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STATE OF WASHINGTON

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CLERK IN THE SUPREME COURT OF WASHINGTON

Supreme Court No. 79236-4  
Court of Appeals No. 23698-6-III

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STATE OF WASHINGTON,

Petitioner,

v.

ALYSSA KNIGHT,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Jerome LeVeque, Judge

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SUPPLEMENTAL BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

	Page
A. <u>ISSUES ADDRESSED IN SUPPLEMENTAL BRIEF</u> .....	1
B. <u>SUPPLEMENTAL STATEMENT OF THE CASE</u> .....	1
C. <u>SUPPLEMENTAL ARGUMENT</u> .....	4
1. THE COURT OF APPEALS PROPERLY RELIED ON <u>STATE V. BOBIC</u> TO VACATE ONE OF THE CONSPIRACY COUNTS .....	4
2. THE STATE CANNOT SATISFY ITS BURDEN TO SHOW KNIGHT WAIVED HER APPEAL OR DOUBLE JEOPARDY RIGHTS.. .....	6
D. <u>CONCLUSION</u> .....	20

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Guy Stickney, Inc., v. Underwood,</u> 67 Wn.2d 824, 827, 410 P.2d 7 (1966) .....	16
<u>In re Restraint of Butler,</u> 24 Wn. App. 175, 599 P.2d 1311 (1979).....	6, 18
<u>In re Restraint of Cook,</u> 114 Wn.2d 802, 792 P.2d 506 (1990) .....	12
<u>In re Restraint of Hemenway,</u> 147 Wn.2d 529, 55 P.3d 615 (2002) .....	10, 17
<u>In re Restraint of Isadore,</u> 151 Wn.2d 294, 88 P.3d 390 (2004) .....	7, 13
<u>In re Restraint of James,</u> 96 Wn.2d 847, 640 P.2d 18 (1982) .....	13, 20
<u>In re Restraint of Shale,</u> 160 Wn.2d 489, 158 P.3d 588 (2007) .....	7-14, 16, 17
<u>In re Restraint of Stoudmire,</u> 141 Wn.2d 342, 353-54, 5 P.3d 1240 (2000) .....	10
<u>In re Restraint of Tortelli,</u> 149 Wn.2d 82, 66 P.3d 606 (2003) .....	12
<u>State v. Bisson,</u> 156 Wn.2d 507, 130 P.3d 820 (2006) .....	15, 16

**TABLE OF AUTHORITIES (CONT'D)**

Page

WASHINGTON CASES (cont'd)

<u>State v. Bobic,</u> 140 Wn.2d 250, 996 P.2d 610 (2000).....	1, 3-5, 7
<u>State v. Cox,</u> 109 Wn. App. 779, 37 P.3d 1240 (2002).....	3, 5, 18, 19
<u>State v. Ermels,</u> 156 Wn.2d 528, 131 P.3d 299 (2006).....	17-19
<u>State v. Freeman,</u> 153 Wn.2d 765, 108 P.3d 753 (2005) .....	6
<u>State v. Gocken,</u> 127 Wn.2d 95, 896 P.2d 1267 (1995) .....	4
<u>State v. Kells,</u> 134 Wn.2d 309, 949 P.2d 818 (1998).....	14
<u>State v. Knight,</u> 134 Wn. App. 103, 138 P.3d 1114 (2006).....	3, 17
<u>State v. Larson,</u> 128 Wn. App. 1071, 2005 Wash. App. LEXIS 2063 .....	15
<u>State v. Leyda,</u> 157 Wn.2d 335, 138 P.3d 610 (2006) .....	4, 5, 7
<u>State v. Matuszewski,</u> 30 Wn. App. 714, 637 P.2d 994 (1981) .....	14
<u>State v. Perkins,</u> 108 Wn.2d 212, 213-15, 737 P.2d 250 (1987) .....	15

**TABLE OF AUTHORITIES (CONT'D)**

Page

WASHINGTON CASES (cont'd)

