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Supreme Court No. ____
COA No. 58369-1-II

Case #: 1041900

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JARROD A. AIRINGTON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR
GRAYS HARBOR COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jarrod Airington, the petitioner here and appellant below, asks this Court to accept review of the Court of Appeals' decision termination review. RAP 13.3, 13.4.

B. COURT OF APPEALS DECISION

Mr. Airington seeks review of the Court of Appeals' published decision dated March 18, 2025, *State v. Airington*, __ Wn. App. 2d __, 565 P.3d 656 (2025). The Court of Appeals denied reconsideration on April 30, 2025. Both decisions are appended here.

C. ISSUES PRESENTED FOR REVIEW

1. An individual may raise an argument in a successive collateral attack if the subsequent petition does not raise the same argument as a previous petition, and the individual shows "good cause" for not previously raising the argument. Mr. Airington filed a successive (yet timely) collateral attack challenging the trial court's inclusion of three prior offenses in his offender score. The court

concluded it had jurisdiction over the motion but denied it on the merits. On appeal, the State did not argue Mr. Airington lacked good cause. The Court of Appeals nevertheless held Mr. Airington did not have good cause and affirmed. It did not reach the merits.

The Court of Appeals' decision is erroneous and requires review. First, the court violated the rule of party presentation. Second, if the Court of Appeals believed good cause was an issue, it should have remanded for fact-finding. Third, even assuming remand was unnecessary, the court still erred by affirming because the record sufficiently demonstrated good cause. Fourth, even if good cause was lacking, the Court of Appeals should have transferred the case to this Court instead of affirming. The Court of Appeals decision conflicts with precedent from this Court and the Court of Appeals. This Court should grant review to resolve the confusion generated by the Court of Appeals' published decision. RAP 13.4(b)(1), (b)(2), (b)(4).

2. A court may not utilize a constitutionally invalid conviction in calculating an offender score. A conviction is invalid if it is predicated on a facially defective charging document. The trial court utilized three prior felon in possession of a firearm convictions in calculating Mr. Airington's offender score. In those three cases, the State used informations that omitted the essential element of knowledge. The court incorrectly included these convictions in Mr. Airington's offender score, increasing it by three points. The Court of Appeals did not reach this issue. This Court should grant review and resolve whether a previous conviction that rests on an invalid charging document may be included in an offender score. RAP 13.4(b)(3), (b)(4).

D. STATEMENT OF THE CASE

A jury convicted Mr. Airington of first-degree kidnapping, second-degree assault, two counts of possession with intent to deliver, and first-degree unlawful possession of a firearm. CP 13–14. The trial court imposed an exceptional

sentence of 434 months under the free crimes aggravator. CP 15–18, 26–27. The court noted the offender score was likely more than 16. RP 5; CP 51.

Mr. Airington appealed, arguing the court's inclusion of drug convictions in his offender score was incorrect under *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). CP 41, 51. The Court of Appeals agreed and remanded for resentencing. *State v. Airington*, 19 Wn. App. 2d 1023, 2021 WL 4472068, at *9 (Sept. 30, 2021) (*see* GR 14.1(a)).

Resentencing occurred on April 15, 2022. CP 67. The trial court calculated his current offenses as four points and his prior offenses as seven points. CP 106. The prior offenses included, *inter alia*, three felon in possession of a firearm convictions. CP 58–60, 106.

The court concluded Mr. Airington had an offender score of 11 for the kidnapping conviction, which engendered a standard range of 149 to 198 months. CP 60; RP 16. Because his offender score was significantly lower than it

was beforehand, the court declined to enter an exceptional sentence and instead imposed 198 months in prison. RP 15–16. The court ordered the sentences for the other counts—all of which were lower than 198 months—to run concurrently to the 198-month sentence. RP 16; CP 60–62.

Roughly a month later, Mr. Airington filed a CrR 7.8 motion, arguing insufficient evidence supported his first-degree unlawful possession of a firearm conviction. Slip Op. at 2. The trial court transferred the motion to the Court of Appeals for consideration as a PRP, which the court denied on the merits. Slip Op. at 2–3.

Several months later, Mr. Airington filed another PRP in the Court of Appeals, which was transferred to this Court. Slip Op. at 3. A commissioner of this Court dismissed the PRP. Slip Op. at 3.

