IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 39616-9-III

STATE OF WASHINGTON, Respondent,

v.

GREGORY DEAN LONE, Petitioner.

PETITION FOR REVIEW

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
1360 N. Louisiana St. #A-789
Kennewick, WA 99336
Tel: (509) 572-2409
Email: Andrea@2arrows.net
Attorney for Petitioner

TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Statutes

Court Rules

I. IDENTITY OF PETITIONER

Gregory Lone requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on November 27, 2024, concluding that his stipulation that a 36-month exceptional sentence would serve the interests of justice empowered the trial court to impose a 92-month exceptional sentence. A copy of the Court of Appeals' published opinion together with the dissenting opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

RCW 9.94A.535(2)(a) expands the authority of the sentencing court to impose an exceptional sentence beyond the standard range when

> The defendant and the state both stipulate that justice is best served by the imposition of an

> exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

When the defendant and the State stipulate that justice is served by a specific exceptional sentence above the standard range, is the trial court empowered to impose a longer sentence than the parties stipulated based on its own findings?

IV. STATEMENT OF THE CASE

The State charged Gregory Lone with five counts of first degree theft, with each count carrying an aggravating circumstance. CP 44-48. The standard range for the charges was 12+ to 14 months. CP 54. Before trial, the parties reached an agreement for Mr. Lone to plead guilty to all five counts, but the exceptional circumstance allegations were stricken. CP 49-52, 57. Instead, the parties stipulated that an exceptional sentence of 36 months in prison was in the interests of justice. CP 57.

At the hearing on Mr. Lone's guilty plea, the State explained that it was removing the aggravators from each of the charged counts. RP 5. The trial court acknowledged the stipulation to a 36-month exceptional sentence. RP 8. The trial court accepted the plea upon finding that Mr. Lone made it knowingly, intelligently, and voluntarily. RP 9-10.

The State again reiterated at sentencing that the parties had stipulated to an exceptional sentence of three times the length of the standard range. RP 17. After hearing from several victims and witnesses and noting that they wanted the court "to throw the book at Mr. Lone," the trial court inquired into its ability to impose consecutive sentences. RP 36-38. The defense contended that running the sentences consecutive would require the court to find grounds for an exceptional sentence, since the parties had only stipulated that a sentence of up to 36 months was in the interests of justice. RP 41. Counsel pointed out that the intention in striking the charged aggravators and instead authorizing the exceptional sentence by stipulation

was to limit the trial court's discretion to exceed 36 months. RP 50, 52. The State agreed that if the justification for the exceptional sentence was the parties' stipulation, then the trial court's discretion was limited. RP 53.

Subsequently, in supplemental briefing, the State argued that by incorporating the probable cause affidavit to support the factual basis for the plea, Mr. Lone had stipulated to aggravating facts that the court could rely on to impose an exceptional sentence. CP 112-14. Counsel for Mr. Lone reiterated that the only basis for an exceptional sentence was his stipulation that a 36-month term of imprisonment was in the interests of justice. CP 137, 139. And counsel disputed that the incorporation of the probable cause affidavit amounted to a stipulation to all of the underlying facts, contending instead that the purpose of the incorporation was to assist the State in requesting restitution. CP 140. To the contrary, in the plea negotiations, the defense specifically sought dismissal of the aggravating factors to avoid "writing a blank check." CP 140.

The trial recognized that the State's argument amounted to attempting to "backdoor" the aggravating circumstances back into the plea agreement by incorporating the probable cause affidavit. RP 75-76. Nevertheless, the court adopted the State's reasoning and imposed 96-month concurrent terms on each count. CP 189, 303. In the judgment and sentence, it indicated that it relied on aggravating factors found by the court, not Mr. Lone's stipulation. CP 302. It also entered findings of fact and conclusions of law in support of its sentence. CP 184. In them, the trial court concluded that "Defendant stipulated to facts sufficient to support an exceptional sentence above the standard range" and that "the record is replete with the egregious conduct of the defendant and the devastating impact his actions had on the victims. There is a basis in the record to support an exceptional sentence." CP 188-89.

