

FILED  
Court of Appeals  
Division II  
State of Washington  
6/28/2018 3:09 PM  
NO. 51248-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON, Respondent

v.

JESUS SOLIS-VAZQUEZ, Appellant

---

FROM THE SUPERIOR COURT FOR COWLITZ COUNTY  
COWLITZ COUNTY SUPERIOR COURT CAUSE NO. 14-1-01468-3

---

RESPONSE TO ANDERS MOTION

---

Attorneys for Respondent:

RYAN P. JURVAKAINEN  
Prosecuting Attorney  
Cowlitz County, Washington

ERIC H. BENTSON, WSBA #38471  
Deputy Prosecuting Attorney

Cowlitz County Prosecuting Attorney  
312 S.W. First Avenue  
Kelso, WA 98632  
Telephone (360) 577-3080

**TABLE OF CONTENTS**

	<b>PAGE</b>
<b>I. IDENTITY OF RESPONDENT.....</b>	<b>1</b>
<b>II. STATEMENT OF RELIEF SOUGHT.....</b>	<b>1</b>
<b>III. ISSUES PRESENTED FOR REVIEW.....</b>	<b>1</b>
<b>A. DID SOLIS-VAZQUEZ PRESERVE A POTENTIAL ARGUMENT THAT THE REINSTATED FIREARM ENHANCEMENTS WERE NOT MANDATORY WHEN HE DID NOT RAISE THE ISSUE BEFORE THE SENTENCING COURT? .....</b>	<b>1</b>
<b>B. DID SOLIS-VAZQUEZ RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENCING WHEN HIS ATTORNEY CORRECTLY INTERPRETED THE LAW AND PURSUED THE SENTENCE HE SOUGHT? .....</b>	<b>1</b>
<b>IV. STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>V. ARGUMENT.....</b>	<b>3</b>
<b>A. SOLIS-VAZQUEZ FAILED TO PRESERVE ANY ARGUMENT FOR REVIEW THAT THE FIREARM ENHANCEMENTS WERE NOT MANDATORY, BECAUSE HE FAILED TO MAKE THIS CLAIM WITH THE SENTENCING COURT.....</b>	<b>4</b>

**B. SOLIS-VAZQUEZ DID NOT RECEIVE  
INEFFECTIVE ASSISTANCE OF COUNSEL AT  
RESENTENCING..... 7**

**VI. CONCLUSION ..... 10**

## TABLE OF AUTHORITIES

	Page
 <b>Cases</b>	
<i>Anders v. California</i> , 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d (1967) ..	3
<i>Herberg v. Swartz</i> , 89 Wn.2d 916, 578 P.2d 17 (1978).....	4
<i>State v. Brown</i> , 139 Wn.2d 20, 983 P.2d 608 (1999) .....	6
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 21, 391 P.3d 409 (2017) .....	6
<i>State v. Jamison</i> , 25 Wn. App. 68, 604 P.2d 1017 (1979).....	4
<i>State v. Jury</i> , 19 Wn. App. 256, 576 P.2d 1302 (1978).....	8
<i>State v. Kirwin</i> , 165 Wn.2d 818, 203 P.3d 1044 (2009).....	4
<i>State v. Lynn</i> , 67 Wn. App. 339, 835 P.2d 251 (1992) .....	5
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	8
<i>State v. Myers</i> , 86 Wn.2d 419, 545 P.2d 538 (1976) .....	8
<i>State v. Robinson</i> , 171 Wn.2d 292, 253 P.3d 84 (2011).....	4
<i>State v. Sardinia</i> , 42 Wn. App. 533, 713 P.2d 122, <i>review denied</i> , 105 Wn.2d 1013 (1986).....	8
<i>State v. Theobald</i> , 78 Wn.2d 184, 470 P.2d 188 (1977).....	3
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	8
<i>State v. Visitacion</i> , 55 Wn. App. 166, 776 P.2d 986, 990 (1989).....	8
<i>Strickland v. Washington</i> , 446 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	7

**Statutes**

RCW 9.94A.533..... 5, 6, 7, 9  
RCW 9.94A.533(3)..... 5, 7  
RCW 9.94A.533(3)(e) ..... 5  
RCW 9.94A.533(4)..... 5, 9  
RCW 9.94A.533(4)(e) .....9

**Rules**

RAP 18.3(a) ..... 1, 2  
RAP 15.2(i)..... 1, 2  
RAP 2.5(a) ..... 4, 5  
RAP 2.5(a)(3) ..... 5

**I. IDENTITY OF RESPONDENT**

The State of Washington, Respondent, asks for the relief designated in Part II.

**II. STATEMENT OF RELIEF SOUGHT**

The State agrees that this appeal presents no basis for a good faith argument on review. Pursuant to RAP 15.2(i) and 18.3(a), the State asks this Court to grant appellate counsel's motion to withdraw and dismiss this appeal.

