No. 32637-3-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

RIGOBERTO G. SANCHEZ, Appellant.

BRIEF OF RESPONDENT

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III. STATEMENT OF THE CASE

On February 20, 2014, the Appellant, Rigoberto G. Sanchez, was arrested immediately after he and his co-Defendant, Jose A. Rivera, delivered approximately one pound of high purity methamphetamine to a residence in Clarkston, Washington. Report of Proceedings (hereinafter RP) 91 - 104, 120 - 124. On February 21, 2014, the State charged the Appellant by way of Information with Delivery of a Controlled Substance (Methamphetamine). Information, Clerk's Papers (hereinafter CP) 10. Further, that same date the State filed notice of its intent to seek an exceptional sentence, alleging that the above crime was a "major violation of the Uniform Controlled Substance Act, chapter 69.50 RCW, relating to trafficking in controlled substances, which was more onerous that the typical offense of its statutory definition." Notice of Intent to Seek Exceptional Sentence, CP 13. The Appellant was arraigned on the charges and the matter was set for trial scheduled to commence May 6, 2014. CP 17. On March 24, 2014, the Appellant appeared with new privately retained counsel and made several oral motions,[1] which were denied, at which time the Appellant entered a plea of guilty as charged, without the benefit of an agreement from the State. RP 17, 19 - 27. Prior to entry

[1]The Appellant complained, without factual basis, that he had not been served, and had not been timely arraigned. RP 8. The court reviewed the record and determined that the Appellant's claims were baseless. RP 9 - 10. After the court began calculating a the speedy trial date, the Appellant announced that he was entering a plea of guilty to the charge. RP 11- 17.

of his guilty plea, the State made clear its intent to seek an exceptional sentence and to pursue the matter to a jury finding, if necessary. RP 17 - 18, 20. Specifically, the deputy prosecutor stated:

> Last, I want to make sure that Mr. Sanchez understands that the State is proceeding with the, ah, aggravating factor regarding major violation of the violation of the uniform controlled substance act and specifically, the, ah - - ah, statement on plea references that the Court can impose an exceptional sentence, ah, if the State proves beyond a reasonable doubt and has given notice, ah - - ah, if we have proven beyond a reasonable doubt the factual basis for an exceptional sentence to the satisfaction of a jury or a judge if he waives a jury.

RP 20 - 21. The Appellant's attorney further clarified that his client understood and asked his client:

> We need to make sure we have a good record. So are you aware that the State has, ah, filed a document that states that they intend to seek an exceptional sentence outside the standard range?

RP 21 - 22. The Appellant replied that he understood. RP 22. The court then set the matter for a hearing to select a sentencing trial date. RP 29.

At the scheduling hearing held April 14, 2014, the Appellant objected to empaneling a jury, and requested immediate sentencing. RP 39 - 40. The court requested briefing and the matter was set for hearing to address the Appellant's objection. RP 43 - 46. The Appellant filed with the court, and served upon the State, its

sentencing memorandum, and therein noted that the State's Notice of Intent to Seek Exceptional Sentence contained language that the State would "argue for the sentences on each felony conviction in this case to be ordered consecutive to each other." Defendant's Sentencing Memorandum, CP 42 - 43. Upon receipt and review thereof, the State immediately filed an amended notice that omitted the superfluous language concerning consecutive sentences. Amended Notice of Intent to Seek Exceptional Sentence, CP 41.

At hearing held April 24, 2014, the court determined that the State had provided sufficient notice to the Appellant concerning its intent to seek an exceptional sentence. RP 56. The court denied the Appellant's request to strike the State's Amended Notice and ruled that the State would be permitted to present its case to a jury concerning the facts which would support an exceptional sentence. RP 56 - 58. The court then set the matter for jury trial on May 30, 2014 and scheduled a pretrial conference. CP 54

At the pretrial conference, held May 22, 2014, the Appellant and objected to the trial date, claiming that his right to speedy trial rights had been violated. RP 68. After hearing from the State, the court denied the Appellant's motion, noting the parties were prepared for trial on May 30, 2014. RP 70. On May 27, 2014, three days prior to trial, State filed its proposed instructions to the jury. State's Proposed Jury Instructions Re: Aggravating Circumstances, CP 55 -