Mr. Lone challenged the 96-month exceptional sentence on appeal, contending that he did not stipulate that a 96-month

sentence was in the interests of justice and that the trial court's finding of egregiousness constituted prohibited judicial fact-finding under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). *Appellant's Brief*, at pp. 7-8. According to Mr. Lone, by stipulating that an exceptional sentence of 36 months was in the interests of justice, the plain language of RCW 9.94A.535(2)(a) requires the court to impose "the" exceptional sentence stipulated, not any exceptional sentence up to the statutory maximum, or to reject the plea agreement. *Appellant's Brief*, at pp. 10-11. He also pointed out that the rejection of the stipulated sentence rendered his plea bargain illusory because if the court was empowered to impose any sentence it chose, he no longer received any benefit from negotiating the dropping of the statutory enhancements that would have authorized an exceptional sentence. *Appellant's Brief*, at pp. 11-12.

By a narrow majority, the Court of Appeals affirmed the sentence. The majority reasoned that other provisions of the

Sentencing Reform Act provide that the sentencing court is not bound by the recommendations of the parties as to sentencing and may impose any sentence up to the maximum based on a jury's finding of that an aggravating circumstance is present. *Opinion*, at pp. 10-11. The majority did not address the sentencing court's reliance on judicial fact-finding to support the sentence. The dissenting judge agreed with Mr. Lone that the definite article "the" in RCW 9.94.535(2)(a) only empowers the trial court to impose the stipulated sentence agreed upon by the parties. *Dissent*, at pp. 3-4.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(3) and (4). The question affects the scope of the parties' ability to plea bargain for an exceptional sentence, an issue of significant public interest when the overwhelming majority of criminal cases resolve by plea bargain. *See State v. Harris*, __ Wn.2d __, 559 P.3d 499, 506 (2024) (noting that plea bargaining "is an

integral tool in the criminal justice system."). The case also implicates the right to have a jury decide any fact that can increase the sentence under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004).

The question this case presents is whether RCW 9.94A.535(2)(a) allows the parties to stipulate that a specific exceptional sentence serves the interests of justice, or whether it only permits the parties to stipulate that any exceptional sentence up to the maximum for the crime serves the interests of justice. If, as Mr. Lone contends and as the dissent agreed, the statutory language permits the parties to expand the sentencing court's authority to impose a sentence beyond the standard range up to a specified point, then plea bargains for exceptional sentences are encouraged and facilitated because the stipulation provides the factual basis for the exceptional sentence. But if the statutory language only permits the parties to stipulate to the imposition of *any* exceptional sentence, then there is no reason to plea bargain for a resolution of aggravating

circumstances because there is no range beyond the statutory maximum sentence limiting the trial court's sentencing authority. Under this reading, because RCW 9.94A.535(2)(a) provides the sentencing court with a blank check, the defendant obtains no benefit from negotiating for the dismissal of aggravating circumstances charged in the complaint.

To the contrary, in the present case, the Court of Appeals' interpretation of RCW 9.94A.535(2)(a) deprived Mr. Lone of the benefit of his bargain by facially dismissing the charged aggravating circumstances, but then reintroducing them through the back door by imposing a greater-than-stipulated exceptional sentence based on a judicial finding of egregiousness. Because Mr. Lone did not stipulate that a 96-month sentence was in the interests of justice, his stipulation did not support the sentence imposed. This result undermines the "measure of certainty as to possible punishments" that undergirds plea bargaining as a practice. *Harris*, 559 P.3d at 506.

The statutory language, the prohibition against judicial fact-finding at sentencing, and the promotion of plea bargaining all support Mr. Lone's interpretation of RCW 9.94A.535(2)(a) as permitting the parties to expand the sentencing court's authority to exceed the standard range up to an agreed point. Because the meaning of RCW 9.94A.535(2)(a) presents a question of substantial public interest affecting plea bargaining and implicates important constitutional questions concerning judicial fact-finding, review should be granted pursuant to RAP 13.4(b)(3) and (4).

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(3), and (4) and this Court should enter a ruling that the sentencing court lacked authority to sentence Mr. Lone to a term greater than 36 months based on his stipulation that a 36-month exceptional sentence was in the interests of justice.

RESPECTFULLY SUBMITTED this 27 day of December, 2024.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by e-mail through the Court of Appeals' electronic filing portal to the following:

Ethan Taylor Morris
Douglas County Prosecutor's Office
emorris@co.douglas.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 27 day of December, 2024 in Kennewick, Washington.

Andrea Burkhart

Court of Appeals Opinion no. 39616-9-III (filed 11/27/2024)

APPENDIX A

FILED
NOVEMBER 27, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. GREGORY DEAN LONE, Appellant.	)))))))))	No. 39616-9-III OPINION PUBLISHED IN PART

PENNELL, J. — Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, a judge can impose a sentence above the standard guideline range if the parties "stipulate that justice is best served by the imposition of an exceptional sentence." RCW 9.94A.535(2)(a). The stipulation authorizes a sentence up to the statutory maximum for the defendant's offense of conviction regardless of whether the parties have stipulated to a specific exceptional sentence below the statutory maximum.

