filed his personal
6 restraint petition more than one year after the mandate was issued terminating the appeal *from his*
7 *conviction.*[3]RCW 10.73.090 provides that "[n]o petition or motion for collateral attack on a judgment
8 and sentence in a criminal case may be filed more than one year after the judgment becomes final."
9 RCW 10.73.090 (1). However, the RCW 10.73.090 time bar applies only if the judgment and sentence
10 "[were] rendered by a court of competent jurisdiction." RCW 10.73.090 (1). Dalluge contends that
11 because the juvenile court had exclusive jurisdiction over his proceedings, the adult criminal court lacked
12 competent jurisdiction in his case. The State seems to argue, for the first time at oral argument, that the
13 adult criminal court did have jurisdiction in this case based on Dalluge's failure to object at trial to adult
14 criminal court jurisdiction or request a remand to juvenile court after the information was amended.
15 In *State v. Werner* , 129 Wn.2d 485 , 487, 918 P.2d 916 (1996), this court specifically clarified the nature
16 of juvenile court jurisdiction. Significantly, the juvenile court is a division of the superior court; it is not a
17 separate court. *Id.* at 492. The *Werner* court recognized that there are " 'three jurisdictional elements in
18 every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person, and the power
19 or authority to render the particular judgment.' " *Id.* at 493 (quoting *In re Marriage of Little* , 96 Wn.2d
20 183 , 197, 634 P.2d 498 (1981)). The superior court has jurisdiction over the subject matter of juvenile
21 offenses under article IV, section 6 of the Washington Constitution and RCW 2.08.010 . Superior courts
22 also have personal jurisdiction over juveniles who commit crimes in Washington. RCW 9A.04.030 : *State*
23 *v. Golden* , 112 Wn. App. 68 , 74, 47 P.3d 587 (2002). However, by statute, only the juvenile division of
24 the superior court has the power to hear and determine certain juvenile matters. RCW 13.04.030 (1)
provides that juvenile divisions of the superior courts in Washington have " *exclusive* original jurisdiction

1 over all proceedings . . . (e) [r]elating to juveniles alleged or found to have committed offenses, traffic or
2 civil infractions, or [enumerated] violations," (emphasis added) *unless* one of the exceptions in
3 RCW 13.04.030 (1)(e) applies. *Black's Law Dictionary* defines "exclusive jurisdiction" as "[a] court's
4 power to adjudicate an action or class of actions to the exclusion of all other courts." BLACK'S LAW
5 DICTIONARY 856 (7th ed. 1999). Thus, the plain language of RCW 13.04.030 (1) requires juvenile
6 court jurisdiction in certain cases. Two of the statutory exceptions to the juvenile division's exclusive
7 jurisdiction are relevant to this case. First, if "[t]he juvenile is sixteen or seventeen years old and the
8 alleged offense is: (A) A serious violent offense as defined in RCW 9.94A.030 ." the adult criminal court
9 shall have " *exclusive* original jurisdiction." RCW 13.04.030 (1)(e)(v)(A) (emphasis added). Second, the
10 juvenile court may conduct a decline hearing upon the request of a party or on its own motion.
11 RCW 13.04.030 (1)(e)(i); RCW 13.40.110 . Key to this case is the provision that *unless waived by the*
12 *juvenile court* , the parties, *and* their counsel, a decline hearing in juvenile court *must* be held if the
13 respondent is 15, 16, or 17 years old and the information alleges a class A felony such as rape in the
14 second degree, the amended charge in this case. RCW 13.40.110 (1)(a); RCW 9A.44.050 .«3»After the
15 decline hearing, the juvenile court can waive its exclusive jurisdiction by "transfer[ring] jurisdiction of a
16 particular juvenile to adult criminal court." RCW 13.04.030 (1)(e)(i), "upon a finding that the declination
17 would be in the best interest of the juvenile or the public." RCW 13.40.110 (2) In *State v. Mora* , 138
18 Wn.2d 43 , 49, 977 P.2d 564 (1999), this court recognized that the statutes contemplate only "automatic
19 decline, based on the nature of the crime, or an actual decline hearing by the juvenile court." In *Mora* , as
20 in this case, charges against the juvenile defendant originally subjected him to automatic adult criminal
21 court jurisdiction. *Id.* at 45. The prosecutor later amended the information, reducing the charge such that
22 automatic decline of the juvenile court's jurisdiction no longer applied. *Id.* at 47. After a trial and guilty
23 verdict in adult criminal court, defense counsel moved for arrest of judgment based on lack of jurisdiction
24 of the adult criminal court. *Id.* The *Mora* court held that: With the exception of those offenses set forth in
RCW 13.04.030 , the Legislature intended that juvenile courts maintain not only exclusive original