65. The Appellant did not file any proposed instructions. *See* Court Record, *generally.*

On May 30, 2014, the matter proceeded to jury trial during which testimony was heard from Detective Bryson Aase, of the Whitman County Sheriff's Office. RP 89 - 105. Detective Aase testified that, through the course of an ongoing narcotics investigation, officers had identified an individual known as "Rigs" to be bringing methamphetamine to a residence in Clarkston. RP 92. A delivery of a large amount of methamphetamine had been arranged and Detective Aase was assigned as an undercover officer to be present inside the residence when the delivery occurred. RP 92 - 93. He testified concerning his observations during this undercover investigation, the involvement of the Appellant, and the recovery of the nearly full pound of methamphetamine that had been delivered by the Appellant. *Id.* Detective Aase testified that an arrangement had been made to purchase a pound of methamphetamine from the Appellant for seven thousand six hundred dollars ($7,600.00) with the use of pre-recorded[2] money. RP 91 - 94. Detective Aase identified the Appellant as one of the two persons who brought the methamphetamine to the residence. RP 95. He described and

[2]Pre-recorded money involves the recording of denominations and serial numbers on Unites State's currency so that it may be identified as the money used to purchase narcotics or other contraband for tracing purposes if recovered by law enforcement at a later date. RP 93 - 94.

identified the Tupperware container and the methamphetamine that was originally in it. RP 96. He testified that later he went to the location where other officers had detained the Appellant and Mr. Rivera, and he identified the buy money which had been recovered. RP 97 - 99. Detective Aase testified that he had been a narcotics detective for six years. RP 99. He testified that this was the largest single transaction of methamphetamine he had ever seen. RP 99 - 100.

Detective Jonathan Coe of the Clarkston Police Department testified concerning his involvement in this investigation as well as his training and experience in narcotics sales, trafficking, and interdiction. RP 106 - 151. Detective Coe testified that he was the case agent in charge of the investigation. RP 110. He testified that he had made arrangements for the purchase of a pound of methamphetamine. RP 137. He testified that he observed the Appellant's vehicle leave the residence and, after receiving a message from Detective Aase that the delivery had occurred, he requested patrol units stop the Appellant's vehicle. RP 120 - 123. Detective Coe testified that the Appellant was arrested, searched and the pre-recorded currency was found in his coat pocket. RP 123.

Detective Coe testified concerning his training and his knowledge of the drug distribution hierarchy. RP 108 - 118, 131 - 151. During his testimony, Detective Coe testified that most

methamphetamine is manufactured in Mexico and transported north into the United States. RP 111. He testified that large crystal formations of methamphetamine is indicative of higher level distribution, because this form of methamphetamine is highly pure and otherwise unadulterated with cutting agents. RP 111 - 113. He explained how cutting agents are used to dilute methamphetamine to increase profit when sold by lower level distributors. RP 113 - 115. Detective Coe testified regarding "street level" dealers and ordinary amounts that individual users would likely purchase. RP 117. He testified that an average user would purchase between one quarter to one full gram of methamphetamine per day. RP 117 - 118. He testified that a heavy user would only be able to consume a gram to a gram and a half per day. RP 134.

During his testimony, Detective Coe analogized drug sales to a business enterprise that common persons could identify, specifically, Costco Wholesale and Albertson's Grocery Store.[3] RP 116. Detective Coe testified that, in the realm of methamphetamine distribution, the Appellant would be analogous to Costco Wholesale's suppliers. RP 126. He testified that the official lab weight of this methamphetamine seized herein was four hundred twelve and sixty

[3]Costco Wholesale and Albertson's Grocery are both consumer stores with locations in Clarkston, Washington, with which the jury and the court would be familiar.

nine hundredths (412.69) grams. RP 134. He testified that, after the ordinary practice of cutting the methamphetamine, the street value would be approximately eighty-two thousand dollars. RP 135. After almost thirty years as a police officer, he had not seen a single delivery case involving more methamphetamine than the Appellant delivered. RP 135.

At the conclusion of the State's case, the Appellant declined to offer any further evidence. RP 151. The court held conference on the record with the parties concerning the written instructions to the jury. RP 153 -158. The Appellant offered no additional instructions and made no substantive objections to the State's instructions as proposed, including the Instruction Six. RP 153 - 158. The State's proffered Instruction Six read as follows:

> A major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense. The presence of any of the following factors may identify this offense as a major trafficking violation:
>
> > Whether the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or
> >
> > Whether the circumstances of the offense reveal that the Defendant occupied a high position in the drug distribution hierarchy.

CP 55 - 65. The only objection raised concerned a defense request to insert the word "current" before the word "offense" in the last two

paragraphs. RP 155. The court granted the defense request and those paragraphs were submitted to the jury and read as follows:

> A major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense. The presence of any of the following factors may identify this offense as a major trafficking violation:
>
> > Whether the ***current*** offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or
> >
> > Whether the circumstances of the ***current*** offense reveal that the Defendant occupied a high position in the drug distribution hierarchy.

(*Emphasis added*). RP 156. Court's Supplemental Instructions to the Jury, CP 66 - 75.

