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COURT OF APPEALS
DIVISION III
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NO. 25740-1-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JOEL RODRIGUEZ RAMOS,

Appellant.

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court erred in declining juvenile court jurisdiction.
2. The state violated double jeopardy clause protections of the state and U.S. Constitutions by charging multiple counts of felony murder based on the same underlying felony.
3. The trial court violated double jeopardy clause protections of the state and U.S. Constitutions by imposing a judgment of conviction, and consecutive sentences, on multiple counts of felony murder based on the same underlying felony.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Whether the Superior Court lacked jurisdiction over Mr. Ramos' case, since he was 14 years old at the time that he waived his right to a decline hearing, and RCW 13.04.110 does not authorize either declination of juvenile court jurisdiction or waiver of a decline hearing for a child under age 15?
2. What is the unit of prosecution for first-degree felony murder – is it each underlying felony, or each resulting death?

STATEMENT OF THE CASE

- I. **MR. RAMOS WAIVED A DECLINE HEARING AND ENTERED A GUILTY PLEA TO FOUR COUNTS OF FELONY MURDER IN 1993**

Mr. Ramos was originally charged in Juvenile Court with four counts of aggravated first degree murder. See Information, CP:40.

According to his appointed lawyers, after several weeks of pretrial motions, discovery, and investigation, Mr. Ramos decided to waive the right to a decline hearing “and ask the court to proceed in the adult felony Superior Court division.” 8/23/93 VRP:2. Mr. Ramos’ public defenders listed the evidence that they were prepared to present at the scheduled decline hearing, including a social and educational history along with a number of witnesses, from teachers, family members and probation counselors to a “forensic expert.” VRP:3.

The trial court questioned Mr. Ramos about this. VRP:4-7. The court discussed the prerequisites to decline of juvenile jurisdiction under Kent.¹ The court then accepted Mr. Ramos’ waiver of the decline hearing, ruling that it was knowing, voluntary and willing. VRP:7.

Following this decision to decline jurisdiction, the judge asked the prosecutor to describe the four first-degree murder charges against Mr. Ramos in the adult court Information. VRP:8-9. The prosecutor explained that the adult court Information (CP:18-21) contained one count of premeditated first-degree murder against Ramos for the death of Bryan

¹ Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

Skelton, and three counts of first-degree felony murder for homicides that occurred during the course of the same first-degree robbery for the deaths of the other three Skelton family members. VRP:8-9.

Defense counsel then described their investigation and preparation of the case to date. VRP:12-13. The court followed with a colloquy with Mr. Ramos about his plea. VRP:15-20. The judge initially told Mr. Ramos that he had a right to appeal if he went to trial, but continued, “Do you understand that a plea of guilty gives up that right to appeal?” Mr. Ramos answered, “Yeah.” VRP:17. The judge then advised Mr. Ramos about his sentencing exposure. He stated that Mr. Ramos’ standard range was 240-320 months on each and added that they must be consecutive. VRP:19. The judge continued that that means 80 to 106 years, and Mr. Ramos said that he agreed. Id.

In the Statement of Defendant on Plea of Guilty, the elements of each of the three counts of felony murder are virtually identical. Each of them lists the underlying crime as “First Degree Robbery” with no further description or specification. CP:10. The only difference is the name of the person killed during the course of that “Robbery.”

Mr. Ramos then pled guilty. VRP:20.

The state recommended the low end of the sentencing range, that is, 80 years. VRP:26. Defense counsel urged the court to follow that

recommendation, adding that there are important differences between Mr. Gaitan, who was the principal in these crimes, and Mr. Ramos, who was the “follower.” VRP:27. The court accepted that recommendation and imposed a total sentence of 80 years. VRP:34.

II. THE SUPERIOR COURT NEVER ADVISED MR. RAMOS OF HIS RIGHT TO APPEAL THE TRANSFER OF JURISDICTION TO ADULT COURT, AND THE SUPREME COURT HAS REINSTATED HIS RIGHT TO HAVE THE CASE “PROCEED AS A TIMELY NOTICE OF APPEAL” WITHOUT ANY LIMITATION

The Superior Court did not advise Mr. Ramos of his right to appeal the transfer of jurisdiction to the adult court at any point during that August 23, 1993, decline, plea, and sentencing hearing. Nor did the Superior Court advise Mr. Ramos of his right to appeal anything else – like the conviction and sentence itself – at any point during that hearing. The transcript is absolutely silent about any advice of appellate rights to Mr. Ramos from anyone, except for the judge’s advice that Mr. Ramos had lost those rights by pleading guilty. Not surprisingly, Mr. Ramos did not timely appeal.

But he did file a *pro se* motion to enlarge the time within which to appeal in this Court of Appeals on December 7, 2006, in CA No. 25740-1, when he learned that he could do so. His pleadings focused on denial of the right to raise certain issues on appeal, including the decline decision.

Mr. Ramos' motion was finally denied by this Court on June 21, 2007, in an Order Denying Motion to Modify Commissioner's Ruling. His motion for discretionary review was denied, but Mr. Ramos filed a Motion to Modify.

The Washington Supreme Court granted it. On March 7, 2008, that Court entered an order granting the Petitioner's Motion to Modify Commissioner's Ruling; it stated, "this matter is remanded to Division Three of the court of appeals *to proceed as a timely filed notice of appeal.*" (Emphasis added.)

There were no limits placed on the scope of the instant "timely filed notice of appeal," and of course the only time a notice of appeal can be filed challenging the decision to decline juvenile court jurisdiction is following entry of the Judgment & Sentence, as part of the appeal of the final order. In re Lewis, 89 Wn.2d 113, 115, 569 P.2d 1158 (1977) (transfer or decline order not appealable as a matter of right until conclusion of the adult criminal matter); In re the Personal Restraint of Hegney, 138 Wn. App. 511, 534, 158 P.3d 1193 (2007) (same).

The Supreme Court thus reinstated Mr. Ramos' right to proceed on appeal as if "a timely notice of appeal" of the case had been filed, without limitation. It therefore allowed Mr. Ramos to raise any issues that he might have raised following the filing of a "timely notice of appeal,"

including challenges to the conviction and sentences themselves.