When Gregory Lone pleaded guilty to five counts of first degree theft, he entered into a plea agreement containing a stipulation to an exceptional sentence under RCW 9.94A.535(2)(a). As part of the stipulation, the parties agreed to jointly recommend a sentence of 36 months, which was below the 10-year (120-month) statutory maximum. At sentencing, the court accepted the parties' stipulation to an exceptional sentence, but determined 36 months was insufficient. The court instead imposed a sentence of 92 months. Because the 92-month sentence was within the statutory maximum and did not constitute an abuse of discretion, we affirm Mr. Lone's sentence.

FACTS

Gregory Lone worked as a financial advisor and defrauded several elderly clients of their retirement savings. The State charged Mr. Lone with five counts of first degree theft, each with a special allegation of aggravating circumstances: (1) the offense constituted a major economic loss or series of losses, RCW 9.94A.535(3)(d), and (2) Mr. Lone used his position of trust, confidence, or fiduciary responsibility to facilitate commission of the offense, RCW 9.94A.535(3)(n).

The parties engaged in plea negotiations and the State ultimately agreed to drop the aggravators in exchange for Mr. Lone's guilty plea to five counts of first degree theft and a stipulation to an exceptional sentence. Mr. Lone's written guilty plea statement set

forth the stipulation as follows: "By stipulation of the Defendant, and in the interest of justice, an exceptional sentence of 36 months in prison, $500 [crime victim penalty assessment], [r]estitution in the amount of $480,000, [and] 24 months bench probation." Clerk's Papers (CP) at 57.

The statement on plea of guilty also acknowledged:

> (k) The judge does not have to follow anyone's recommendation as to sentence. . . .
>
> . . . .
>
> (*iii*) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the [SRA].

Id. at 57-58; *see id.* at 187.

During Mr. Lone's change of plea hearing, the trial court reviewed the written guilty plea statement, reading aloud and confirming Mr. Lone's understanding of the stipulated sentence. The court asked Mr. Lone:

> THE COURT: And do you understand that this Court is free to disregard recommendations from the parties and impose whatever sentence the court deems appropriate up to the statutory maximum?
> MR. LONE: Yes sir.

Rep. of Proc. (RP) (Jan. 12, 2023) at 8; *see* CP at 120, 187.

The court accepted Mr. Lone's guilty plea and the matter was scheduled for sentencing. The parties agreed Mr. Lone had an offender score of 4, resulting in a standard sentencing range of 12 months plus 1 day to 14 months in prison. The statutory maximum for each offense was 10 years' incarceration.

In advance of sentencing, the court received numerous letters from victims and Mr. Lone's family members. The letters all advocated for a term of incarceration longer than 36 months. The victims, many of them elderly, relayed their financial losses suffered as a result of Mr. Lone's offense conduct.

At the time originally scheduled for sentencing, the court addressed the parties and asked whether it was legally possible to impose a sentence greater than 36 months. The matter was continued to allow for briefing. The defense argued the court's authority was capped at 36 months. In contrast, the State claimed the court had authority to issue a sentence above 36 months. Nevertheless, the State continued to advocate for a sentence of 36 months, as set forth in the plea agreement.

After reviewing the parties' briefing and conducting multiple hearings, the court determined it was not bound by the parties' agreed recommendation. The court instead imposed a 96-month exceptional sentence.

Mr. Lone now appeals.

ANALYSIS

Under the SRA, courts are generally limited to imposing a standard range sentence, determined by a defendant's offender score and the seriousness of the crime. *See* RCW 9.94A.505-.533. But a court can go outside the range if it determines "substantial and compelling reasons" justify an exceptional sentence. RCW 9.94A.535.

The SRA contemplates that a party aggrieved by an exceptional sentence can appeal. RCW 9.94A.585(2). Relief may be granted in two circumstances: first, if the court lacked a basis for the exceptional sentence (either factually or legally); second, if the extent of the exceptional sentence was either too high or too low. RCW 9.94A.585(4). Mr. Lone's appeal touches on both the legal basis for the exceptional sentence and the extent of the exceptional sentence. We address each issue in turn.