1 jurisdiction over all proceedings relating to juveniles, *but also discretionary authority to determine*
2 *whether to transfer jurisdiction to adult court*. *Id.* at 49. Therefore, the legislature intended the adult
3 criminal court to have jurisdiction over a juvenile proceeding only by means of automatic decline based
4 on the nature of the crime or as the result of an actual decline hearing where the juvenile court waives its
5 own exclusive jurisdiction. *Id.* The juvenile court's decision to either maintain or decline its exclusive
6 jurisdiction is a mandatory step absent automatic decline based on the nature of the crime. Finally,
7 Washington courts have held that under very limited circumstances, where a juvenile willfully deceives
8 an adult criminal court into believing that he or she is an adult and does not correct the error, the
9 defendant waives his or her right to proceed in juvenile court, and adult criminal court jurisdiction can be
10 deemed proper on that basis alone. *Sheppard v. Rhay*, 73 Wn.2d 734, 739, 440 P.2d 422 (1968); *State v.*
11 *Mendoza-Lopez*, 105 Wn. App. 382, 387-89, 19 P.3d 1123 (2001) (finding no waiver absent willful
12 deception); *State v. Anderson*, 83 Wn. App. 515, 519-21, 922 P.2d 163 (1996) (finding no waiver where
13 juvenile's correct age was revealed at trial); *Nelson v. Seattle Mun. Court*, 29 Wn. App. 7, 10, 627 P.2d
14 157 (1981). To hold otherwise would burden the adult criminal court with conducting an independent
15 investigation as to a defendant's true age to avoid a situation where a deceptive juvenile could take his
16 chances in adult court, but later seek to overturn an adult court conviction based on his
17 minority. *Sheppard*, 73 Wn.2d at 740. «5» Yet in both *Sheppard* and *Nelson*, the only cases in which
18 waiver was found to have occurred, both juvenile petitioners underwent a posttrial hearing in superior
19 court to determine whether adult criminal court jurisdiction had been proper. *Sheppard*, 73 Wn.2d at
20 735; *Nelson*, 29 Wn. App. at 10; *see also Dillenburg*, 70 Wn.2d 349. As explained in more detail
21 below, such a hearing can serve as a substitute for the juvenile court's decline hearing requirement where
22 necessary. *Dillenburg*, 70 Wn.2d at 355 -56. «6» Therefore, even where Washington courts have found the
23 juvenile waived his or her right to proceed in juvenile court, adult criminal court jurisdiction was not
24 proper until either the juvenile court also waived its jurisdiction or the adult criminal court confirmed that
the juvenile court would have waived its jurisdiction in that case. In sum, absent automatic decline by

