

41783-9-II  
NO. 84248-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

JD KIENITZ, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE DIANE M. WOOLARD  
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-00316-5

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BRIEF OF RESPONDENT

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## I. STATEMENT OF FACTS

In this instant case, defendant Kienitz initially had been charged with three counts of Delivery of a Controlled Substance Marijuana, each count with a school bus stop enhancement. (CP 46) The three delivery counts were based on two controlled buys to a Confidential Informant (CI 1); and a third controlled buy to a different Confidential Informant (CI 2). The state made an initial plea offer to the defense (defendant to plead guilty to the three counts of Delivery of a Controlled Substance Marijuana, the State would remove the 24 months school bus enhancements and defendant to stipulate to the high end of the sentencing range of 6 months jail) and made it clear that the offer was based on the non-disclosure of the confidential informants; and that if the defense required the State to disclose the informants then the offer was no longer available and the State would not plea negotiate any further. Ultimately, based on the request of the defense, the State disclosed the two informants and provided the opportunity for both informants to be interviewed by defense counsel prior to trial.

Because the defense required the disclosure of the confidential informants, consistent with the State's earlier representations to the defense, the State confirmed to defense counsel that it would make no new

plea offers in the case and would not plea negotiate any further.

Defendant at that point still had the option to plead as charged, or to proceed to a trial.

Of significance, after the State disclosed the identity of the informants to defendant, defendant allegedly had unlawful contact with one of the two informants which resulted in the filing of additional charges against defendant: one count of Intimidating a Witness and two counts of Tampering with a Witness. (CP 62) At trial, the jury returned with a guilty verdict as to one of the Tampering with a Witness counts (in addition to the guilty verdicts on the drug counts). Thus, one of the many concerns which the State has in disclosing the identity of a confidential informant occurred in this matter: after the identity of the informant was disclosed, the defendant attempted to tamper with that witness.

Regarding the Bashaw jury instruction issue raised by appellant, at trial the court read Instruction No. 24 to the jury. (CP 96) As to the relevant portion of Instruction No. 24, it reads:

If you find the defendant guilty of the crime of Delivery of a Controlled Substance – Marijuana in Count 1, 2 or 3, you will then use the Special Verdict Form A for that Count and fill in the blank with the answer “yes” or “no” according to the decision you reach as to that Count. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms, Special Verdict Form A. In order to answer the special verdict forms “yes” you must unanimously be satisfied beyond a reasonable doubt that

“yes” is the correct answer as to each count. If you unanimously have a reasonable doubt as to this question, you must answer “no”.

-(Court’s Instructions to the Jury, Instruction No. 24 (CP 96)).

Having no reason to do otherwise, defense counsel did not object to the reading of Instruction No. 24. As to the school bus stop enhancement instruction, defense counsel made argument as to a separate and distinct issue regarding an affirmative defense instruction to the school bus enhancement which the court declined to give. (RP 423-424)

After the jury returned with its verdicts, on the record the trial court polled the jury as to each of its decisions, including each juror’s decision as to the Special Verdict Form A for the school bus stop enhancements for the delivery of marijuana counts 1, 2 and 3.

As to Special Verdict Form A for Count 1 (CP 98) the court polled the jury and noted for the record that it was a unanimous verdict for the answer “yes”. (RP 481) The same as to Special Verdict Form A for Count 2 (CP 100), the court polled the jury and noted for the record that it was a unanimous verdict for the answer “yes”. (RP 481) Similarly, as to Special Verdict Form A for Count 3 (CP 102) the court polled the jury and noted for the record that again it was a unanimous verdict for the answer “yes”. (RP 481-82)

Regarding the sentencing issue raised by appellant himself, the State disagrees with the facts recited by appellant as to his sentencing on February 18, 2010, and the characterization of what occurred on that date. At the sentencing, the state opposed the Drug Offender Sentencing Alternative (DOSA) or an exception down for the defendant. In addition, the State presented its arguments on the record in support of its recommendation of a total of 90 months prison (RP 490) and by reference incorporates those arguments herein. (RP 486-490; and RP 498-499) The court ultimately imposed a sentence of a total of 84 months prison, 12 months each for Counts 1, 2, 3 and 6 to run concurrent, with the three 24 months school bus enhancements running consecutive to each other (for a total of 72 months) and consecutive to the concurrent 12 months, pursuant to RCW 9.94A.533(6) and RCW 69.50.435. (RP 501-502; and CP 115)

II. RESPONSE TO ASSIGNMENTS OF ERROR NOS. 1 AND 2

In assignments of error No. 1 and No. 2 raised by the appellant, he claims that he was denied his Sixth Amendment right and his article 1, section 22 right to the effective assistance of counsel during plea negotiations.

