No. 31401-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JUAN A. MENDOZA,

Defendant/Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR CHELAN COUNTY / CAUSE No. 09-1-00630-1

The Honorable John E. Bridges, presiding (Retired)

ORDER CORRECTING JUDGMENT AND SENTENCE, Filed 12/17/2013

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

RAP 10.10

JUAN A. MENDOZA 343534

Airway Heights Correction Center

P.O. Box 2049

Airway Heights, WA 99001-2049

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A. INTRODUCTION

I, Juan A. Mendoza, have received and reviewed the opening brief prepared by my Appellate Attorney, David N. Gasch, WSBA 18270. Stated below are the Additional Grounds for Review that are not addressed in my attorney's brief. I understand the Court will review this statement of Additional Grounds for Review when my appeal is considered on the merits.

B. ADDITIONAL GROUNDS FOR REVIEW

1. THE TRIAL COURT LACKED THE AUTHORITY TO AMEND THE JUDGMENT AND SENTENCE TO DESIGNATE CLASS B FELONY CONVICTIONS FOR COUNTS 2, 3 and 4, WHERE I WAS ACTUALLY CHARGED WITH, ADJUDICATED GUILTY OF, AND SENTENCED FOR CLASS A FELONIES, AND WHERE I SPECIFICALLY PLEADED GUILTY TO CHARGES I BELIEVED WERE VALID TO AVOID AN EXCEPTIONAL SENTENCE THAT ONLY CLASS A FELONIES WOULD HAVE PERMITTED.

C. ISSUES PERTAINING TO ADDITIONAL GROUNDS FOR REVIEW

Did the trial court violate my state and federal constitutional due process rights when it adjudicated me guilty of and sentenced me for invalid charges (Class A Felonies - Counts 2, 3 and 4), and after it realized this charging error, when it amended the judgment and sentence to reflect convictions for Class B felonies (CP 172) -- crimes I was not actually charged with, adjudicated guilty of, or sentenced for, and crimes which eliminated the benefit of the bargain I believed I was reveiving, i.e., I pleaded guilty to Class A felonies (Counts 2, 3 and 4) for a fixed standard range sentence of 92-108 months to avoid a possible exceptional sentence above-and-beyond this range had I went to trial and lost. 9/13/2010 - RP 3, lines 17-22; RP 4, lines 10-25; RP 14, lines 19-25; Wash. Const., article 1, section 22 (amend. 10); U.S. Const. Amend. 14.

Here, no factual basis existed for adjudicating me guilty of Counts 2, 3 and 4 in the Second Amended Information (CP 9-11) because I had no previous drug convictions under chapter 69.50 RCW. Also, I had no knowledge the charges were invalid when I pleaded guilty, nevertheless, I pleaded guilty to avoid an exceptional sentence that only Class A felonies would have permitted. Thus, this was a serious technical defect in the charges that misled me and undermined the nature of the "benefit of the bargain" because I understood that if I went to trial and was convicted an exceptional sentence would be imposed; therefore, I pleaded guilty. Was the proper remedy to amend the judgment and sentence to reflect convictions for Class B felonies - depriving me of the benefit of the bargain, or was the proper remedy for the defective Second Amended Information and subsequent invalid adjudication of guilt- - dismissal w/out prejudice to the state's right to refile charges?

D. STATEMENT OF THE CASE

1. THE CHARGES

On 1/4/2010, the state charged me by Information with three Counts of Unlawful Delivery of a Controlled Substance-Cocaine with a maximum penalty of 10 years in prison and/or a $25,000.00 fine, two Counts of Unlawful Possession of a Controlled Substance-Cocaine, with Intent to Deliver, with a maximum penalty of 10 years in prison and/or a $25,000.00 fine, and one Count of Unlawful Possession of a Controlled Substance-Marijuana-Forty grams or less, with a maximum penalty of 90 days in jail and/or a $1,000.00 fine. CP 1-4. These were the Original charges.