The jury was instructed accordingly and, after short time,[4] returned a verdict, answering the special inquiry in the affirmative. RP 158 -178. On June 9, 2014, the court held a sentencing hearing. RP 187 - 205. At sentencing, the court affirmed the jury's finding of aggravating circumstances and sentenced the Appellant to an exceptional sentence of 84 months. RP 199 - 201. Judgement and Sentence, CP 92 - 101. The court entered findings and conclusions concerning the imposition of the exceptional sentence to which the Appellant made no substantive objection. RP 202, 204. His only

[4] The transcriber's notes indicate that the jury was dismissed and the court recessed at 4:25 p.m. The Court reconvened at 4:51 p.m. to announce that the jury had reached a verdict. RP 177.

objection concerned the use of the words "approximately one pound" and requested that the actual measured weight of four hundred twelve and sixty nine hundredths (412.69) grams be inserted instead.[5] RP 204. This request was granted. CP 92 - 101. In addition, the Court imposed the statutory cleanup assessment of three thousand dollars ($3,000.00). RP 204, CP 92 - 101.

At no time prior to or after trial did the Appellant seek to withdraw his plea of guilty to the underlying charge of Delivery of a Controlled Substance (Methamphetamine). *See* Court Record, *generally*.

While dated July 8, 2014, the Appellant did not file his appeal notice with the trial court until July 25, 2014. Notice of Appeal, CP 109 - 118. In this untimely appeal, the Appellant claims that the Appellant was not given adequate notice of the State's intent to seek an exceptional sentence, that the jury was improperly instructed, and that the court erred in imposing the statutory methamphetamine clean up assessment. *See* Brief of Appellant, p. 3. The Appellant subsequently filed a *Pro Se* Statement of Additional Grounds (*hereinafter* SAG) claiming, "The Plea Judge rendered defense Counsel ineffective in plea negotiations." SAG, p. 1. As discussed below, the Appellant's issues are without merit.

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[5] One pound equals four hundred fifty-three and five hundred ninety-two thousandths (453.592) grams.

IV. DISCUSSION

1. THE APPEAL IS UNTIMELY UNDER RAP 5.2(a) AND SHOULD BE SUMMARILY DISMISSED PURSUANT TO RAP 18.9(c).

The Appellant's Notice of Appeal is untimely. RAP states in pertinent part:

> Except as provided in rules 3.2(e), 5.2(d) and (f), and 15.2(a), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court which the party filing the notice wants reviewed, or (2) the time provided in section (e).

RAP 3.2(e) relating to substitution of parties is inapplicable, as is RAP 5.2(d) relating to superceding statutory filing deadlines and (f) relating to filing of cross appeals. Further, RAP 5.2(e) is inapplicable as the Appellant filed no post conviction motions from which review can be taken. The Appellant was therefore required to file his Notice of Appeal within 30 days of entry of the Judgement and Sentence. He was sentenced on June 9, 2014. His deadline for filing this appeal there would have been July 9, 2014. The Notice of Appeal was not filed in the Superior Court until July 25, 2014. His appeal is therefore untimely and should be dismissed pursuant to RAP 18.8(b) and RAP 18.9(c)(3). RAP 18.9(c) provides in pertinent part: "The appellate court **will**, on motion of a party, dismiss review of a case . . .(3)except as provided in rule 18.8(b), for failure to timely file a notice of appeal

. . ." (*Emphasis added*). RAP 18.8(b) provides, " The appellate court ***will only in extraordinary circumstances*** and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal . . ." (*Emphasis added*). The Appellant's Notice was not timely filed and this appeal is subject to dismissal. The State would so request and move for summary dismissal pursuant to RAP 18.9(c)

2. THE APPELLANT WAS GIVEN ADEQUATE NOTICE OF THE STATE'S INTENT TO SEEK AN EXCEPTIONAL SENTENCE.

The Appellant first complains that the State should not have been allowed to file an Amended Notice of Intent to Seek Exceptional Sentence. The State concedes that its initial Notice (CP 13) contained superfluous language that was inapplicable to the facts fo the case. The State further acknowledges that the filing of the Amended Notice (CP 41) occurred after the Appellant plead guilty to the charge in the Information. However, neither fact is of consequence in this matter. The Appellant's argument boils down to a claim that he did not receive sufficient notice that he could be sentenced above his standard range.

RCW 9.94A.535 provides that a court may impose upon an offender a sentence outside the standard range "if it finds, considering

the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." It further provides that facts supporting an aggravated sentence are to be determined under provisions of RCW 9.94A.537.