A) The State's position is that the appellant's argument should be rejected based on the following case law: State v. Moen, 150 Wn.2d

221, 76 P.3d 721 (2003) (the state's refusal to plea bargain with defendant who sought to discover the identity of the confidential informant does not violate due process).

A court may not dismiss charges because a prosecutor refuses to engage in plea negotiations, as there is no requirement that the prosecutor engage in such a practice. *See* State v. Crawford, 159 Wn.2d 86, 102, 147 P.3d 1288 (2006); State v. Moen, 150 Wn.2d 221, 76 P.3d 721 (2002); *accord* Weatherford v. Bursey, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977) ("the prosecutor need not [plea bargain] if he prefers to go to trial"; "[i]t is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty").

There is no constitutional right to a plea bargain. *See* State v. Crawford, 159 Wn.2d 86, 102, 147 P.3d 1288 (2006); State v. Moen, 150 Wn.2d 221, 76 P.3d 721 (2002); *accord* Weatherford v. Bursey, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). The government is allowed to condition its plea offer on a waiver of disclosure.

Brady applies to a lesser degree in the context of plea bargaining and guilty pleas. The United States Supreme Court held in United States v. Ruiz, 536 U.S. 622, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002), that the Constitution does not require prosecutors to make certain impeachment evidence available to defendants before defendants plead guilty. Ruiz was

followed by the Washington Court of Appeals in In re Personal Restraint of Delmarter, 124 Wn. App. 154, 167, 101 P.3d 111 (2004).

Ruiz expressly allows the prosecutor to condition a plea offer on a defendant's waiver of disclosure. *See Ruiz*, 536 U.S. at 625 (the prosecutors' proposed plea agreement stated that "any [known] information establishing the factual innocence of the defendant" "has been turned over to the defendant," and it acknowledges the Government's "continuing duty to provide such information," but it required that the defendant "waive the right" to receive "impeachment information relating to any informants or other witnesses" as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial). In a case that does not cite Ruiz, the Washington Supreme Court reached the same conclusion. *See State v. Moen*, 150 Wn.2d 221, 76 P.3d 721 (2003).

Post Ruiz, at least one appellate court has held that Brady may apply in the plea bargaining process when the failure to disclose evidence is sufficiently outrageous as to constitute a material misrepresentation. *See Ferrara v. United States*, 456 F.3d 278, 293 (1st Cir. 2006) ("government's nondisclosure was so outrageous that it constituted impermissible prosecutorial misconduct sufficient to ground the petitioner's claim that his guilty plea was involuntary"; prosecutor did not

disclose that a key witness had recanted his grand jury testimony, instead representing to the court that the key witness was standing by his original story). The Seventh Circuit, moreover has noted that while the Court in Ruiz held that "the Due Process Clause does not require the government to disclose impeachment information prior to the entry of a criminal defendant's guilty plea," due process may require government actors to disclose evidence of a defendant's factual innocence before he enters into a guilty plea. McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003).

However, the instant case is similar to Moen, the appellant was not denied effective assistance of counsel. Defense counsel was as effective as possible under the circumstances. The Sixth Amendment right to counsel does not provide unfettered access to every fact, every possible test, etc. The Sixth Amendment acknowledges time constraints (such as denials of continuances).

Furthermore, in the instant matter, defense counsel was given sufficient time to advise his client, defendant Kienitz, on his options. *See United States v. Cronin*, 466 U.S. 648, 649, 666-67, 104 S. Ct. 2039, 2041, 2051; *see also Wright v. Van Patten*, 552 U.S. 120, 128 S. Ct. 743, 169 L. Ed. 583 (2008).

B) In addition, the appellant has failed to show that the outcome of his trial was unreliable, which is the benchmark of an

ineffective assistance claim or that the loss of a “windfall” is the type of prejudiced recognized under Strickland.

Once a case has gone to trial a defendant can only assert deficient performance claims regarding the trial and cannot reach back to plea negotiations. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). “The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.” Id. at 691-692.