1 statute, actual decline by the juvenile court, or waiver based on deception that has been confirmed by a
2 juvenile court or a substitute *Dillenburg* hearing in adult court. Washington courts have held that the adult
3 criminal court lacks jurisdiction over a juvenile's proceeding. *Mora*, 138 Wn.2d at 53 (" 'the adult court
4 determined the statutory criteria for its "exclusive original jurisdiction" . . . were not met, *the court would*
5 *lack jurisdiction over the juvenile* , in the absence of a declination hearing' " (emphasis added) (quoting *In*
6 *re Boot* , 130 Wn.2d 553 , 565 n.7, 925 P.2d 964 (1996)); *id.* ("adult criminal court *lacks jurisdiction if*
7 *juvenile court improperly declined juvenile offender*" (emphasis added) (citing *State v. Pritchard* , 79 Wn.
8 App. 14 , 20, 900 P.2d 560 (1995))). *See also Werner* , 129 Wn.2d at 494 (noting that by statute, only the
9 juvenile division had the power to hear and determine the case against the juvenile offender); *Mendoza-*
10 *Lopez* , 105 Wn. App. at 386 -87; *Anderson* , 83 Wn. App. at 518 . In this case, Dalluge was 17 years old
11 when the prosecutor filed the amended information, after which Dalluge was no longer charged with a
12 serious violent offense. Thus, the adult criminal court no longer had automatic jurisdiction over his
13 proceedings. *See RCW 13.04.030 (1)(e)(v)*. Once the prosecutor amended the information to charge
14 offenses which did not result in automatic adult court jurisdiction, Dalluge's case no longer qualified for
15 that exception to the juvenile court's exclusive jurisdiction. Most importantly, because Dalluge was now
16 charged with rape in the second degree, a class A felony, *RCW 13.40.110 (1)(a)* affirmatively required a
17 decline hearing *unless waived by the juvenile court* , the parties, and their counsel. Thus, the trial court
18 should have remanded the matter to the juvenile court for a decline hearing because the juvenile court was
19 the only court that could have jurisdiction over Dalluge's case. *Mora* , 138 Wn.2d at 54 . The State claims
20 that the adult criminal court maintained jurisdiction over Dalluge, even after the information was
21 amended, because Dalluge did not object to the adult criminal court's jurisdiction or request a hearing in
22 juvenile court. The State argues that Dalluge waived his right to have his case decided in juvenile court by
23 silence. «8» Yet this court has concluded that *RCW 13.04.030 (1)(e)*'s decline hearing requirement can be
24 waived only by way of intentional deception. *Sheppard* , 73 Wn.2d at 739 ; *see also Mendoza-Lopez* , 105
Wn. App. at 388 -89; *Anderson* , 83 Wn. App. at 519 ; *Nelson* , 29 Wn. App. at 10 . The State points to no

1 other circumstances that have been deemed to amount to waiver. Similarly, the dissent claims
2 that *Mora* established that juvenile jurisdiction is waived if a juvenile does not present a timely objection
3 to improper adult jurisdiction. First and foremost, nothing in the dissent effectively counters the plain
4 language of RCW 13.40.110 (1)(a), which affirmatively requires a decline hearing unless waived by the
5 juvenile court. While the *Mora* court noted that "[o]ther Washington case law similarly holds that upon a
6 timely challenge, [adult criminal court] jurisdiction may be terminated, even in the middle of
7 proceedings," 138 Wn.2d at 53 , *Mora* was not a case that directly addressed the issue of waiver. *Id.* at 54
8 n.8. In addition, the *Mora* court did not go so far as to hold that the juvenile court loses its legislatively
9 granted authority to rule on declination when a juvenile fails to raise an objection to adult criminal court
10 jurisdiction. In fact, the *Mora* court emphasized the juvenile court's essential role in declination: "With
11 the exception of those offenses set forth in RCW 13.04.030 , the Legislature intended that juvenile courts
12 maintain not only exclusive original jurisdiction over all proceedings relating to juveniles, but
13 also *discretionary authority to determine whether to transfer jurisdiction to adult court.*" *Id.* at 49
14 (emphasis added). We conclude that absent automatic decline based on the nature of the charges, this
15 discretionary authority must be exercised, either by the juvenile court as the result of a decline hearing or
16 by the adult criminal court in a substitute *Dillenburg* hearing. As noted above, this conclusion is not
17 contradicted by *Sheppard* , in which this court acknowledged that a juvenile had waived his right to
18 proceed in juvenile court by deception, but only after a court had hearing requirement can be waived only
19 by way of intentional deception. *Sheppard* , 73 Wn.2d at 739 ; *see also Mendoza-Lopez* , 105 Wn. App. at
20 388 -89; *Anderson* , 83 Wn. App. at 519 ; *Nelson* , 29 Wn. App. at 10 . The State points to no other
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9 (emphasis added). We conclude that absent automatic decline based on the nature of the charges, this
10 discretionary authority must be exercised, either by the juvenile court as the result of a decline hearing or
11 by the adult criminal court in a substitute *Dillenburg* hearing. As noted above, this conclusion is not
12 contradicted by *Sheppard* , in which this court acknowledged that a juvenile had waived his right to
13 proceed in juvenile court by deception, but only after a court had confirmed, in the context of
14 a *Dillenburg* hearing, that adult criminal court jurisdiction was proper. In sum, the relevant statutory
15 language and this court's case law do not allow waiver of juvenile jurisdiction absent either a decline
16 hearing in juvenile court or a substitute *Dillenburg* hearing. Therefore, the adult criminal court in this case
17 erred when it failed to remand to the juvenile court for a decline hearing after the charges against Dalluge
18 were amended. Absent the juvenile court's waiver of its exclusive jurisdiction, the adult criminal court did
19 not have jurisdiction, i.e., it did not possess the power or authority to render a judgment in these
20 proceedings. Because the judgment in this case was not "rendered by a court of competent jurisdiction,"
21 RCW 10.73.090 (1), Dalluge's personal restraint petition is not procedurally barred, regardless of the
22 timing of its filing.

