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## **I. INTRODUCTION**

The appellant appeals the exceptional sentence imposed for his conviction for three counts of violating a protection order. The appellant argues this sentence was improper because the State never provided him with notice of its intent to seek an exceptional sentence. However, as the appellant did not object on this basis before the trial court, this claim was not preserved for appeal. Even if this Court should reach this argument, the relevant statute does not require the State to provide notice. The Court should therefore deny the appellant's request and affirm the exceptional sentence in this case.

## **II. PROCEDURAL HISTORY**

The appellant was charged by information with three counts of violating a no-contact order issued pursuant to RCW 26.50. The information further alleged that these violations were felonies, as the appellant had at least two prior convictions for violating court orders. The appellant proceeded to jury trial on July 2, 2008, and was convicted on all counts the following day.

At sentencing, the State requested the trial court impose an exceptional sentence based on the fact the appellant's high offender score would result in him incurring no extra penalty for the second and third

counts if a standard range sentence was imposed.<sup>1</sup> The State's request was for the appellant to be sentenced to a total of one hundred and twenty months in prison.

The appellant asked the trial court to simply impose the standard range sentence, which was sixty months. Before the trial court, the appellant did not object to an exceptional sentence on constitutional grounds nor did he argue he had not been given notice of the State's intent to seek an exceptional sentence under RCW 9.94A.537. Instead, the sole basis of the appellant's argument was that an exceptional sentence was not appropriate based on the facts of the case. RP Trial 161-163.

The trial court, having heard the arguments of the parties, chose a middle ground. The trial court did impose an exceptional sentence, but for eighty-four months in prison rather than the one hundred and twenty months requested by the State. RP Trial 164. The instant appeal timely followed.

### **III. STATEMENT OF THE CASE**

The State agrees with the factual history as set forth by the appellant. When appropriate, this brief cites to particular facts in the record.

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<sup>1</sup> Under the current statutory scheme, the court may impose an exceptional sentence based on "free crimes" without a jury finding. See State v. Alvarado, 164 Wn.2d 556, 192 P.3d 345 (2008).

#### IV. ISSUES PRESENTED

1. May the appellant raise the issue of lack of notice to seek an exceptional sentence under RCW 9.94A.537 for the first time on appeal?
2. Does RCW 9.94A.537 require the State to give notice of its intent to seek an exceptional sentence?

#### V. SHORT ANSWERS

1. No.
2. No.

#### VI. ARGUMENT

- I. The Appellant May Not Raise the Issue of the Lack of Notice to Seek an Exceptional Sentence for the First Time on Appeal, as the Issue is not of Constitutional Magnitude.**
  - a. The Alleged Error Asserted by the Appellant is a Statutory Violation That is Not Subject to the Constitutional Error Exception to RAP 2.5(a).**

The appellant argues that the trial court's imposition of an exceptional sentence was improper because the State never filed any documents indicating its intent to seek an exceptional sentence. The appellant argues this omission was in violation of RCW 9.94A.537 and that the failure to file such notice precluded the trial court from imposing an exceptional sentence. However, as the appellant did not object to the lack of notice or raise this issue with the trial court, RAP 2.5(a) prevents the issue from being raised for the first time on appeal.

RAP 2.5(a) states that an appellate court “may refuse to review any claim of error which was not raised in the trial court.” This rule enshrines the longstanding principle that “an issue, theory, or argument not presented at trial will not be considered on appeal.” State v. Jamison, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979), quoting Herberg v. Swartz, 89 Wn.2d 916, 578 P.2d 17 (1978). The purpose of this rule is to require defendants to bring purported errors to the trial court’s attention, thus allowing the trial court to correct them, rather than staying silent in an attempt to “bank” the issue for appeal.<sup>2</sup> See State v. Fagalde, 85 Wn.2d 730, 731, 539 P.2d 86 (1975). Here, RAP 2.5(a) indisputably applies, as the appellant never raised the lack of notice issue at the time of sentencing or indeed at any point in the trial proceedings. Given this, the appellant may not raise this issue unless there is an exception to RAP 2.5(a).