In Strickland, the Supreme Court laid the foundation for analyzing claims of ineffective assistance of counsel; a two-prong test requiring a showing of both deficient performance and resulting prejudice. Proof of prejudice is an essential prerequisite to relief under Strickland. Proof of prejudice normally and logically focuses on the proceeding that resulted in the determination of the defendant’s guilt or sentence. The prejudice test adopted in Strickland reflects that focus: “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. In most cases, the court is

examining the effect of deficient performance in a trial or sentencing hearing.

The courts have applied Strickland to a plea hearing context when the defendant seeks to withdraw his plea on the basis of ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). When a defendant is represented by counsel and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct 1441, 25 L. Ed. 2d 763 (1970). A defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann." Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct 1602, 36 L. Ed. 2d 235 (1973). To prove the "prejudice" prong of Strickland in the plea process "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. at 59. The decisions of the United State Supreme Court dealing with effective assistance during the plea process stem from cases where the defendant entered a plea. Wright v. Van Patten, 552 U.S. 120, 128 S. Ct. 743, 169 L. Ed. 2d 583

(2008); Hill v. Lockhart, *supra*. The State could find no Supreme Court decision which examined the effectiveness of counsel during plea negotiations once the case had proceeded to trial and conviction.

The Court in Strickland emphasized that the “ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged” and instructed courts to be concerned with whether the “result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” Strickland, 466 U.S. at 696. Once a case has gone to trial and the determination of the defendant’s guilt has been rendered by a fact finder, the question under Strickland is whether that determination of guilt is reliable. When guilt has been determined by trial, the Strickland test focuses on how deficient performance affected the outcome of the trial and not the plea negotiations.

Additionally, Strickland’s concept of constitutional prejudice requires something more than simply a probability of a “different result.” Strickland specifically indicated that certain types of “different results” would not qualify as a basis for relief:

An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, “nullification,” and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be

reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

-(Strickland, 466 U.S. at 695.)

The court went on to state that while “idiosyncrasies of the particular decisionmaker” might affect trial counsel’s tactics and be relevant to the performance prong assessment, such factors were irrelevant to the prejudice prong and that “evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge’s sentencing practices, should not be considered in the prejudice determination.” Id.

In Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986), the Court gave another example of a “different result” that would not raise a constitutional concern under the Sixth Amendment. In that case, trial counsel persuaded the defendant not to commit perjury by threatening to expose the perjury if he did. The defendant testified truthfully, was convicted, and on appeal claimed ineffective assistance and denial of his right to present a defense by his attorney’s refusal to allow him to testify falsely. The Supreme Court dismissed this claim stating that constitutional right to testify does not extend to testifying falsely and the

“the right to counsel includes no right to have a lawyer who will cooperate with planned perjury.” Nix, 475 U.S. at 173. The Court held that as a matter of law, defense counsel’s conduct could not establish the prejudice required for relief under the second strand of the Strickland inquiry as there was no possibility that Nix’s truthful testimony negatively affected the fairness of the trial; it reiterated that it is the lack of fairness in an adversary proceeding which is the “benchmark” of an ineffective assistance of counsel claim. Id at 175. Thus, even if the court were to assume Nix’s defense counsel acted incompetently and even if that action had the requisite effect on outcome, counsel’s behavior still would not have been prejudicial because the reliability of the judgment was untouched. As Justice Blackmun stated in a concurring opinion for four Justices: “Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice.” 475 U.S. at 186-187.

In Lockhart v. Fretwell, 506 U.S. 364, 368, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), the Court reemphasized that the Sixth Amendment right to counsel exists to protect the fundamental right to a fair trial. The Lockhart Court reiterated that “prejudice” incorporates more than outcome determination; the reviewing court must determine whether the result of the proceeding was fundamentally unfair or unreliable. 506 U.S. at 368.

Fretwell was convicted of capital felony murder and sentenced to death. He sought habeas relief from his sentence arguing that his attorney had been ineffective in failing to object to the use of an aggravating factor based on a decision by the Eighth Circuit in Collins v. Lockhart, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S. Ct.546, 88 L. Ed. 2d 475 (1985). Collins was good law at the time of Fretwell's trial, direct appeal, and state habeas proceedings, but had been overruled by the time he sought habeas relief in the federal courts. Nevertheless, he obtained relief from the federal district court and his case went before the Eighth Circuit for review. A divided court affirmed the grant of relief finding that the Arkansas court would have been bound by Collins at the time of trial and any objection to use of the aggravator would have been sustained if it had been made, thereby precluding the jury from using that aggravating factor to support a death verdict. Under this scenario Fretwell had shown prejudice under Strickland as he has shown the probability of a different result at the time the error was committed.