23 Remedy for the Trial Court's Failure to Remand

1 [9]This court has clearly concluded that once a prosecutor amends an information to charge offenses that
2 do not result in automatic adult court jurisdiction, the adult criminal court must remand the matter to the
3 juvenile court for a decline hearing. *Mora* , 138 Wn.2d at 54 . However, the parties disagree as to the
4 appropriate remedy for the trial court's failure to remand for a decline hearing.

5 In *Dillenburg* , 70 Wn.2d at 333 , the petitioner filed for a writ of habeas corpus in superior court, arguing
6 he was improperly tried in adult court. This court initially concluded that the petitioner had been
7 improperly transferred to adult court and reversed for a new trial. *Id.* at 345-46. However, upon
8 reconsideration, the court concluded that where the petitioner has demonstrated that a transfer from
9 juvenile court was faulty, the proper remedy is a de novo hearing in superior court on whether declination
10 of juvenile jurisdiction would have been appropriate. *Id.* at 355. If declination would have been
11 appropriate, then the conviction stands. *Id.* Otherwise, the conviction is set aside and a new trial must
12 occur in adult criminal court if the defendant has since turned 18. *Id.* at 356. Subsequently, Washington
13 courts have consistently applied this remedy when lack of adult criminal jurisdiction is successfully
14 argued on appeal. See *Mendoza-Lopez* , 105 Wn. App. at 390 ; *Anderson* , 83 Wn. App. at 522 .

15 The petitioner asserts that the *Dillenburg* remedy is no longer applicable, and the appropriate remedy is
16 now outright dismissal, rather than remand for a *Dillenburg* hearing. Dalluge bases this argument on a
17 post- *Dillenburg* case, in which the defendant claimed that the prosecution delayed filing charges until
18 after his 18th birthday, resulting in a loss of juvenile court jurisdiction. See *State v. Dixon* , 114 Wn.2d
19 857 , 860, 792 P.2d 137 (1990) The *Dixon* court adopted a three-part test for determining whether
20 preaccusatorial delay violated a defendant's right to due process where the result was a loss of juvenile
21 jurisdiction, but the test is clearly inapplicable here since there is no claim of preaccusatorial delay. See
22 *id.* Moreover, unlike the prosecutor in *Dixon* , the State in this case did not have any particularized duty
23 to ensure that Dalluge's case was remanded after the amended information. See , e.g ., *Mora* , 138 Wn.2d
24 at 54 (containing no discussion of a prosecutorial duty to insist on remand). Therefore, *Dixon* is

1 inapposite. Most fundamentally, *Dillenburg* has not been overruled, and Washington courts continue to
2 implement its remedy.

3 The dissent asserts that a *Dillenburg* hearing is not required here, claiming that there is no authority for
4 the proposition that an automatic decline that was valid when it occurred is retroactively invalid as the
5 result of a subsequent amendment to the charging instrument. Dissent at 795. Yet *Mora* seems to be
6 exactly that case, and in *Morawe* remanded for further proceedings. 138 Wn.2d at 54 . Here too, we
7 remand for further proceedings, specifically a *Dillenburg* hearing, the proper remedy under Washington
8 case law. We conclude that where the defendant has since turned 18, the appropriate remedy for a trial
9 court's failure to remand to juvenile court is remand to the adult criminal court for a de novo hearing on
10 whether declination would have been appropriate. If declination would have been appropriate, then the
11 conviction stands, but if not, the defendant is entitled to a new trial.

