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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROY NEFF, PETITIONER

On review from the Court of Appeals, Division Two, COA # 32402-4
and the Superior Court of Pierce County, No. 02-1-05356-6

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO THE PETITION FOR REVIEW.

1. When the record shows that defendant obtained the dismissal of five felony charges and four firearm enhancements in exchange for his knowing, voluntary, and intelligent waiver of his right to challenge the sufficiency of the evidence on appeal, and his agreement to a stipulated facts bench trial on a single felony count and firearm enhancement, should this court hold defendant to the terms of his bargain and refuse to consider his a challenge to the sufficiency of the evidence?
2. Has defendant failed to meet his burden of showing ineffective assistance of counsel under the two-prong test set forth in Strickland v. Washington?
3. Should this court refuse to consider defendant's arguments on the right to bear arms when this issue was first raised summarily in the petition for review and where he has failed to present any analysis under Gunwall?

B. STATEMENT OF THE CASE.

On November 21, 2002, the Pierce County Prosecutor's office charged petitioner ROY LEN NEFF, hereinafter "defendant," with two counts of unlawful manufacturing of a controlled substance (methamphetamine and marijuana), and unlawful possession of ammonia

with intent to manufacture methamphetamine in Pierce County Cause No. 02-1-05356-6. CP 1-2. Two of these charges had enhancements for having a person under the age of eighteen on the premises. Id. The State later amended the charges adding a count of unlawful possession of psuedoephedrine and/or ephedrine with intent to manufacture methamphetamine, a count of possession of a controlled substance with intent to deliver, and a count of unlawful possession of a firearm in the first degree. CP 34-37. The State alleged firearm enhancements on every count except the firearm charge. Id.

Defendant moved to suppress all evidence seized from his property during the execution of a search warrant alleging that the evidence in the supporting affidavit had been acquired unlawfully for a variety of reasons. CP 58-65. The suppression hearing was held before the Honorable Ronald E. Culpepper on November 20, 24, and 25, 2003. 7RP 1-239. The court denied the motion to suppress, and later entered written findings. 7RP 173-199; CP 321-355.

The trial was also before Judge Culpepper. 7RP 199. The parties proceeded to impanel a jury. 8RP 119-124. Prior to the start of evidence, the parties reached an agreement as to how the charges could be resolved short of a jury trial. The State agreed to file a second amended information reducing the charges to one count of manufacture of a controlled substance (methamphetamine), with a firearm enhancement, in exchange for defendant's agreement to proceed on a stipulated facts bench

trial. 7RP 213-214, 219-229; CP 99-104, 105. As part of this agreement, defendant waived his right to challenge the sufficiency of evidence on appeal, but preserved his right to challenge the court's ruling on the suppression motion. 7RP 224-225; CP 99-104. The court accepted defendant's stipulation. 7RP 229.

The court found defendant guilty based upon the stipulated facts, and also found the firearm enhancement. 7RP 229-237. The court entered findings and conclusions on its determination of guilt. CP 158-320. The court set sentencing for January 16, 2004. 7RP 238.

Defendant failed to appear for his sentencing. SRP 2. Defendant agreed that the State could increase its sentencing recommendation from 114 months to 125 months, in exchange for the State's agreement not to file bail jumping charges. SRP 2-4; CP 117. The court imposed a standard range sentence of 89 months, plus 36 months for the firearm enhancement, for a total period of confinement of 125 months, \$3,710 in court costs and fees, and 9-12 months of community supervision. SRP 12; CP 118-129.

Defendant filed a timely notice of appeal. CP 136-149. On appeal, he challenged the trial court's ruling on his suppression motion and the sufficiency of the evidence supporting the firearm enhancement. Defendant contended that the court should not find that he waived his right to raise a sufficiency of evidence argument as part of his agreement or, if the court found a waiver, that it was because he received ineffective

assistance of counsel. In an unpublished decision, the Court of Appeals affirmed defendant's conviction. Defendant then filed a petition for review on whether: 1) defendant had entered a knowing, voluntary waiver of certain appellate rights; 2) defendant had received ineffective assistance of counsel; and, 3) there was sufficient evidence to support the firearm finding. In the petition for review, defendant alleged that the finding of the firearm enhancement raised constitutional concerns.