On 1/12/2010, the state charged me by Amended Information with the following counts:

Count I-III - Unlawful Delivery of a Controlled Substance-Cocaine within 1000 feet of a school zone/RCW 69.50.401(1), RCW 69.50.435 and RCW 9.94A.533(6), Class A felony, maximum penalty 20 years in prison and/or a $50,000.00 fine;

Count IV - Unlawful Possession of a Controlled Substance-Cocaine, with Intent to Deliver within 1000 feet of a school zone / RCW 69.50.401(1), RCW 69.50.435, RCW 9.94A.533(6) while armed with a firearm / RCW 9.94A.602 and 9.94A.533(3), Class A felony, maximum penalty 20 years in prison and/or $50,000.00 fine;

Count V - Unlawful Possession of a Controlled Substance-Cocaine, with Intent to Deliver within 1000 feet of a school zone / RCW 69.50.435 and RCW 9.94A.310, Class A felony, maximum penalty 20 years in prison and/or a $50,000.00 fine; and

Count VI - Unlawful Possession of a Controlled Substance Marijuana-Forty grams or less / RCW 69.50.4014, maximum penalty of 90 days in jail and/or a $1,000.00 fine.

CP 5-8. The Amended Information added five school zone enhancements and one firearm enhancement.

On 9/13/2010, the state charged me by Second Amended Information with the following counts:

Count I- Unlawful Delivery of a Controlled Substance-Cocaine/RCW 69.50.401(1), Class B felony, maximum penalty of 10 years in prison and/or a $25,000.00 fine; and

Counts II-IV- Unlawful Delivery of a Controlled Substance-Cocaine within 1000 feet of a school zone/RCW 69.50.401(1), RCW 69.50.435 and RCW 9.94A.533(6), Class A felony, maximum penalty 20 years in prison and/or a $50,000.00 fine.

CP 9-11. The Second Amended Information dismissed count IV and count VI, because the court determined there was no probable cause to search the vehicle and suppressed the cocaine, marijuana and firearm.

2. PARTIES

The State of Washington was represented by Deputy Prosecuting Attorney James A. Hershey. I was appointed Defense Counsel Jeremy Ford who later withdrew because I retained Travis Brandt as counsel. Mr. Brandt represented me for the plea and sentencing phase of this case.

3. GUILTY PLEA

After the state filed its "Amended Information" (CP 5-8), Mr. Ford advised me that I was facing Class A felonies with a maximum of 20 years in prison, and that I faced a firearm enhancement and several school zone enhancements, which he indicated must be served consecutive to each other. He said he would talk to Mr. Hershey and see what type of plea offer was on the table. Later, he advised me the state was offering a deal for 256 months.

After Mr. Ford withdrew as counsel and Mr. Brandt took over, Mr. Brandt re-affirmed the fact that I was facing Class A felonies. He said he would try to get the firearm enhancement dropped because it was unlawfully seized and no proof existed that I possessed or controlled the firearm during the deliveries. He also specifically advised me that I was facing Class A felonies because there were multiple delivery counts committed on different dates, and that some of them were deemed "other current offenses" for purposes of "criminal history." and since they were considered "prior criminal history" they were elevated to Class A felonies pursuant to a doubling rule. RCW 69.50.408(1); 9/13/2010-Plea & Sentencing Hearing, RP 4, lines 10-25; RP 7, lines 19-21 (Hereinafter Report of Proceedings: "9/13/2010 - RP").

On 9/2/2010, at a CrR 3.6 suppression hearing, the court held the police did not have the right to search my vehicle and suppressed the cocaine, marijuana and firearm seized from the vehicle. Appearance Docket, Clerk's Sub # 107, COURT REPORTER NOTES LN (Criminal Minutes prepared by Clerk, Nelson). Because these items were unlawfully seized, the state filed a "Second Amended Information" (CP 9-11), dropping Counts IV and VI related to possession of the cocaine, marijuana and firearm enhancement. 9/13/2010 - RP 2, lines 9-14.

After the Second Amended Information was filed, Mr. Brandt advised me that I was still facing Class A felonies, but that Mr. Hershey was offering a one-time non-negotiable deal for 92-108 months, and if I did not take it and went to trial I would be facing 256 months in prison. 9/13/2010 - RP 4, lines 10-25. He also advised me that if I went to trial and was found guilty, the state expressed an intention to seek an exceptional sentence above the standard range for the amount of cocaine found to be in my possession, and that the court could sentence me up to the maximum penalty for Class A felonies - 20 years in prison. 9/13/2010 - RP 14, lines 19-25. Therefore, he advised me it was in my best interest to take the deal.