Mr. Airington filed the CrR 7.8 motion at the heart of this case in March 2023, roughly eleven months after his resentencing. CP 78–79. In his pro se motion, he argued the

trial court erred by "including three felony firearm convictions to his offender score calculation that are facially invalid [due] to insufficient charging document informations." CP 82. The three convictions were from 1995, 1997, and 1999. CP 85–89. The informations in those cases alleged Mr. Airington possessed a firearm without alleging his possession was knowing, unlawful, or felonious. CP 96, 100, 103.

Mr. Airington argued these convictions were invalid because the informations omitted the essential element of knowledge. CP 84–89. As a result, he contended the court erred by scoring these three convictions. CP 84–89.

Mr. Airington pleaded good cause in his motion. When he was researching the issues for his initial collateral attack, Mr. Airington discovered law that indicated his three felon in possession of a firearm convictions should not have scored. CP 83. He immediately requested documents from

the trial court, and he filed his CrR 7.8 motion as soon as he received the charging documents. CP 82.

In response, the State did not argue Mr. Airington lacked good cause. CP 105–11; RP 19–21. Instead, it contended the informations sufficiently alleged the knowing element because they charged Mr. Airington with "unlawful" possession. CP 107.

The trial court found it had "jurisdiction over the parties and the subject matter herein." CP 110. It nevertheless denied Mr. Airington's motion, reasoning the term "unlawfully" in the charge sufficiently alleged "the knowledge element with respect to the unlawful possession of a firearm."[1] CP 110; RP 19–20.

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[1] In fact, only one information charged Mr. Airington with the offense of "unlawful possession of a firearm." CP 103. This information, however, only contended Mr. Airington possessed a weapon. CP 103. The other two informations charged Mr. Airington with the offense of "felon in possession of a firearm." CP 96, 100.

On appeal, Mr. Airington argued the trial court improperly denied his motion because the prior convictions did not legally charge an offense. The State did not dispute good cause.

Yet, acting sua sponte and without giving the parties an opportunity to brief the issue, the Court of Appeals held Mr. Airington lacked good cause and affirmed. Slip Op. at 4–6. It did not remand the case to the trial court, address the merits, or transfer the case to this Court. Slip Op. at 6.

E. LAW AND ARGUMENT

1. The Court of Appeals erroneously denied Mr. Airington's appeal on the basis of good cause. Its published decision conflicts with precedent and engenders confusion about the procedural requirements for successive motions.

The trial court correctly exercised jurisdiction over Mr. Airington's successive collateral attack. At no point did the State claim otherwise. Yet, for the first time on appeal, the Court of Appeals sua sponte found the trial court incorrectly failed to consider good cause. Slip Op. at 1. It

then held Mr. Airington failed to demonstrate good cause. Slip Op. at 4. It affirmed the trial court's denial of Mr. Airington's motion on this alternative basis.

The Court of Appeals' published decision suffers several flaws. It violated the rule of party presentation, ignored the need for remand for further fact-finding, incorrectly found a lack of good cause, and flouted precedent by affirming instead of transferring the case to this Court. The court's decision creates deep uncertainty about the procedural requirements for successive post-conviction motions. This Court should grant review. RAP 13.4(b)(1), (b)(2), (b)(4).

a. The Court of Appeals improperly resolved this case based on good cause, even though no party advocated for that result.

No one challenged the trial court's conclusion that it had jurisdiction to resolve Mr. Airington's CrR 7.8 motion on the merits. But the Court of Appeals ignored how the parties framed the case and instead sua sponte resolved it on

the basis of good cause. This decision violated the rule of party presentation and contravened this Court's precedent.

Mr. Airington was resentenced on April 15, 2022. CP 67. Roughly 11 months later, Mr. Airington filed a pro se CrR 7.8(b)(1) motion in the trial court. CP 78–79. There, Mr. Airington openly acknowledged he had two pending PRPs. CP 81–82. He contended he could not include his offender score argument in his earlier petition because he was waiting for "supporting documents." CP 82. In response, the State argued Mr. Airington's prior convictions rested on sufficient charging documents and were thus facially valid convictions. CP 107–08.

Before denying the motion, the trial court found it "ha[d] jurisdiction over the parties *and subject matter*" in Mr. Airington's CrR 7.8 motion. CP 110 (emphasis added). This jurisdictional finding necessarily included a finding that Mr. Airington had good cause.