RCW 9.94A.537 provides the procedures for finding aggravating circumstances. Concerning notice, that statute states:

> (1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

No particular form is required to "give notice" of the State's intent. *See* State v. Bobenhouse, 143 Wn.App. 315, 331, 177 P.3d 209, 216 (Div. III, 2008). In Bobenhouse, a letter sent to the defense attorney which was not filed with the Court nor served on the Defendant, was found to be sufficient to "give notice" as required by the statute. *Id.* at 331. Here, the State filed with the court and served upon the Appellant written notice of its intent. CP 13. The document provided all the information required by RCW 9.94A.537. The document advised the Appellant that the State would be seeking an exceptional sentence. CP 13. It further advised that the State was alleging that "the offense charged against the Defendant was a major violation of the Uniform Controlled Substance Act, chapter 69.50 RCW, relating to trafficking in controlled substances, which was more onerous that

the typical offense of its statutory definition." Id. The document further provided the specific statutory authority upon which the State intended to rely: RCW 9.94A.535(3)(e). Id.

The Appellant's argument assumes that, because the State's intitial Notice also included extraneous information concerning the State's intended mechanism for requesting an exceptional sentence, the Notice itself was ineffective. There is no requirement that the State give notice to the defendant of the actual numerical sentence it will request, or how departure from the standard sentencing guidelines will occur. See RCW 9.94A.537(1), *supra*. The State is not required, even in the Information charging a defendant with a crime, to provide information concerning possible punishment. See State v. Hale, 65 Wn.App. 752, 756, 829 P.2d 802 (Div. III, 1992). The Defendant is not entitled to be advised of the actual penalty to be sought.

The Appellant argues that State should not have been allowed to file the Amended Notice which struck the superfluous language and clarified that the State "will argue for the sentences on a felony conviction in this case to be ordered in excess of the standard range." However, this document merely clarified the possible punishment and did not substantively alter the State's allegations. It did not have any affect on any information that the State is required to provide pursuant

to RCW 9.94A.537. In denying the Appellant's request to strike the State's Amended Notice, the court found that the situation was analogous to an amendment of the Information prior to trial. RP 57. The State has a right to amend an existing information to include an alternate means of committing a crime formerly charged anytime before the verdict "if substantial rights of the defendant are not prejudiced." See CrR 2.1(d); State v. Smith, 93 Wn.2d 329, 610 P.2d 869, *cert. denied*, 49 U.S. 873, 66 L. Ed. 2d 93, 101 S. Ct. 213 (1980). The State have given notice of its intent to seek an exceptional sentence prior to entry of the Appellant's plea of guilty. This situation is analogous to an amendment to conform to the evidence prior to verdict. See State v. Schaffer, 120 Wn.2d 616, 621, 845 P.2d 281, 284 (1993)(*citing* CrR 2.1(e)). This is especially true where, as here, there is no showing that the Appellant was prejudiced in the slightest by the Amended Notice. At best, the language concerning consecutive sentences could be considered "surplusage" and subject to motion to strike as such. See CrR 2.1(b).

It is at this juncture that the Appellant interjects his discussion with his private attorney concerning the efficacy of the State's original Notice of Intent. See Brief of Appellant, p. 6, 13. See *also* Motion to Take Additional Evidence. He effectively claims that he had been assured that the State's Notice was legally defective and that the

State would not be allowed to seek an exceptional sentence. *See* Brief of Appellant, p. 6. He intimates that this was his thought process in entering his guilty plea. *Id.* This Court must recognize this issue is a red herring and discard it out of hand.

The Appellant has made no claim of ineffective assistance of counsel, nor has he ever sought to withdraw his guilty plea as uninformed or involuntary. As such, what he and his attorney might have discussed concerning the legal efficacy of the State's first Notice of Intent to Seek and Exceptional Sentence is of no moment. Whether or not the State's Notice was sufficient is a question of law. *See* State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30, 32,(2007)(sufficiency of the charging document is a question of law and reviewed *de novo.*)(*citing* State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995)). His state of mind is irrelevant to the question of whether the State gave adequate notice.

Regardless of discussions had with counsel, the State provided sufficient notice to preserve the opportunity to present the matter to a jury. In any event, the Appellant was certainly aware that his attorney's "plead quick strategy" had failed as of April 24, 2014 when the trial court denied the motion for immediate sentencing and authorized the empaneling of a jury. Even after that, he did not file any motion for withdrawal of his plea, premised upon this alleged

faulty advice to plead guilty.