C. ARGUMENT.

1. THE COURT OF APPEALS PROPERLY REFUSED TO REVIEW DEFENDANT'S CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE AS HE KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO RAISE SUCH A CLAIM IN HIS AGREEMENT TO PROCEED WITH A STIPULATED FACTS BENCH TRIAL.

A criminal defendant may, as part of plea agreement, waive constitutional and statutory rights, including rights under the SRA and the right to appeal. In re Personal Restraint of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999); State v. Perkins, 108 Wn.2d 212, 216, 737 P.2d 250 (1987); State v. Mollichi, 132 Wn.2d 80, 89 n.4, 936 P.2d 408 (1997). There are some limitations to this principle. A defendant may not waive or stipulate to a sentence not authorized by the Legislature. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 871, 50 P.3d 618 (2002)

("[i]mposition of a sentence which is not authorized by the SRA is a fundamental defect which may justify collateral relief."). Nor may a court extend or waive limitations on its subject matter jurisdiction. State v. Phelps, 113 Wn. App. 347, 357, 57 P.3d 624 (2002) ("criminal statute of limitation is not merely a limitation upon the remedy, but is a limitation upon the power of the sovereign to act against the accused."). Agreements to waive the right to appeal are a permissible component of valid plea agreements. State v. Moen, 150 Wn.2d 221, 230-231, 76 P.3d 721 (2003). Moreover, a criminal defendant may waive certain appellate rights while retaining others. In Perkins, the defendant waived his right to appeal his conviction and a standard range sentence, but retained his right to appeal the imposition of any exceptional sentence. 108 Wn.2d at 218.

When the record indicates that, at least presumptively, a defendant has waived his right to an appeal - or some portion of that right - the focus of inquiry must become whether the waiver of that right was valid. Waiver is the intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938). The State has the burden of demonstrating that a defendant has made a voluntary, knowing, and intelligent waiver of the right to appeal. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

In this case, just after the jury had been impaneled to hear defendant's trial, defendant entered into an agreement with the State to resolve his case with a stipulated facts bench trial on reduced charges.

7RP 217-219, CP 34-37, 105. As part of the agreement, the State reduced the charges defendant was facing from 6 felony counts, with 5 firearm enhancements, to one felony count with a firearm enhancement. CP 34-37, 105. In order to accomplish this resolution, defendant completed a written agreement entitled “Stipulation to Facts Sufficient and Stipulated Bench Trial.” CP 99-104 (see, Appendix A). The written stipulation included the following paragraph regarding defendant’s right to appeal:

I am waiving the right to challenge the sufficiency of the evidence to support these convictions on appeal, while reserving the right to challenge the trial court’s suppression hearing findings and conclusions of law.

CP 99-104 (see paragraph 1.2(e)); see also, Appendix A. Looking at the agreement in its entirety, it is unequivocal as to which appellate rights defendant was preserving. It expressly states that defendant is preserving his right to challenge the trial court ruling on the suppression motion and the right to appeal an exceptional sentence. CP 99-104 (paragraphs 1.1(e)(g)and (j)); 7RP 213-214. In the agreement, defendant acknowledged that he could not appeal a sentence that imposed time for a firearm sentencing enhancement. Id. (paragraph 1.1(g)). The agreement reflects a general waiver of his right to appeal, except for the retention of the right on specific issues.

The written agreement also stated that defendant was entering the stipulation freely and voluntarily and that his attorney had explained and

discussed the entirety of the document with him. CP 99-104 (paragraphs 1.4 and 1.6).

Before discharging the jury, the court engaged defendant in a colloquy regarding the stipulation. 7RP 219-229. Defendant verified that he had reviewed the entire document with his attorney. 7RP 220. Defense counsel also verified that he had gone over every word on the document and thoroughly discussed it with his client:

DEFENSE COUNSEL: Your Honor, I might explain a couple of things. I went over all these items, the constitutional rights. Mr. Neff and I have discussed the facts of this case at length and possible defenses at length. We've talked about the prosecutor's recommendation and the stipulation. I read every word on that document, the stipulation to Mr. Neff. He appeared to be reading along with me. However, sometimes these things can be complicated, so if Mr. Neff is not able to answer your question[s], I can certainly explain it, but I wanted to let the court know that.