RCW 10.73.140 is a jurisdictional statute. *In re Pers. Restraint of Turay*, 153 Wn.2d 44, 49, 101 P.3d 854 (2004); *accord In re Pers. Restraint of Perkins*, 143 Wn.2d 261, 265, 19 P.3d 1027 (2001). The statute grants a reviewing court "jurisdiction to decide successive personal restraint petitions raising new issues." *Turay*, 153 Wn.2d at 49. By its terms, it grants jurisdiction if: (1) the subsequent petition does not raise the same arguments as a previous petition, and (2) the petitioner shows "good cause" for not raising the argument in the previous petition. RCW 10.73.140; *see In re Pers. Restraint of Bell*, 187 Wn.2d 558, 563, 387 P.3d 719 (2017).

The trial court found it had jurisdiction to address Mr. Airington's successive CrR 7.8 motion, and neither the State nor Mr. Airington challenged this finding on appeal. "Unchallenged findings are verities on appeal." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). And "[u]nchallenged conclusions of law become the law of the case." *Rush v. Blackburn*, 190 Wn. App. 945, 956, 361 P.3d

217 (2015). Unchallenged conclusions or findings "cannot be considered" by the reviewing court. *Murray v. Mossman*, 52 Wn.2d 885, 891, 329 P.2d 1089 (1958).

But the Court of Appeals—for the first time and without giving the parties an opportunity to brief the issue—resolved the case by holding Mr. Airington did not have good cause. Slip Op. at 4–6. This holding violated the rule of party presentation.

"Washington courts generally follow the rule of party presentation under which appellate courts 'normally decide only questions presented by the parties.'" *Dalton M, LLC v. N. Cascade Tr. Servs., Inc.*, 2 Wn.3d 36, 50, 534 P.3d 339 (2023) (quoting *Greenlaw v. United States*, 554 U.S. 237, 244, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008)). "It is 'our settled policy' that 'an appellate court must not adjudicate resolved, separate and distinct claims that are not raised by any party on appeal.'" *Id.* at 51 (quoting *Clark Cnty. v. W. Washington*

Growth Mgmt. Hearings Review Bd., 177 Wn.2d 136, 146, 298 P.3d 704 (2013)).

It is worth noting the court deviated from this rule to affirm the *denial* of Mr. Airington's pro se motion. "To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights." *Greenlaw*, 554 U.S. at 244. By any measure, the Court of Appeals violated the rule of party presentation and this Court's precedent by affirming this case based on good cause. This Court should grant review. RAP 13.4(b)(1).

b. Even if the Court of Appeals could consider good cause, the proper remedy would have been remand to the trial court, not outright affirmance.

Even if the Court of Appeals could have considered the good cause issue on appeal, affirmance would still have been incorrect. If a reviewing court is concerned that the trial court neglected to consider good cause, the remedy is

remand. The Court of Appeals conflicted with its precedent by affirming this case. RAP 13.4(b)(2).

In *In re Pers. Restraint of Vasquez*, 108 Wn. App. 307, 309–10, 31 P.3d 16 (2001), the petitioner filed a CrR 7.8 motion alleging ineffective assistance of counsel, which was converted into a PRP and consolidated with the petitioner's direct appeal. The Court of Appeals affirmed without resolving the ineffective assistance issue. *Id.* at 310. A year later, the petitioner filed another PRP, again arguing ineffective assistance of counsel. *Id.* at 310–11. The State argued the PRP was procedurally barred under RCW 10.73.140 without addressing the merits. *Id.* at 311.

The Court of Appeals agreed with the State. *Id.* The court held the petitioner's subsequent collateral attack invoked the requirements in RCW 10.73.140. *Id.* at 313. As a result, it held the petitioner "is barred by RCW 10.73.140 from filing successive petitions without good cause." *Id.* at 314.

But the Court of Appeals did not dismiss the PRP. It held the proper remedy was remand "to the trial court for a reference hearing to determine whether Vazquez can show good cause." *Id.* at 315.

The same should have happened here. Despite the trial court's explicit jurisdictional finding, the Court of Appeals held the trial court failed to consider good cause. Slip Op. at 4. If the Court of Appeals was concerned that Mr. Airington did not have good cause, the proper remedy was remand to the trial court for more factual development. *Vasquez*, 108 Wn. App. at 315. Depriving Mr. Airington of his ability to develop the record is particularly unfair because, while he pleaded good cause below, no one disputed him on this front until the Court of Appeals issued its decision.

Thus, the Court of Appeals should have remanded the case for further factual development instead of affirming. *Vasquez*, 108 Wn. App. at 315. The court's decision conflicts

with other published decisional law, warranting review. RAP 13.4(b)(2).

c. Even if remand was not required, the record sufficiently demonstrated good cause.