Assuming *arguendo* that the trial court should have stricken the State's Amended Notice because it was filed after the Appellant pled guilty, the Appellant was given notice of the legally required information. He had been advised that the State intended to seek and exceptional sentence, and that the State alleged that the delivery of methamphetamine constituted a "major violation of the Uniform Controlled Substance Act." The State had had not withdrawn its Notice of Intent to Seek Exceptional Sentence, nor had the State abandoned it's allegations that the Appellant's crime constituted a "major violation." As stated above, the Appellant was adequately apprized of the State's intent. The Appellant pled guilty to the underlying charge with full knowledge that the State was seeking an exceptional sentence based upon the allegations concerning this being a major violation, "relating to trafficking in controlled substances, which was more onerous that the typical offense of its statutory definition." In the Statement of Defendant on Plea of Guilty, the Appellant acknowledged the possibility that the court could impose an exceptional sentence. CP 30 - 40. Therein, paragraph 8, section c on page 3 recites:

> The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the

> requested sentence will be based, and facts supporting an exceptional sentence are proved beyond a reasonable doubt to a unanimous jury, to a judge if I waive jury, or by stipulated facts.

CP 30 - 40. While pleading to the underlying charge, the Appellant specified that he was not admitting the facts that would support an exceptional sentence. RP 17 - 20. He was reminded that the State had filed the Notice and still intended to seek to prove those additional allegations to a jury. RP 20. With these facts in mind, he plead guilty to the charge of Delivery of a Controlled Substance (Methamphetamine). RP 27. He can certainly not now complain that he was not sufficiently aware that he was not in peril of receiving an exceptional sentence. The State's original Notice of Intent to Seek Exceptional Sentence put the Defendant on notice, adequately advised him of the additional sentencing consequences, and satisfied all requirements set forth in RCW 9.94A.537(1). The court therefore, properly allowed the matter to proceed to trial on the sole issue of the existence of aggravating circumstances.

3. THE JURY WAS PROPERLY INSTRUCTED CONCERNING THE REQUIRED FACTUAL FINDINGS NECESSARY TO SUPPORT AN EXCEPTIONAL SENTENCE.

The Appellant next contends that the court improperly instructed the jury. Specifically, the Appellant claims that Instruction Six failed to include necessary "elements" of the aggravating

circumstance. *See* Brief of Appellant, p. 20. The Appellant claims that the State must demonstrate both, that the crime was "a major violation" and that it was "more onerous than typical." *Id*. The State, unsurprisingly, disagrees.

The court instructed the jury according to exact language of WPIC 300.14, with the exception of the defense's requested addition of the term "current." As noted in the commentary to the instruction, WPIC 300.14 follows the statutory language of RCW 9.94A.535(3)(e) which provides:

> The current offense was a major violation of the Uniform Controlled Substance Act, chapter 69.50 (VUCSA), relating to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition.

That section continues with a description of facts to be considered and states in pertinent part:

> The presence of ANY of the following may identify a current offense as a major VUCSA:
>
> > (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;
> >
> > (iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

RCW 9.94A.535(3)(e). The logical interpretation of this statute is as set forth in the WPIC instruction. The phrase "which was more

onerous than the typical offense" is merely a descriptive restatement of the term "major violation" and not a different statutory term unto itself. The statute does not independently define the term, but rather, gives six examples concerning what is meant by "major VUCSA." *Id.* Clearly, the critical inquiry is whether the crime was, in fact, a "major violation" and the factors that describe that circumstance, any of which will satisfy the inquiry are listed therein.

This interpretation is consistent with prior caselaw concerning this aggravating factor, one which has been in the statutes for decades. In a pre-Blakely[6] case, the Washington Supreme Court analyzed this statute, then codified at RCW 9.94A.390(2)(d) which contained the identical language. *See* State v. Soleberg, 122 Wn.2d 688, 861 P.2d 460 (1993). Therein, the Court stated:

> For purposes of imposing an exceptional sentence, the statute states that an offense is a major violation of the Uniform Controlled Substances Act when it is more onerous than the "typical offense of its statutory definition".

The court recognized that the two terms are used interchangeably and describe the same basic fact. The Court analyzed the origins of

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[6]Blakely v. Washington, 542 U.S. 296,124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Therein, the Supreme Court ruled that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt under the 6th Amendment to the U.S. Constitution and further found that RCW 9.94A.390 (now codified at RCW 9.94A.535) to be unconstitutional to the extent it allowed a judge to make the additional factual determination. Blakely, 542 U.S. at 305.

the statutory language used therein:

> Professor David Boerner, in his treatise on Washington's sentencing law, points out that in 1983 when the State Sentencing Guidelines Commission recommended treating a major violation of the Uniform Controlled Substances Act as an aggravating circumstance, it, with one exception, used language essentially identical to the comparable Minnesota provision. The one change was to replace the Minnesota requirement that at least two of the specified circumstances exist with "the emphatic statement that the presence of 'ANY' of the specified circumstances was a sufficient aggravating circumstance". Therefore, a properly supported finding of any one of the statutory aggravating circumstances ***may elevate a drug offense to a "major violation" which allows a trial court, in its discretion, to impose an exceptional sentence***.