<u>State v. Skiggn,</u> 58 Wn. App. 831, 795 P.2d 169 (1990) .....	16
<u>State v. Turley,</u> 149 Wn.2d 395, 69 P.3d 338 (2003) .....	8-10, 12-14, 19, 20
<u>State v. Tvedt,</u> 153 Wn.2d 705, 107 P.3d 728 (2005) .....	6
<u>State v. Watson,</u> 63 Wn. App. 854, 822 P.2d 327 (1992) .....	9
<u>State v. Weber,</u> 159 Wn.2d 252, 149 P.3d 646 (2006) .....	6
<u>State v. Williams,</u> 131 Wn. App. 488, 128 P.3d 98 (2006), <u>remanded on other grounds for reconsideration</u> <u>in light of Washington v. Recuenco,</u> 158 Wn.2d 1006 (2006) .....	1, 3
<u>State v. Womac,</u> 160 Wn.2d 643, 160 P.3d 40 (2007) .....	4, 6

**TABLE OF AUTHORITIES (CONT'D)**

Page

**FEDERAL CASES**

<u>Bell v. United States</u> , 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955) .....	5
<u>Benton v. Maryland</u> , 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) .....	4
<u>Blackledge v. Perry</u> , 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) .....	6
<u>Brown v. Ohio</u> , 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) .....	5
<u>Green v. United States</u> , 355 U.S. 184, 191-92, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) .....	14
<u>Jeffers v. United States</u> , 432 U.S. 137, 154, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977) .....	11
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) .....	14
<u>Menna v. New York</u> , 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) .....	6, 10, 15, 18

**TABLE OF AUTHORITIES** (CONT'D)

Page

**FEDERAL CASES** (cont'd)

Schneckloth v. Bustamonte,  
412 U.S. 218, 93 S.Ct. 2041,  
35 L.Ed.2d 854 (1973) ..... 14

United States v. Broce,  
488 U.S. 563, 109 S.Ct. 757,  
102 L.Ed.2d 927 (1989) ..... 16, 17

United States v. Jacobo-Castillo,  
\_\_\_ F.3d \_\_\_, 2007 U.S. App. LEXIS 17625 (9th Cir. 2007) ..... 20

United States v. Jeronimo,  
398 F.3d 1149 (9th Cir. 2005) ..... 16

United States v. Patterson,  
381 F.3d 859 (9th Cir. 2004) ..... 9

United States v. Ritsema,  
89 F.3d 392 (7th Cir. 1996) ..... 9

**OTHER JURISDICTIONS**

State v. Means  
91 N.J. 610, 926 A.2d 328 (N.J. 2007) ..... 9

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>RULES, STATUTES AND OTHERS</u></b>	
CrR 4.2(e) .....	15
RAP 10.4(h) .....	16
RCW 9.94A.090(1).....	15
RCW 9.94A.650(1).....	11
RCW 9A.28.040(1).....	5
U.S. Const. amend. 5.....	4
Wash. Const. art. 1, § 9 .....	4

A. ISSUES ADDRESSED IN SUPPLEMENTAL BRIEF

The state and Alyssa Knight sought review of several issues in the petition and answer. This Court granted review only "on the issue of the proper remedy for a double jeopardy violation."

1. Did the Court of Appeals properly apply this Court's settled remedy for double jeopardy violations?

2. Did the Court of Appeals properly reject the state's late and meritless complaint that Knight either waived her appeal and double jeopardy rights, or that Knight's appeal violates the terms of the plea agreement?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The state initially charged Knight with five counts. CP 4-7. Knight pled guilty to three counts in the amended information:

count I: conspiracy to commit second degree robbery;  
count II: conspiracy to commit first degree burglary; and  
count III: second degree murder.

CP 11-20; 1RP 2-18. The plea agreement required Knight to testify against two codefendants and to forfeit her vehicle. CP 15, 35-37. In exchange for these concessions, the state agreed to file the amended information. CP 35-37; 1RP 10-12. The parties also agreed both "will be free to argue for any sentence allowed by law." CP 35.