Assuming further that the record is sufficient to determine good cause and remand was not required, the Court of Appeals still erred. The uncontested facts in the record suggest Mr. Airington had good cause to file a successive CrR 7.8 motion. The Court of Appeals ruled otherwise, creating confusion about whether a person—especially if acting pro se—can demonstrate good cause.

"The purpose of RCW 10.73.140 is to limit collateral review." *Vasquez*, 108 Wn. App. at 313. But at the same time, this Court has "recognize[d] the role of collateral review in preserving constitutional liberties and remedying prejudicial error." *State v. Brand*, 120 Wn.2d 365, 368–69, 842 P.2d 470 (1992). "Thus, in balancing these competing interests, we limit collateral review, but not so rigidly as 'to

prevent the consideration of serious and potentially valid claims.'" *Id.* at 369 (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 809, 792 P.2d 506 (1990)).

To determine the existence of good cause, courts make the distinction "between an 'external objective impediment,' which can establish good cause, and 'self-created hardship,' which cannot." *State v. Crumpton*, 90 Wn. App. 297, 302, 952 P.2d 1100 (1998) (quoting *State v. Dearbone*, 125 Wn.2d 173, 180–81, 883 P.2d 303 (1994)).

In *Crumpton*, the court found no good cause where the defendant claimed he could not include testimonial affidavits in a previous petition because he was incarcerated and lacked the funds to hire an investigator and interview witnesses. *Id.* at 302–03.

In *State v. Fletcher*, 19 Wn. App. 2d 566, 580, 497 P.3d 886 (2021), the court found no good cause where the defendant did not challenge his offender score in his initial collateral attack. The defendant waited three years to file his

subsequent motion, but the argument was both legally and factually available to him when he filed his initial motion. *Id.* The defendant possessed a copy of his criminal history and the judgment and sentence when he originally filed the motion, which the court found was a sufficient factual record to make the offender score argument. *Id.*

The facts here are significantly distinct from either *Fletcher* or *Crumpton*. Unlike *Fletcher*, Mr. Airington did not wait an exceedingly long period to file his successive petition. He filed it four months after his initial collateral attack and 11 months after resentencing.

In his motion, Mr. Airington explained that, when he was researching the issue for his initial collateral attack, he uncovered law that indicated three of his prior convictions for unlawful possession of a firearm should not have been scored. CP 83. He further explained that, upon discovering this law, he sought documentation about his older convictions. CP 82.

He needed the charging documents from his 1995, 1997, and 1999 convictions before he could make his offender score argument. *Cf. State v. Yuen*, 23 Wn. App. 377, 379–80, 597 P.2d 401 (1979) (observing the State may obtain a continuance if they need more time to obtain evidence for trial). He filed this motion as soon as he received the necessary charging documents. CP 82.

While RCW 10.73.140 lacks an explicit due diligence requirement, the fact Mr. Airington was able to collect these old court documents and file his motion within the one-year procedural bar supports his good cause argument. *Fletcher*, 19 Wn. App. 2d at 580–81. And, unlike *Fletcher*, there is no indication Mr. Airington could have made these arguments without the charging documents from his prior convictions.

This is also not a situation where Mr. Airington languished with self-created hardships. Unlike *Crumpton*, he did not excuse his successive filing because of his incarceration. Nor did he claim he could not file his motion

because he lacked resources. His sole claim was that he needed charging documents to file his motion, which required him to wait for the trial court to provide these documents. The record indicates Mr. Airington filed his motion as soon as he could. Good cause existed for his successive motion.

Even if not, the Court of Appeals could have construed Mr. Airington's successive motion as an amendment to his pending PRP. The Court of Appeals even acknowledged this in its decision. Slip Op. at 2–3, 6.

Mr. Airington was pro se when he filed his collateral attacks. *See, e.g., In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 565, 243 P.3d 540 (2010) (relaxing procedural rules on collateral attack when the petitioner files successive PRPs pro se). Courts should facilitate adjudication on the merits without resolving cases on procedural grounds. *State v. Turner*, 156 Wn. App. 707, 711, 235 P.3d 806 (2010). The Court of Appeals intimated it could have bypassed the

procedural issues here, yet it declined to do so without explanation.

