IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT C. KINNAMAN, Petitioner.	No.: 89342-0 **RESPONSE TO PETITION FOR REVIEW**

I. FACTUAL BACKGROUND

On February 6, 2012, the defendant pled guilty in Grays Harbor County Cause 12-1-7-0 to an Information alleging Attempt to Elude a Pursuing Police Vehicle and further alleging that his conduct during the commission of the crime threatened physical injury or harm to persons other than the defendant or the pursuing law enforcement officer. RCW 46.61.024, RCW 9.94A.834, RCW 9.94A.533(11). At the time of the plea of guilty the defendant was informed that the sentence enhancement would be 12 months. RCW 9.94A.834 requires a sentence enhancement of 12 months and one day.

The charge and the enhancement all arose out of the same incident. The defendant, at the time of the plea of guilty, gave the court a factual basis for both the plea of guilty to the substantive charge and the admission to the aggravating factor. The defendant was asked by the court whether he willfully failed or refused to immediately bring his motor vehicle to a stop and did drive the motor vehicle in a reckless manner while attempting to elude a pursuing police

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vehicle after being given a visual or audible signal to bring the vehicle to a stop by a uniformed police officer in a police vehicle equipped with emergency lights and sirens. To this question the defendant answered as follows:

> The Defendant: Well, I discussed this with my attorney, Your Honor, and he advised me that once I realize what was going on I should have pulled over and stopped. But initially I - my passenger of the vehicle jumped out of the car because he had warrants himself and didn't want to be arrested. And when he jumped out, as I was pulling over I ran him over and I panicked and took off. And then when I realized what happened it was too late and I didn't stop then, so therefore I did refuse to willfully stop.
> The Court: Right. So after you realized the officer was behind you –
> The Defendant: Yes.
> The Court: – and chasing you, you made a conscience decision to still go ahead and elude –
> The Defendant: Yes.
> The Court: – to try to get away.
> The Defendant: I was trying to go back and check on him, make sure the guy was all right, but I still eluded.

The court further asked the defendant whether he admitted that one or more persons were threatened with physical injury as a result of his conduct. To that, the defendant responded as follows:

> The Defendant: Yes, Your Honor. There was a construction site going on - there was construction going on the highway and I went through the construction site and I guess the individuals that were working, the flaggers were pretty distraught about it, so yeah.
> The Court: – so they were flagging a construction site and you were trying to elude and you ran right through, is that –
> The Defendant: On the first time through I ran through there it and when I came back I didn't run through it, I took a side road.

II. ISSUES PRESENTED

1. Does the decision of the COA that the plea of guilty is not severable conflict with prior decision of this Court?

2. Is the decision of the Court of Appeals in conflict with statute or court rule?

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III. ARGUMENT

1. Does the decision of the COA that the plea of guilty is not severable conflict with prior decision of this Court?

The State continues to acknowledge that under prior case law this Court has previously found that an error regarding the sentence range in the plea agreement and adopted at sentencing, renders the plea of guilty involuntary and entitles the defendant to withdraw his plea of guilty. This has been found to be a "manifest error affecting a constitutional right" for which prejudice is assumed even though, for instance, the correct standard range turned out to be lower than the representations made in the plea agreement and the defendant suffered no actual prejudice. State v Mendoza 157 Wn.2d 582, 591, 141 P.3d 49 (2006). The reasoning of the court in Mendoza, needs to be revisited. The State, also, adopts the reasoning of Judge Penoyar from his dissent in this matter. The Court should take the opportunity in this case to review its prior case law in this regard.

Having said that, there is no basis on the record before the Court to justify a severance of the admission to the enhancement from the plea of guilty to the criminal charge. The criminal charge and the sentencing enhancement arose out of the same criminal conduct committed by this defendant. The defendant admitted to both the charged crime and the enhancement, acknowledging that they arose out of the same incident.

In State v Chambers, 176 Wn.2d. 573, 293 P.3d 1185 (2012) this court reviewed a plea agreement that was intended to be a global resolution of several different criminal acts which occurred at different times and resulted in the filing of criminal charges. The court in Chambers looked at the manifest intent of the parties as reflected by the record to determine whether the plea agreement to one charge could be severed from the plea agreement to another charge. The court in Chambers found that the parties intended a "package deal" and that therefore the plea to one of the criminal charges was not severable from the other. In other words, the plea to one relied on and was related to the plea to the other. In the case at hand, it is manifestly apparent that it was the intent of the parties to resolve this criminal case by this single plea agreement that

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encompassed a sentence recommendation that included a standard range sentence plus an enhancement.

