

FILED  
March 21, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 73341-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

LISA D. HERNANDEZ,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S REPLY BRIEF

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## **A. ARGUMENT IN REPLY**

### **1. The Sixth Amendment bars the court from imposing restitution based on loss that was not found by a unanimous jury beyond a reasonable doubt, absent a knowing waiver.**

The federal constitutional right to have a jury determine restitution derives from our expanded understanding of the protections inherent in the Sixth Amendment guarantee of a jury. See e.g. Alleyne v. United States, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (facts increasing mandatory minimum sentences are “elements” that must be submitted to jury); Southern Union Co. v. United States, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012) (the historical function of the jury included determining the value of a financial penalty or fine). The State argues that this Court should ignore the U.S. Supreme Court’s clear explication of the jury trial right in a manner that plainly extends to the imposition of financial penalties such as restitution. SRB at 11. This Court is not bound to perpetuate such constitutional error, however, where the law has moved on and our Supreme Court has yet to address the question. See e.g. State v. Kilgore, 141 Wn.App. 817, 832-33, 172 P.3d 373 (2007), affirmed, 167 Wn.2d 28 (2009) (Armstrong, J., dissenting).

The “core concern” of Apprendi is the reservation to the jury of “the determination of facts that warrant punishment.” Id. at 2350 (citing Ice, 555 U.S. at 170). “That concern applies whether the sentence is a criminal fine, or imprisonment or death.” Southern Union, 132 S. Ct. at 2350. The Southern Union Court specifically recognized Apprendi applies where the punishment is based upon “the amount of the defendant’s gain or the victim’s loss.” 132 S. Ct. at 2350-51. That is precisely how restitution is determined under RCW 9.94A.753.

Kinneman’s holding that restitution did not trigger the Sixth Amendment’s protections because the statute does not set a maximum amount ignores the significant development represented by Alleyne. “A fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense” that must be proved beyond a reasonable doubt. Alleyne, at 2158. Because the Kinneman opinion focused on the notion that no jury finding would be required unless restitution exceeded the maximum allowed by statute, without regard to the increase in minimum punishment triggered by restitution, the premise upon which it was built does not survive Alleyne which held that “[a] fact that increases a sentencing floor, thus, forms an essential

ingredient of the offense” that must be proven as an element of the offense. Id. at 2161.

RCW 9.94A.753 requires restitution be imposed in all but the undefined extraordinary circumstances. Indeed, in any case in which the victim receives benefits from the crime victims’ compensation fund the trial court has no discretion at all and must impose restitution. RCW 9.94A.753(7). The SRA’s mandate of restitution is not “advisory” but rather mandatory, and creates a mandatory minimum amount based on factual findings made by a judge and explicitly tied to the particular factual findings the judge is required to make. *See* Southern Union, 132 S.Ct. at 2349.

Kinneman erroneously concluded that the absence of a maximum in RCW 9.94A.753 avoids any Sixth Amendment implications. To use the lexicon of Apprendi, the “maximum” permitted by RCW 9.94A.753 is \$0 unless there is a determination of “easily ascertainable damages.” Crucially, the statute sets an additional cap when it provides “restitution shall not exceed double the amount of the offender’s gain or the victim’s loss from the commission of the crime.” RCW 9.94A.753(3). Because the underlying factual determination results in an increase in punishment it must be made by the jury.

Before a court may impose any amount of restitution, the Sixth and Fourteenth Amendments require the State prove damages resulting from the loss or injury to a jury beyond a reasonable doubt. Southern Union, 132 S. Ct. at 2350-51.

In this case, Ms. Hernandez's Statement of Defendant on Plea of Guilty did not include any explanation regarding the right to a jury determination of the amount of restitution or the requirements of strict causation and unanimity. As such, Ms. Hernandez did not waive her right to jury determination of the amount of restitution.

**2. The Washington Constitution guarantees a jury determination of damages.**

The assurance of Article I, section 21 of the Washington Constitution that the jury trial right "shall remain inviolate" already requires a jury determination of civil damages. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 648, 771 P.2d 711, *amended*, 780 P.2d 260 (1989). In analysis which parallels that of the U.S. Supreme Court jurisprudence outlined in the previous section, the Washington Supreme Court found the jury's function as fact finder could not be divorced from the ultimate remedy provided. Id. at 661.