On the same day the Second Amended Information was filed (9/13/2010) and the state's non-negotiable deal was offered, and after talking to Mr. Brandt about the multiple deliveries counting as prior criminal history which elevated them to Class A felonies and the possibility of and exceptional 20 year sentence, I agreed to waive my right to a trial and plead guilty 9/13/2010 - RP 4, 7-8.

At the 9/13/2010 Plea and Sentencing Hearing Judge Bridges advised me that I was pleading guilty to the charges set forth in the Second Amended Information. 9/13/2010 - RP 5. The court informed me that "Count I was a Class B felony, with a maximum penalty of 10 years and $25,000.00 fine, and that Counts II, III and IV were Class A felonies with school zone enhancements and a maximum penalty of 20 years and $50,000.00 fine." 9/13/2010 - RP 5-7.

The trial court then asked me how I plead to each count in succession and I pleaded guilty as charged. 9/13/2010 - RP 11-12. For Counts II-IV, I specifically understood they were Class A felonies because there were multiple counts committed on different dates and deemed "other current offense" for purposes of "criminal history," and since they were considered "prior drug offenses" they elevated the counts to Class A

felonies. Therefore, I accepted the deal and pleaded guilty as charged in the Second Amended Information to avoid a possible 20 year exceptional sentence, and Judge Bridges accepted my pleas and signed the Statement of Defendant on Plea of Guilty. CP 12-19; 9/13/2010 - RP 14, lines 7-8.

Even though I indicated on the record that no one forced or threatened me to plead guilty and that my plea was freely and voluntarily entered, I was adjudicated guilty and convicted of three Class A felonies based upon a misunderstanding that the factual basis for the Class A felonies was that I had a criminal history for drug deliveries even though the offenses were not actually priors.

4. SENTENCING

On 9/13/2010, after pleading guilty as charged in the Second Amended Information, Judge Bridges sentenced me to 108 months. CP 20-31; 9/13/2010 - RP 24-25. In accordance with the Second Amended Information and Statement of Defendant on Plea of Guilty, Judge Bridges memorialized the fact that he adjudicated me guilty of one Class B feloniy (Count I) and three Class A felonies (Counts II-IV). Id.

Because Judge Bridges actually convicted me of three Class A felonies (Counts II-IV), the fact that he designated them as such on the Judgment and Sentence was no "mistake" or "clerical error." I was charged with Class A felonies, specifically pleaded guilty to Class A felonies, and thus Judge Bridges properly designated them as Class A felonies on the Judgment and Sentence. Id.

5. PERSONAL RESTRAINT PETITION

On January 19, 2012, the Court of Appeals concluded that the judgment and sentence contained a "defect" because is designated the cocaine deliveries and possession with intent to deliver in Counts 2, 3 and 4 as Class A felonies with a 20-year maximum sentence. In re the Personal Restraint of Juan Alejandro Mendoza, No. 30317-9-III, filed

1/19/2012, pgs. 3-4. The Appellate court noted that "The 20-year maximum would be correct if these counts were a "second or subsequent offense" under Chapter 69.50 RCW, which requires Mr. Mendoza to have had a previous drug conviction. RCW 69.50.408(1), (2), But the judgment and sentence indicates he has no prior criminal history. Counts 2, 3 and 4 are therefore Class B felonies with a 10-year maximum. See RCW 69.50.401(1), (2)(a)." Id.

Despite the "defect," the Court went on to declare that the judgment and sentence was not invalid on its face because the actual sentence imposed was within the applicable standard range. Id. The Court remanded the matter back to the Superior Court for the limited purpose of correcting the defect. Id. Page 6. The Court disposed of the issue as a defect in the sense that it was more of a mistake or clerical error than a fundamental defect in obtaining a conviction for crimes I did not commit. Because I was actually adjudicated guilty of Class A felonies, simply ordering the judgment and sentence corrected to reflect Class B felonies had the impact of adjudicating me guilty for crimes that I was not charged with and for which I have not pleaded guilty to.

6. ORDER CORRECTING JUDGMENT AND SENTENCE ON REMAND

On December 17, 2012, Judge Bridges brought me back to correct the defect on the judgment and sentence. Judge Bridges entered the following order: "It is hereby ordered that the judgment and sentence entered herein on 9/13/2010 is corrected to reflect that counts 2, 3 and 4 are B felonies with a maximum penalty of 10 years." Cp 172; 12/17/2012 - RP 61-72.

