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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 25740-1-III  
(consolidated with No. 27524-8-III)

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,

Respondent,

v.

JOEL RODRIGUEZ RAMOS,

Appellant.

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APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

The Brief of Respondent acknowledges that the “unit of prosecution” and “waiver” issues are both reviewed *de novo*. Response, pp. 6, 12.

With regard to the waiver issue, however, the state’s main argument is that the juvenile decline statute applies to children under the age of fifteen. The main question here, however, is whether the provision for *waiver* of a juvenile decline hearing can be applied to children under 15. The state cites no controlling decision on that subject. It does cite two statutes discussing waiver. But the only one that mentions waiver of this particular right, rather than waiver in general, specifically discusses waiver by children 15 and over. It is silent about waiver of this particular right for children who are younger. Given the absence of clear statutory authority on this point, particularly when contrasted with the presence of clear statutory authority permitting waiver of this important right by older children, rules of statutory interpretation compel the conclusion that the Legislature did not want younger children to suffer decline without a real hearing. Section II.

With regard to the unit of prosecution for felony murder, the state cites numerous decisions of the Washington Supreme Court addressing the unit of prosecution for statutes using the article “a.” None of those

decisions, however, addressed the unit of prosecution for the felony murder statute – which uses not just the singular article “a” to describe the number of victims of the homicide, but also the singular article “the” to describe the number of underlying felonies upon which each felony murder charge must be based. Thus, the decisions cited by the state do not address the important question of which singular article in the felony murder statute is the one that controls the unit of prosecution – the one describing “the” underlying felony (which in this case was just one) or the one describing “a” resulting victim (which in this case was more than one). Section III.

## **II. THE INTERPRETATION OF THE JUVENILE DECLINE STATUTE**

The state begins by arguing that children under 15 years old can be the subject of a decline hearing. Response, p. 8.

The key question here, however, is whether children under age 15 can give up the important protection of the decline hearing. The state cites no decision that has ever addressed this specific issue concerning the interpretation of RCW 13.40.110.

The state does provide a lengthy block quote from *In re the Personal Restraint of Dalluge*, 152 Wn.2d 772, 780, 100 P.3d 279 (2004). Response, p. 9. The question in that case, however, was not whether a

child under age 15 could waive the right to a decline hearing. Instead, the question in that case was whether the adult court retained jurisdiction over a juvenile after the prosecutor amended the information to charge a crime other than one for which “automatic” decline was appropriate. The answer was no: “Once the prosecutor amended the information to charge offenses which did not result in automatic adult court jurisdiction, Dalluge’s case no longer qualified for that exception to the juvenile court’s exclusive jurisdiction.” *Dalluge*, 152 Wn.2d at 773. Thus, the *Dalluge* quote containing a reference to RCW 13.40.110’s provision for holding a decline hearing for 15, 16, and 17-year olds does not answer the question of whether such a hearing is required for 14-year olds.

The state also quotes from *State v. Mendoza-Lopez*, 105 Wn. App. 382, 387, 19 P.3d 1123 (2001). Response, p. 10. The only holding of that case, however, was that a juvenile who willfully deceives the court into believing that she is 18 years of age or older affirmatively waives the right to a juvenile decline hearing. That case dealt with a 17-year old. Thus, the *Mendoza-Lopez* quote concerning willful waiver of juvenile court jurisdiction by a 17-year old does not answer the question of whether there can be willful waiver of juvenile court jurisdiction by a child under the age of 15.

Further, the state makes no response to the argument that RCW 13.40.110 provides that the state “may” file a motion requesting a transfer of jurisdiction to the adult court, but it specifies that a “decline hearing” “shall be held” or may be “waived” in only certain circumstances, that is, when the juvenile is 15-17 years old and charged with particular crimes. As we explained in the Opening Brief, that statute states in full, with the relevant portions italicized:

(1) The prosecutor, respondent, or the court on its own motion may, before a hearing on the information on its merits, file a motion requesting the court to transfer the respondent for adult criminal prosecution and the matter *shall be set for a hearing* on the question of declining jurisdiction. *Unless waived* by the court, the parties, and their counsel, *a decline hearing shall be held when:*

(a) The respondent is fifteen, sixteen, or seventeen years of age and the information alleges a class A felony or an attempt, solicitation, or conspiracy to commit a class A felony;

(b) The respondent is seventeen years of age and the information alleges assault in the second degree, extortion in the first degree, indecent liberties, child molestation in the second degree, kidnapping in the second degree, or robbery in the second degree; or

(c) The information alleges an escape by the respondent and the respondent is serving a minimum juvenile sentence to age twenty-one.