Knight testified at the trials of two codefendants. She put herself and her family at significant risk. As stated in the Brief of Appellant, "[t]here is no question she fulfilled her side of the plea bargain." BOA at 4 (citing CP 33-34, 1RP 32-25; 2RP 4-5, 10-12, 15-16; 3RP 5-10). At sentencing, both parties made their recommendations. 1RP 31-32 (prosecutor recommends the standard range, without arguing any breach of the plea agreement); 1RP 33-35 (defense recommends the standard range, asserting that Knight complied with the plea agreement).

Knight appealed. In her supplemental brief, she challenged the two conspiracy convictions as violating double jeopardy. Those counts constituted a single unit of prosecution because there was only one agreement. Under State v. Bobic and State v. Williams, there could only be one conspiracy. Supp'l Brief of Appellant (Supp'l BOA) at 4-8 (citing State v. Bobic, 140 Wn.2d 250, 267, 996 P.2d 610 (2000); State v. Williams, 131 Wn. App. 488, 128 P.3d 98 (2006), remanded on other grounds for reconsideration in light of Washington v. Recuenco, 158 Wash.2d 1006 (2006)). Knight's opening and supplemental briefs made it clear she did not seek to withdraw her plea. BOA at 3, n.3 and 24; Supp'l BOA at 7, n.4 and 9.

The state's supplemental response argued only that Williams was wrongly decided. Supp'l BOR at 3-7. Despite the clarity of Knight's briefing, neither of the state's appellate briefs claimed Knight waived her double jeopardy or appeal rights.

The Court of Appeals ruled for Knight. Based on Bobic and Williams, the Court of Appeals struck count II, concluding there could be only one count of conspiracy. Knight, at 109-10 (citing Bobic, 140 Wn.2d at 262-65; State v. Williams, 131 Wn. App. at 497). The court expressly held Knight's plea did not waive her right to argue that double jeopardy barred the two conspiracy convictions. Knight, at 109 (citing State v. Cox, 109 Wn. App. 779, 782, 37 P.3d 1240 (2002)).

No language in the state-drafted plea agreement, the standard plea form, or the plea and sentencing transcripts suggested the state intended the agreement to require Knight to waive her rights to appeal or to argue double jeopardy. CP 13-14; 35-37. This was not identified as important to the state until the state's motion to reconsider, after the Court of Appeals had held the count I and II convictions violated Knight's double jeopardy rights.

The state raised the claim again in its petition in this Court. See Petition for Review at 1 (tersely identifying these issues: "Did the Court of Appeals misinterpret State v. Bobic," and "Are Plea Bargains

Indivisible?"). This Court granted review "only on the issue of the proper remedy for a double jeopardy violation."

C. SUPPLEMENTAL ARGUMENT

1. THE COURT OF APPEALS PROPERLY RELIED ON STATE V. BOBIC TO VACATE ONE OF THE CONSPIRACY COUNTS.

The double jeopardy clauses of the state<sup>1</sup> and federal<sup>2</sup> Constitutions guarantee three separate protections, including the protection against "multiple punishments for the same offense." State v. Gocken, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995) (citations omitted); accord State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). This protection prevents an accused from being convicted more than once under the same statute when only one unit of the crime is committed. State v. Leyda, 157 Wn.2d 335, 342-43, 138 P.3d 610 (2006); State v. Bobic, 140 Wn.2d 250, 267, 996 P.2d 610 (2000). When an accused has been punished more than once for a

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<sup>1</sup> Const. art. I, § 9 provides: "[n]o person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

<sup>2</sup> In relevant part, the Fifth Amendment to the United States Constitution provides: "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." This federal provision applies to the states. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

single unit of prosecution, the proper remedy is to vacate the multiple convictions and remand for a single conviction. Leyda, 157 Wn.2d at 351 (vacating three of four convictions); Bobic, 140 Wn.2d at 267 (vacating two of three conspiracy convictions); accord, Brown v. Ohio, 432 U.S. 161, 169-70, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); Bell v. United States, 349 U.S. 81, 83-84, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

The state charged Knight with two counts of violating the conspiracy statute. Count I alleged conspiracy to commit second degree robbery, while count II alleged conspiracy to commit first degree burglary. CP 11; RCW 9A.28.040(1).