For these reasons, the record in this case demonstrates Mr. Airington had good cause to file a successive collateral attack. Even if not, the Court of Appeals should still have reached the merits. This Court has not considered how a person demonstrates good cause to file a successive collateral attack. Without this guidance, courts will continue to produce inconsistent, unfair, and confusing results—as the Court of Appeals did here. RAP 13.4(b)(4).

d. Assuming none of the above is true, the Court of Appeals still erred by refusing to transfer this case to this Court.

Assuming none of the above is true, the Court still erred by affirming the dismissal of Mr. Airington's CrR 7.8 motion. If good cause does not exist to justify a successive collateral attack, the remedy is transferal to this Court, not affirmance or dismissal.

In a footnote, the Court of Appeals ruled it could not "transfer" this case to this Court because the trial court decided Mr. Airington's motion on the merits. Slip Op. at 6 n.5. This conflicts with several binding decisions from this Court.

"When the Court of Appeals determines that its review is barred under RCW 10.73.140 but that RAP 16.4(d) might allow this court to entertain the petition, the proper practice is to transfer the petition to this court, where RCW 10.73.140 does not apply." *In re Pers. Restraint Martinez*, 171 Wn.2d 354, 362, 256 P.3d 277 (2011). The law "explicitly requires the case *shall not be dismissed* but *shall* be transferred to the proper court." *Perkins*, 143 Wn.2d at 265 (emphasis in original). Several cases from this Court clearly state the Court of Appeals must transfer a collateral attack to the Supreme Court instead of dismissing it. *Id.*; *Bell*, 187 Wn.2d at 562; *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 260–61, 111 P.3d 837 (2005); *Adolph*, 170 Wn.2d at 564; *In re Pers.*

Restraint of Stoudmire, 145 Wn.2d 258, 262–63, 36 P.3d 1005 (2001).

Holding otherwise would create inconsistent, unfair procedural rules. Under this Court's precedent:

> The Court of Appeals retains the power under RAP 16.4(d) to dismiss successive PRPs seeking the same relief. Furthermore, the Supreme Court may dismiss successive PRPs based on new grounds if it determines there has been an abuse of writ. But no further procedural obstacles are placed in the path of a petitioner raising new grounds in a successive PRP.

Perkins, 143 Wn.2d at 267 (footnote and citation omitted). The Court of Appeals attempts to graft a new obstacle onto this procedural framework.

If a defendant moves under CrR 7.8, and the trial court denies the motion on the merits, the Court of Appeals' decision permits dismissal for a lack of good cause. Slip Op. at 5–6. But if the trial court instead transfers the CrR 7.8 motion to the Court of Appeals, the Court of Appeals would have to further transfer the collateral attack to the Supreme

Court. This distinction creates an artificial and unfair roadblock for defendants if a trial court resolved their collateral attack on the merits. *See State v. Hayden*, 72 Wn. App. 27, 32–33, 863 P.2d 129 (1993) (courts must construe statutory frameworks to avoid equal protection issues).

Using RCW 10.73.140 to dismiss adjudicated CrR 7.8 motions but not PRPs makes no sense, and it does not comport with binding Supreme Court precedent. "RCW 2.06.030 compels the Court of Appeals to transfer a successive petition that raises new grounds, and that is not time-barred, to" the Supreme Court. *Bell*, 187 Wn.2d at 562.

If good cause did not exist here, the Court of Appeals should have transferred this case to this Court. Its failure to do so conflicts with this Court's precedent and creates confusion about how to comply with procedural requirements for successive collateral attacks. This Court should grant review. RAP 13.4(b)(1), (b)(4).

2. This Court should grant review and resolve whether a conviction from a case with an invalid charging document may be included in an offender score.

Mr. Airington has convictions for unlawful possession of a firearm from 1995, 1997, and 1999. CP 58–60, 106. In each of these three prior convictions, the State used an information that contended Mr. Airington possessed a firearm. CP 96, 100, 103. But in each information, the State neglected to allege Mr. Airington's possession was knowing, unlawful, or felonious. CP 96, 100, 103. Because these charging documents failed to include the requisite mens rea, they failed to charge a crime and were thus facially defective. *State v. Marcum*, 116 Wn. App. 526, 535, 66 P.3d 690 (2003).

The trial court nevertheless used these invalid convictions when it calculated Mr. Airington's offender score. Without these convictions, Mr. Airington's offender score would be eight. CP 60, 106. The Court of Appeals did

not resolve this issue. This Court should grant review and resolve whether a prior conviction from a case with an invalid charging document may count in an offender score. RAP 13.4(b)(3), (b)(4).

a. A court can correct an illegal sentence in post-conviction litigation.