The Supreme Court took review and reversed. The Supreme Court noted that the Eighth Circuit had overruled Collins in light of the Court's decision in Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), therefore the Arkansas sentencing hearing had been conducted under the correct standard of the law, in retrospect, although at

the time, the proceeding was contrary to the Eighth Circuit's decision in Collins. In view of the change in the law, the failure to comply with Collins did not render the sentencing proceeding unreliable or fundamentally unfair. Had an objection been made and sustained at Fretwell's sentencing hearing, he would have received a benefit to which he was not entitled under the law.

To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

-(Lockhart v. Fretwell, 506 U.S. at 369-370.)

The Court held that “[u]nreliability or unfairness does not result *if* the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.” 506 U.S. at 372 (emphasis added). It concluded that Fretwell suffered no prejudice from his counsel's deficient performance.

This limitation on the type of prejudice that will support an ineffective assistance of counsel claim was explored by Justice Powell in his concurring opinion in Kimmelman v. Morrison, 477 U.S. 365, 392, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Morrison was convicted of rape after his attorney failed to object to admission of an illegally seized bed sheet. While the Court held that Stone v. Powell, 428 U.S. 465, 96 S. Ct.

3037, 49 L. Ed. 2d 1067 (1976), did not bar this ineffective assistance claim, Justice Powell wrote separately to clarify that the Court was not resolving a Strickland prejudice issue as it had not been argued:

The admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. . . . Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall. Because the fundamental fairness of the trial is not affected, our reasoning in Strickland strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment. . . . It would shake th[e] right [to effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall.

-(Kimmelman, 477 U.S. at 396-397.)

Strickland, Nix, Lockhart, and Kimmelman illustrate that when a defendant, who has been convicted following a trial, claims a denial of his Sixth Amendment right to counsel, the reviewing court must focus on whether the claimed error affected the fundamental fairness of the trial such that there has not been a fair and reliable determination of the defendant's guilt. If the court concludes the determination of defendant's guilt is unreliable, then defendant has succeeded in showing prejudice under the Strickland test. If the claimed error does not affect the reliability and fairness of the trial proceeding, then the error will not serve as a basis for a Sixth Amendment claim.

In the appellant's case in this instant matter, he has never shown that the fundamental fairness of his trial was affected by his attorney's deficient performance during plea negotiations. In addition, plea negotiations did take place between the State and defense counsel but a resolution was simply not agreed upon pre-trial so the case ultimately went to trial. For the reasons set forth above, Strickland's "benchmark" of an ineffective assistance of counsel claim, an unreliable trial result, is not present in appellant's case. His claim of ineffective assistance of counsel must fail.

Additionally, the appellant seeks to show a type of prejudice that is not recognized by the Supreme Court as providing a basis for relief on an ineffective assistance of counsel claim. He asserts that he did not receive effective assistance of counsel because a plea resolution could not be reached between the two parties. Under Strickland, since the appellant was found guilty at trial, he needs to show that his attorney was deficient in his performance at trial so as to create a reasonable probability that the outcome of his trial would have been different in order to show prejudice. He has not shown this type of prejudice.

The appellant's claim of prejudice also runs afoul of Lockhart and Justice Powell's view that the scope of the Sixth Amendment does not include protecting criminal defendants against errors that merely deny

those defendants “a windfall.” There is no question that the jury found appellant guilty of three counts of Delivery of a Controlled Substance Marijuana with school bus stop enhancements and one count of Tampering with a Witness. The appellant has, however, no constitutionally based argument that he is entitled to a pre-trial plea negotiated resolution to his criminal case.

As stated previously, a criminal defendant does not have a constitutional right to plea bargain. State v. Wheeler, 95 Wn.2d 799, 804, 631 P.2d 376 (1981); Weatherford v. Bursey, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). A prosecutor has broad discretion over whether to enter into plea bargaining and may revoke an offer at any time before defendant enters his guilty plea or otherwise detrimentally relies on the agreement. Mabry v. Johnson, 467 U.S. 504, 507-508, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984); Wheeler, 95 Wn.2d at 803-805; State v. Moen, 150 Wn.2d 221, 76 P.3d 721 (2003). The Sixth Amendment offers a criminal defendant many protections pertaining to trial, but none pertaining to the “right” to plea bargaining. Moreover, to paraphrase Justice Black - since appellant was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice. *See* Nix, 475 U.S. at 186-187. Under Lockhart, as appellant was not deprived of any substantive or procedural right to

which the law entitles him, he cannot show unreliability or unfairness in the outcome of his proceeding and cannot demonstrate “prejudice.” He cannot claim the “loss” of a windfall as constituting prejudice.