Relying on this Court's decision in Bobic, the Court of Appeals held there was one conspiracy, i.e., a single agreement or plan to commit robbery. Knight, at 109-10 (citing Bobic, at 264-65). The court accordingly reversed Knight's conspiracy to commit burglary conviction and remanded for resentencing on counts I and III. Knight, 134 Wn. App. at 110.

By granting this remedy, the Court of Appeals relied on settled Washington law for "unit of prosecution" claims. Leyda, at 351; Bobic, at 267. The same remedy applies to "multiple punishment" claims. If the state charges violations of multiple statutes that constitute the "same offense," the remedy is to vacate the lesser

conviction and remand for resentencing solely on the greater conviction. State v. Womac, 160 Wn.2d at 656, 658; accord, State v. Weber, 159 Wn.2d 252, 267-69, 149 P.3d 646 (2006); State v. Freeman, 153 Wn.2d 765, 775, 108 P.3d 753 (2005).<sup>3</sup>

As this Court has held, vacation of the lesser conviction is the "proper remedy for a double jeopardy violation." The Court of Appeals granted that remedy. Where that is the sole issue on which review has been granted, the Court of Appeals should be affirmed.

2. THE STATE CANNOT SATISFY ITS BURDEN TO SHOW KNIGHT WAIVED HER APPEAL OR DOUBLE JEOPARDY RIGHTS.

Knight may raise this double jeopardy claim for the first time on appeal, State v. Tvedt, 153 Wn.2d 705, 709 n.1, 107 P.3d 728 (2005), even if trial proceedings were resolved by guilty plea. Menna v. New York, 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975); Blackledge v. Perry, 417 U.S. 21, 30-31, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); State v. Cox, 109 Wn. App. 779, 782, 37 P.3d 1240 (2002); accord In re Restraint of Butler, 24 Wn. App. 175, 178, 599

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<sup>3</sup> Based on Weber and Freeman, the state may claim the Court of Appeals should have vacated count I rather than count II, as the count II offense has a higher standard range. CP 63. Because the count II sentence is concurrent with the longer count III sentence, this potential distinction makes no practical difference in Knight's case.

P.2d 1311 (1979) (remedy for double jeopardy in following guilty plea is to strike one count and resentence on the other).

Nonetheless, in light of this Court's recent decision in In re Restraint of Shale,<sup>4</sup> there may be one remaining question: whether a plea agreement might change the settled Leyda/Bobic remedy. In Knight's direct appeal, the answer should be "no." Because the state did not ask Knight to waive her appeal and double jeopardy rights, and because nothing in the record suggests Knight waived those rights, the state cannot meet its burden to prove a knowing, intelligent and voluntary waiver. Simply stated, the state should not benefit from a plea deal it may wish it had made, but did not.

Shale discussed when a guilty plea might waive a double jeopardy claim raised for the first time in a personal restraint petition (PRP). When properly analyzed, Shale does not support the state.<sup>5</sup>

The state charged Shale with 12 offenses in seven different cause numbers. The record showed the prosecutor and defense counsel worked together to reach one unified plea agreement to allow

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<sup>4</sup> 160 Wn.2d 489, 158 P.3d 588 (2007).

<sup>5</sup> Shale was a split decision with four Justices signing the lead opinion and four signing the concurrence. Generally, a plurality decision that does not garner a majority is not binding precedent. In re Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).

Shale to seek a first-time offender waiver. The trial court instead imposed standard range sentences. Shale, at 491-93, 501-02.

Shale did not appeal. His later PRP sought to vacate some of the convictions, but also to specifically enforce the plea agreement. Shale claimed several convictions violated double jeopardy because they were one "unit of prosecution." Shale, at 491-92. The lead opinion rejected Shale's PRP claim, concluding Shale had pled to multiple counts as part of a single plea deal. Shale, at 493-94 (citing State v. Turley, 149 Wn.2d 395, 398, 69 P.3d 338 (2003)).