III. THE SUPERIOR COURT NEVER ADVISED MR. RAMOS OF HIS RIGHT TO APPEAL HIS CONVICTION AND SENTENCE, AND AFFIRMATIVELY MISADVISED HIM THAT HE HAD RELINQUISHED THAT RIGHT TO APPEAL, SO THERE IS ALSO AN INDEPENDENT GROUND FOR REINSTATING A RIGHT TO APPEAL THE CONVICTION AND SENTENCE

There is another reason that Mr. Ramos' right to appeal the entire conviction and sentence must be reinstated.

As discussed above, the Superior Court never advised Mr. Ramos of his right to appeal his conviction and sentence. 8/29/93 VRP:1-37. Such advice, however, was required by CrR 7.2(b).

In fact, as part of the colloquy prior to entering the guilty plea (8/23/93 VRP:15-20), the judge affirmatively misadvised Mr. Ramos that he had no right to appeal. The judge said to Mr. Ramos, "Do you understand that a plea of guilty gives up that right to appeal?" Mr. Ramos answered, "Yeah." *Id.*, VRP:17.

Similarly, the Statement of Defendant on Plea of Guilty advised Mr. Ramos that if he pleaded guilty, he waived the right to appeal. It states that Mr. Ramos gives up the following right by pleading guilty: "The right to appeal a determination of guilt after a trial." CP:11, paragraph 5(f).

The combination of the failure to provide Mr. Ramos with the advice of right to appeal required by CrR 7.2; plus the misleading information from the judge and on the Statement of Defendant on Plea of Guilty advising him that he had no right to appeal; combined to deprive Mr. Ramos of the right to appeal the convictions themselves, as discussed in Argument Section III.

ARGUMENT

- I. **THERE IS NO STATUTORY AUTHORITY FOR DECLINING JUVENILE COURT JURISDICTION OVER A 14-YEAR OLD, AND THERE IS NO STATUTORY AUTHORITY FOR WAIVING A DECLINE HEARING FOR A 14-YEAR OLD; THE SUPERIOR COURT CANNOT ARROGATE SUCH AUTHORITY TO ITSELF WITHOUT LEGISLATIVE AUTHORIZATION**
 - A. **RCW 13.40.110 Authorizes Decline Hearings for Juveniles as Young as Age 15, But it Makes No Provision for Decline Hearings or Waiver of Decline Hearings for Juveniles Younger than That – And Mr. Ramos Was Younger Than That**

An adult criminal court acquires jurisdiction to hear juvenile criminal cases only when the juvenile court properly “transfers jurisdiction,” meaning the power to hear and adjudicate the controversy, to the adult court. See RCW 13.40.030(1)(e), 13.40.110; State v. Pritchard, 79 Wn. App. 14, 20, 900 P.2d 560 (1995), review denied, 128 Wn.2d 1017 (1996); In re the Personal Restraint of Hegney, 138 Wn. App 511, 534.

The applicable transfer or decline statute – RCW 13.40.110 – however, does not authorize decline hearings for juveniles as young as 15, and certainly does not authorize waiver of decline hearings for juveniles that young. Since the decline of juvenile court jurisdiction was purportedly done under the authority of that statute, the decline order was not proper and the adult court lacked jurisdiction.

1. The Language of RCW 13.40.110

The procedure for transferring or declining jurisdiction is contained in RCW 13.40.110. That statute 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. 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).

As the italicized portion shows, the first sentence of that statute authorizes either a party or the court to file a motion to decline juvenile court jurisdiction – and it does not say when the parties or the judge may or may not file such a motion. That same sentence continues that when such a motion is filed, the matter “shall be set for a [decline] hearing.” “Shall,” of course, is a mandatory term. City of Wenatchee v. Owens, ___ Wn. App. ___, 2008 Wash. App. LEXIS 1442 at *8 (June 19, 2008) (Nos. 26152-2-III, 26153-1-III).

The next sentence, which introduces subsections (a) through (c), discusses when the decline hearing “shall” be held but also goes on to specify when “waive[r]” of the decline hearing can occur. Subsection (a) says that a hearing “shall” occur when certain crimes are charged, and the juvenile is 15, 16, or 17 years old. Mr. Ramos was 14 years old at the time of the crime, the decline hearing, the guilty plea, and the judgment. He is not within this class of juveniles for which a decline hearing must be held or may be waived. Subsection (b) states a hearing “shall” occur when certain other crimes are charged, and the juvenile is 17 years old. Mr. Ramos, again, was 14 years old. Subsection (c) concludes that such a hearing “shall” occur when an escape is charged and the juvenile is already serving a “minimum juvenile sentence to age twenty-one.” Mr. Ramos was not charged with escape and not serving such a “minimum juvenile sentence.”

Thus, this statute’s three prerequisites to holding a decline hearing are not satisfied in this case.

More importantly, the statute makes no provision at all for waiver of a decline hearing for a 14 year old. Its 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, automatic, 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. Nor does any other statute. Similarly, paragraph (3) says that declination findings “shall” (again, a mandatory term) “be supported by relevant facts and opinions *produced at the hearing.*” *Id.* (emphasis added). It makes no provision for findings to be adopted without a decline hearing. These paragraphs consistently mention only one way to accomplish declination for people like Mr. Ramos – via a decline hearing and findings from that hearing.

The juvenile court transferred jurisdiction to the adult, Superior Court, nonetheless.

2. The Transfer of Jurisdiction, Especially Without a Decline Hearing, Was Not Authorized by the Statutory Language

Even if this Court believes that RCW 13.40.110’s introductory sentence provides the necessary authorization to hold a decline hearing, that sentence says absolutely nothing about waiving a decline hearing. The only time that waiver of a decline hearing is mentioned is in the second sentence of the introductory paragraph – the one that talks

specifically about the prerequisites to mandatory decline hearings when certain specified crimes are charged and the juvenile is older than Mr. Ramos was. Further, waiver is not mentioned in paragraph (2), which says when the court can transfer jurisdiction, that is, “after a decline hearing,” or paragraph (3), which says that findings must be based on such a “hearing.”

There is no other juvenile court statute that provides for waiver of a decline hearing for a 14 year old – or a younger child – either. See RCW 13.40.030(1)(e)(i) (granting juvenile court exclusive jurisdiction over juvenile charged with crimes unless the case is transferred “pursuant to RCW 13.40.110”). Cf. RCW 13.40.140(9) (defining standard by which to judge validity of juvenile’s waiver of rights – without addressing which rights may be waived). The language of RCW 13.40.110 instead indicates that to the extent the legislature contemplated transfer of juvenile court jurisdiction for the youngest children, it had to be with a hearing and judicial oversight – not by simple agreement of the parties.