Whether there was a legal basis for the exceptional sentence

The issue of whether a sentencing court had a legal basis for an exceptional sentence is a question of law reviewed de novo. *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

The available legal bases for exceptional sentences upward are set by statute. RCW 9.94A.535(2)-(3). Most require a jury determination of aggravating facts. *See* RCW 9.94A.535(3). This serves to protect a defendant's constitutional jury trial rights

under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *See id.* at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). But the right to a jury determination can be waived. *State v. Poston*, 138 Wn. App. 898, 904, 158 P.3d 1286 (2007). Thus, an exceptional sentence can be imposed without the need for a jury determination if the parties stipulate to an "exceptional sentence outside the standard range." RCW 9.94A.535(2)(a); *see Poston*, 138 Wn. App. at 904.

A stipulation to an exceptional sentence can provide the court with "a substantial and compelling reason that justifies the imposition of a sentence outside the standard range." *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 300, 979 P.2d 417 (1999). When there is a stipulation, there is no need for any additional aggravating facts to justify a sentence above the standard range. *See id.* at 309-10. In addition, once the parties have entered into a valid stipulation, justifying an exceptional sentence, the legal effect of the stipulation (i.e., the court's authorization to impose a sentence above the standard range) is not negated by the fact that the court makes findings regarding "additional aggravating factors" that would otherwise require a jury determination. *Poston*, 138 Wn. App. at 906.

Here, the parties entered into a plea agreement, stipulating to a sentence above the standard range. Mr. Lone does not challenge the validity of his plea or the stipulation. There is, therefore, no real dispute that the court was authorized to impose a sentence above the standard sentencing range.

The only additional statutory requirement for an exceptional sentence is the court must determine "the exceptional sentence" would be "consistent with and in furtherance of the interests of justice and the purposes of the [SRA]." RCW 9.94A.535(2)(a). This assessment is one that is generally required for all exceptional sentences upward. *See* RCW 9.94A.535, .537(6). It involves a legal evaluation, not a factual finding that would implicate the constitutional right to a jury trial. *See State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006); *State v. Sage*, 1 Wn. App. 2d 685, 709-10, 407 P.3d 359 (2017).

The trial court here abided by the appropriate statutory procedure. The court reviewed Mr. Lone's guilty plea and agreed with the parties' stipulation that there were "substantial and compelling reasons" justifying an exceptional sentence. CP at 188. The court specifically noted Mr. Lone had stipulated to an exceptional sentence, despite being advised at his guilty plea hearing that the court could impose a sentence "up to the statutory maximum." *Id.* at 187. The legal requirements for an exceptional sentence

upward were met.

Mr. Lone complains that, apart from the parties' stipulation, the court also found Mr. Lone's conduct was "'egregious.'" *Id.* at 188. He argues that this finding constituted a fact necessary for punishment and therefore should have been found by a jury beyond a reasonable doubt. We disagree with this interpretation of the record. The court made clear that the legal basis for its exceptional sentence was the parties' stipulation under RCW 9.94A.535(2)(a). *See* RP (Feb. 21, 2023) at 95 ("We're under Section 535, 2(a) of the—of the statute."); CP at 188 ("[Mr. Lone] and the state both stipulated that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court found that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the [SRA]."). The court's discussion of the egregious nature of Mr. Lone's conduct went to the extent of the court's exceptional sentence; it was not the legal basis for the court's chosen sentence.

Whether the exceptional sentence was too high

We review a court's decision regarding the length of an exceptional sentence for abuse of discretion. *State v. Vaughn*, 83 Wn. App. 669, 680, 924 P.2d 27 (1996). An exceptional sentence cannot exceed the statutory maximum for a defendant's offense of conviction. *See* RCW 9.94A.537(6). And a chosen term of incarceration must "have

some basis in the record." *State v. Brown*, 60 Wn. App. 60, 77, 802 P.2d 803 (1990), *review denied*, 116 Wn.2d 1025, 812 P.2d 103 (1991), *overruled on other grounds by State v. Chadderton*, 119 Wn.2d 390, 832 P.2d 481 (1992). But otherwise, a court has "'all but unbridled discretion' in fashioning the structure and length of an exceptional sentence." *France*, 176 Wn. App. at 470 (quoting *State v. Halsey*, 140 Wn. App. 313, 325, 165 P.3d 409 (2007)).