As the appellant will doubtlessly argue, there is an exception to RAP 2.5(a) that allows, “manifest error affecting a constitutional right” to be raised for the first time on appeal. However, this exception does not apply to the appellant’s argument, as this claim asserts a statutory violation rather than error affecting a constitutional right. The appellant

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<sup>2</sup> Requiring defendants to raise their objections in the trial court also allows for the development of a complete record regarding the alleged error. To allow defendants to bring forth new claims on appeal denies the State the ability to make a full record, and in this case ultimately deprives the Court of all the relevant information needed to decide if the appellant had actual notice of the State’s intentions for sentencing.

argues that RCW 9.94A.537 mandates the State file notice of its intent to seek an exceptional sentence, and that the failure to do so precludes the State, and the trial court, from imposing such a sentence.<sup>3</sup> This argument is explicitly not based on constitutional grounds, but instead on an alleged failure to comply with certain statutory provisions of the Sentencing Reform Act. The appellant appears to recognize this claim is not based on constitutional grounds.<sup>4</sup> Given that this claim is not of constitutional magnitude, this Court should not consider such a belated argument. RAP 2.5(a), See also State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988).

The appellant may attempt to argue that, despite the fact his claim is clearly based on a statutory violation, issues of constitutional magnitude are nevertheless somehow implicated. The problem with this claim is that the appellant's brief only references the Washington or United States constitutions in one sentence which reads: "Notice of aggravating factors is required by RCW 9.94A.537, as well as the Sixth and Fourteenth Amendments and Articles I, §3, 22 of the Washington Constitution." Appellant's brief at 5.

Other than this boilerplate language, the appellant never explains or argues how this claim implicates any constitutional issues. The courts

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<sup>3</sup> The validity of this claim will be address in section II of the State's argument.

<sup>4</sup> See Appellant's brief at 6, "Even if notice of prior convictions is not expressly required by the constitution, notice of intent to seek an exceptional sentence is statutorily required in Washington."

regularly refuse to consider blanket constitutional claims without any supporting argument. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). It has been held that “naked castings into the constitutional sea” such as these are insufficient to merit judicial consideration. Johnson, 119 at 171, quoting In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). This Court should reject any attempt by the appellant to reshape the argument from a statutory violation to a constitutional error. Review of this issue is inappropriate, as it is a claim of statutory error not preserved before the trial court.

**b. Even if the Appellant’s Claim is Considered to be a Constitutional Issue, It is Not a Manifest Error that May be Raised for the First Time on Appeal.**

If the Court should consider the appellant’s claim to be constitutional in nature, this is not the end of the inquiry under RAP 2.5(a). Instead, analyzing whether a constitutional claim may be pursued for the first time on appeal is a four-step process:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992).

Importantly, not every constitutional error is manifest and therefore able to be raised for the first time on appeal, as the Supreme Court has noted that “permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), quoting State v. Lynn, 67 Wn.App. at 344. (Emphasis in original). An error is “manifest” if it is unmistakable, evident, or indisputable. Lynn, at 345. In contrast, a “purely formalistic error is insufficient.” Id.

Here, the State disputes that the appellant’s argument is constitutional at all, as it has been framed as a statutory violation. Assuming *arguendo* this claim is constitutional, it is not a manifest error that may be raised for the first time on appeal. Rather than being unmistakable or clear, the nature of the error is vague. It is uncertain what constitutional right or protection was violated by the failure to give notice of the intent to seek an exceptional sentence, and the appellant has provided no argument or authority to clarify this. Instead, if the error is constitutional, it plainly falls into the category of purely formalistic, i.e. non-manifest errors.

It must also be noted that prior to the enactment of RCW 9.94A.537, the courts had repeatedly ruled that a defendant had no constitutional right to notice of the possibility the court or prosecutor intended to seek an exceptional sentence. In State v. Moro, 117 Wn.App. 913, 920, 73 P.3d 1029 (2003), the court noted that “due process does not require that an adult defendant receive notice that the court is considering imposing an exceptional sentence. No such notice is required because an exceptional sentence is a possibility in all sentencings.” *See also* State v. Falling, 50 Wn.App. 47, 49-50, 747 P.2d 1119 (1987); State v. Wood, 57 Wn.App. 792, 798, 790 P.2d 220 (1990); State v. Holyoak, 49 Wn.App. 691, 697, 745 P.2d 515 (1987); State v. Dennis, 45 Wn.App. 893, 898, 728 P.2d 1075 (1986). Thus, even if this Court were to now find there is a constitutional right to notice of the intent to seek an exceptional sentence, the failure to provide such notice cannot be said to be manifest error in light of the long line of cases holding there was no such requirement.