**III. ISSUES PRESENTED FOR REVIEW**

- A. Did Solis-Vazquez preserve a potential argument that the reinstated firearm enhancements were not mandatory when he did not raise the issue before the sentencing court?**
  
- B. Did Solis-Vazquez receive ineffective assistance of counsel at resentencing when his attorney correctly interpreted the law and pursued the sentence he sought?**

**IV. STATEMENT OF THE CASE**

After a jury trial, Solis-Vazquez was convicted of several felonies including possession of methamphetamine with intent to deliver with four firearm enhancements. CP 54. At the time he committed these crimes,

Solis-Vazquez was 33-years-old.<sup>1</sup> CP 54. After the trial, the trial court dismissed two of the firearm enhancements the jury had found. *State v. Jesus Solis-Vazquez*, Court of Appeals No. 47593-6-II at 6. The State appealed the trial court's dismissal of the two firearm enhancements. No. 47593-6-II at 6. The Court of Appeals found that the trial court erred in dismissing these two firearm enhancements, ordered they be reinstated, and that Solis-Vazquez be resentenced. No. 47593-6-II at 21. Although the judge who had originally sentenced Solis-Vazquez was unavailable on the day of his sentencing, Solis-Vazquez requested the trial court proceed with sentencing him. RP 13. Solis-Vazquez did not request an exceptional sentence downward or argue that the firearm enhancements were not mandatory. RP 13. Rather, he asked the trial court to reinstate the original standard range sentence and add the firearm enhancements. RP 13. Solis-Vazquez then filed a notice of appeal. CP 66. His appellate counsel reviewed the case, and having no basis for a good faith argument on review, now requests permission to withdraw pursuant to RAP 15.2(i) and 18.3(a). *See Appellant's Brief* at 2.

---

<sup>1</sup> Solis-Vazquez's J&S shows his date of birth as 10/18/1981 and the date of the crime as 12/12/2014.

## V. ARGUMENT

Because the trial court correctly sentenced Solis-Vazquez after the Court of Appeals reinstated two firearm enhancements, there is no basis for a good faith argument to raise on review. When reviewing whether there is an issue to raise on an appellant's behalf, "if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d (1967). When such a request is (1) accompanied by a brief referring to anything in the record that might arguably support the appeal, (2) a copy of the brief is provided to the indigent, (3) time is provided for the appellant to raise any points he or she chooses, and (4) the reviewing court conducts a full examination and determines that the appeal is wholly frivolous, then appellate counsel should be permitted to withdraw, and the appeal dismissed. *See State v. Theobald*, 78 Wn.2d 184, 185, 470 P.2d 188 (1977). Because these requirements are met and there is no issue to be raised as to Solis-Vazquez's resentencing, the Court of Appeals should grant his counsel's motion to withdraw and dismiss his appeal.

**A. Solis-Vazquez failed to preserve any argument for review that the firearm enhancements were not mandatory, because he failed to make this claim with the sentencing court.**

After the Court of Appeals reinstated the two mandatory firearm enhancements, Solis-Vazquez did not argue the enhancements were not mandatory; thus he failed to preserve this issue for review. “[A]n 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)). At the time of his resentencing, Solis-Vazquez did not argue for a lesser sentence on the reinstated firearm enhancements. Further, the issue his brief arguably suggests does not constitute a manifest error affecting a constitutional right. Therefore, his attorney cannot in good faith raise this issue for the first time on appeal.

“The general rule in Washington is that a party’s failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error affecting a constitutional right.’” *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)); *see also* RAP 2.5(a). An error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be

granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a).

The parameters of a “manifest error affecting a constitutional right” are not unlimited:

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.

*State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). Thus, it is insufficient to raise an issue that merely suggests a constitutional issue; to raise an issue for the first time on appeal, the alleged error must be “manifest.” *See id.* at 345. “Manifest” means “unmistakable, evident or indisputable as distinct from obscure, hidden or concealed.” *Id.* An error that is abstract and theoretical does meet this definition. *See id.* at 346.

When a felony is committed by one who is armed with a firearm, then depending on the classification of the crime, additional time “shall be added to the standard range sentence.” RCW 9.94A.533(3). Moreover, “[n]otwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.” RCW 9.94A.533(3)(e). Identical language is used in RCW 9.94A.533(4) with regard to crimes committed while armed with a deadly

weapon. According to the Supreme Court, “judicial discretion to impose an exceptional sentence does not extend to a deadly weapon enhancement[.]” *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999) (overruled as applied to juveniles). If the statutory language “is to have any substance, it must mean that courts may not deviate from the term of confinement required by a deadly weapon enhancement.” *Id.*

Recently, the Supreme Court held that because “children are different,” when sentencing juveniles, the Eighth Amendment requires that “[t]rial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or enhancements.” *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 21, 391 P.3d 409 (2017). Recognizing that RCW 9.94A.533 and other statutes did not allow such discretion, the court held the statutes prohibiting discretion were unconstitutional as applied to juveniles, stating: “To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled.” *Id.* at 21. Thus, the mandatory application of these statutes remains for adults, as was noted in the concurrence. *Id.* at 35 (Madsen, J., concurring) (“I recognize that this court has held that sentencing courts do not have the discretion to depart from mandatory firearm sentencing enhancements because of the legislature’s ‘absolute language.’”).