There is no room for this Court to add or substitute other, unlisted, less rigorous, prerequisites to decline and/or waiver in place of the prerequisites that the legislature chose. First, the plain language of an unambiguous statute controls unless there is a clearly expressed legislative

intent to the contrary.² As the Washington Supreme Court has explained, “If the language of the act is unambiguous, the statute is not subject to judicial construction, as there is nothing to construe.” State v. Howell, 119 Wn.2d 513, 517, 833 P.2d 1385, 1387 (1992). Since there is no legislative intent to the contrary, the clear language of RCW 13.40.110 – limiting decline and especially waiver to children at least a year older than Mr. Ramos was at the time he pled guilty – is the only possible construction of that statute.

The same result is compelled by application of the rules that provisions in a statute are to be read in the context of the statute as a whole,³ and, under the rule of “*expressio unius est exclusio alterius*,” “[w]hen a statute limits a thing to be done in a particular mode, it includes the negative

² United States v. Napier, 861 F.2d 547, 548 (9th Cir. 1988); United States v. Hurt, 795 F.2d 765, 770 (9th Cir. 1986), as amended, 808 F.2d 707 (9th Cir.), cert. denied, 484 U.S. 816 (1987) (“In construing a statute, we must first look to the plain language used by Congress. ... If the language of the statute is unambiguous, it is conclusive unless there is a ‘clearly expressed legislative intention to the contrary ...’”) (numerous citations omitted); United States v. Roach, 745 F.2d 1252, 1253 (9th Cir. 1984), cert. denied, 474 U.S. 835 (1985).

³ Pope v. University of Washington, 121 Wn.2d 479, 489, 852 P.2d 1055 (1993), corrected by 871 P.2d 590, cert. denied, 510 U.S. 1115 (1994); Malo v. Alaska Trawl Fisheries, Inc., 92 Wn. App. 927, 930, 965 P.2d 1124 (1998), review denied, 137 Wn.2d 1029 (1999).

of any other mode”;⁴ “The exceptions become exclusive.”⁵ RCW 13.40.110 *requires* the court to hold a decline hearing, and authorizes waiver of a decline hearing in only certain specific instances, that is, when the child is older than Mr. Ramos (or charged with escape, which he is not). Creating a new exception would make the statutory prerequisites listed in subsections (a) through (c) nonexclusive, and essentially irrelevant. Such an interpretation would flout the rules discussed in this section.

Indeed, the only Washington cases that have spoken on the issue of waiver of the decline hearing have indicated that it cannot be waived in this situation: “this court has concluded that RCW 13.04.030(1)(e)’s decline hearing requirement can be waived only by way of intentional deception The State points to no other circumstances that have been deemed to amount to waiver.” In re the Personal Restraint of Dalluge, 152 Wn.2d 772, 783-84, 100 P.3d 279 (2004) (citation omitted). Id. at 785 (“In sum, the relevant statutory language and this court’s case law do not allow waiver of juvenile jurisdiction absent either a decline hearing in juvenile court or a substitute Dillenburg hearing.”); State v. Mendoza-

⁴ Botany Worsted Mills v. United States, 278 U.S. 282, 289, 49 S.Ct. 129, 73 L.Ed. 379 (1929); Washington Natural Gas Co. v. Public Util. Dist. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

⁵ State v. Kazeck, 90 Wn. App. 830, 953 P.2d 832 (1998).

Lopez, 105 Wn. App. 382, 386-87, 19 P.3d 1123 (2001) (“The juvenile court must hold a hearing to decline jurisdiction over the underaged defendant Absent a declination hearing, the adult division of the superior court does not have jurisdiction to hear the case.”) (citations omitted).

Arguably, there are other plausible interpretations of RCW 13.40.110. The Superior Court must have interpreted it as authorizing the court to permit the juvenile to waive the decline hearing (perhaps by its silence on this point), even when the juvenile was under 15 years old. If that is a plausible interpretation, then at best, that makes RCW 13.40.110 ambiguous.⁶ The ambiguity must be resolved in favor of the criminal defendant.⁷ That means interpreting RCW 13.40.110 against allowing a 14-year old child to waive a decline hearing.

⁶ State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998), review denied, 137 Wn.2d 1039 (1999); State v. Sunich, 76 Wn. App. 202, 206, 884 P.2d 1 (1994); State v. Garison, 46 Wn. App. 52, 54, 728 P.2d 1102 (1986).

⁷ Ratzlaf v. United States, 510 U.S. 135, 148, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); United States v. Figueroa, 165 F.3d 111, 119 (2d Cir. 1998); State v. Lively, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996); In re Personal Restraint of Sietz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994); State v. Van Woerden, 93 Wn. App. 110, 116 (“If there is no contrary legislative intent, we apply the rule of lenity, which resolves statutory ambiguities in favor of the criminal defendant.”).

B. The Courts Lack the Power to Establish Decline and Waiver Provisions That the Legislature Declined to Provide

Thus, RCW 13.40.110 does not authorize decline of juvenile court jurisdiction for a child of Mr. Ramos' age. Nor does it authorize waiver of the decline hearing for juveniles as young as he was. No other statute provides such authorization, either.

This Court cannot adopt such procedures now, to retrospectively justify declining, convicting and sentencing Mr. Ramos to 80 years in prison, rather than 7 years, that is, until he turned 21. Only the legislature can adopt such procedures governing superior court's jurisdiction to adjudicate and sentence. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975).⁸ A defendant cannot extend the trial court's jurisdiction or sentencing authority, even by agreeing to it – as Mr. Ramos purported to do with his waiver of juvenile court jurisdiction. In re Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991).

The state Supreme Court has reaffirmed these limits on the courts' ability to rewrite legislation on structuring sentencing procedures over and

⁸ Accord State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, modified, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986) (upholding SRA against separation of powers and related challenge because (1) the legislature has the sole authority to set the terms under which the trial court can impose punishment for crimes and (2) the trial court has no independent inherent authority to punish for crimes).

over again. In State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), and State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981), for example, that Court declined to read into the former Washington death penalty statutes a procedure for impaneling a jury after a guilty plea since the legislature had not enacted such a procedure; that Court held that, however attractive the solution of rewriting the death penalty statute might be, “*we do not have the power to read into a statute that which we may believe the legislature has omitted.*” Martin, 94 Wn.2d at 8 (emphasis added).