7RP 221. Defendant showed no misunderstanding about the nature of the trial rights he was giving up. 7RP 222-224. The stipulation form included a stipulation that "there is sufficient evidence to support the charged offense and the firearm enhancement as charged in the second amended information. CP 99-104, paragraph 1.1(a). The court read this part of the stipulation aloud during the colloquy. 7RP 223. Defendant verified that he was entering the agreement "freely and voluntarily." 7RP 224. When the court got to the part addressing the appellate rights that defendant was giving up, the court misspoke (or misread) the relevant paragraph and

asked if defendant understood that he was “reserving the right to challenge sufficiency of evidence to support the conviction while reserving the right to challenge the suppression hearing findings and conclusions.” 7RP 224. At that point, defense counsel interrupted and asked if he had misunderstood the court with regard to what it had said about reserving the right to challenge the sufficiency of the evidence. 7RP 224. The court then correctly read the paragraph to indicate that the defendant was waiving the right to challenge the sufficiency of the evidence on appeal, but maintaining his right to challenge the suppression hearing ruling. 7RP 224-225. The prosecutor confirmed that that was the intent of the agreement. 7RP 225.

Before accepting the stipulation, the court again verified that defendant wanted to enter into the agreement, that he was not subject to pressure or coercion, and that he had thoroughly gone over the document with his attorney. 7RP 228-229. Defendant’s attorney indicated that he believed defendant was entering into the agreement freely and voluntarily. 7RP 228-229. This record shows a knowing, voluntary, and intelligent waiver of defendant’s right to challenge the sufficiency of the evidence on

appeal, while maintaining the right to argue the issue¹ to the trial court. The Court of Appeals below correctly found that this record showed that defendant *was* knowingly and voluntarily waiving his right to challenge the sufficiency of the evidence on appeal, but was keeping his right to contest the sufficiency of the evidence at the trial level. Defendant contends now that the language in the plea agreement and colloquy was not clear enough to support a valid waiver. He suggests that if the agreement had informed him that he was waiving a “due process” right when he was waiving his right to challenge the sufficiency of the evidence on appeal, that this wording would have been more informative than the language “I am waiving the right to challenge the sufficiency of the evidence to support these convictions on appeal.” See, Petition at pp. 26-27. Defendant fails to explain how a specific description of the right being waived can be construed as less informative than the generic description of “due process rights.”

¹ Defendant argued below that the written agreement reflects a desire to preserve his right to challenge the sufficiency of the evidence. In making this claim, defendant pointed to paragraphs that indicated a desire to preserve the right to argue the issue in the trial court rather than to raise the issue on appeal. As part of the agreement, defendant acknowledged that the stipulated facts contained sufficient evidence to support a determination of guilt. CP 99-104 (paragraph 1.1(a)); RP 223. However, he did not stipulate that the court should find him guilty on the basis of such evidence. CP 99-104 (stricken paragraphs 1.2 and 1.5). In other words, the defendant took the position that the evidence allowed, but did not demand, a finding of guilt. Under the agreement, defendant was free to argue to the trial court that it should not find him guilty of the crime or the enhancement. CP 99-104; 7RP 234-235. Defense counsel did argue that the court should not find the enhancement, but the court rejected this argument. 7RP 234-237.

Having waived his right to challenge on appeal the sufficiency of the evidence as part of a resolution agreement involving a reduction of charges and a stipulated facts bench trial, defendant should be held to his agreement. This court has spoken before about the public policy reasons behind upholding the terms of plea agreements:

This state recognizes a strong public interest in enforcing the terms of plea agreements which are voluntarily and intelligently made. Between the parties, they are regarded and interpreted as contracts and both parties are bound by the terms of a valid plea agreement.

...

Plea agreements which are intelligently and voluntarily made, with an understanding of the consequences, are accepted, encouraged and enforced in Washington.

In re PRP of Breedlove, 138 Wn.2d 298, 309-310, 979 P.2d 417 (1999)(citations omitted); State v. Moten, 95 Wn. App. 927, 976 P.2d 1286 (1999). Defendant now seeks to have the full advantage of the reduced charges he obtained under the agreement while trying to avoid having to uphold his end of the contract. The State dropped five felony counts and four firearm enhancements in exchange for defendant's waiver of his right to challenge the sufficiency of evidence on appeal. Under the agreement, defendant bound himself to abide by the decision of the trial court by waiving his right to appeal these factual determinations. This court should refuse to allow him to escape the consequences of his actions and thereby undermine the agreement struck between defendant and the State. This court should refuse to consider defendant's claim of

insufficient evidence to support the deadly weapon enhancement as he waived his right to appeal this issue.² This court should affirm the decision of the Court of Appeals.