"A trial court only possesses the power to impose sentences provided by law." *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). A court may not use a constitutionally invalid conviction in calculating an offender score. *State v. Gonzalez*, 25 Wn. App. 2d 295, 298–99, 523 P.3d 800 (2023). When the court miscalculates an offender score, the court miscalculates the standard range and imposes a sentence in excess of its statutory authority. *Fletcher*, 19 Wn. App. 2d at 577.

"A sentence that lacks statutory authority cannot stand." *State v. Wilson*, 170 Wn.2d 682, 688, 244 P.3d 950 (2010). "Moreover, a sentence that is based upon an

incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). A defendant can challenge an incorrectly calculated offender score in a CrR 7.8(b) motion. *State v. Crawford*, 164 Wn. App. 617, 624, 267 P.3d 365 (2011).

Whether a sentence is invalid is not confined to the four corners of the judgment and sentence. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 138–39, 267 P.3d 324 (2011). Rather, this Court has endorsed consideration of certain documents in addition to the judgment and sentence. *Id.* at 139–40. The Court has specifically permitted the examination of informations in determining whether a prior conviction is valid for purposes of calculating an offender score. *Id.* at 139; *In re Pers. Restraint of Scott*, 173 Wn.2d 911, 917, 271 P.3d 218 (2012) ("We hold that charging documents . . . may be consulted to determine whether a judgment and sentence is valid on its face.").

The informations in Mr. Airington's 1995, 1997, and 1999 felony firearm convictions were invalid, rendering those convictions void and ineligible for purposes of calculating his offender score.

b. The three felony firearm convictions are invalid because the informations in each case failed to charge Mr. Airington with knowing possession of a firearm and thus failed to charge a crime.

"An offense is not properly charged unless the information sets forth every essential statutory and nonstatutory element of the crime." *State v. Pry*, 194 Wn.2d 745, 751, 452 P.3d 536 (2019). "Failure to allege each element means the information is insufficient to charge a crime and must be dismissed." *Id.* at 752. Indeed, "if any statutory element is omitted, the charging document is constitutionally defective, and the charges must be dismissed." *State v. Hopper*, 118 Wn.2d 151, 154, 822 P.2d 775 (1992).

To commit unlawful possession of a firearm, which was previously known as felon in possession of a firearm, an individual must knowingly possess a firearm. *State v. Anderson*, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000). This element does not appear in the statute, RCW 9.41.040(1)(a), so "the State cannot rely on the statutory language for the information." *Marcum*, 116 Wn. App. at 534–35. Instead, "the essential element, knowledge, must . . . be added to the information." *Id.* at 355. "The knowledge element must therefore appear in the body of the information." *Id.* "Simply to state that the offense charged is unlawful possession is not enough." *Id.*

The informations in the 1995, 1997, and 1999 cases were all defective. They charged Mr. Airington for possessing a firearm without alleging he unlawfully, knowingly, or feloniously possessed a weapon. CP 96, 100, 103. The Court of Appeals has reversed cases that featured the same defective informations. *Macrum*, 116 Wn. App. at

535; *State v. LaBounty*, 21 Wn. App. 2d 1055, 2022 WL 1155739, at *2 (April 19, 2022) (*see* GR 14.1(a)).

The convictions were constitutionally invalid as they were predicated on informations that failed to charge an offense. *See State v. Holt*, 104 Wn.2d 315, 319, 704 P.2d 1189 (1985) (recognizing that an information is "constitutionally defective" if it fails to charge a crime). These convictions are thus void and ineligible for calculation in Mr. Airington's offender score. *See State v. Lewis*, 29 Wn. App. 2d 565, 581, 541 P.3d 1051 (2024) ("[I]f a conviction is constitutionally invalid on its face, it may not be considered [for purposes of calculating an offender score]."). The trial court factored these ineligible convictions into Mr. Airington's offender score, which increased it from eight to 11. Remand for resentencing is required. *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004).

The Court of Appeals did not address this issue. While this Court has observed a defective information may make a

conviction ineligible for an offender score, it has not squarely addressed this issue. This Court should grant review. RAP 13.4(b)(4).

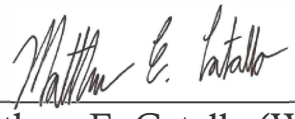
F. CONCLUSION

Mr. Airington respectfully asks this Court to accept discretionary review. RAP 13.4(b). Alternatively, in the interest of judicial economy, this Court should transfer the case to its docket for consideration as a PRP.