This conclusion was reaffirmed in State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), rev'd on other grounds, 548 U.S. 212 (2006). In that case, the Court held, in part, that a trial court has no authority to impose a firearm enhancement unless the jury finds the defendant was armed with a firearm. The basis for that conclusion was the underlying holding that in the absence of a statutory procedure by which a jury can find a firearm sentencing enhancement, as opposed to a deadly weapon enhancement, the trial court has no authority to impose a 60-month enhancement for being armed with a firearm.

This same conclusion was reaffirmed in State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). In that case, the Supreme Court ruled that the state courts cannot adopt sentencing procedures, even those that might be considered necessary to fill gaps left by the legislature

concerning the ability of the trial courts to impose exceptional sentences. The courts cannot rewrite the procedures that the legislature adopted to expand its sentencing authority.

Following this line of cases, RCW 13.40.110's failure to provide a procedure for adult conviction and sentencing for children under 15, and its failure to provide a procedure for children of that age to waive the decline hearing, cannot be altered by this Court. If it is to be changed, it must be changed by the legislature.

C. **Lack of Jurisdiction Can be Raised for the First Time on Appeal**

The issue raised here implicates the jurisdiction of the adult, Superior Court, over Mr. Ramos. In re Dalluge, 152 Wn.2d 772, 782-83. As such, it can be raised at any time. RAP 2.5(a)(1), (3). Since this is a matter of statutory interpretation, review is de novo. State v. Thomas, 150 Wn.2d 666, 670, 80 P.3d 168 (2003).

II. **THE UNIT OF PROSECUTION FOR FELONY MURDER IS THE UNDERLYING FELONY; IT THEREFORE VIOLATES DOUBLE JEOPARDY PROTECTIONS TO CHARGE MULTIPLE COUNTS OF FELONY MURDER BASED ON THE SAME ROBBERY**

A. **Mr. Ramos Pled Guilty to Three Felony Murder Convictions Based on one Underlying Felony: Robbery**

Mr. Ramos was convicted of one count of intentional murder, and

three counts of felony murder. The three “felony murder” charges were all based on the same underlying felony of “First Degree Robbery.” The Information listed the four murders as four separate crimes, but it listed the same “Robbery” as the underlying offense upon which the three felony murder counts were based:

Count I

First Degree Murder – “In that you, on or about March 24, 1993, in Yakima County, Washington, with premeditated intent to cause the death of another person, did strike BRYAN SKELTON in the head with a piece of firewood, thereby causing the death of BRYAN SKELTON, a human being.

In violation of RCW 9A.32.030(1)(a).

Count II

First Degree Murder – “In that you, on or about March 24, 1993, in Yakima County, Washington, *while committing the crime of First Degree Robbery*, and in the course of and furtherance of said crime, JOEL RAMOS and MIGUEL GAITAN, another participant, did beat and stab MICHAEL SKELTON, a human being, not a participant in such crime, thereby causing the death of MICHAEL SKELTON.

In violation of RCW 9A.32.030(1)(c).

Count III

First Degree Murder – “In that you, on or about March 24, 1993, in Yakima County, Washington, *while committing the crime of First Degree Robbery*, and in the course of and furtherance of said crime, MIGUEL GAITAN, another participant, did beat and stab LYNN

SKELTON, a human being, not a participant in such crime, thereby causing the death of LYNN SKELTON.

In violation of RCW 9A.32.030(1)(c).

Count IV

First Degree Murder – “In that you, on or about March 24, 1993, in Yakima County, Washington, *while committing the crime of First Degree Robbery*, and in the course of and furtherance of said crime, MIGUEL GAITAN, another participant, did beat and stab JASON SKELTON, a human being, not a participant in such crime, thereby causing the death of JASON SKELTON.

In violation of RCW 9A.32.030(1)(c).

Information (adult court), CP:18-21 (emphasis added.) As the emphasized material shows, the underlying crime in each of the felony murder charges was identical: “the crime of First Degree Robbery.”

B. The Unit of Prosecution for Felony Murder is the Underlying Felony. It Therefore Violates the Double Jeopardy Clause to Convict Mr. Ramos of Three Counts of Felony Murder Based on one Underlying Felony: Robbery

It is impermissible to punish a defendant multiple times for the same offense; it violates the double jeopardy clauses of the state and U.S. Constitutions. U.S. Const. amend. V; Wash. Const. art. 1, § 9; State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995).

Where as here there are multiple prosecutions of a single defendant under the *same* statute, the courts decide whether the multiple convictions

and punishments are impermissible by determining the “unit of prosecution” of that statute. As the Court explained in State v. Adel, 136 Wn.2d 629, 633, 965 P.2d 1072 (1998), the double jeopardy inquiry in that context is, “what act or course of conduct has the Legislature defined as the punishable act”; “When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.” Id., at 634. Where the legislature has not clearly indicated the unit of prosecution in a criminal statute, the “lack of statutory clarity favors applying the rule of lenity.” Id., at 635.

Both state and federal cases applying this “unit of prosecution” analysis compel the conclusion that the focus of the statute is generally determined by its initial prohibition and the act whose *mens rea* forms the basis for the crime – here, the underlying felony of robbery – rather than by the consequence that might follow from that crime, no matter how many people are harmed.

1. State Unit-of-Prosecution Decisions Compel the Conclusion that the Unit of Prosecution is the Underlying Crime That is the Initial Focus of the Statute and the Basis for Its Mens Rea – Regardless of the Number of Resulting Harms (Here, Homicides)

State unit of prosecution decisions compel the conclusion that the unit of prosecution is the underlying crime whose conduct is the initial focus of the statute, regardless of the number of harms resulting.

For example, in the recent decision 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, RCW 9A.28.030, 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 analyzed the language of the solicitation statute, which provides: “A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute said crime” RCW 9A.28.030(1). 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. The structure and the primacy of the prohibited intent element led the Court to conclude that the solicitation, rather than the number of potential victims, formed the statute’s unit of prosecution.

The Varnell Court relied in part on State v. Bobic, 140 Wn.2d 250, 263-66, 996 P.2d 610 (2000). 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 contemplated or 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). Notably, this statute lists the prohibited intent first. As the Bobic Court noted, it also focuses – though not “clearly” – on the “conspiratorial agreement” rather than the resulting harms. Bobic, 140 Wn.2d at 263, 265. The Court concluded that where the objects of the conspiracy arose from geographically and temporally related acts, only a single charge could lie.