See id. at 706 - 707 (Emphasis added). No additional consideration or discussion was given to a separate requirement that the offense be both "a major violation" and "more onerous than the typical offense." The Court determined that the statute only requires that the crime be a "major VUCSA" as evidenced by ANY one of the listed factors. See id. No separate finding that the offense was also "more onerous than typical" is required.

After the United States Supreme Court decided Washington v. Blakely, and required juries, and not judges, to decide the existence of aggravating facts, the legislature amended the statute to provide for procedures for jury trials on aggravating facts. See Laws 2005, ch. 68 sec. 3. The amendment further specified that the list of aggravating

facts was no longer merely illustrative but now exclusive. *See id.* However, the Legislature made no changes to the statutory language relating to the substantive definition concerning the "Major VUCSA" aggravator. The rule in such case is as follows:

> "When a statute fails to define a term, the term is presumed to have its common law meaning and the Legislature is presumed to know the prior judicial use of the term." The legislature is presumed to know the law in the area in which it is legislating, and statutes will not be construed in derogation of common law absent express legislative intent to change the law.

See State v. Torres, 151 Wn. App. 378, 384-385, 212 P.3d 573, 576 (Div. I, 2009). (*citing* State v. McKinley, 84 Wn.App. 677, 684, 929 P.2d 1145 (Div. I, 1997). " The failure of the Legislature to amend a statute to change the statute' s judicial construction is reflective of legislative acquiescence in the Court' s interpretation. " *See* State v. Berlin, 133 Wn.2d 541, 558, 947 P.2d 700 (1997). Here, the legislature made no changes to the language at issue herein after either Soleberg or Blakely. Clearly, the legislature did not intend that the two phrases to have separate meaning and significance. A "major violation" ***is*** "more onerous than the typical" VUCSA offense of its catagory.

The Appellant cites to State v. Gonzales Flores, 164 Wn.2d 1, 186 P.3d 1038 (2008), and claims that this case supports his position that the terms are separate and not interchangeable. *See* Brief of

Appellant, p. 18. The issue raised herein was not the issue before the Court in Gonzales Flores. In that case, the Court was concerned with whether a jury's verdicts of guilty on three or more trafficking related charges necessitated a finding that the aggravating circumstance had occurred. Gonzales Flores, at 22. In fact, a review of the opinion of the Court therein reveals that, contrary to the Appellant's assertion, the Washington Supreme Court uses the two terms interchangeably:

> Like the "major economic offense" aggravator, the "major VUCSA" aggravator allows, but does not compel, an exceptional sentence when the defendant commits multiple violations ("[t]he presence of ANY of the following *may* identify a current offense as a major VUCSA"). Former RCW 9.94A.535(2)(e) (*emphasis added*). Thus, the trial court had to make factual determinations in order to justify the exceptional sentence. In particular, the trial court had to infer the offenses were "more onerous than the typical offense." Id. In drawing that inference—an inference the State correctly observes is sufficiently supported (but not compelled) by the jury verdict—the trial court made a factual determination that must be made by a jury. The "statutory maximum" is the maximum that a judge may impose "'without any additional findings.'" Because the jury verdict does not necessarily imply Flores' multiple offenses were a "major VUCSA," the exceptional sentence is based on a finding made by the judge, not the jury.

Gonzales Flores, at 22-23. (*Internal citations omitted*)(*emphasis Court's*). The Gonzales Flores Court makes clear that a "major violation" ***is*** an offense that is "more onerous than typical" as identified by at least one of six factors

Specifically, as it relates to this issue, in Instruction Six, the

court instructed the jury: "A major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense." CP 66 - 75. The court further instructed therein concerning specific factors to be considered by the jury in determining whether the offense was a major violation. *Id*. In order to answer the special verdict inquiry "yes" as to whether the Appellant's crime was a major violation of the Unform Controlled Substance Act, the jury necessarily found that the offense was more onerous than a typical drug offense. The jury was instructed that a major violation is more onerous than typical. *See id*. The Jury was properly instructed under the statute, as interpreted by prior court decisions.

4. ANY CLAIMED INSTRUCTIONAL ERROR WAS NOT RAISED BELOW, WAS IN ANY EVENT INVITED AND THEREFORE WAIVED.

Assuming *arguendo*, that the Appellant's proffered interpretation of the statute is accurate, the Appellant is precluded from raising the issue on appeal. Generally, an appellate court may refuse to entertain a claim of error not raised before the trial court. RAP 2.5(a). An exception exists for a claim of manifest error affecting a constitutional right. *See id*. The Supreme Court has stated:

> In order to benefit from this exception, "the [defendant] must identify a constitutional error and show how the alleged error actually affected the [defendant]'s rights at trial." A constitutional error is manifest if the appellant

> can show actual prejudice, i.e., there must be a "plausible showing by the [defendant] that the asserted error had practical and identifiable consequences in the trial of the case." If an error of constitutional magnitude is manifest, it may nevertheless be harmless.

