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No. 90782-0

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY CONOVER,

Petitioner.

**SUPPLEMENTAL BRIEF OF
RESPONDENT**

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I. ARGUMENT

RCW 9.94A.533 (6) requires school zone enhancements to run consecutive to one another. The rule of lenity should not be applied. As this court has repeatedly held, the rule of lenity should apply only to resolve statutory ambiguities where there is no evidence of legislative intent. *In re Matter of Charles*, 135 Wn.2d 239, 250, 955 P.2d 798 (1998) *superseded on other grounds by statute as cited in State v. DeSantiago*, 149 Wn.2d 402, 415–16, 68 P.3d 1065 (2003); *In re Sietz*, 124 Wash.2d 645, 652, 880 P.2d 34 (1994); *State v. Roberts*, 117 Wash.2d 576, 586, 817 P.2d 855 (1991); *see also State v. Lively*, 130 Wash.2d 1, 14, 921 P.2d 1035 (1996); *State v. Gore*, 101 Wash.2d 481, 486, 681 P.2d 227 (1984). This rule applies only where the “statute is ambiguous *and* legislative intent is insufficient to clarify the ambiguity. *Id.* at FN4, citing *In re Sietz*, 124 Wash.2d 645, 652, 880 P.2d 34 (1994); *see also Moskal v. United States*, 498 U.S. 103, 107–08, 111 S.Ct. 461, 465, 112 L.Ed.2d 449 (1990). Before even considering whether to apply the rule of lenity, this Court has historically looked first to see if evidence of legislative intent can be found to resolve the ambiguity. *Id.* at 252. There is ample evidence that the legislature intended for sentence enhancements imposed under this section to run consecutive to one another.

Petitioner’s entire argument presupposes ambiguity regarding the legislature’s intent in enacting the statute. Comparing one statutory provision (firearm enhancements) to the school zone enhancements at

issue here is only necessary if the intent of the legislature is unclear. No such detective work is necessary. The legislative history behind the changes in the law post- *Jacobs* illustrates the legislature's intent that school zone enhancements are to be run consecutive to one another. The application of the various methods of statutory construction is simply unnecessary when the intent of the legislature is known.

The legislature's intent is that sentence enhancements for ranked drug offenses are to be served consecutively. The Final Bill Report on Engrossed Second Substitute S.B. 6239, the bill that modified the statutory provision from its pre-*Jacobs* language, stated that "Sentence enhancements for ranked drug offenses are to be served consecutively." 59th Leg., Reg. Sess., at 4 (Wash. 2006). Any other interpretation, or the interpretations put forth by Petitioner, require this Court to disregard the plain statement of intent and engage in statutory construction in an effort to create something that simply does not exist: ambiguity.

The legislature was responding specifically to this Court's decision in *State v. Jacobs*, which had held that school zone enhancements should be run concurrently to one another due to ambiguity present in the words of the statute. 154 Wn.2d 596, 604, 115 P.3d 281 (2005). The legislature noted the Court's decision, as well as the procedural posture of the case. H.B. REP. on Second Substitute H.B. 6239, 59th Leg., Reg. Sess., at 7, 13-14 (Wash. 2006). The intent of the changed language must be considered in light of the Court's decision in *Jacobs*. Since *Jacobs* held

that enhancements must run concurrently and the legislature changed the statute in response to that holding, the only reasonable conclusion is that the legislature intended for school zone enhancements to run consecutively.

The changes to the statutory language post-*Jacobs* illustrate the legislature's intent. Pre-*Jacobs* the statute at issue read "twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW [the Uniform Controlled Substances Act] if the offense was also a violation of RCW 69.50.435 or 9.94A.605." Former RCW 9.94A.533(6). To patch the statute post-*Jacobs*, the legislature added "All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter." RCW 9.94A.533(6). To hold that the statute does not direct courts to run such enhancements consecutive to one another, in light of the legislature's explicit reference to *Jacobs*, would render the additional statutory language meaningless, violating a different canon of statutory construction. Canons of statutory construction themselves are complicated things, as the great Karl Llewellyn noted in his famous critique of the use of such canons, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*. 2 Vand L. Rev. 395 (1950). Using one canon can produce a result that is wholly inconsistent with a different canon of statutory construction. It would be ironic if the Court, relying on

such devices, were to construe this statute in a manner contrary to the express intent of the legislature.

II. CONCLUSION

Extensive analysis of the language used by the legislature in crafting a statutory provision might make sense in a vacuum, but where there is specific evidence of legislative intent, the practice is academic and can lead to absurd results. Finding that school zone enhancements should run concurrently to one another would subvert the authority and intent of the legislature. It would render the legislature's action in amending the statute in 2006 moot and the added language superfluous. The law would revert to the same essential state wherein it existed post-*Jacobs*, but pre-legislative fix. The statute was modified for one purpose and one purpose only, to ensure that sentence enhancements for ranked drug offenses are to be served consecutively. The State respectfully requests that this court construe the statute in light of the clear legislative intent and find that the school zone enhancements must run consecutive to one another.

Respectfully submitted this 6th day of March, 2015.

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By:


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APPENDIX

RCW 9.94A.533 (6)

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

Former RCW 9.94A.533 (6) before amendment by Laws 2006, ch.
339, § 301

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827.

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Supplemental Brief of Respondent was served electronically via e-mail to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 6th, 2015.



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Attached, please find the Supplemental Brief of Respondent with Certificate of Service.

If you have any questions, please contact this office.

Thanks,

Michelle Sasser

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