12 Ineffective Assistance of Appellate Counsel

13 Dalluge's appellate counsel neglected to argue that the trial court had erred by failing to remand for a
14 decline hearing once the amended information was filed. Because the appellate court would have been
15 required to remand to superior court for a *Dillenburg* hearing, Dalluge argues that he suffered prejudice as
16 a result. The United States Supreme Court has recognized that a criminal defendant has a right to have
17 effective assistance of counsel on his first appeal of right. *Evitts v. Lucey* , 469 U.S. 387, 396, 105 S. Ct.
18 830, 83 L. Ed. 2d 821 (1985). A criminal defendant's first opportunity to raise an ineffective assistance of
19 appellate counsel claim is often on collateral review. *See , e.g ., Maxfield* , 133 Wn.2d 332 . This court has
20 held that [i]n order to prevail on an appellate ineffective assistance of counsel claim, petitioners must
21 show that the legal issue which appellate counsel failed to raise had merit and that they were actually
22 prejudiced by the failure to raise or adequately raise the issue. *Id .* at 344. Failure to raise all possible
23 nonfrivolous issues on appeal is not ineffective assistance, and the exercise of independent judgment in
24 deciding what issues may lead to success is the heart of the appellate attorney's role. *Lord* , 123 Wn.2d at

1 314 . Yet if a petitioner can show that his appellate counsel failed to raise an issue with underlying merit,
2 then the first prong of the ineffective assistance test is satisfied. *Maxfield* , 133 Wn.2d at 344 . In this
3 case, it is important to note that *Mora* , 138 Wn.2d 43 , was decided in June 1999, before the decision in
4 Dalluge's first appeal was filed in November 1999. *Dalluge* , 1999 WL 1079190, 1999 Wash. App.
5 LEXIS 2011. *Mora* firmly established that after an amended charge destroys the automatic jurisdiction of
6 adult criminal court, the case should be remanded to the juvenile court for a decline hearing. Had
7 Dalluge's appellate counsel raised this argument, his case would have been remanded to the appropriate
8 division of the superior court. Thus, Dalluge has established that his appellate counsel failed to raise a
9 meritorious issue. *See Maxfield* , 133 Wn.2d at 344 . Under the second prong of the ineffective assistance
10 of appellate counsel test, this court has required that the petitioner show that he was "actually prejudiced
11 by the failure to raise or adequately raise the issue." *Id.* ; *see also Lord* , 123 Wn.2d at 314 . In *Smith v.*
12 *Robbins* , 528 U.S. 259, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000), the United States Supreme Court
13 reiterated that the proper standard for evaluating claims of ineffective assistance of appellate counsel
14 derives from the standard set forth in *Strickland v. Washington* , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.
15 2d 674 (1984). *Smith* , 528 U.S. at 285. The Court held that Robbins was required to demonstrate
16 prejudice. "[t]hat is, he must show a reasonable probability that, but for his counsel's unreasonable failure
17 to file a merits brief, he would have prevailed *on his appeal* ." *Id.* at 285-86 (emphasis added) (the
18 Supreme Court's requirement that the defendant must show " 'a reasonable probability that, but for
19 counsel's unprofessional errors, the result of the proceeding would have been different.' " (emphasis
20 added) (quoting *Strickland* , 466 U.S. at 694). As noted above, had appellate counsel raised the issue of
21 the trial court's failure to remand for a decline hearing, Dalluge would have been entitled to a de
22 novo *Dillenburg* hearing. Therefore, we conclude that Dalluge was prejudiced by his appellate counsel's
23 ineffective assistance. Although generally the remedy for ineffective assistance of appellate counsel is
24 reinstatement of the appeal and remand. *In re Personal Restraint of Frampton* , 45 Wn. App 554, 563,
726 P.2d 486 (1986). Dalluge urges this court, in the interests of efficiency, to resolve the trial court error

1 under the standard of review applicable upon direct appeal. *See id.* (recognizing resolution on the merits
2 would be appropriate if the record were sufficient). Because no further information is needed, we
3 conclude that the trial court indeed erred when it failed to remand for a decline hearing after the amended
4 information was filed. Because Dalluge is now over 18, remedy for such error on direct appeal is remand
5 to the adult criminal court for a de novo *Dillenburg* hearing. Because we remand to the superior court for
6 a de novo *Dillenburg* hearing, we need not address the petitioner's remaining arguments. . . . Dalluge's
7 petition is not procedurally barred because the adult criminal court did not have jurisdiction over his case.
8 We hold that the trial court erred in failing to remand for a decline hearing after the amended information
9 destroyed its jurisdiction. Dalluge suffered prejudice resulting from ineffective assistance of appellate
10 counsel because his appellate counsel failed to raise this lack of jurisdiction on direct appeal. The
11 personal restraint petition is granted, the Court of Appeals is reversed, and this matter is remanded to
12 superior court for a decline hearing consistent with the procedure set forth in *Dillenburg*