Even in State v. Westling, 145 Wn.2d 607, 40 P.3d 669 (2002), the Court held that convictions of three counts of arson for setting a single fire violated the double jeopardy clause, regardless of the number of victims whose cars were harmed, because the “unit of prosecution” of the arson statute was the fire, not the victims. The statute at issue in Westling began with a prohibition on setting a fire, the criminal “knowingly and

maliciously” intent to start that fire, and talked about the resulting harm only thereafter. RCW 9A.48.030(1).

These decisions compel the conclusion that in determining the unit of prosecution, the courts focus on the primary harm listed – the prohibition stated at the beginning of the criminal statute – along with the mental element described by the statute. In Bobic, Varnell, and Westling, the initial harm listed and the mental element required to prove the crime determined the focus of the statute (and hence its unit of prosecution), rather than the resulting harm no matter how many victims.

We apply that logic to the felony murder statute here, RCW 9A.32.030(1)(c). It states:

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

* * *

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping 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 other than one of the participants: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant ... [prerequisites listed].

RCW 9A.32.030(1)(c).

It is clear from this language that the initial prohibited conduct, and the *mens rea* for the crime of *felony* murder, is the underlying felony – not the resulting deaths. This is clear from the fact that the felony murder statute lists the underlying felony first, just as the conspiracy, solicitation, and arson statutes list the agreement, solicitation, or fire and the required mental state first – and the additional harm caused by completion of the primary illegality (the target “crime” or homicide) only at the end. It is also clear from the fact that the only *mens rea* required for conviction of the felony murder statute is the *mens rea* for the underlying felony. The felony murder statute’s structure is essentially the same as the conspiracy, solicitation, and arson statutes’ structures. Its initially listed prohibition and mental state – the underlying felony’s *actus reus* and *mens rea* – must therefore be considered its unit of prosecution.

The Westling Court did also note that the resulting damage in that arson case was described using the plural adjective “any,” and this influenced its decision that the legislature contemplated that multiple harms might occur from a single crime. Id. In Varnell and Bobic, however, the statutes described the resulting harm with the singular article “a” – “intent to promote ... *a crime*” in Varnell and “intent that conduct constituting *a crime* be performed” and “*a substantial step*” be taken in Bobic. The Washington Supreme Court ruled that the legislature

contemplated that multiple harms might flow from a single crime, anyway. So the Washington Supreme Court does not treat the use of a singular or plural article or adjective to describe the resulting harm as dispositive of its unit of prosecution analysis. Thus the felony murder statute's description of the resulting harm as "death of *a person*" does not alter the analysis compelled by Bobic and Varnell: the unit of prosecution is the underlying felony, not the resulting, unintended, harm or harms.

2. Federal Unit-of-Prosecution Decisions Compel the Conclusion that the Unit of Prosecution is the Underlying Crime – Regardless of the Number of Resulting Harms

This conclusion also flows from the federal unit of prosecution cases, such as Ladner v. United States, 358 U.S. 169, 79 S.Ct. 209, 3 L.Ed.2d 199 (1958). In Ladner, the defendant was convicted of two different counts of assaulting two different federal officers with a deadly weapon in violation of a statute barring assaults on a federal officer. There as here, the defendant was convicted of a separate count for each victim; there as here, he received consecutive sentences. But one underlying act (there, a single discharge from a shotgun) formed the basis for both harms. The Supreme Court ruled that the language of the statute was not clear about whether Congress intended a single act affecting more than one victim to be punished as two offenses or one. It concluded that

since Congress did not make the unit of prosecution clear, the policy of lenity required that the less harsh of the two possible meanings control.

Following Ladner, the first step in the unit of prosecution analysis is to look at the language of the statute, to see whether it specifies the unit of prosecution.

As discussed above, the felony murder statute applied to Mr. Ramos stated:

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*

RCW 9A.32.030(1)(c) (emphasis added). It does not specifically state whether the underlying felony of “robbery,” which is listed first, is the focus, or if the resulting “death of a person,” listed at the end, is. But it does begin by criminalizing the underlying felony, here “robbery,” and mentions resulting “death” only thereafter. Under Ladner, any lack of clarity concerning the object or focus of this statute should be interpreted in favor of limiting the number of prosecutions.

That is what other federal courts faced with statutes having a

structure similar to RCW 9A.32.030(1)(c) have done. For example, in United States v. Lindsay, 985 F.2d 666 (2d Cir.), cert. denied, 510 U.S. 832 (1993), the court analyzed a statute with a similar structure and concluded that the prohibition first listed, rather than the prohibition listed at the end, formed the object of the statute. In Lindsay, the defendant was convicted of a variety of charges including fourteen counts of violating 18 U.S.C. § 924(c)(1). Section 924(c)(1) provides in relevant part: “Whoever, *during and in relation to any crime of violence or drug trafficking* crime ... for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall [receive specified punishment]” (Emphasis added.) Guided by the statute’s language, the court concluded “that congress considered the appropriate unit of prosecution to be the underlying drug-trafficking offense, not the separate firearms.” Lindsay, 985 F.2d at 673.

The structure of § 924(c) is similar to that of Washington’s felony murder statute. Section 924(c) begins with the person who can be prosecuted – “[w]hoever” – and then immediately introduces the prohibition of “use” “during and in relation to” particular crimes. The felony murder statute begins with the underlying felony, here robbery. Section 924(c) does not refer to “a firearm” until the end of its prohibition; the felony murder statute does not refer to the resulting harm to a person until the end of its prohibitions. The Second Circuit’s reasoning about what constitutes the

object of the offense therefore compels the conclusion that the object of the felony murder statute is the underlying felony, here robbery, first described, rather than the resulting death described at the end.

Other federal cases came to the same conclusion, based on the same structure of § 924(c). United States v. Taylor, 13 F.3d 986, 992-93 (6th Cir. 1994); United States v. Fontanilla, 849 F.2d 1257, 1259 (9th Cir. 1988) (separate firearm count may be charged for each separate underlying crime); United States v. Smith, 924 F.2d 889, 894 (9th Cir. 1991) (“We, along with other circuits, have required each § 924(c)(1) charge be based on a separate predicate offense.”).