This petition is 4,841 words long and complies with RAP 18.7.

DATED this 16th day of May 2025.

Respectfully Submitted



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Washington State
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Division Two

March 18, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JARROD ALLAN AIRINGTON, Appellant.	No. 58369-1-II PUBLISHED OPINION

CRUSER, C.J.—Jarrod A. Airington appeals from the trial court's denial of his second CrR 7.8 motion. Because the trial court failed to determine that Airington had good cause for failing to raise his new issues in his prior collateral attacks, the trial court erred in deciding the second CrR 7.8 motion on its merits. But because the record fails to demonstrate that Airington had good cause for filing a successive CrR 7.8 motion, we affirm the trial court's decision.

FACTS

I. CONVICTION AND APPEAL

In February 2019, a jury convicted Airington of first degree kidnapping, second degree assault, two counts of unlawful possession of a controlled substance (methamphetamine and heroin) with intent to deliver, and first degree unlawful possession of a firearm. Airington appealed.

Division Three of this court affirmed the convictions but remanded the matter for resentencing following *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).[1] *State v. Airington*, No. 37975-2-III, slip op. at 1 (Wash Ct. App. Sept. 30, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/379752_unp.pdf. The appeal mandated in February 2022. The trial court entered an amended judgment and sentence on April 15, 2022.

II. PRIOR CRR 7.8 MOTION AND PERSONAL RESTRAINT PETITION

On May 20, 2022, a little over a month after entry of the amended judgment and sentence, Airington filed his first collateral attack on his judgment and sentence in the trial court. In a timely CrR 7.8 motion, he asked the trial court to find that the evidence was insufficient to support his first degree unlawful possession of a firearm conviction. The trial court transferred the motion to this court for consideration as a personal restraint petition (PRP) under CrR 7.8(c)(2) after having determined that (1) the motion was untimely under RCW 10.73.090, (2) Airington had not made a substantial showing that he was entitled to relief, and (3) resolution of the matter would not require a factual hearing.

In November 2022, Airington filed a new pleading challenging the adequacy of the charging document for the firearm offense that this court accepted as a timely supplement to his PRP. Decl. of Statement of Additional Grounds, *In re Pers. Restraint of Airington*, No. 57352-1-II at 1-2 (Wash. Ct. App. Nov. 16, 2022); Ruling, *Airington*, No. 57352-1-II (Wash. Ct. App. Nov 21, 2022).

[1] The issues raised in the appeal were not the same as the issues in the CrR 7.8 motion currently before us.

We held that this PRP was timely in light of his resentencing. *In re Pers. Restraint of Airington*, No. 57352-1-II (Wash. Ct. App. Apr. 30, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2057352-1-II%20Unpublished%20Opinion.pdf. But we denied the PRP because his arguments either lacked merit or he was unable to demonstrate actual and substantial prejudice. *Id.* at 2.

Meanwhile, on January 11, 2023, Airington initiated a second timely collateral attack on his judgment and sentence by filing a PRP in this court. We transferred this PRP to our supreme court as successive. Ord. Transferring Pet., *In re Pers. Restraint of Airington*, No. 57769-1-II (Wash. Ct. App. Mar. 28, 2024). The deputy commissioner of the supreme court dismissed the PRP as frivolous.[2] Ruling Dismissing Pers. Restraint Pet., *In re Per. Restraint of Airington*, No. 102907-1 (Wash. Apr. 9, 2024) at 4.

III. SECOND 7.8 MOTION

In March 2023, while Airington's other collateral reviews were still pending, Airington initiated a third timely collateral attack on his judgment and sentence by filing a CrR 7.8 motion in the trial court. In this motion, Airington argued that the trial court erred when it calculated his offender score because it included (1) two washed-out juvenile offenses and (2) three prior felony firearm convictions that were "facially invalid [due] to insufficient charging document informations" that omitted the "knowledge" element of the offense of unlawful possession of a firearm. Clerk's Papers at 82, 85. Airington also asserted that he had been unable to raise these

[2] In this PRP, Airington did not raise any of the issues he raised in the CrR 7.8 motion currently before us.

new issues in his earlier collateral attacks because of a "lack of documentation to support these arguments." *Id.* at 82.

The trial court considered the March 2023 motion. Without hearing argument from the parties or discussing whether Airington had good cause for not previously raising his new issues, the trial court denied the motion because it "lack[ed] merit." Verbatim Rep. of Proc. at 20.