I objected to the order correcting the judgment and sentence and filed a notice of appeal. CP 178-179. Right now I am currently under restraint for crimes that I have not been convicted of, i.e., Counts 2, 3 and 4 as Class B felonies.

E. ARGUMENT

1. THE TRIAL COURT LACKED THE AUTHORITY TO AMEND THE JUDGMENT AND SENTENCE TO DESIGNATE CLASS B FELONY CONVICTIONS FOR COUNTS 2, 3 and 4, WHERE I WAS ACTUALLY CHARGED WITH, ADJUDICATED GUILTY OF, AND SENTENCED FOR CLASS A FELONIES, AND WHERE I SPECIFICALLY PLEADED GUILTY TO CHARGES I BELIEVED WERE VALID TO AVOID AN EXCEPTIONAL SENTENCE THAT ONLY CLASS A FELONIES WOULD HAVE PERMITTED.

a. Introduction

I contend the trial court exceeded its authority and violated my State and Federal Constitutional rights when it amended the judgment and sentence to reflect convictions for Class B felonies for Counts 2, 3 and 4 -- essentially improperly convicting me of crimes I was not charged with, crimes I did not plead guilty to, crimes the court did not adjudicate me guilty of, and crimes the court did not sentence me for. Wash. Const. Article 1, Section 22 (amend. 10); U.S. Const. Amends. 6 & 14 (Notice and Due Process).

Moreover, I contend that the amendment of my judgment and sentence was not a correction of a simple "defect" that had no impact on fundamental rights. I specifically waived my right to a jury trial and pleaded guilty to Class A felonies and a one-time-non-negotiable deal of 92-108 months to avoid imposition of an exceptional sentence had I went to trial and lost. By amending the judgment and sentence to reflect convictions for Class B felonies, the trial court deprived me of the bargain I thought I was receiving, i.e., plead guilty and avoid an exceptional sentence that only Class A felonies would permit. Had I known the offenses were Class B felonies and that no sentence above the 10 year maximum could be imposed, I would not have pleaded guilty to the maximum penalty, i.e., 108 months, plus 12 months community custody (10 years), because there was no benefit involved; I could have went to trial on Class B felonies and received the same sentence.

Furthermore, I contend that threatening me with Class A felonies and as exceptional sentence if I went to trial, and then offering me a one-time-deal for 92-108 months plus 12 months community custody, to induce a guilty plea, was legitimate only if a "factual basis" existed for Class A felonies and an exceptional sentence could be imposed for Class A felonies. Once the Court of Appeals determined Counts 2, 3 and 4 were actually Class B felonies with a 10 year statutory maximum, it was a 'complete miscarriage of justice' to amend the judgment and sentence to reflect convictions for Class B felonies on the pretense that the "defect" was a simple "technical error" which had no impact on my rights. Its a complete miscarriage of justice because the amended judgment and sentence purports to reflect convictions for Class B felonies that were obtained legitimately, when in fact they were obtained from a threat that really didn't exist, i.e., a "phantom threat" because the charging information was defective and thus the state couldn't seek a 256 month exceptional sentence for Class A felonies, because the offenses were, in reality, Class B felonies with a statutory maximum of 10 years.

The trial court memorialized convictions for Counts 2, 3 and 4 as Class A felonies on the judgment and sentence because I was actually charged with and adjudicated guilty of Class A felonies. This was no mistake or clerical error and the "technical defect" originated from the Amended Information (CP 5-8), Second Amended Information (CP 9-11), and all parties mutual misunderstanding that "other current offenses" counted as "criminal history" and thus constituted "prior drug convictions" under Chapter 69.50 RCW, which doubled the Class B felonies to Class A felonies. RCW 69.50.408(1). Both of my attorneys, Mr. Ford and Mr. Brandt, advised me this doubling rule was the "factual basis" for Class A felonies and that if I went to trial and lost I would be facing 256 months in prison because the state would seek an exceptional sentence above the 92-108 months standard range sentence. Had I known the charges were defective and that RCW 69.50.408(1) was not applicable

to "other current offenses" being used as "criminal history," and that no factual basis existed for pleading guilty to Class A felonies or for a 256 month exceptional sentence, I would not have pleaded guilty. I would have exercised my right to trial.