13 ALEXANDER , C.J ., and SANDERS , CHAMBERS , OWENS , and FAIRHURST , JJ ., concur .

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16 in a "limited sense." *Sheppard v. Rhay* , 73 Wn.2d 734 , 736, 440 P.2d 422 (1968). It is not, for example,
17 like "subject matter jurisdiction," which cannot be waived. Juvenile court jurisdiction can be
18 waived. *E.g.* , *Sheppard* , 73 Wn.2d 734 ; *Nelson v. Seattle Mun. Court* , 29 Wn. App. 7 , 627 P.2d 157
19 (1981). Here, the issue is whether the adult court loses the authority to try a juvenile when he or she has
20 been automatically subjected to adult criminal court jurisdiction because a serious violent offense has
21 been charged, and the State thereafter amends the information to charge an offense within the juvenile
22 court's jurisdiction. Nothing in the Basic Juvenile Court Act, chapter 13.04 RCW, prescribes that the adult
23 criminal court loses jurisdiction in these circumstances.

1 The majority assumes, however, that the court held in *State v. Mora* , 138 Wn.2d 43 , 977 P.2d 564
2 (1999) that the adult criminal court inevitably loses its authority to render a judgment once the
3 information is amended to charge only offenses not subject to the automatic decline provisions. *Mora* ,
4 however, simply does not stand for this proposition. Instead, *Mora* clearly contemplates the necessity of a
5 timely objection.

6 In *Mora* , a 17-year-old was originally charged in adult court based on the date of birth he had given. At
7 arraignment, defense counsel objected to adult court jurisdiction on the basis that Mora was actually 17
8 years old. *Mora* , 138 Wn.2d at 46 . On the day a hearing was scheduled to hear evidence on Mora's age,
9 the prosecutor moved to amend the information to add a charge that subjected Mora to the automatic
10 decline provisions of RCW 13.04.030 (1)(e)(v). The court allowed the amendment. Later, the prosecutor
11 filed a second amended information that reduced the charged offenses: as amended, the information did
12 not charge any offense within the automatic decline provisions of RCW 13.04.030 (1)(e)(v). *Mora* , 138
13 Wn.2d at 47 . Mora was tried as an adult. After he was found guilty, his counsel moved for an arrest of
14 judgment, challenging the adult trial court's authority to render judgment. *Id* . The trial court denied the
15 motion. *Id* .

16 This court reversed. The court found that the legislature intended that only certain crimes will trigger
17 automatic decline, and that RCW 13.04.030 (1)(e)(v) nowhere suggests legislative intent that the
18 offender's juvenile status is forever lost based on a prosecutor's charging decision. *Mora* , 138 Wn.2d at
19 51 -52. However, to obtain the adult court's reexamination of whether it has authority under
20 RCW 13.04.030 (1) and transfer of the case to the juvenile court, a timely challenge is
21 required. *Mora* , 138 Wn.2d at 53 . The court in *Mora* noted that "Washington case law . . . holds that
22 upon a *timely challenge* , jurisdiction may be terminated, even in the middle of the proceedings, if the trial
23 court lacks jurisdiction over the juvenile." *Mora* , 138 Wn.2d at 53 . The court made it clear that the
24 defendant's right to be tried as a juvenile is subject to waiver if the right is not invoked upon a timely