The Ninth Circuit’s construction of the Travel Act compels the same conclusion. In United States v. Polizzi, 500 F.2d 856, 897 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975), the defendant appealed convictions under 18 U.S.C. § 1952(b). That statute provides in relevant part, “Whoever *travels* in interstate or foreign commerce ... with intent to – (1) distribute the proceeds of any unlawful activity ..., and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall [be punished]” (Emphasis added.) The Ninth Circuit ruled that the focus of the statute was the first listed act of *travel*, not each act of distribution or other act prohibited in subparagraphs (1), (2) or (3). “The offense defined is an act of *travel* or use of an interstate facility, with the requisite intent, plus

subsequent performance of another act of the kind specified” Polizzi, 500 F.2d 856, 897 (emphasis added).

The structure of § 1952(b) is also similar to that of Washington’s felony murder statute. Section 1952(b) begins with the person who may be prosecuted, and immediately follows with the prohibition on certain “travel[.]” The types of prohibited travel are then enumerated. The Ninth Circuit’s decision meant that the prohibition introduced at the very beginning of the sentence, immediately following the description of the person – “[w]hoever” – that can be prosecuted, formed the focus of the statute.

The felony murder statute similarly begins with the person who can be prosecuted, and then immediately introduces the prohibition of committing the underlying felony, here, robbery. Section 1952(b) does not refer to the types of travel prohibited until later; the felony murder statute does not refer to the resulting death of “a person” until later. The Ninth Circuit’s reasoning about what constitutes the object of an offense also compels the conclusion that the objects of the felony murder statute are the first acts or felonies described, rather than resulting deaths.

Since Counts 2-4 of the Information in Mr. Ramos’ case charged the same underlying felony of robbery, three times; and since that act, not the resulting deaths, forms the focus of the felony murder statute; Counts 2-4 are impermissibly duplicative. Even if the felony murder statute is not

completely clear about this result, any doubt about the propriety of Mr. Ramos' multiple convictions must be resolved against turning a single transaction into multiple offenses.⁹

3. State Cases Finding Multiple Units of Prosecution are Distinguishable

It is true that before Varnell was decided, the Washington Supreme Court analyzed the reckless endangerment statute, RCW 9A.36.050(1), in State v. Graham, 153 Wn.2d 400, 103 P.3d 1238 (2005). The statute at issue in Graham, RCW 9A.36.050(1), provided: "A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person." Graham argued that the unit of prosecution is the alleged act of reckless conduct (there, her reckless driving), while the state argued that the unit of prosecution was the endangerment of each separate individual. The state Supreme Court

⁹ Bell v. United States, 349 U.S. 81, 82-83, 75 S.Ct. 620, 99 L.Ed.2d 905 (1955) (Congress has the power to define "what it desires to make the unit of prosecution" but Mann Act did not explicitly do so; "[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, *doubt will be resolved against turning a single transaction into multiple offenses*") (emphasis added). See Heflin v. United States, 358 U.S. 415, 419-20, 79 S.Ct. 451, 3 L.Ed.2d 407 (1959); Ladner v. United States, 358 U.S. 169, 173-77; Prince v. United States, 352 U.S. 322, 329, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957); Adel, 136 Wn.2d 629, 640.

agreed with the state and concluded that the focus of the legislation was on each person so endangered.

That reckless endangerment statute, like the solicitation, conspiracy, and arson statutes, also has some things in common with the felony murder statute. In particular, it lists the principal harm – reckless “conduct” – first, and the risk of harm or death posed to another thereafter; yet in Graham, unlike Adel, Bobic and Varnell, the Washington Supreme Court ruled that the unit of prosecution was each person harmed. The Court focused on the fact that the statute referred to the resulting harm with the singular noun “another” rather than the plural adjective “any,” as in the arson statute.

As noted above, however, there was no plural adjective “any” (or anything similar) in the conspiracy or solicitation statutes construed in Bobic and Varnell; in fact, those statutes contained the singular article “a” to describe the harm contemplated. Nevertheless, the Washington Supreme Court construed the unit of prosecution as the harm initially described rather than the resulting harm or potential harm nonetheless. The Varnell Court explained on this point:

The relevant portion of the statute at issue in this case provides:

(1) A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a

crime, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime....

RCW 9A.28.030(1).

The language of the solicitation statute focuses on a person's "intent to promote or facilitate" a crime rather than the crime to be committed. The evil the legislature has criminalized is the act of solicitation. The number of victims is secondary to the statutory aim

Varnell, 162 Wn.2d at 196.

Thus, the use of a singular noun or plural adjective to describe the resulting harm cannot be considered outcome determinative of the unit of prosecution analysis. Instead, in its most recent decision on this issue, the Washington Supreme Court has ruled that the structure and focus of the statute – especially the principal evil against which the statute is focused – determines its unit of prosecution.

The evil first mentioned, and most particularly described, in the felony murder statute, is the underlying felony. The resulting harm is a prohibited consequence, but it is not the focus of the statute. In fact, the defendant himself need not even commit that resulting harm in order to be held liable for it under the felony murder law, nor must he have the *mens rea* for any sort of homicide – the *mens rea* for the underlying felony, here robbery, suffices. Every portion of the statute, therefore, is centered on

proving the defendant's commission of the underlying felony – its *mens rea* and *actus reus*. This is critical to evaluating the statute's focus.

We acknowledge that at least one state court has come to a contrary conclusion. State v. Couture, 194 Conn. 530, 565-66, 482 A.2d 300 (1984), cert. denied, 469 U.S. 1192 (1985) (rejecting double jeopardy challenge to two consecutive life sentences for felony murder of two victims of the same robbery); State v. Madera, 198 Conn. 92, 110, 503 A.2d 136 (1985) (rejecting double jeopardy challenge to consecutive sentences for single act of arson resulting multiple deaths). The Washington Supreme Court and federal courts, however, have described the way to determine the focus of a criminal statute and have ruled that the focus of the statute is its initially listed prohibition or, if that is unclear, then the rule of lenity applies. Under those controlling (and persuasive) decisions, the focus of the *felony* murder statute, and hence its unit of prosecution, is the felony first listed, not the unintended resulting harm.

4. The Remedy is to Vacate the Duplicative Convictions

The remedy is to vacate the additional, duplicative, convictions. State v. Varnell, 162 Wn.2d 165 (vacating three of four convictions for solicitation to commit murder all occurring in the same conversation); State v. Knight, 162 Wn.2d 806, 174 P.3d 1167 (2008) (vacating

conviction that violated double jeopardy clause despite the fact that it was entered following a guilty plea).