The trial court issued written findings of fact and conclusions of law regarding the denial of the March 2023 motion. These findings addressed the merits of Airington's arguments. But they did not address whether the motion was successive or whether Airington's assertion that he could not have raised these issues in his earlier collateral attacks amounted to just cause for failing to previously raise this issue.

Airington appeals the trial court's denial of his March 2023 CrR 7.8 motion.

ANALYSIS

Airington argues that the trial court erred when it rejected his argument that his prior unlawful possession of a firearm convictions should not have been included in his offender score and denied his timely CrR 7.8 motion on the merits.[3] Because Airington's motion was a subsequent collateral attack and the trial court did not make findings regarding whether Airington had good cause for failing to raise these new grounds in his previous collateral attacks, the trial court erred by denying the motion on its merits. But because the record does not establish good cause for filing a subsequent collateral attack under RCW 10.73.140, which applies to collateral attacks brought in the trial court through CrR 7.8(b), we affirm the trial court.

[3] Airington appears to have abandoned his juvenile washout argument.

CrR 7.8 motions are a form of collateral attack and are subject to the restrictions placed on successive petitions stated in RCW 10.73.140. CrR 7.8(b);[4] *In re Pers. Restraint of Becker*, 143 Wn.2d 491, 496, 20 P.3d 409 (2001); *State v. Fletcher*, 19 Wn. App. 2d 566, 578, 497 P.3d 886 (2021). Where, as here, a defendant has already filed a prior collateral attack in the trial court, the trial court must determine whether a subsequent collateral attack is barred under RCW 10.73.140 before considering the merits of the defendant's arguments. *See State v. Brand*, 120 Wn.2d 365, 370, 842 P.2d 470 (1992) (RCW 10.73.140 applies to collateral attacks filed in the trial court by analogy through CrR 7.8(b); "a court may not consider a CrR 7.8(b) motion" if the movant does not comply with RCW 10.73.140); *Fletcher*, 19 Wn. App. 2d at 578-79. Under RCW 10.73.140, a second or subsequent collateral attack will not be considered unless the defendant certifies " 'that he or she has not filed a previous petition on similar grounds, *and* shows good cause why [they] did not raise the new grounds in the previous petition.' " *Fletcher*, 19 Wn. App. 2d at 578-79 (emphasis added) (quoting RCW 10.73.140).

The parties do not dispute that Airington raised new issues in his March 2023 CrR 7.8 motion. But, although Airington alleged in his March 2023 motion that he could not have raised his new issues in his prior collateral attacks because he did not have access to the necessary documentation, the trial court never addressed whether this amounted to good cause for failing to previously raise this issue. The trial court's failure to consider good cause before considering the merits of the motion was error.

[4] CrR 7.8(b) provides, in part, that CrR 7.8(b) motions are "subject to RCW 10.73.090, .100, .130, and .140."

But because the record before us is the same as the record before the trial court, we may consider whether Airington established good cause. *See Fletcher*, 19 Wn. App. 2d at 580-81 (rejecting trial court's good cause analysis and concluding there was a lack of good cause based on existing record). We hold that he did not. Although Airington asserted that he was unable to file his third collateral attack earlier because he was having problems locating the documentation necessary to support his arguments, he was in fact able to locate the documents in time to file a timely collateral attack raising these arguments. This demonstrates that there was no good cause for failing to raise the new issues in his original collateral attack because he could have either waited to file a single, timely collateral attack or moved to amend his first collateral attack, which was still pending before this court, to include the same issues within the one-year time-bar period.

Because the record demonstrates that Airington did not have good cause for failing to include the new issues in his first collateral attack, his motion was barred under RCW 10.73.140 and, ultimately, dismissal was still appropriate. Accordingly, we affirm the trial court.[5]

CRUSER, C.J.

We concur:

VELJACIC, J.

CHE, J.

[5] We note that because this is an appeal from the trial court's decision on the merits and not a CrR 7.8 motion that was transferred to this court for consideration as a PRP, we cannot transfer the motion to our supreme court under RCW 10.73.140. *Fletcher*, 19 Wn. App. 2d 581.

Filed
Washington State
Court of Appeals
Division Two

April 30, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JARROD ALLAN AIRINGTON, Appellant.	No. 58369-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Jarrod Airington moves for reconsideration of the court's published opinion filed on March 18, 2025. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Cruser, Veljacic, Che

FOR THE COURT:

CHIEF JUDGE

WASHINGTON APPELLATE PROJECT

May 16, 2025 - 3:56 PM

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