The only Supreme Court authority these decisions cite to support the contention that failed or unsuccessful plea negotiations are subject to the Strickland standard is Hill v. Lockhart. Mask v. McGinnis, 233 F.3d 132, 138-139 citing the lower court opinion at 28 F. Supp. 2d 122 at 124-125. As discussed above, Hill v. Lockhart pertained to ineffective assistance by an attorney in the plea process where the defendant accepted the offer and entered a plea. It does not stand for the proposition that ineffective assistance claims regarding deficient performance in the plea negotiation phase will survive a trial that is untainted by deficient performance.

For the above reasons, the court should reject appellant’s claim that the prosecutor is required to plea bargain when a defendant seeks to discover the identity of a confidential informant. In addition, the court should also reject appellant’s claim of ineffective assistance of counsel because the prejudice he claims is not the kind recognized by the Supreme Court as affecting the fairness or reliability of the outcome of his trial, which is the “benchmark” of a Sixth Amendment violation.

III. RESPONSE TO ASSIGNMENTS OF ERROR NOS. 3 AND 4

Citing the recent case of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), the appellant challenges the instruction for the school bus enhancement special allegation, arguing that the jury should not have been told that it had to be unanimous in order to answer "no." However, appellant did not object to the instruction (Instruction No. 24 of CP 96) below, did not propose an alternative instruction, and because the claimed error is not of constitutional magnitude, he has waived this issue on appeal.

A) The state constitutional right to a jury trial in criminal matters stems from Const. art. I, sections 21 and 22. Const. art. I, section 22 is comparable to the Sixth Amendment to the United States Constitution, but article I, section 21 has no federal counterpart. State v. Schaaf, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987). Const. art. I, section 21 which provides that “[t]he right of trial by jury shall remain inviolate...”, preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. See, e.g., Sofie v. Fiberboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989). This right, in criminal cases, included a right to a twelve person jury, and a right to a unanimous verdict. See, e.g., State v. Stegall, 124 Wn.2d 719,

723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

While our Supreme Court has long held that a criminal defendant may waive the requirement of a twelve person jury, the Court has steadfastly rejected waivers of the unanimity requirement. *Compare* Stegall, 124 Wn.2d at 723-24, *with* State v. Noyes, 69 Wn.2d 441, 445-446, 418 P.2d 471 (1966). The Court has also held that a criminal defendant does not have a constitutional right to have a jury instructed that it may render a verdict to a lesser charge when it is “unable to agree” upon the defendant’s guilt as to a greater charge. State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1981).

While recognizing Const. art I, section 21’s unanimity requirement, the Court held in Labanowski that Washington’s trial courts should utilize “unable to agree” transition instructions, rather than “acquittal first” instructions. At the same time, our Supreme Court held that an “acquittal first” instruction was not wrong as a matter of law, and convictions obtained in cases in which the instruction was used would not be set aside. Labanowski, 117 Wn.2d at 425.

In State v. Golberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), our Supreme Court allowed a non-unanimous verdict with respect to an aggravating circumstance to serve as an acquittal. This result was

consistent with the jury instructions that had been tendered. The Supreme Court, however, did not indicate that Const. art. I, section 21 mandated such a result or required the use of similar jury instructions in every single case. In fact, the Supreme Court cited to none of its prior decisions in support of its holding.

B) Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Appellant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id.

The case cited by appellant, Bashaw, makes clear that the claimed error is not of constitutional dimension. Bashaw was charged with three counts of delivery of a controlled substance and a school bus stop sentencing enhancement. The special verdict form for the sentencing enhancement stated: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." 169 Wn.2d at 139. Our

Supreme Court held that the instruction was incorrect because it told the jury that they had to be unanimous to answer "no." Id. at 145-47. Citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the Court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." 169 Wn.2d at 146.