See State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (some citations omitted) (internal quotation marks omitted) (*quoting* State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). This exception does not afford a defendant a means for obtaining a new trial whenever he can identify a constitutional issue not preserved below. *See* State v. Kirkpatrick, 160 Wn.2d 873, 879, 161 P.3d 990 (2007). Here, while the State must necessarily concede that an alleged instructional error would be considered constitutional, the error here was not "manifest" as it had no practical and identifiale consequences in the trial. *See* Gordon, *supra*, at 676.

The State's evidence was uncontroverted. The Appellant delivered an extremely large quantity of methamphetamine. The amount was more than two narcotics detectives, with decades of law enforcement experience between them, had ever been involved with. The highly pure methamphetamine demonstrated that the Appellant was a reasonably high level narcotics trafficker, several levels above street dealers. The Appellant cannot show how instructing the jury that it must find that the "current offense was a major violation" **and** that the current offense was "more onerous than the typical" delivery

and any impact on the outcome of his case. That this delivery was extraordinary was not reasonably in issue at trial. The Appellant can't show that the claimed error had any impact on his trial.

"Even where a constitutional error is manifest, it can still be waived if the issue is deliberately not litigated during trial." *See* State v. Hayes, 165 Wn.App. 507, 515, 265 P.3d 982 (Div. I, 2011). The invited error doctrine prohibits a party from setting up an error at trial then complaining of it on appeal. *See* State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). A defendant may not request instructions be given to the jury and then complain upon appeal that the instructions are constitutionally deficient, even if the error is of constitutional magnitude. *See* State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999). The invited error doctrine is applied as a "strict rule" to situations where the defendant's actions at least in part caused the error. *See* State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

Here, the court held a jury instruction conference at the close of the evidence. RP 153 -158. The State offered its proposed instructions but the Appellant did not submitted any alternate instructions. At the conference the Appellant lodged no objections to the State's proposed instructions with the exception of the one at issue herein: Instruction Six. RP 155. The Appellant requested that

the court modify that instruction, which request was granted by the court. RP 155 - 156. The court, did therefore, in fact, give Instruction Six as proposed by the Appellant. He cannot now complain that the court should not have given his proposed instruction. This Court should therefore deem the issue waived as invited error.

5. ANY INSTRUCTIONAL ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Further assuming that Instruction Six did not accurately instruct the jury as to what it must find, that the error could be described as "manifest," and further assuming that consideration of the issue is not barred as invited, the error is none the less harmless and therefore not grounds for reversal. As conceded by the Appellant, "Constitutional error, including the omission of an element from the 'to convict' jury instruction, is harmless if it is clear beyond a reasonable doubt that the error did not contribute to the verdict." *See* Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1829, 144 L.Ed.2d 35 (1999). As further recognized by the Appellant, "A misstatement of the law in a jury instruction is harmless if the element is supported by uncontroverted evidence." *See* State v. Peters, 163 Wn. App. 836, 850, 261 P.3d 199 (Div. I, 2011) (*citing* State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Here, the evidence presented was clear, uncontroverted, and

above reasonable challenge. The Appellant delivered an extraordinarily large quantity of methamphetamine for which he received seven thousand six hundred dollars ($7,600.00), which in any reasonable estimation, is substantially larger quantities than for personal use. *See* RCW 9.94A.535(3)(e)(ii). The purity and packaging of the methamphetamine itself demonstrated that the Appellant held a high position in the drug hierarchy. *See* RCW 9.94A.535(3)(e)(iv). Clearly this was a "major violation" and substantially more "onerous" than the ordinary delivery of methamphetamine.

The Appellant aptly concedes that the amount involved herein satisfies RCW 9.94A.535(3)(e)(ii). However, the Appellant incorrectly claims that there was no evidence relating to typical deliveries, upon which a jury could conclude that this delivery was "more onerous than typical." The Appellant ignores the uncontroverted testimony of Detective Coe, who testified that he had been involved in over one hundred controlled purchases of methamphetamine and other controlled substances. RP 131. He testified that the ordinary controlled purchase amount is a quarter (0.25) of a gram. RP 117. He testified concerning other controlled purchases and the court admitted a photo of an amount of methamphetamine purchased during a controlled buy operation. RP 128 - 132. On redirect, he testified:

Q. Mr. Alford was asking you about, ah, you ordered up a

pound or you requested to purchase a pount?
A. Yes, sir.
Q. Can you ask to buy a pound from a street dealer?
A. No.
Q. So, it's - - it's only from special people that you can purchase a pound from?
A. Yes, sir.
Q. In fact, in your whole career you've basically made one - - one, ah pound deal?
A. Yes

RP 149. This clearly demonstrates that this crime was well beyond typical. No reasonable dispute can be had on this fact. Based upon these facts, any claimed error was harmless beyond any reasonable doubt.