I was substantially misinformed about the factual basis supporting Class A felonies for Counts 2, 3 and 4, and "substantial defect" which clearly affected the voluntariness of my plea because I did not understand the law in relation to the facts. Specifically, I did not understand the evidence was insufficient to support convictions on Counts 2, 3 and 4 as Class A felonies, because I believed RCW 69.50.408(1) applied. This was a "substantial defect" of a constitutional magnitude that originated from a defective charging document and which had an actual effect on my rights and the voluntariness on my plea -- because in reality, RCW 69.60.408(1) was inapplicable and Counts 2, 3 and 4 were not Class A felonies; they were Class B felonies. Because the convictions were obtained on the basis of a defective information, substantial misinformation, a phantom threat, and insufficient evidence (lack of a factual basis), it was improper for the Court of Appeals to label the error a simple "defect" that had no actual effect on my rights. In re the Personal Restraint Petition of Juan Alejandro Mendoza, No. 30317-9-III, filed 1/19/2012, pg. 6 (citing In re Coats, 173 Wn.2d 123, 143-44, 267 P.3d 324 (2011)).

Here, Coats is distinguishable because the error originated from the "defective information" and the trial court exceeded its authority when it accepted my plea and adjudicated me guilty of Class A felonies when the evidence was insufficient as a matter of law to sustain a finding of guilt. This was not a simple "defect" tantamount to a 'typo-graphical error,' 'clerical error,' or 'mistake,' because neither the court nor I knew the charging document was invalid at the time I pleaded guilty. In other words, I did not plead guilty to the invalid charges knowing that they were invalid to receive the standard range sentence. Moreover,

the fact that the Standard Range Sentence of 108 months was actually imposed is irrelevant because RCW 69.50.408(1) doubles the statutory maximum, not the standard range sentence. In re Personal Restraint Petition of Cruz, 157 Wn.2d 83, 90, 134 P.3d 1166 (2006). Therefore, it was the state's "threat" to impose an exceptional sentence for Class A felonies that induced my plea, and the standard range sentence of 92-108 months remained the same for both Class A and B felonies, so the fact that the standard range sentence was actually imposed is not relevant to the error and its prejudicial impact on the voluntariness of my plea. Because the error was generated from a "defective charging document" that resulted in a "threat" that was not real, the proper remedy was dismissal without prejudice to the state's right to refile proper charges. State v. Vangerpen, 125 Wn.2d 782, 793, 888 P.2d 1177 (1995)(quoting State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992)); see e.g. IN re Keene, 95 Wn.2d 203, 622 P.2d 360 (1981)(vacating forgery conviction obtained by a guilty plea where the evidence did not support a finding that the defendant's acts constituted the crime); State v. Zumwalt, 79 Wn.App. 124, 901 P.2d 319 (1995)(finding an insufficient factual basis to sustain guilty plea; conviction vacated); In re Bratz, 101 Wn.App. 662, 5 P.3d 759 (2000)(same); In re Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000)(same).

The distinction between the error in Coats and the error in my case is astronomical. Coats pleaded guilty to take advantage of the State's offer to drop three serious charges and make a standard range sentence recommendation, which the judge followed. Although his judgment and sentence misstated the statutory maximum penalty for one count, the error was more akin to a more typographical error that had no actual effect on his rights because he received the benefit of his bargain and the standard range sentence he expected. Coats, 173 Wn.2d at 136 (citing In re McKiernan, 165 Wn.2d 777, 783, 203 P.3d 375 (2009)).

In my case, I unknowingly pleaded guilty to defective charges to avoid an exceptional sentence that only Class A felonies would have permitted. The trial court accepted my pleas and memorialized the convictions as Class A felonies on my judgment and sentence because I was actually adjudicated guilty of Class A felonies; as such, this was no mere mistake or typographical error. Although the trail court imposed a standard range sentence of 92-108 months, this range was the same for both Class A and B felonies, therefore, simply equating the error to Coats and labeling it a "defect" that had no actual effect on my rights was extremely prejudicial and deprived me of the benefit of the bargain. In other words, simply correcting my judgment and sentence to reflect convictions for Class B felonies had a direct impact on my rights and the voluntariness of my pleas because it removed the "defective charges" and "threat" that induced my pleas. These facts clearly distinguish my case from Coats. I was substantially misinformed and induced to plead to the standard range sentence I received based on a "threat" that really didn't exist because the charges were defective, whereas Coats bargained for and received the sentence he expected based on legitimate charges and a correct understanding of the law in relation to the facts.