In so holding, the Court acknowledged that this rule was not of constitutional dimension. "This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg." 169 Wn.2d at 146 n.7. Instead, the court cited policy justifications for this common law rule:

"The rule we adopted in Goldberg and reaffirm today serves several important policies.... The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant's "'valued right' to have the charges resolved by a particular tribunal." [Citation omitted]. Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by

the countervailing policies of judicial economy and finality.”

-(Id. at 146-47).

When no exception is taken to a jury instruction, that instruction becomes the law of the case. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). An exception to the rule that a defendant may not complain about a jury instruction for the first time on appeal, exists in the case of manifest error affecting a constitutional right. Id. In a circumstance such as the instant case, however, neither our Supreme Court nor the appellant has been able to identify a constitutional or statutory basis for a non-unanimous verdict.

Appellant does not explain how the issue raised is of constitutional magnitude. Moreover, appellant waived his challenge to this instruction by not objecting to it in the trial court.

C) The rule in Bashaw is contrary to legislative intent. While this Court is bound by Bashaw, the State respectfully submits that the holding in that case is incorrect and offers the following argument in order to preserve the issue.

As noted previously, the state constitutional right to jury trial in criminal matters stems from Const. art. I, sections 21 and 22. Const. art. I, section 21 which provides that "[t]he right of trial by jury shall remain

inviolable" preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. Sofie v. Fiberboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989). This right, in criminal cases, included a right to a twelve person jury, and a right to a unanimous verdict. State v. Stegall, 124 Wn.2d 719, 723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

The Washington Supreme Court has rejected the notion that a defendant can waive the unanimity requirement. In State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966), the defendant's first trial resulted in a hung jury which stood 11 to 1 for acquittal. On appeal, the court characterized as "without merit" the notion that the defendant could waive his right to a unanimous verdict and accept the vote of 11 jurors as a valid verdict of acquittal. Id. at 446.

When enacting sentencing enhancement statutes, the legislature is presumed to be familiar with the court's rulings on jury unanimity. The legislature gave force or meaning to a non-unanimous verdict in only one sentencing statute concerning aggravated first-degree murder. *See* RCW 10.95.080(2). For all other sentencing statutes, consistent with the dictates of Const. art. I, section 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal.

The fixing of legal punishments for criminal offenses is a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The judiciary may only alter the sentencing process when necessary to protect an individual from excessive fines or cruel and inhuman punishment. Id. Otherwise, the court may recommend or identify needed changes, but must then wait for the legislature to act. *See, e.g.*, State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should receive the death sentence). Accordingly, it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury.

Thus, a jury is properly instructed in compliance with Const. Art. I when it is instructed that it must be unanimous in order to render a verdict.

IV. RESPONSE TO ASSIGNMENT OF ERROR RAISED BY APPELLANT HIMSELF AS TO THE SENTENCE IMPOSED BY THE TRIAL COURT

The final assignment of error raised by appellant himself appears to be a claim that the sentencing statute, RCW 9.94A.533(6) is ambiguous and the defendant should not be given consecutive sentencing because of

that. This has previously been discussed in case law and there is no indication from any source given by this appellant that there is an ambiguity here.

The meaning of a statute is a question of law that an appellate court reviews de novo. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The court's goal is to determine and give effect to the legislature's intent. Id. If the language is unambiguous, the court will give effect to that language and that language alone because we presume the legislature says what it means. State v. Radan, 143 Wn.2d 323, 330, 21 P.3d 255 (2001). Clear and unambiguous statutory language is not subject to judicial construction. Hines v. Data Lines Sys., Inc., 114 Wn.2d 127, 143, 787 P.2d 8 (1990); Bravo v. Dolsen Cos., 124 Wn.2d 745, 752, 888 P.2d 147 (1995) (*quoting* Krystad v. Lau, 65 Wn.2d 827, 844, 400 P.2d 72 (1965)). Only if a statute is ambiguous do we examine extrinsic evidence of legislative intent or resort to canons of statutory construction. State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); Burton v. Lehman, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). An undefined term in a statute will be given its usual and ordinary meaning, and the court may use a dictionary definition to determine the usual and ordinary meaning of the term. State v. Martin, 55 Wn. App 275, 277, 776 P.2d 1383 (1989); State v. Anderson, 58 Wn. App. 107, 110-11, 791 P.2d 547

(1990). Statutory language is unambiguous when it is not susceptible to two or more interpretations. State v. Delgado, 148 Wn.2d 723, 726, 63 P.3d 792 (2003).