Turley had been informed his plea to two counts would not require community placement. When this proved wrong as to one count, Turley moved to withdraw his plea to both counts. The state claimed Turley should only be allowed to withdraw his plea to one count. Shale, at 493; Turley, at 397-99.

There was no question Turley was misinformed of the plea's direct consequences and this was a "manifest injustice" supporting withdrawal of the plea. Turley, at 398-99. The "sole issue" was "whether a trial court may grant or deny a motion to withdraw a plea agreement as to each count separately when the defendant pleaded guilty to multiple counts entered the same day in one agreement." Turley, at 398.

This Court rejected the state's position and held Turley could withdraw both pleas because he pled to a "package deal" that was not divisible. This Court reasoned pleas to multiple counts, entered at the same time and in one document, are presumed indivisible. But this presumption will not apply if there are "objective indications to the contrary in the agreement itself[.]" Turley, at 400.

The Turley court stated it would not consider unexpressed subjective manifestations of the parties' intent, only objective manifestations. Turley, at 400. Other courts have similarly refused to permit a unilateral mistake to undermine a plea contract.<sup>6</sup>

Applying Turley to Shale's facts, the lead opinion concluded Shale could not challenge the "indivisible package deal." Shale, at 494. The lead opinion misread Turley, however, stating the Turley court "held that a trial court must treat a plea agreement as indivisible when pleas to multiple counts or charges were made at the same

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<sup>6</sup> See, e.g., State v. Watson, 63 Wn. App. 854, 860, 822 P.2d 327 (1992) (the defendant's unilateral mistake will not undermine a plea); State v. Means, 91 N.J. 610, 926 A.2d 328, 335 (N.J. 2007) (prosecution's unilateral mistake was not sufficient to undercut plea); United States v. Patterson, 381 F.3d 859 (9th Cir. 2004) (plea cannot be vacated simply because the government erred in its assumptions about the sentence length); United States v. Ritsema, 89 F.3d 392, 400-01 (7th Cir. 1996) (court cannot vacate plea after court accepted plea based on court's unilateral mistake in understanding the potential sentence).

time, described in one document, and accepted in a single proceeding." Shale, at 493 (emphasis added). Turley, however, had only ruled indivisibility could be presumed where the defendant seeks to withdraw a plea based on misadvisement. Turley, at 400.

The Shale concurrence, however, properly distinguished Turley because it involved plea withdrawal, not waiver of double jeopardy rights. Shale, at 497 (Madsen, J., concurring). Rather than apply Turley inflexibly, the concurrence would have held a guilty plea does not foreclose an attack on multiple convictions where a double jeopardy violation is evident on its face. Shale, at 497-98 (Madsen, J. concurring) (citing Menna v. New York, 423 U.S. at 62). In determining facial invalidity, courts review the judgment and sentence and those documents submitted as part of a plea agreement. See In re Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002) (plea documents are relevant when they disclose invalidity in the judgment and sentence); see also In re Stoudmire, 141 Wn.2d 342, 353-54, 5 P.3d 1240 (2000) (court may consider plea documents in determining whether judgment and sentence is invalid on its face).

The concurrence instead reviewed the record to see whether Shale "waived his right to challenge these convictions, either explicitly or through his actions in negotiating this plea agreement." Shale, at

501. The concurrence concluded Shale waived his jeopardy claim by actively crafting a plea bargain "in order to preserve his eligibility for a first offender waiver." Shale, at 502 (citing Jeffers v. United States, 432 U.S. 137, 154, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977)).

Shale is distinguishable. Both parties worked together and intended that deal to allow a first-time offender waiver. That sentencing option necessarily required Shale's multiple convictions to be entered simultaneously. See RCW 9.94A.650(1) ("This section applies to offenders who have never been previously convicted of a felony[.J]"). Under those circumstances, Shale's consolidation of multiple counts in different cause numbers might have shown he bargained away his right to argue double jeopardy, at least for purposes of collateral review. Compare Jeffers, 432 U.S. at 152 (plurality op.) (where Jeffers successfully opposed the government's motion to consolidate indictments, and where the two offenses permitted separate punishments, Jeffers waived any right to argue against sequential prosecution of the second offense).