1 challenge. *Mora*, 138 Wn.2d at 53, 54 n.8; *see also Sheppard*, 73 Wn.2d 734 (offender waived the right
2 to be heard in juvenile court where he deliberately misrepresented his actual age, and his counsel did not
3 raise the issue or reveal his age at trial); *Nelson*, 29 Wn. App. 7 (claim of the right to be treated as a
4 juvenile waived where the offender deliberately misrepresented her age throughout the trial and only
5 challenged adult court jurisdiction when faced with revocation of her probation). Here, there was no
6 timely objection to adult court jurisdiction, and Dalluge did not assert a right to be treated as a juvenile.
7 Accordingly, Dalluge waived any challenge to the authority of the adult criminal court. The majority
8 maintains, however, that waiver can be found only in cases where the defendant has deliberately
9 misrepresented his or her age. Majority at 781-82, 782. However, in the only case where this court held
10 that intentional misrepresentation of age constitutes waiver, the court never indicated that waiver cannot
11 be found in other circumstances. *Sheppard*, 73 Wn.2d 734. The fact that waiver is found in age
12 misrepresentation cases instead demonstrates that the statutory right to be treated as a juvenile can be
13 waived, and nothing in the statute itself limits the circumstances where waiver can occur. In addition, the
14 court in *Sheppard* found waiver resulted from the defendant's own willful acts *and* from counsel's failure
15 to raise the issue. *Sheppard*, 73 Wn.2d at 739. This suggests that failure to object to trial in adult court is
16 a basis for finding waiver. Finally, as explained, *Mora* instructs that waiver can be found where there is
17 no timely challenge. The majority also concludes that waiver cannot be found unless the juvenile court
18 itself also waives juvenile court jurisdiction. Majority at 780 n.3, 782-83. The majority is confusing use of
19 the term in RCW 13.40.110 (1), under which a decline hearing must be held unless all parties, their
20 counsel, and the juvenile court waives the decline hearing, and the issue here, a juvenile's waiver through
21 the failure to timely object to the adult court's continued jurisdiction following automatic decline. Here,
22 juvenile court jurisdiction had already been declined as mandated by law, and there is no question of the
23 juvenile court itself waiving a decline hearing. Nothing in the statute or the case law requires that the
24 juvenile court must agree under RCW 13.40.110 (1) to waiver in order for the juvenile to waive the right
to a decline hearing through failure to timely object once the adult court has obtained jurisdiction under

1 the automatic decline provisions, and the information is thereafter amended to charge a crime not coming
2 within those decline provisions . . . in response to the State's argument that this personal restraint petition
3 is procedurally barred by RCW 10.73.090 , the majority concludes that Dalluge's judgment and sentence
4 is invalid on its face, and therefore the time bar does not apply. As explained, however, the adult court did
5 not lack jurisdiction. . . Finally, assuming the adult court lacked authority to try this case, the majority's
6 choice of remedy is not justified by *Dillenburg* , 70 Wn.2d 331 . In *Dillenburg* the petitioner was
7 transferred to adult court following a decline decision made by a probation officer without a formal
8 hearing. *Dillenburg* , 70 Wn.2d at 334 -35. The petitioner pleaded guilty. Following his conviction, he
9 filed a petition for a writ of habeas corpus claiming, among other things, that the order surrendering
10 jurisdiction of the juvenile court was void because it was not signed by a judge of the superior
11 court. *Dillenburg* , 70 Wn.2d at 333 . This court relied on *Kent v. United States* , 383 U.S. 541, 86 S. Ct.
12 1045, 16 L. Ed. 2d 84 (1966), in which the United States Supreme Court held that procedural due process
13 requires, before an offender may be transferred to adult court, that a judicial hearing be held to determine
14 whether the juvenile court's jurisdiction should be declined. *Dillenburg* , 70 Wn.2d at 344 -45
15 (quoting *Kent* , 383 U.S. at 552-54). The court in *Dillenburg* determined that the juvenile probation
16 officer lacked authority to perform the function of a judge and held the transfer void because there was no
17 valid declination hearing. *Dillenburg* , 70 Wn.2d at 342 -45. On reconsideration, the court held that the
18 due process requirement is satisfied by a de novo hearing to determine the propriety of the transfer to
19 adult court. *Dillenburg* , 70 Wn.2d at 345 . Thus, the requirement of a *Dillenburg* hearing is based on
20 procedural due process requirements.

21 WHEREFORE, Appellant, Lavelle X. Mitchell, request this Honorable Court to vacate the
22 judgment of conviction and set aside the order denying appellant's 60(b) motion on the grounds that the
23 judgment is void, the court lacked jurisdiction and the counsel for defendant was ineffective and created a
24 miscarriage of justice requiring a reversal of the trial court in its entirety.

1 Respectfully Submitted.

2 Lavelle Mitchell

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9 Certificate of Service

10 I, Lavelle X. Mitchell, declare under the penalty of perjury for the state of Washington that I caused to be
11 served on the State of Washington, Plaintiff/Respondent a true copy of the above via Regular U.S. Mail
12 and hand delivering a copy to King County Prosecuting Attorney's Office, 516 Third Avenue S., Seattle,
13 Washington 98104.

14 Lavelle Mitchell

15 Lavelle X. Mitchell, Pro Se Appellant/Counsel
16 In Custody

17 Attorney for Defendant

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