Restitution is similarly limited to damages causally connected to the offense. RCW 9.94A.753. Those damages are no different than the damages at issue in Sofie, where the fact-finder determines the value of the loss suffered as a result of the acts of another. To preserve “inviolable” the right to a jury trial, Article I, section 21 must afford a right to a jury determination the damages ordered under the restitution statute. In the absence of determination by unanimous jury based on proof beyond a reasonable doubt, the restitution order must be stricken.

**3. The record establishes a manifest constitutional error for which Ms. Hernandez is entitled to relief.**

Ms. Hernandez’s attorney’s acquiescence to a substantial portion of the restitution ordered does not preclude appellate review given the fundamental misunderstanding of the prosecutor’s obligations and the burden of proof which in turn flows from the application of the jury trial right.

It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 490 (emphasis added); Oregon v. Ice, 555 U.S. 160, 163, 129 S. Ct. 711, 172 L. Ed. 2d 51 (2009) (preserving the

“historic jury function” of “determining whether the prosecution has proved each element of an offense beyond a reasonable doubt.”) The Supreme Court has made clear the criminal fines are subject to the Sixth Amendment jury right. Southern Uni Co. v. United States, 132 S. Ct. at 2354.

Where Ms. Hernandez’s guilty plea and stipulation were based on misinformation regarding the prosecutor’s obligations and burden of proof, the result is a manifest constitutional error for which she may obtain relief in the appellate courts. See e.g. State v. Walsh, 143 Wn.2d 1, 5-9, 17 P.3d 591 (2001). CrR 4.2(d) provides that the trial courts “shall 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.” Id. citing State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996); State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988).

RAP 2.5(a)(3) in turn provides that “manifest error affecting a constitutional right” which may be raised for the first time on appeal. A defendant gives up constitutional rights by agreeing to a plea agreement, and, because fundamental rights of the accused are at issue, due process governs the considerations that then come into play.

Walsh, 143 Wn.2d at 7-9, citing State v. Van Buren, 101 Wn.App. 206, 211, 2 P.3d 991 (2000); State v. Tourtellotte, 88 Wn.2d 579, 583, 564 P.2d 799 (1977) (“[a] plea of guilty constitutes a waiver of significant rights by the defendant, among which are the right to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt”); In re Personal Restraint of Montoya, 109 Wn.2d 270, 277, 744 P.2d 340 (1987) (due process requires that a guilty plea be knowing, intelligent and voluntary); Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

Given the fundamental constitutional rights of an accused which are implicated when a defendant pleads guilty, a claim that the stipulations and waivers in a guilty plea entered pursuant to a plea agreement are involuntary where there is a misunderstanding about the facts the prosecution must prove, to whom they must be proven and the burden of proof to be applied, this is the kind of constitutional error that RAP 2.5(a)(3) encompasses. See Walsh, 143 Wn.2d at 8.

“Manifest” in RAP 2.5(a)(3) means that a showing of actual prejudice is made. State v. McFarland, 127 Wn.2d 322, 333-34, 899

P.2d 1251 (1995). The appellate court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed. State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). Ms. Hernandez’s claim that her plea and stipulation was not voluntary is very likely to succeed because “[a] defendant must understand the sentencing consequences for a guilty plea to be valid.” State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). Ms. Hernandez may, therefore, raise the issue of the involuntariness of stipulation and the inadequacy of the State’s proof for the first time on appeal.

**B. CONCLUSION.**

The restitution order should be vacated because Ms. Hernandez is entitled to a jury determination regarding restitution and specificity in the alleged medical expenses.

DATED this 21<sup>st</sup> March, 2016.

Respectfully submitted,

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LISA HERNANDEZ,	)	
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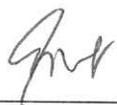
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21<sup>ST</sup> DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] IAN ITH, DPA [paoappellateunitmail@kingcounty.gov] [ian.ith@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>( ) ( ) (X)</p>	<p>U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL</p>
<p>[X] LISA HERNANDEZ 7429 RAINIER AVE S #203 SEATTLE, WA 98118</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF MARCH, 2016.

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