In Knight's direct appeal, however, the plea agreement specifically left both parties free to recommend "any sentence allowed by law." CP 35. The record shows the state's main motivation for its offer was to secure Knight's testimony against potential codefendants.

CP 35-36; 2RP 8-12. Nothing suggests Knight and the state meant for this bargain to include the waiver of Knight's rights to appeal or to claim double jeopardy.

Under Turley, this might have been, at best, an unexpressed subjective manifestation of the state's intent. Turley, at 400. But even that is a stretch, because the state did not suggest this subjective manifestation until its appellate motion for reconsideration. As shown in Knight's answer to the motion for reconsideration, no facts in the trial court record support the state's late claim. See Answer, at 4-5, 9-12.

Shale's case also arose as a PRP, not a direct appeal. Given his active participation in seeking the first-time offender waiver, Shale could not meet his burden to show actual and substantial prejudice arising from a constitutional error. No relief was warranted. See In re Restraint of Tortorelli, 149 Wn.2d 82, 95, 66 P.3d 606 (2003) (discussing PRP burden) (citing In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)).

The lead opinion in Shale also reviewed the factual record to confirm there was no double jeopardy violation. Shale, at 496 (stating the probable cause statements "establish[ed] the separate nature of each charge."). Here, however, the Court of Appeals properly

concluded "the record . . . supports only one conspiracy conviction[.]" citing the police reports attached to Knight's plea form. Knight, 134 Wn. App. at 110. This conclusion established the double jeopardy violation that was not present in Shale.

For all these reasons, Shale is factually and legally distinguishable and should not apply to Knight's appeal.

Knight also respectfully argues the lead opinion in Shale misapplied Turley. The Turley court was rightly concerned with protecting a defendant's due process right to notice of the direct consequences of a guilty plea. Where an accused is misadvised of direct consequences, a "manifest injustice" is established, allowing withdrawal. This is settled constitutional law. Turley, at 398-400; In re Restraint of Isadore, 151 Wn.2d 294, 301-02, 88 P.3d 390 (2004).

But the constitution offers the state no similar protection. The state is instead protected by its own counsel's ability to draft a waiver whenever a waiver is material consideration for the state's plea offer.

Furthermore, to the extent the lead opinion in Shale may have presumed indivisibility in this different context, it conflicts with settled law. This Court has long held that waivers of constitutional rights will not be presumed. The state instead bears the "heavy burden" to establish such waivers. In re Restraint of James, 96 Wn.2d 847, 850-

51, 640 P.2d 18 (1982) ("any constitutional right"); accord, State v. Kells, 134 Wn.2d 309, 313-14, 949 P.2d 818 (1998) (right to appeal); State v. Matuszewski, 30 Wn. App. 714, 717 n.1, 637 P.2d 994 (1981) (double jeopardy rights); see also, Shale, at 501 (double jeopardy rights) (Madsen, J., concurring, citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). The United States Supreme Court has similarly recognized the state must prove a knowing and voluntary waiver of double jeopardy rights. Schneekloth v. Bustamonte, 412 U.S. 218, 237-38 & n.24, 93 S.Ct. 2041, 35 L.Ed.2d 854 (1973) (citing Green v. United States, 355 U.S. 184, 191-92, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)).

Applying Turley's indivisibility presumption to this different context would turn the constitution on its head. Where the Turley court created this presumption to shield the defense, the Shale concurrence properly refused to use Turley as the state's sword to eviscerate settled constitutional protections. To the extent the lead opinion in Shale can be read to allow this errant result, it is both incorrect and harmful and should be reconsidered.