Finally, if the Court should find the failure to provide notice was a manifest constitutional error, this error was harmless. The appellant’s defense against the State’s request would not be been altered in any way by the filing of a formal notice. Once the appellant was convicted of all three counts, the only available argument was that the facts of the case made an exceptional sentence inappropriate. This is the exact argument

that trial counsel urged on the sentencing judge, with some success. The failure to give notice cannot be said to have prejudiced the appellant in any meaningful way. Even if the Court reaches this argument, the appellant's claim must fail.

**II. The Plain Language of RCW 9.94A.537 Does Not Require the State Give Notice of Its Intent to Seek an Exceptional Sentence.**

The appellant argues that RCW 9.94A.537 states that the State must file notice of its intent to seek an exceptional sentence, or else forfeit this possibility. However, a close reading of the statute does not support this position. Instead, the actual language of RCW 9.94A.537 states that “[a]t 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.” (Emphasis added). Thus, on its face RCW 9.94A.537 does not require the State to give notice of its intent to seek an exception sentence, but rather makes clear that the giving of notice is discretionary.

The Supreme Court remarked on the fact that notice is not required under RCW 9.94A.537 in the seminal State v. Pillatos, 159 Wn.2d 459, 479, 150 P.3d 1130 (2007), decision, observing that “Laws of 2005, chapter 68 [codified as RCW 9.94A.537], does not explicitly require such pleading of aggravators. Instead, it says that if the ‘substantial rights of the

defendant' are not offended, notice of intent to seek an exceptional sentence may be given any time 'prior to trial or the entry of a guilty plea.'" The appellant is therefore correct when he claims the statute is unambiguous. However, contrary to his claims, the statute unambiguously states that pre-trial notice of the intent to seek an exceptional sentence is not mandatory.

This conclusion is in keeping with prior decisions by the Supreme Court regarding pre-trial notice of sentencing consequences. In State v. Crawford, 159 Wn.2d 86, 147 P.3d 1288 (2006), the court held a defendant had no constitutional or statutory right to notice he was facing a third strike and a mandatory life sentence. The court rejected a request to require such notice, holding that "we will not mandate greater procedural protections than those required by statute unless those requirements violate a constitutional guaranty." Crawford, 159 Wn.2d at 94.

Here, RCW 9.94A.537 does not require the State to give notice. The statute reads "may give notice" not "shall give notice." It is a long standing rule that use of the word "shall" indicates an action is mandatory while use of the word "may" indicates the action is discretionary. See State v. Huntzinger, 92 Wn.2d 128, 594 P.2d 917 (1971). Considering this, the appellant's argument that notice is mandatory must fail. If the Court reaches the merits of this issue, the plain language of the statute indicates

the State was not required to file any notice of its intent to seek an exceptional sentence.

## VII. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the appellant's appeal. The appellant's claim was not properly preserved before the trial court, and is based on a misreading of the statutory requirements. The State asks this Court to uphold the exceptional sentence imposed by the trial court.

Respectfully submitted this 21<sup>st</sup> day of May, 2009.

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COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 DAVID CHARLES HAMILTON, )  
 )  
 Appellant. )

NO. 37995-3-II  
Cowlitz County No.  
08-1-00376-8

CERTIFICATE OF  
MAILING

BY \_\_\_\_\_  
IDENTITY \_\_\_\_\_

MAY 26 11:20 AM '09  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II

I, Michelle M. Sasser, certify and declare:

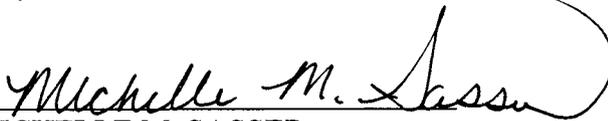
That on the 22<sup>nd</sup> day of May, 2009, I deposited in the mails of  
the United States Postal Service, first class mail, a properly stamped and  
address envelope, containing Brief of Respondent addressed to the  
following parties:

LISA E. TABBUT  
ATTORNEY AT LAW  
P.O. BOX 1396  
LONGVIEW, WA 98632

COURT OF APPEALS, CLERK  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402-4454

I certify under penalty of perjury pursuant to the laws of the State  
of Washington that the foregoing is true and correct.

Dated this 22<sup>nd</sup> day of May, 2009.

  
MICHELLE M. SASSER