In State v Turley, 149 Wn.2d. 395, 69 P.3d 338 (2003) the defendant was charged in a single Information with Escape in the First Degree and Conspiracy to Manufacture Methamphetamine. As it turned out, the defendant was misinformed regarding the consequence of his plea of guilty to the charge of Conspiracy to Manufacture Methamphetamine. The State incorrectly represented in the plea agreement that there was no community placement required for the drug charge. In Turley the charges arose from unrelated instances. The court in Turley held that the pleas of guilty to each of the charged crimes were not severable. Turley 149 Wn.2d 390 at page 400. Once again, if, under the facts in Turley, the pleas of guilty are not severable, how can they possibly be severable under circumstances such as this where the charge and enhancement all arose from a single event?

In State v Bisson 156 Wn.2d 507, 130 P.3d 820 (2006) the defendant pled guilty to five counts of First Degree Robbery and three counts of Second Degree Robbery. The State conceded that the defendant's plea agreement was involuntary because the defendant had not been clearly informed that the five deadly weapon enhancements applicable to the counts charging Robbery in the First Degree had to be served consecutively to one another. The court in Bisson held that the defendant had the option to either withdraw all of his pleas of guilty or to ask for specific performance of the plea agreement if the terms of the plea agreement were unambiguous. (i.e if each party's intent was that the enhancements were to run concurrently) Thus, in Bisson the defendant would have been entitled to a sentence in which the enhancements would be served concurrently had the reviewing court been able to determine on the record that this was the intent of the parties.

Bisson clearly does not apply to the case at hand. In fact, the intent of the parties in the case at hand is clear. The parties intended that the defendant would plead guilty and receive a standard range sentence to the criminal charge. The parties intended, mistakenly, that, following admission to the enhancement, the defendant would serve an additional 12 months. Under the

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facts of the case at hand, the defendant is entitled to withdraw his entire guilty plea. If he chooses not to do so then he may ask for specific performance of the plea agreement on file with the court, thus serving an enhancement of 12 months rather than 12 months and one day.

2. Is the decision of the Court of Appeals in conflict with statute or court rule?

Chapter 47 Laws of Washington, 1982, First Extraordinary Session dealt with criminal law revisions. A number of statutes were amended including, for instance, RCW 9.41.025 regarding firearm enhancements as well as other provisions of RCW 9.41. Washington Laws, 1982, Chapter 4 First Extraordinary Section 2, 3, 4. It also dealt with amendments to RCW 9.92 and RCW 9.95 regarding suspended and deferred sentences. Washington Laws of 1982, Chapter 4 First Extraordinary Session, Sections 8, 9, 10. It set up different degrees for the crime of vehicle prowling, RCW 9A.52. Washington Laws of 1982, Chapter 4 First Extraordinary Session, Sections 13, 14. In short, it amended numerous criminal statutes. The legislature also enacted RCW 46.61.024. Washington Laws of 1982, Chapter 4 First Extraordinary Session, Section 25. The severability clause referred to by the defendant simply states the obvious. It was the legislature's intent that if any section of that chapter was found invalid that the balance of the chapter would not be effected. The severability clause is not authority to sever the charge of Attempting to Elude a Pursuing Police Vehicle from a sentence enhancement which did not exist in 1982.

Similarly, this is not in violation of CrR 4.2(b). That court rule simply provides that when two or more offenses are charged in an Information that the defendant shall plead guilty separately to each charged count. A sentence enhancement is not a criminal offense. Nothing in CrR 4.2(b) speaks to the right to sever the criminal charge from the enhancement. Indeed, a defendant must plead to the charge and the enhancement. He cannot pick and choose. State v Bowerman, 115 Wn.2d. 194, 799, 802 P.2d 116 (1990).

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IV. CONCLUSION

The court should overrule Mendoza and its presumption of prejudice. If the court is unwilling to do this, then this court should deny review. If this Court accepts review and is not willing to overrule Mendoza it should hold that the defendant is not entitled to severance of the plea of guilty from the admission to the sentence enhancement. This court should hold that the plea agreement in its entirety must be vacated or, if the defendant so chooses, he may have specific performance of the plea agreement entered into between the parties.

Dated this 10 day of February, 2014.

Respectfully Submitted,

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