The Statute in question is the following:

RCW 9.94A.533. Adjustments to standard sentences....  
(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

This statute was addressed in In the Matter of the Postsentencing

Review of Gutierrez, 146 Wn. App. 151, 156, 188 P.3d 546 (2008):

The last sentence of RCW 9.94A.533(6), requiring drug zone enhancements to be served consecutively “to all other sentencing provisions,” was added by Laws of 2006, ch. 339, § 301. The acknowledged purpose of the amendment was to overturn the decision in State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2006). See FINAL BILL REPORT on Engrossed Second Substitute S.B. 6239, 59<sup>th</sup> Leg., Reg. Sess., at 4 (Wash. 2006); ENGROSSED SECOND SUBSTITUTE S.B. 6239, at 6-7, 59<sup>th</sup> Leg. Reg. Sess. At 7, 13-14 (Wash. 2006); HOUSE CRIMINAL JUSTICE & CORRRCTIONS COMM., H.B. ANALYSIS on Engrossed Second Substitute S.B. 6239, at 6-7, 59<sup>th</sup> Leg. Reg. Sess. (Wash. 2006). In Jacobs the court had reversed a DOSA sentence based on a range that had been expanded by stacking two 24-month drug zone enhancements. The court had concluded that it was unclear if the legislation required multiple drug zone enhancements to be served concurrently or consecutively to each other. Applying the rule of lenity, the court directed the trial court to add only 24 months to the base range on resentencing. Jacobs, 154 Wn.2d at 602-

604. The addition of the stacking provision in the 2006 legislation to change the *Jacobs* result did not change the command of the first sentence of RCW 9.94A.533(6) that enhancements are to be added to the base range. The amendment permitted multiple enhancements and directed that they run consecutively. It did not change the way that enhanced sentence ranges are calculated.

The School Bus Zone enhancement as defined by RCW 9.94A.533(6) is “an additional” twenty-four months “added to the standard sentence range.” The statutory language explicitly provides that the 24-month school Bus Zone enhancement is “added to,” or in other words consecutive to, the standard range sentence imposed. State v. O’Neal, 159 Wn.2d 500, 150 P.3d 1121 (2007). The appellant does not cite any cases which have interpreted the School Bus Zone enhancement as running concurrently with the underlying sentence. During the many years that the School Bus Zone enhancement legislation has been in effect, it has been consistently applied in accordance with the plain language of the statute as an additional 24-month period of confinement added to the sentence imposed. *See* State v. Silva-Baltazar, 125 Wn.2d 472, 478, 886 P.2d 138 (1994) (interpreting former RCW 9.94A.310(5), which is now RCW 9.94A.533(6), the court concluded the School Bus Zone enhancement provision adds 24 months onto the presumptive sentence); State v. Lusby, 105 Wn. App. 257, 265-66, 18 P.3d 625 (2001) (citing legislative history that the School Bus Zone enhancement statute was

intended to impose additional penalties for drug activities conducted within certain localities to increase the maximum penalty imposed and add two years to the presumptive sentence); *See also*, State v. Johnson, 116 Wn. App. 851, 856, 68 P.3d 290 (2003); State v. Nunez-Martinez, 90 Wn. App. 250, 256, 951 P.2d 823 (1998); State v. Wimbs, 74 Wn. App. 511, 514, 874 P.2d 193 (1994); State v. Dobbins, 67 Wn. App. 15, 18-19, 834 P.2d 646 (1992).

Moreover, in the alternative, the State would argue that “other enhancements” are “other sentencing provisions” and as a consequence, the language of RCW 9.94A.533(6) does not even require an analysis of legislative interpretation. In the Matter of Post Sentencing Review of Guy L. Charles, 135 Wn.2d 239, 955 P.2d 798 (1998), *superseded by statute as stated in* State v. DeSantiago, 149 Wn.2d 402, 415-416, 68 P.3d 1065 (2003).

The State submits that the sentencing in this matter was proper under the circumstances.

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V. CONCLUSION

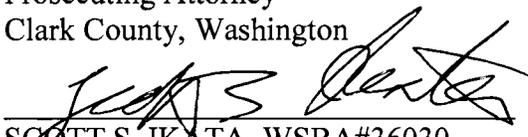
The trial court should be affirmed in all respects.

DATED this 10 day of NOV., 2010.

Respectfully submitted:

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