6. IMPOSITION OF THE THREE THOUSAND DOLLAR "CLEAN UP" ASSESSMENT AS MANDATORY WAS NOT PRESERVED AND OTHERWISE WAIVED.

At sentencing, the State argued, based upon the language of RCW 69.50.401, that the statute requires a mandatory three thousand dollar ($3,000.00) assessment for methamphetamine trafficking and manufacturing related crimes. The State acknowledges the authorities cited by the Appellant, and that the assessment is discretionary. However, the Appellant failed to preserve the issue for appeal.

As discussed above, RAP 2.5 precludes review of issues raised for the first time on appeal. This issue is not one of constitutional magnitude since the court had discretion to impose the fine. *See* RCW 69.50.401. The court certainly had jurisdiction to

impose up to twenty-five thousand dollars ($25,000.00). The Appellant would argue that the issue was preserved when he objected to the court's imposition of the fine. While he did object at the sentencing hearing to imposition of the fine, the Appellant agreed that the fine was mandatory. RP 203. Instead, he claimed that, since his case involved only delivery and not manufacturing of methamphetamine, it did not apply. *Id.* This Court should not reach any expanded argument on appeal under RAP 2.5(a), especially where the Appellant agreed that the assessment was mandatory. Any error was not preserved and was, in any event, invited by counsel's arguments below. *See* State v. Studd, 137 Wn.2d at 547. The Appellant is not entitled to be resentenced.

7. ISSUES RAISED IN THE APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS LACK MERIT.

The Appellant filed his SAG pursuant to RAP 10.10. The Appellant makes one single claim therein which can be best expressed as: that the State breached the plea agreement. *See* SAG, p. 1. He couches the argument in terms of the court "render[ing] defense Counsel ineffective in plea negotiations" by virtue of allowing the State to move forward with proving up the facts supporting an exceptional sentence. *See id.* He expounds for five pages regarding the rules and remedies for breach of a plea agreement. *See id. generally.* He asserts that the State should not

be allowed to change its position "surrounding the parameters & [sic] basis that the plea agreement was negotiated upon]." *See* SAG, p. 5. Finally, the Appellant requests "specific performance" referencing the remedy for breach of a plea agreement with the State. *See id. See e.g.* State v. Barber, 152 Wn. App. 223, 229, 217 P.3d 346, (Div. II, 2009). The Appellant's SAG suffers from one, absolute, inarguable, and necessarily fatal factual flaw: there was no plea agreement in this case. CP 30 - 40. RP 17 - 20. In his SAG, the Appellant claims that he thought State would not be seeking an exceptional sentence if he pled guilty. However, it was explained to him prior to entering his plea that the State would be seeking an exceptional sentence in this matter. RP 20 - 21. The Appellant acknowledged this before he pled. RP 21 - 22.

There was never any agreement between the State and the Appellant. His claims that he didn't receive the benefit of his bargain are without merit. There was no "bargain." Regardless of any expectation he may have harbored after speaking with his attorney, representations of counsel are not binding on the court or the State.

V. CONCLUSION

The Appellant was provided with legally sufficient notice of the State's intent to seek an exceptional sentence. The jury was properly instructed. Any instructional error was not properly preserved, invited and, in any event, harmless beyond a reasonable doubt. Likewise,

any error in imposing the Methamphetamine Clean Up fee was not preserved. The Appellant raises no other meritorious basis upon which this Court should grant relief. The State respectfully requests this Court affirm the Appellant's conviction and exceptional sentence for Deliver of a Controlled Substance (Methamphetamine).

Dated this 10th day of March, 2015.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. RIGOBERTO G. SANCHEZ, Appellant.	Court of Appeals No: 32637-3-III **DECLARATION OF SERVICE**

DECLARATION

On December 26, 2014 I electronically mailed, with prior approval from Ms. Kristina M. Nichols, a copy of the BRIEF OF RESPONDENT in this matter to:

KRISTINA M. NICHOLS
Wa.Appeals@gmail.com

I further declare that on March 11, 2015 I deposited in the mail of the United States a properly stamped, and addressed envelope directed to all counsel and parties as listed below a copy of the BRIEF OF RESPONDENT in this matter to:

RIGOBERTO G. SANCHEZ #377069
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on March 11, 2015.

Lisa M. Webber

LISA M. WEBBER
Office Manager

Benjamin C. Nichols, Prosecuting Attorney
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