III. EVEN IF THE WASHINGTON SUPREME COURT DID NOT REINSTATE A FULL RIGHT TO APPEAL TO MR. RAMOS, THERE IS A SEPARATE BASIS FOR ENLARGING THE TIME WITHIN WHICH TO FILE AN APPEAL FROM THE CONVICTIONS AND SENTENCES THEMSELVES.

The unit of prosecution issue is cognizable, since the Washington Supreme Court ruled that this current proceeding must be treated as Mr. Ramos' timely filed appeal of right.

Even if the Washington Supreme Court did not already reinstate a full right to appeal to Mr. Ramos by its Order, there is a separate basis for enlarging the time within which to file an appeal from the convictions and sentences themselves.

A. The Violation of CrR 7.2 Satisfies RAP 18.8(b)'s Prerequisites to Extending the Time For Appeal

RAP 18.8(b) provides that the appellate court may extend the time within which a party may file the notice of appeal in "extraordinary circumstances and to prevent a gross miscarriage of justice."

Under CrR 7.2(b), the Superior Court was obligated to advise Mr. Ramos of his right to appeal at sentencing. It states: "The court *shall*, immediately after sentencing, *advise the defendant*: (1) *of the right to appeal the conviction*; (2) *of the right to appeal a sentence outside the*

standard sentence range; (3) *that unless a notice of appeal is filed within 30 days after the entry of the judgment or order appealed from, the right to appeal is irrevocably waived*; (4) *that the superior court clerk will, if requested by the defendant appearing without counsel, supply a notice of appeal form and file it upon completion by the defendant*; (5) *of the right, if unable to pay the costs thereof, to have counsel appointed* and portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal; and (6) *of the time limits on the right to collateral attack These proceedings shall be made a part of the record.*" (Emphasis added.)

The Superior Court, however, completely failed to advise Mr. Ramos of his right to appeal, and of these other rights concerning appeal, in violation of CrR 7.2(b)'s plain language. See 8/23/93 VRP:1-37; there is no right to appeal notice anywhere.

The same thing happened in City of Seattle v. Braggs, 41 Wn. App. 646, 705 P.2d 303 (1985). The appellate court therefore reversed the Superior Court's decision against reinstating the appeal from a Seattle Municipal Court misdemeanor conviction; the appellate court ruled that the Municipal Court's failure to give the defendant proper advice on the record about filing the notice of appeal as required by RALJ 7.2 necessitated reinstatement of the appeal. RALJ 7.2 is equivalent in

relevant respects to CrR 7.2 in this case. Accord State v. Lewis, 42 Wn. App. 789, 793-94, 715 P.2d 137 (1986).

The defect in Mr. Ramos' case was even worse than the defect necessitating reinstatement of the appeal in Braggs. In addition to the lack of advice of the right to appeal at sentencing with all the particulars that CrR 7.2(b) contains, the judge affirmatively advised Mr. Ramos at the guilty plea hearing (summarized above) and in the Statement of Defendant on Plea of Guilty that he had *no right to appeal*.

In the language of RAP 18.8(b), it is an extraordinary situation when a criminal defendant is affirmatively (and mistakenly) told by the court, in both oral and written form, that he has no right to appeal; when defense counsel fails to correct that misadvice; and when the judge gives no advice of the right to appeal from the bench. The violation of CrR7.2(b) therefore warrants an extension of the time to file the notice of appeal under RAP 18.8(b). This is especially true given RAP 1.2(a)'s provision that "[t]hese rules [of appellate procedure] will be liberally interpreted to promote justice and facilitate the decision of cases on the merits."

B. The Violation of Wash. Const. Art. 1, § 22, Satisfies RAP 18.8(b)'s Prerequisites to Extending the Time to Appeal.

There is also a fundamental constitutional right to appeal a

criminal conviction in Washington under Art. 1, § 22.¹⁰ State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978); State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959). “The presence of the right to appeal in our state constitution convinces us it is to be accorded the highest respect from that which is applicable to other constitutional rights.” Id.

For that reason, that right to appeal cannot be waived unless the *constitutional* standard of waiver is met. That is, the right is not relinquished unless the defendant does so knowingly, intelligently and voluntarily. State v. Sweet, 90 Wn.2d 282, 286.

Given this constitutional standard, even reading CrR 7.2(b) rights to a defendant “may well be insufficient in itself to give rise to a conclusion of waiver.”¹¹ But no such rights were even read to Mr. Ramos.

¹⁰ Art 1, § 22 states in part: “In all criminal prosecutions the accused shall have the . . . right to appeal in all cases . . .” (emphasis added).

¹¹ “[I]n addition to showing strict compliance with CrR 7.2(b) by reading appeal rights to a defendant, the circumstances must at least reasonably give rise to an inference the defendant understood the import of the court rule and did in fact willingly and intentionally relinquish a known right.” State v. Sweet, 90 Wn.2d at 287 (finding on the record before it that there was no knowing, intelligent and voluntary waiver and deciding the merits of the case). This remains the rule today. See, e.g., State v. Perkins, 108 Wn.2d 212, 217, 737 P.2d 250 (1987) (defendant may waive right to appeal in a plea bargain, as long as the waiver is knowing, intelligent and voluntary; state bears burden of showing that it is a knowing, intelligent and voluntary waiver).

Further, given this constitutional standard, the State bears the burden of demonstrating the voluntariness of any purported waiver of the right to appeal and in the absence of such a showing, an untimely appeal may not be dismissed.¹²

All of the state Supreme Court's controlling cases on this constitutional right confirm that the state bears the burden of proving that it has been waived; that absent such proof, the right to appeal must be reinstated; and, hence, that even if Mr. Ramos' full right to appeal the convictions themselves was not already reinstated, it must be reinstated now.

1. *State v. Kells*

The Court's decision in Kells shows that knowledge of the right to appeal and the means for accomplishing the filing are key prerequisites to a knowing waiver of the right to appeal. See also State v. French, 157 Wn.2d 593, 601, 141 P.3d 54 (2006) (citing Sweet, 90 Wn.2d at 287).