As a consequence, the trial court erred when it amended my judgment and sentence to reflect convictions for Class B felonies on Counts 2, 3 and 4, and this Court should vacate the order amending the judgment and sentence and dismiss Counts 2, 3 and 4 of the defective Second Amended Information without prejudice to the State's right to refile correct charges. State v. Vangerpen, 125 Wn.2d at 793 (Dismissal without prejudice is the proper remedy for an error based on a defective charging document).

b. Prejudicial Constitutional Error

It is well established that a conviction based upon a guilty plea

that is not knowing and voluntary is constitutionally invalid. State v. Chervenell, 99 Wn.2d 309, 312, 662 P.2d 836 (1983). Due process requires that a guilty plea be voluntary, knowing and intelligent. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A guilty plea cannot be knowing and intelligent when the defendant has been misinformed about the element of the offense. Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)(guilty plea invalid because the defendant did not know his conduct did not satisfy an element of the charge); In re Thompson, 141 Wn.2d at 712; In re Keene, 95 Wn.2d at 207.

Moreover, a defendant must understand that his alleged criminal conduct satisfies the elements of the offense. In re Hews, 99 Wn.2d 80, 660 P.2d 263 (1983)(minimal requirements of guilty plea requires that "an accused must not only be informed of the requisite elements of the crime charged, but also must understand that his conduct satisfys those elements"); McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 116, 22 L.Ed.2d 418 (1969)(guilty plea "cannot be truly voluntary unless defendant possess an understanding of the law in relation to the facts"). Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State's case and, thus, to enter a knowing and intelligent guilty plea. State v. Chervenell, 99 Wn.2d at 319.

CrR 4.2(d) requires that the trial court find a factual basis supporting the plea:

> "Valuntariness. The Court should not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

To satisfy the requirements of CrR 4.2(d) there must be sufficient evidence of a factual basis for the plea for a jury to conclude that the defendant is guilty of the crimes charged. State v. Zhoa, 157 Wn.2d 188, 198, 137 P.3d 835 (2006)(citing State v. Newton, 87 Wn.2d 363, 370, 552 P.2d 682 (1979), quoting U.S. v. Webb, 433 F.2d 400, 403, (1st Cir 1970)); State v. Durham, 16 Wn.App. 648, 653, 559 P.2d 567 (1977).

I contend the trial court lacked the authority to accept my pleas of guilt to Counts 2, 3 and 4 because the evidence was insufficient for a jury to determine guilt. No jury could find me guilty of Counts 2, 3 and 4 as Class A felonies because I did not have any "prior drug convictions," RCW 69.50.408(1) was inapplicable and thus the trial court did not have the legal authority to adjudicate me guilty of Counts 2, 3 and 4. And because the pleas were not valid and based upon defective charges, I contend they must be vacated (set aside) regardless of a "manifest injustice." State v. McDermond, 112 Wn.App. 239, 243, 47 P.3d 600 (2002); State v. Vangerpen, 125 Wn.2d at 793.

This exact issue was addressed in State v. Zhoa, where the court held In re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984), In re Hews (Hews II), 108 Wn.2d 579, 741 P.2d 983 (1987), and In re Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000), stood for the "proposition that when pleading to an amended charge for which there is no factual basis, the validity of the plea turns on both the trial judge's and the defendant's understanding of the infirmity in the amended charge." Zhoa, 157 Wn.2d at 198. The Hews II and Thompson courts primarily focused on whether those defendant's knowingly pleaded guilty to defective or potentially defective charges. Hews II, 108 Wn.2d at 595; Thompson, 141 Wn.2d at 724-25; Id.