(2) The court *after a decline hearing* may order the case transferred for adult criminal prosecution upon a finding that the declination would be in the best interest of the juvenile or the public. The court shall consider the relevant

reports, facts, opinions, and arguments presented by the parties and their counsel.

(3) When the respondent is transferred for criminal prosecution or retained for prosecution in juvenile court, the court shall set forth in writing *its finding which shall be supported by relevant facts and opinions produced at the hearing.*

RCW 13.40.110 (emphasis added).

The state does not respond to the argument that, as the italicized portion of the first paragraph shows, it authorizes either a party or the court to file a motion to decline juvenile court jurisdiction and continues that when such a motion is filed, the matter “shall be set for a [decline] hearing.” “Shall” is a mandatory term. *City of Wenatchee v. Owens*, 154 Wn. App. 196, 204, 185 P.3d 1218 (2008), *review denied*, 165 Wn.2d 1021 (2009). There are three listed exceptions to this statutory mandate, listed in subsections (a) – (c). However, as discussed in the Opening Brief, Mr. Ramos does not fit within any of those exceptions.

Further, that statute makes no provision at all for waiver of a decline hearing for a 14-year old. As explained in the Opening Brief, that statute’s first, introductory, sentence, says that a party or the court may move for such a hearing. It says nothing about waiver. Its second sentence then makes explicit provision for waiver of the mandatory decline hearing by certain 15, 16, and 17-year olds, as discussed in (a)

through (c). It makes no provision for waiver of a decline hearing by anyone else. In fact, paragraph (2) states, “the court *after a decline hearing* may order the case transferred for adult prosecution ....” RCW 13.40.110(2) (emphasis added). It makes no provision for transfer without a decline hearing.

The Response posits the irrationality of permitting a juvenile to waive a decline hearing (and hence waive juvenile court jurisdiction) inferentially, but not explicitly. Response, p. 10. That would indeed be an irrational outcome, if we were comparing silent or inferential waiver by a 17-year old with explicit waiver by a 17-year old. But we are not. We are comparing the permissibility of waiver of any sort by a 15, 16, or 17-year old, with the lack of statutory or other authority for waiving a decline hearing by a child younger than 15.

In fact, the result of the state’s argument is the most irrational. It would permit a child as young as 8 or 9 to waive a decline hearing and waive juvenile court jurisdiction. The legislature could not possibly have been intending for juvenile decline hearing waiver to have no lower limit. Yet that is the ultimate result of the state’s “logic.”

Even if this Court concludes that the juvenile decline statute is subject to both the state’s and Mr. Ramos’ interpretations, the result is the same. The statute must be interpreted in Mr. Ramos’ favor under the rule

of lenity.<sup>1</sup>

**III. THE STATE CITES NO CONTROLLING  
AUTHORITY ADVERSE TO MR. RAMOS'  
POSITION CONCERNING THE UNIT OF  
PROSECUTION OF THE FELONY MURDER  
STATUTE**

With regard to the unit of prosecution for felony murder, the state cites numerous decisions of the Washington Supreme Court addressing the unit of prosecution of statutes using the article “a.” Response, pp. 14-15.

None of those decisions, however, address the unit of prosecution of the felony murder statute – which uses not just the singular article “a” to describe the number of victims of homicide but also the singular article “the” to describe the number of underlying felonies upon which any homicides can be based:

1) A person is guilty of murder in the first degree when:

\* \* \*

(c) He or she commits or attempts to commit *the crime of ... robbery* in the first or second degree ... and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes *the death of a person* ....

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<sup>1</sup> *Ratzlaf v. United States*, 510 U.S. 135, 148, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996).

RCW 9A.32.030(1)(c) (emphasis added). Thus, the decisions holding that use of a singular article control the unit of prosecution are not dispositive – because there are two potentially applicable singular articles in the felony murder statutes referring to two different occurrences, that is, “the crime of ... robbery,” and “the death of a person.” The felony murder statutes does not specifically state whether the underlying singular felony of “robbery,” which is listed first, is the focus of the statute, or if the resulting “death of a person,” listed at the end, is the focus instead. Thus, the state’s citation to numerous Washington Supreme Court decisions holding that a singular article denotes that singular occurrence as the unit of prosecution are beside the point, because they do not answer whether the singular robbery felony or the multiple resulting deaths in this case form the focus of the statute and hence the unit of prosecution.