2. DEFENDANT HAS NOT SHOWN INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S.

² Should this Court disagree with the State's procedural argument, then the court is referred to the Respondent's brief filed at the Court of Appeals level for a discussion of the merits of this issue. See, Respondent's Brief at pp. 12-16.

668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn. 2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995).

Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." Strickland, 466 U.S. at 694.

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls

within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Defendant argues that he received ineffective assistance of counsel because his attorney did not present case authority to the trial court on the issue of what is sufficient evidence to support a finding for a firearm enhancement. In order to succeed on this claim, defendant must show that if such authority was presented, that the court would have, as a matter of law, found that the State failed to prove the firearm enhancement applied. Defendant's argument is disproved by the decision of the Court of Appeals below. The Court of Appeals considered all of the authority

which could have been presented to the trial court as well as some cases that were decided after the trial court made its ruling and still affirmed the trial court's finding of the firearm enhancement. If an appellate court is not convinced by defendant's authority, then defendant cannot show that the trial court would have found in defendant's favor had additional authority been presented to it. It is defendant's burden to show that the legal grounds for his motion were meritorious; he has failed to show that the outcome in the trial court would have been any different had trial counsel presented some case law on firearm enhancements to the trial court.

3. THIS SHOULD NOT ADDRESS DEFENDANT'S CONSTITUTIONAL ARGUMENTS ON THE RIGHT TO BEAR ARMS AS THEY WERE NOT RAISED UNTIL THE PETITION FOR REVIEW AND HAVE NOT BEEN PROPERLY DEVELOPED.

Under Rule 2.5(a) of the Rules of Appellate Procedure, appellate courts will generally not consider issues raised for the first time on appeal; this also allows the court to refuse to consider constitutional issues raised for the first time in the petition for review. Heg v. Alldredge, 157 Wn.2d 154, 162, 137 P.3d 9 (2006), citing State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

In his petition for review, defendant claims that his case presents “[s]ignificant constitutional questions regarding the limits of the right to bear arms.” Petition for Review pg. 17. Defendant did not raise

arguments under the Second Amendment to the federal constitution, or Art. I, § 24 of the state constitution in the trial court, or at the Court of Appeals. The defendant raised this claim for the first time in his petition for review and did not develop his constitutional arguments in the petition. Consequently, the State is in the dark as to the nature of his constitutional claims. Under the rules of appellate briefing, the State will have no opportunity to address in a responsive brief to any arguments raised in defendant's supplemental brief to this court. Because defendant has failed to properly frame and brief this issue, this court should refuse to consider any claim he may raise in his supplemental brief.

Defendant argues that his individual right to have a gun in his home is protected by the Second Amendment. The Second Amendment states:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The scope of protection under this amendment has been addressed in many cases. There is a general consensus that the Second Amendment does not protect an individual's right to possess a firearm. In an early challenge under this amendment, the Supreme Court consulted the text and the history of the Second Amendment. United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L.Ed. 1206 (1939). The Court found that the right to keep and bear arms is meant only to protect the right of states to

keep and maintain an armed militia. Id. at 178. Likewise, a majority of the circuit courts, including the Ninth Circuit, have concluded that the second amendment does not provide an individual right to possess a firearm. The Ninth Circuit stated, “We follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen.” Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996). Therefore, any challenge to the enhancement regarding an individual’s right to possess a firearm under the Second Amendment of the U.S. Constitution must fail.

In contrast to the federal constitution, Article 1, § 24 of the Washington Constitution states:

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

“Although this provision is stated in absolute terms, the right to bear arms is subject to reasonable regulation by the State under its police power.” State v. Spencer, 75 Wn. App. 118, 122, 876 P.2d 939 (1994) (citing State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984)). See also, Morris v. Blaker, 118 Wn.2d 133, 821 P.2d 482 (1992)(holding a statute requiring the revocation of a concealed weapons permit after being involuntarily

committed for mental health reasons was constitutional); Second Amendment Found. v. City of Renton, 35 Wn. App. 583, 668 P.2d 596 (1983)(holding a municipal ordinance limiting the possession of firearms in locations where alcohol is being served does not violate the Washington Constitution); State v. Gohl, 46 Wash. 408, 90 P. 259 (1907)(holding a statute that criminalizes organizing, maintaining and employing an armed body of men does not violate the Washington Constitution).