Here, the defective Second Amended Information charging Class A felonies for Counts 2, 3 and 4, and the threat of an exceptional sentence that would only be permitted by these Class A felonies, materially

affected my decision to plead guilty. State v. McDermond, 112 Wn.App. at 247 (if inaccurate advise about a consequence materially taints the defendant's decision, the plea should be set aside). Neither I nor Judge Bridges knew the charges were defective and that no factual basis existed for the Class A felonies. Because the validity of the pleas turn on knowledge and understanding of the infirmity in the charges and neither I nor the court knew there was an infirmity, the trial court lacked the authority to accept pleas and adjudicate guilty for Counts 2, 3 and 4 because no factual basis existed. I could not legally be adjudicated guilty for Counts 2, 3 and 4 as Class A felonies because I had no "prior drug convictions," RCW 69.50.408(1) did not apply and the offenses, in reality, were Class B felonies. Zhoa, 157 Wn.2d at 198-99; see also In re Bratz, 101 Wn.2d at 670; In re Keene, 95 Wn.2d at 214; and State v. R.L.D., 132 Wn.App. 699, 133 P.3d 505 (2006).

c. Counts 2, 3 and 4 must be vacated and dismissed

I contend it would be a "manifest injustice" to simply correct the judgment and sentence to reflect convictions for Class B felonies when the error originated from a defective charging document that induced my pleas of guilt. A manifest injustice is defined as "an injustice that is obvious, directly observable, overt, not obscure," and includes a plea that is "not voluntary." State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001); State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

I pleaded guilty to avoid a possible exceptional sentence that only Class A felonies would have permitted; a threat generated from defective charges. However, the threat was not real because I actually had no prior drug convictions and the convictions were not Class A felonies -- they were Class B felonies because RCW 69.50.408(1) was not applicable. The threat was not real because a 256 month exceptional

sentence could not be imposed for Class B felonies. Because the defective charges and threat induced my guilty pleas, they were not voluntary. Moreover, I was substantially misinformed about the law in relation to the facts, and neither I nor the court knew I was pleading guilty to charges that were defective and that no factual basis existed. As a consequence, it would be a manifest injustice to deprive me of the bargain I thought I was getting by simply correcting the judgment and sentence to reflect convictions for Class B felonies. To do so would make it appear the convictions were obtained legally and voluntary when they were not. Because my pleas to Counts 2, 3 and 4 did not meet the minimal constitutional standards and there was an insufficient factual basis to support adjudications of guilt, they were obtained unlawfully and without authority, and it would be manifestly injust to make it appear otherwise by simply correcting the judgment and sentence.

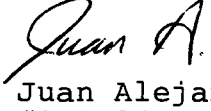
Because the errors stemmed from a defective charging document, the proper remedy is to vacate the unlawful convictions and dismiss without prejudice to the state's right to refile proper charges. State v. Vangerpen, 125 Wn.2d at 793; In re Keene, 95 Wn.2d at 214; State v. R.L.D., 132 Wn.App. 699. And whether a manifest injustice exists or not, if the pleas were not valid when entered, they must be set aside. State v. McDermond, 112 Wn.App. at 243. The proper remedy here is to vacate and dismiss Counts 2, 3 and 4 of the defective Second Amended Information without prejudice to the state's right to refile the charges.

F. CONCLUSION

Based on the foregoing reasons I respectfully ask this Court to Vacate the order amending my judgment and sentence and accordingly dismiss Counts 2, 3 and 4 of the defective Second Amended Information without prejudice.

Dated this 18th day of September, 2013.

Respectfully Submitted,



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Airway Heights, WA 99001-2049

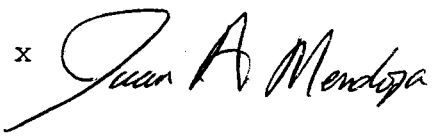
G. CERTIFICATE OF MAILING / SERVICE

I, Juan A. Mendoza, certify and declare under penalty of perjury under the laws of the State of Washington that on THIS 18th day of September, 2013, I deposited this STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW in the Airway Heights Corrections Center, U.S. Postal Mailbox, First Class Postage prepaid and properly addressed to:

1. Clerk of the Court
   Court of Appeals, Div III
   N. 500 Cedar
   Spokane, WA 99201

2. James A. Hershey
   Prosecuting Attorney
   P.O. Box 2596
   Wenatchee, WA 98807-2596

Executed this 18th day of September, 2013, at Airway Heights, WA, Spokane County.

x 

Juan Alejandro Mendoza