In Kells, the state charged 15-year old Kells with second-degree murder. After the juvenile court declined jurisdiction, Kells pled guilty. The plea form in that case – like the plea form here – told Kells that he

¹² State v. Kells, 134 Wn.2d 309, 314, 949 P.2d 818, 820 (1998). Accord State v. Tomal, 133 Wn.2d 985, 948 P.2d 833 (1997) (inaction by defendant's attorney is insufficient to establish a knowing, voluntary, and intelligent waiver of appeal).

waived his right to appeal the conviction by pleading guilty. Then, at sentencing, as required by CrR 7.2(b), the trial court informed Kells of his right to appeal the conviction and told him the appeal must be filed within 30 days or the right would be “irrevocably waived.” Kells, 134 Wn.2d at 311, 312. But the rule did not require the court to inform Kells of his right to appeal the declination order transferring him to Superior Court, and the judge failed to tell him that. Id.

Fifteen months later, Kells’ attorney discovered his client had a right to appeal the decline decision and filed a notice of appeal. The Court of Appeals dismissed the case as untimely pursuant to RAP 18.8(b).

The state Supreme Court reversed. It ruled that the appellate court had impermissibly failed to apply Sweet before dismissing the appeal. That Court explained, “an involuntary forfeiture of the right to a criminal appeal is never valid.” Kells, 134 Wn.2d at 313. The Court ruled that enforcement of the usual time limit required by the Rules of Appellate Procedure must be tempered by the criminal defendant’s constitutional right to appeal:

Despite this strong language [in RAP 18.8], this court made clear in State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978) that the strict application of filing deadlines must be balanced against a defendant’s state constitutional right to appeal.

Kells, 134 Wn.2d at 314. The Court further ruled that given the advice that the defendant received, the state failed to make the affirmative showing necessary to demonstrate that Kells understood his right to appeal and “consciously gave up the right.” Id.

2. State v. Tomal

In Tomal, the state moved to dismiss a criminal defendant’s appeal for failure to prosecute pursuant to RALJ 10.2(a). Under that rule, an appeal is deemed abandoned where no action has been taken for 90 days and is subject to involuntary dismissal. Tomal’s attorney had failed to take any action on the appeal for four years; he finally filed a brief, but no transcript. The Superior Court found the delay was due to attorney error and denied the State’s motion.

The state Supreme Court affirmed. It framed the question presented as whether the appeal could be “dismissed as abandoned without a showing that the defendant made a waiver of his right to appeal?” The Court answered no – and it explicitly held that where a court rule seems to conflict with the constitutional right to appeal and its knowing, intelligent and voluntary waiver standard, then the constitutional right trumps the court rule. Tomal, 133 Wn.2d at 989. That Court rejected the State’s argument that “it is not asserting ‘waiver’ but only ‘abandonment’ of the appeal,” explaining that a waiver via abandonment must still be knowing

and voluntary. Tomal, 133 Wn.2d at 990 (citing State v. Ashbaugh, 90 Wn.2d 432, 439, 583 P.2d 1206 (1978) (reversing dismissal for failure to pay \$25 filing fee required by court rule)).

In fact the Court in Tomal explained that inaction by the appellant personally – rather than his lawyer – can establish a valid waiver, but only when the appellant is first informed of the consequences of his or her conduct.

In a case where the judge informs the defendant at the time of sentencing of the right to appeal and the timing requirements, then the defendant's failure to timely pursue an appeal may be found to be a valid waiver. See CrRLJ 7.2(b); former RALJ 2.7; [State v.] Perkins, 108 Wn.2d [212], 216-17 [(1987)].

Tomal, 133 Wn.2d at 990.

Under Tomal, the failure to file a notice of appeal cannot, alone, form the basis for a finding of waiver. Tomal holds that more is needed than attorney inaction and more is needed than appellant inaction; some showing that the decision against filing the appeal was made with knowledge of the right to appeal and how to do it is necessary.

3. City of Seattle v. Klein¹³

The state Supreme Court reiterated each of those points in its recent decision in City of Seattle v. Klein. In that case, the Court held that

¹³ City of Seattle v. Klein, 161 Wn.2d 554, 166 P.3d 1149 (2007).

applying the fugitive disentitlement doctrine to a defendant who was not warned that his failure to appear could divest him of the right to appeal, violated the state constitutional right to appeal. The Klein decision emphasizes the constitutional stature of the criminal defendant's right to appeal; the fact that the burden is on the state to prove knowing, intelligent and voluntary relinquishment of that right; and the fact that even prior case law concerning the fugitive disentitlement doctrine could not stand in the face of that knowing, intelligent and voluntary constitutional waiver standard.

As the Klein Court explained, "We reject this doctrine insofar as it purports to substitute involuntary forfeiture for the well-established waiver principles found in our previous decisions. See State v. Sweet, 90 Wn.2d 282, 286; State v. Kells, 134 Wn.2d 309, 313; State v. Tomal, 133 Wn.2d 985, 988. Thus, we affirm the trial court's decision and emphasize the sanctity of the right to appeal." Klein, 161 Wn.2d 554, 556.

This obviously reiterates the holding of Sweet, that is, that the right to a full appeal must be preserved unless the waiver is knowing, intelligent and voluntary.

C. Application of the *Sweet, Kells, Tomal and Klein* Standards to Mr. Ramos

The record shows that Mr. Ramos received no advice about the right to appeal at sentencing. The record shows that Mr. Ramos received no such advice from any other source. Finally, the record shows that Mr. Ramos was advised that he gave up his right to appeal.

Thus, Mr. Ramos' relinquishment of his appeal was not knowing – specifically, he did not know that he had a right to appeal the result of the conviction and sentence, nor was he aware of how to start that process going in the right amount of time. Further, Mr. Ramos' relinquishment of his appeal was not intelligent and voluntary – he made no decision about giving up the right to appeal based on advice and a choice among different alternatives of which he was aware.

The current appeal must, therefore, be treated as Mr. Ramos' single, full, and complete appeal of right from his decline, conviction and sentence. There is no room for a “piecemeal” approach to this appeal under either the Supreme Court's current order reinstating his appeal of right, under CrR 7.2, or under prior precedent concerning reinstatement of the appeal of right absent a knowing, intelligent and voluntary waiver.

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IV. CONCLUSION

For all of 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 8th day of August, 2008.

Respectfully submitted,



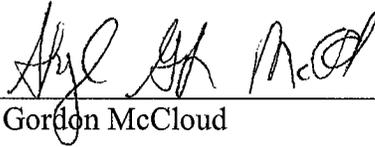
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of August, 2008, a copy of the APPELLANT'S OPENING BRIEF was served upon the following individual by depositing same in the U.S. Mail, first-class, postage prepaid:

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Yakima, WA 98901-2639

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