In fact, the numerous Washington Supreme Court decisions cited by the state in its lengthy block quote are really fatal to the state’s position. They emphasize the recurring and vexing nature of the problem of determining the proper unit of prosecution even for statutes that use the singular article “a.”

Finally, the state ignores the Washington Supreme Court decisions that are most closely on point, including the decision concerning the unit of prosecution where homicides or potential homicides are involved.

As discussed in the Opening Brief, in *State v. Varnell*, 162 Wn.2d 165, 170 P.3d 24 (2007), the Washington Supreme Court held that the unit of prosecution for solicitation to commit murder is the underlying request to commit the unlawful act – and even when the unlawful act is the murder of more than one person, there is still only a single crime of solicitation. The Court did not limit its analysis to the singular or plural nature of the article involved in the solicitation statute or the murder statute. Instead, it strived to determine the legislative intent by discussing the focus of legislature in creating this crime. The Court ruled that “[t]he language of the solicitation statute focuses on a person’s intent to promote or facilitate a crime rather than the crime to be committed.” *Varnell*, 162 Wn.2d at 169. The structure of the statute – the fact that it placed the intent to promote a crime rather than the resulting potential harms first – was key to the Court’s analysis even though there were multiple victims targeted by the solicitation to commit homicides.

As further discussed in the Opening Brief, the Washington Supreme Court’s decision in *State v. Bobic*, 140 Wn.2d 250, 263-66, 996 P.2d 610 (2000), also focuses on the intent of the defendant rather than the resulting number of victims. In *Bobic*, the Court held that the unit of prosecution for conspiracy is the agreement to commit the unlawful act or acts – even where there are numerous unlawful acts pursued by the

conspirators. The conspiracy statute provides: “A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in ... such conduct, and any one of them takes a substantial step ....” RCW 9A.28.040(1). This statute uses the singular article “a” a couple of times. First, it begins with the prohibited intent, criminalizing “intent that conduct constituting *a crime* be performed.” Next, it prohibits “agree[ing]” to commit a crime, without using any article at all in front of “agree.” Finally, it criminalizes taking “*a substantial step*.” The fact that “a” was used in that statute was not dispositive – it could not be, because that singular article was used twice to describe two different things. Instead, the state Supreme Court ruled that the conspiracy statute’s focus was on the “conspiratorial agreement” rather than the resulting harms. *Bobic*, 140 Wn.2d at 263, 265. Interestingly, a literal application of the “a” rule cited by the state to the latter “a” in the statutes – describing “a substantial step” – would have produced a different result, since there was “a substantial step” towards numerous different crimes and victims.

Finally, the Response argues that since there were multiple victims the multiple charges could not possibly constitute “same criminal conduct” or violate double jeopardy. Response, pp. 15-16. But this is a circular argument. It begins from the premise that the number of deaths is

the starting point for determining the number of victims of the crime charged. If you could start with that premise even before analyzing the statutory language, then *Varnell* could not have turned out the way it did – because there were several “victims” whose murders defendant Varnell solicited. Instead, the *Varnell* court begins with the language and focus of the statute and ruled that the target of that statute was the individual solicitation. Thus, no matter how many victims could have suffered from the solicitation to commit murder, the state could prosecute for only a single solicitation.

Thus, *Varnell* and *Bobic* – cited in the Opening Brief and ignored in the Response, just as they were ignored in the state’s Motion on the Merits – affirmatively support the position advanced by Mr. Ramos concerning the unit of prosecution of the felony murder statute.

#### IV. CONCLUSION

For the foregoing reasons, Mr. Ramos’ convictions should be vacated due to lack of Superior Court jurisdiction. Alternatively, his duplicative convictions of first-degree felony murder should be vacated.

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

Respectfully submitted,

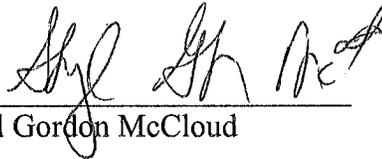
  
\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 20<sup>th</sup> day of May, 2009, a copy of the APPELLANT'S REPLY BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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