This Court has established certain criteria that a court should consider in order to determine whether it is appropriate to construe a provision of the Washington Constitution independently from its federal counterpart. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). This Court has repeatedly refused to review a constitutional claim if the factors have not been properly addressed. State v. Fire, 145 Wn.2d 152, 164-165, 34 P.3d 1218 (2001)(“This court will not consider a claim that the Washington Constitution guarantees more protection than the federal constitution unless the party making the claim adequately briefs and argues the Gunwall factors.”); State v. Davis, 141 Wn.2d 798, 834, 10 P.3d 977 (2000); State v. Thomas, 128 Wn.2d 553, 562, 910 P.2d 475 (1996), (Court refused to review state constitutional claim where defendant failed to conduct a thorough analysis of the six *Gunwall* factors). If the party has not engaged in a *Gunwall* analysis, then the Supreme Court will consider the claim only under federal constitutional law. Fire, 145 Wn.2d at 164-165.

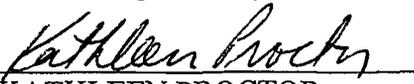
The State is now filing its final brief and has never seen a *Gunwall* analysis from defendant, and does not know if defendant will present one in his supplemental brief or not. Supplemental briefs filed in the Supreme Court are non-responsive. The State will have no opportunity to respond to any argument raised for the first time in the defendant's supplemental brief. This Court should refuse to review the state constitutional claim for failure to properly raise and develop the issue so that the matter could be fully and fairly addressed by the State.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the decision of the Court of Appeals below.

DATED: August 6, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811



KAREN WATSON
Prosecuting Attorney
WSB # 24259

FILED AS ATTACHMENT
TO E-MAIL

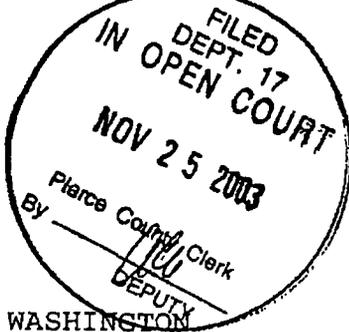
Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/10/02
Date Signature

APPENDIX "A"

Stipulation to Facts Sufficient and Stipulated Bench Trial



02-1-05356-6 20078197 STP 12-01-03

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff,
vs.
ROY LEN NEFF,
Defendant.

CAUSE NO. 02-1-05356-6
STIPULATION TO FACTS
SUFFICIENT AND STIPULATED
BENCH TRIAL

THIS MATTER coming on in open court, and it appearing that the defendant, ROY L. NEFF, is charged with the crime of UNLAWFUL MANUFACTURE A CONTROLLED SUBSTANCE, METHAMPHETAMINE, with a Firearm enhancement (see attached Second Amended Information) in the above entitled cause and that the parties have agreed to submit the case to the court based on the police reports, attached materials, the forensic reports, and the testimony and exhibits from the CrR 3.6 hearing; and that there will be no other evidence presented; and that the parties agree that there is sufficient evidence to support ^{a possible} ~~the~~ conviction of the defendant as charged in the second amended information.

1.1 STATEMENT OF DEFENDANT: I am the defendant in this case. I wish to submit the case on the record. I understand that:

(a) The judge will read the police reports, other attached

materials, the forensic reports, and consider the evidence from the CrR 3.6 hearing, and based upon that evidence, the judge will decide if I am guilty of the crime of Unlawful Manufacture a Controlled Substance, Methamphetamine; and determine whether there is sufficient evidence to support the firearm enhancement to that charge. I stipulate that there is sufficient evidence to support the charged offense and the firearm enhancement as charged in the Second Amended Information.

- (b) I have the right to be represented by a lawyer in this case. If I cannot afford to pay for a lawyer, one will be provided at no expense to me. If I proceed without a lawyer, I will be acting as my own lawyer, and there may be disadvantages to me that would not exist if I had a lawyer representing me. My Lawyers name is Kent Underwood.
- (c) I am giving up the following Constitutional rights: the right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed; the right to remain silent before and during trial, and the right to refuse to testify against myself; the right at trial to hear and question

witnesses who testify against me; the right at trial to testify and to have witnesses testify for me (these witnesses can be made to appear at no expense to me).