Applying Shale to these facts also would conflict with settled contract law principles. If the state wanted Knight to waive her double jeopardy and appeal rights, it could and should have included that

language when it drafted the plea agreement.<sup>7</sup> Courts will not read waivers into a plea agreement that the state did not establish. State v. Bisson, 156 Wn.2d 507, 522, 130 P.3d 820 (2006) (ambiguous plea agreements are construed against the drafter).<sup>8</sup>

Holding the state to this burden is fair, particularly where case law offers the state substantial drafting assistance. Twenty years ago in State v. Perkins, 108 Wn.2d 212, 213-15, 737 P.2d 250 (1987), for example, this Court held a person can waive the right to appeal as part of a plea negotiation. The colloquy in Perkins provides a model for the state's past and future plea agreements when it seeks to establish waivers. Perkins, at 219-20; see also, State v. Larson, 128 Wn. App. 1071, 2005 Wash. App. LEXIS 2063 (noting that Larson's

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<sup>7</sup> The plea form listed the standard trial rights Knight waived, including "the right to appeal a finding of guilt after a trial." CP 14; 1RP 5-6. The form did not waive Knight's right to appeal the sentence, nor did it waive her right to claim double jeopardy. The plea agreement was no clearer on this question, stating only Knight "waives those rights and agrees to the terms of this agreement." CP 36-37; 1RP 11-12. In light of the holdings in Cox and Menna, the state had to do more than this to establish a waiver of double jeopardy rights.

<sup>8</sup> See also, CrR 4.2(e) ("The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered"); RCW 9.94A.090(1) ("If a plea agreement has been reached by the prosecutor and the defendant ... they shall at the time of the defendant's plea state to the court, on the record, the nature of the agreement and the reasons for the agreement.").

plea specifically waived his right to argue double jeopardy).<sup>9</sup> Federal case law also eases the state's drafting burden.<sup>10</sup>

Assuming arguendo the plea agreement could somehow be ambiguous on this point, the agreement, like any contract, will be construed against the state as the drafter. State v. Bisson, 156 Wn.2d at 522 (citing State v. Skiggn, 58 Wn. App. 831, 795 P.2d 169 (1990) and Guy Stickney, Inc. v. Underwood, 67 Wn.2d 824, 827, 410 P.2d 7 (1966)). Here, however, there is no ambiguity. The state simply omitted a waiver it now asks this Court to construct, or presume, for the first time on appeal. The state did not even think to invent this claimed waiver until its motion to reconsider. This was long after Knight's briefs had twice made it clear she does not seek to withdraw her plea.

The Shale concurrence also briefly cited United States v. Broce, 488 U.S. 563, 575-76, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989),

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<sup>9</sup> Knight does not cite the unpublished decision in Larson as "authority" on any legal proposition, RAP 10.4(h), but rather as a factual illustration of how easy it is for the state to draft such agreements when it intends them.

<sup>10</sup> See, e.g., United States v. Jeronimo, 398 F.3d 1149, 1154 (9th Cir. 2005) (plea agreement included this term: "[b]y accepting the benefits of this agreement and if sentenced by the Court to a term of imprisonment of less than the statutory maximum of 20 years, Mr. Jeronimo waives **any and all** rights to appeal") (court's emphasis).

for the proposition that a double jeopardy claim may be waived "if a defendant collaterally challenges a *facially valid conviction* and seeks to expand the record to show that a conviction violates double jeopardy[.]" Shale, at 497-98 (court's italics, underscore added). The Broce court held a guilty plea waives the right to a fact-finding hearing to raise a double jeopardy claim on collateral review. Broce, 488 U.S. at 573-74.<sup>11</sup> Broce does not apply to Knight's direct appeal because she does not seek to expand the record. The Court of Appeals properly relied on the judgment and sentence and the plea documents to determine this facial violation. Knight, 134 Wn. App. at 110<sup>12</sup>; accord, In re Hemenway, 147 Wn.2d at 532 (proper to review plea documents).

The state's petition for review also cited State v. Ermels, 156 Wn.2d 528, 540, 131 P.3d 299 (2006). As part of a plea agreement,

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<sup>11</sup> Broce pled guilty to two separately filed indictments charging two conspiracies related to bid-rigging on two different highway projects, one occurring in April 1978, the other in July 1979. Broce, 488 U.S. at 565, 577-79. After the convictions were final he moved for an evidentiary hearing in an effort to expand the record to show these were part of a larger ongoing conspiracy to rig bids that had been going on for 25 years. Broce, at 568-69.