Here, at sentencing, Solis-Vazquez failed to claim any mitigation, therefore, he cannot raise such an issue for the first time on appeal unless he can show a manifest error affecting a constitutional right. However, because Solis-Vazquez was 33-years-old at the time he committed the offense, he was not a juvenile. CP 54. Thus, the mandatory application of RCW 9.94A.533(3) applies to him as it would to any adult. Because this statute has never been found to be unconstitutional as applied to adults, his potential claim does not suggest a constitutional issue, much less one that is “manifest.” Because Solis-Vazquez did not preserve any claim that the reinstated firearm enhancements were not mandatory, he has waived this issue for appeal. Consequently, there is no basis for a good faith argument on review.

**B. Solis-Vazquez did not receive ineffective assistance of counsel at resentencing.**

Solis-Vazquez did not receive ineffective assistance of counsel at resentencing because his attorney properly instructed the court on the dictates of the law and pursued the sentence Solis-Vazquez sought. To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d

816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 335.

Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978) (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show

“there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

Here, Solis-Vazquez’s attorney’s representation was not deficient because he properly analyzed the law and also pursued his client’s desire to proceed with sentencing without attempting to ask for an exceptional sentence downward. At his resentencing, on October 31, 2017, Solis-Vazquez’s attorney informed the court: “After speaking again with Mr. Solis Vazquez, he indicated that he would like to proceed today to resentencing, understanding that that removed any opportunity to ask for an exceptional sentence downward on the original sentence.” RP 13. Solis-Vazquez’s attorney correctly informed the court that it was required to include the reinstated firearm enhancements by virtue of the mandate from the Court of Appeals. RP 13. While an attorney may zealously advocate on his or her client’s behalf, that attorney also has a duty of candor to the court. Thus, Solis-Vazquez has not shown that his attorney failed to exercise customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.

Further, Solis-Vazquez did not suffer any prejudice. For adults, firearm enhancements remain mandatory. It is the legislature, not the courts, who have set forth the punishment for being armed with firearms during the commission of felonies. RCW 9.94A.533(4)(e) expressly

states: “all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions[.]” The Court of Appeals reinstated the firearm enhancements, and the trial court was required to add them to the sentence. No argument to the contrary would have prevailed, and Solis-Vazquez suffered no prejudice. Thus, there is no basis for a good faith argument for ineffective assistance of counsel.

## VI. CONCLUSION

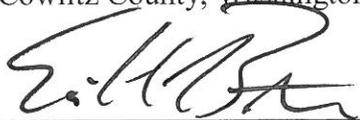
Both of the potential issues identified are frivolous. Solis-Vazquez’s appellate counsel should be permitted to withdraw and his sentence affirmed.

DATED this 28<sup>th</sup> day of June, 2018.

Respectfully submitted:

RYAN P. JURVAKAINEN  
Prosecuting Attorney  
Cowlitz County, Washington

By:

  
ERIC H. BENTSON, WSBA #38471  
Deputy Prosecuting Attorney

**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. Eric J. Nielsen/E. Rania Rampersad  
Attorney at Law  
Nielsen Broman & Koch, PLLC  
1908 E. Madison Street  
Seattle, WA 98122-2842  
[nielsene@nwattorney.net](mailto:nielsene@nwattorney.net)  
[rampersadr@nwattorney.net](mailto:rampersadr@nwattorney.net)  
[sloanej@nwattorney.net](mailto:sloanej@nwattorney.net)

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 28<sup>th</sup>, 2018.

  
Michelle Sasser  
Michelle Sasser

# COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

June 28, 2018 - 3:09 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51248-3  
**Appellate Court Case Title:** State of Washington, Respondent v. Jesus Vazquez, Appellant  
**Superior Court Case Number:** 14-1-01468-3

### The following documents have been uploaded:

- 512483\_Briefs\_20180628150723D2391675\_5083.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was SKMBT\_65418062815130.pdf*

### A copy of the uploaded files will be sent to:

- Jurvakainen.ryan@co.cowlitz.wa.us
- nielsene@nwattorney.net
- rampersadr@nwattorney.net
- sloanej@nwattorney.net

### Comments:

RESPONSE TO ANDERS MOTION WITH CERT OF SERVICE

---

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

**Filing on Behalf of:** Eric H Bentson - Email: bentsone@co.cowlitz.wa.us (Alternate Email: appeals@co.cowlitz.wa.us)

### Address:

312 SW 1St Avenue

Kelso, WA, 98626

Phone: (360) 577-3080 EXT 2318

**Note: The Filing Id is 20180628150723D2391675**