- (d) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I plead guilty.
- (e) I am waiving the right to challenge the sufficiency of the evidence to support these convictions on appeal, while reserving the right to challenge the trial court's suppression hearing findings *and conclusions of law.*
- (f) The maximum sentence for each of the crimes is 20 years in prison and a \$20,000 fine.
- (g) The standard range sentence for a conviction of this offense, with my offender score, is 67-89 months in prison, plus 36 months for the Firearm Sentencing Enhancement. The sentence will also include 9-12 months of Community Custody to be served after I am released from jail. If the judge sentences me within the standard range, I cannot appeal that sentence.
- (h) I stipulate that based on my criminal history, which includes the following three convictions, none of which washout, nor constitute the same criminal conduct:

1997	Con, UDCS	Pierce County, WA
2002	UPCS	Pierce County, WA

2002 Unlaw.Poss.Fire,2nd Pierce Co., WA

That my offender score is three.

- (i) In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a victim's compensation fund assessment, and \$110 in court costs. The judge will also order me to pay a \$3,000 methamphetamine lab clean-up fee pursuant to RCW 69.50.401(a)(1)(ii). The judge also has the authority to impose fines or other legal financial obligations.
- (j) The judge may impose any sentence up to the high end of the standard range, no matter what the prosecuting authority or defense recommends. The judge can sentence the defendant to the maximum allowed by law (240 months) if the judge finds that compelling reasons exist to justify an exceptional sentence. I do have a right to appeal an exceptional sentence.
- (k) I understand that if the judge reads the police reports, the attached materials, and stipulated summation of the case, and finds me guilty of either or both crimes I will lose my right to possess firearms until I have that right restored by a court of record.
- (l) I understand that the offense charged in this stipulation includes a firearm enhancement. The firearm enhancement is mandatory, it must be served in total confinement, and must be run consecutively to any other

sentence and to any other enhancement.

- (m) Because the crime charged has a firearm sentencing enhancement, it is a most serious offense, or strike as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.
- 1.2 ~~The defendant stipulates that the police reports, attached materials, forensic reports, and the testimony and evidence submitted at the CrR 3.6 hearing provides sufficient evidence to support a finding of guilt, and supports a finding that defendant was armed with a firearm at the time of the offense.~~

- 1.3 The prosecuting authority has promised to make the following recommendations:

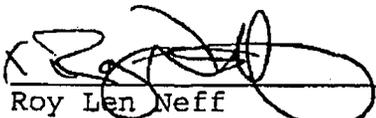
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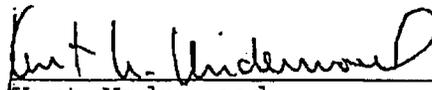
114 months in the ~~Pierce County Jail~~; 9-12 months community custody; DNA draw (which is mandatory upon conviction of a felony); \$100 DNA fee; \$500 Crime Victim Assessment; \$3000 Methamphetamine Clean-up fee; \$110 in court costs; no association with drug users, sellers or manufacturers, no possession of firearms, law abiding behavior, Restitution by later order of the court.

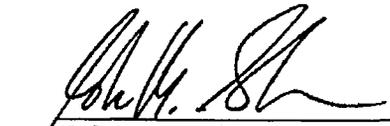
1.4 The defendant agrees that he enters this stipulation freely and voluntarily. No one has made any threats or promises to get the defendant to submit this case in this manner other than the above promises or recommendations by the prosecuting authority.

~~1.5 As part of this stipulation I am agreeing there are sufficient facts in the police reports to find me guilty beyond a reasonable doubt of Manufacture a Controlled Substance, Methamphetamine and of being armed at the time I committed the crime.~~

1.6 The defendant's attorney has explained to the defendant, and has fully discussed with the defendant, all of the above paragraphs and the corresponding consequences of proceeding with this stipulation.


Roy Len Neff
Defendant


Kent Underwood
Defendant's Attorney
WSBA # 27250


John M. Sheeran
Deputy Prosecuting Attorney
WSBA# 26050

FILED
DEPT. 17
IN OPEN COURT
NOV 25 2003
Pierce County Clerk
By  DEPUTY
11/25/2003
DATE


JUDGE

RONALD E. GULPEPPER