<sup>12</sup> In contrast to Broce, the state charged Knight in one information with two alleged conspiracies, both occurring "on or about September 25, 2003." CP 11. The affidavit of facts, incorporated into the plea, established the double jeopardy violation. CP 4-7; 18; 1RP 15-16.

Ermels pled guilty to a lesser charge and stipulated to an exceptional sentence and to facts supporting that sentence. He expressly waived his right to appeal the sentence, preserving only the right to argue the sentence length was excessive. Nonetheless, on appeal he argued the exceptional sentence was unlawful and his express waivers were not knowing and intelligent. Ermels, at 532-34.

This Court held Ermels waived his right to appeal the exceptional sentence and could not appeal the sentence without undermining the entire plea deal. Crucial to this Court's analysis was Ermels' failure to offer objective manifestation of an intent to treat the plea differently than the exceptional sentence, as he expressly waived the right to appeal both. Ermels, at 540-41.

Unlike the express waiver in Ermels, Knight's plea permitted both parties to argue for any sentence supported by law. This is the objective manifestation Ermels lacked. Furthermore, as a matter of both fact and law, the plea did not waive Knight's right to appeal or to argue double jeopardy.<sup>13</sup>

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<sup>13</sup> CP 13-14, 35-37; Supp'l BOA at 5, 7; State v. Cox, 109 Wn. App. at 782; Menna v. New York, 423 U.S. at 62; In re Restraint of Butler, 24 Wn. App. at 178. None of this could have surprised the state, as Cox, Butler, and Menna were decided long before Knight's plea.

The state's petition nonetheless chided the Court of Appeals for "chisel[ing] away at the plea bargain so that the defendant receives a more favorable sentence and the State receives nothing in exchange for this reduction," (Petition, at 7 (state's emphasis)), repeating its theory that plea bargains are "all or nothing" situations. Id., at 7-8. But these rhetorical flourishes misconstrue the facts and holdings in Turley and Ermels, while overlooking the state's settled obligation to plainly draft plea agreements. The state can avoid receiving "nothing" on appeal by drafting clear waivers of double jeopardy and appeal rights when those waivers are material. But the state cannot manufacture such waivers for the first time on appeal. Nor should appellate courts serve as backup draftsmen by presuming such waivers to rescue the state from contracts it drafts.

Finally, the state waived any waiver claim. The state filed three substantive pleadings in the Court of Appeals before it even raised its waiver theory,<sup>14</sup> waiting until its motion to reconsider. In this circumstance, this Court should conclude the state waived its waiver

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<sup>14</sup> The state initially responded to an Anders brief filed by Knight's former appellate counsel. After new counsel filed a brief, the state filed the Brief of Respondent and then a Supplemental Brief of Respondent. None of those pleadings asserted Knight's plea agreement waived her rights to appeal or to claim double jeopardy.

claim. United States v. Jacobo Castillo, \_\_\_ F.3d \_\_\_, 2007 U.S. App. LEXIS 17625, at \*20-21 (9th Cir. 2007) (citing, inter alia, Menna).

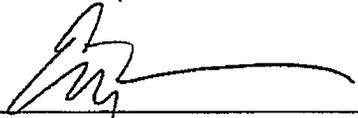
In short, the state now seeks a windfall, asking this Court to misapply Turley to presume a waiver the state omitted from the plea agreement. In the alternative, the state asks this Court to impose an unwarranted remedy, which is to hold Knight no longer can benefit from the plea agreement even though she testified and fully performed her end of the bargain.<sup>15</sup> Because neither remedy is supported by the law, the record, or by sound public policy, this Court should reject the state's late claim and affirm the Court of Appeals.

D. CONCLUSION

This Court should affirm the Court of Appeals and remand for resentencing.

Respectfully submitted this 10<sup>th</sup> day of September, 2007.

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<sup>15</sup> Knight's plea agreement cannot be simply voided by a prosecutor's unilateral request on appeal. This Court has held that due process requires a full hearing on the question whether the defense has breached a plea agreement. In re Restraint of James, 96 Wn.2d at 850-51.