Here, the 92-month sentence chosen by the court was within the statutory maximum sentence of 10 years (120 months). And the court explained its reasoning in support of this sentence in terms of the record before the court and the purposes of punishment set forth at RCW 9.94A.010. Specifically, the court noted the impact of Mr. Lone's conduct on his victims, as contemplated by RCW 9.94A.500(1) (At sentencing, the court "shall consider . . . any victim impact statement, and allow arguments from . . . the victim . . . as to the sentence to be imposed."). The court's explanation as to why it selected a 92-month sentence was sufficient to satisfy the deferential abuse of discretion standard.[1]

[1] We do not opine on whether we would issue the same sentence if tasked with sentencing discretion. Our analysis of the legality of Mr. Lone's sentence is dispassionate. It has nothing to do with "cater[ing] to an instinct for retribution." Dissent at 1.

Mr. Lone argues the court nevertheless acted illegally, because his stipulation to an exceptional sentence capped the court's sentencing authority at 36 months. Mr. Lone points to the wording of RCW 9.94A.535(2)(a) and argues that once the parties stipulate to "an" exceptional sentence, the plain wording of the statute only allows a court to impose "the" exceptional sentence agreed to by the parties. *See* Appellant's Br. at 10-12.

Mr. Lone's argument rests on a question of statutory interpretation. The goal of statutory interpretation is to discern and implement the legislature's intent. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Our starting point is the written text. This encompasses not only the specific words of the applicable statute, but also context and related statutes. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014).

We turn first to context. Two portions of the SRA are particularly relevant to our analysis. First, the SRA specifies that a sentencing court "is not bound by *any* recommendations contained in an allowed plea agreement." RCW 9.94A.431(2) (emphasis added). As worded, this provision makes plain that the parties are *never* authorized to limit a court to the parties' chosen sentencing recommendations. Second, the SRA recognizes that when there is a basis for an exceptional sentence upward, the maximum sentence a court may impose is the applicable statutory maximum term of

confinement. RCW 9.94A.537(6). While this subsection references exceptional sentences based on what a "jury finds," the balance of the statute also recognizes that the same rules apply if there is a valid waiver. A judge may make an exceptional sentence finding if the defendant waives the right to a jury trial. RCW 9.94A.537(3). And neither a judge nor a jury is required in the context of a defendant's stipulation. *Id.*

Looking at the specific statute at issue, RCW 9.94A.535(2)(a) provides that the court may impose an aggravated exceptional sentence without a jury finding if "the defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the [SRA]."

Nothing in the aforementioned language suggests the legislature intended to deviate from the general rules set forth in RCW 9.94A.431(2) and RCW 9.94A.537(6). RCW 9.94A.535(2)(a) does not contemplate, let alone require, that the parties will stipulate to a specific sentence. It instead allows for an exceptional sentence based simply on agreement that an above-guideline sentence would serve the ends of justice. Obviously, if the parties merely stipulate that an exceptional sentence is warranted without an agreed recommendation, a court's sentencing authority cannot be capped by

a term of incarceration below the statutory maximum. It stands to reason, then, that a court's authority is not limited simply because the parties have gone beyond the requirements of the statute and reached a joint sentencing recommendation.

The dissent focuses on the use of the definite article "the" in RCW 9.94A.535(2)(a) to conclude that a sentencing court must confine itself to the parties' recommended sentence. This analysis ignores the fact that, as set forth above, the parties are not required to make a specific sentencing recommendation. But in addition, the word "the" cannot operate as the dissent proposes. A court cannot defer to "the" sentence selected by the parties because no such sentence yet exists. Only a court can impose a sentence. Given the different roles of the parties and the court, the use of the definite article "the" can only mean that the court must be convinced that "the" sentence selected by the court meets the purposes of punishment.[2] This interpretation is consistent with the general expectation that a court must assess the purposes of punishment in imposing an exceptional sentence. *See* RCW 9.94A.535.

[2] The dissent's comparison to the crime of harassment is inapposite. The statute merely requires that a defendant's threat be "the" same one that causes a victim's reasonable fear of harm. Here, because different actors are involved in recommending a sentence and imposing a sentence, the analysis is different.

Empowering the parties to limit a court's sentencing discretion would create tension within the SRA. It would be contrary to RCW 9.94A.431(2), which prohibits the parties from limiting a court's sentencing authority. And it would be inconsistent with RCW 9.94A.537(6), which recognizes that when an exceptional aggravating circumstance applies, the court's discretion is capped at the statutory maximum term of confinement. If the legislature had intended to permit the parties to limit a court's sentencing authority under RCW 9.94A.535(2)(a), it could have done so in a straightforward manner that would not require myopic focus on the word "the." For example, the legislature could have followed the lead of Federal Rule of Criminal Procedure 11(c)(1)(C), which allows the parties to agree on a "specific sentence or sentencing range" that "binds the court once the court accepts the plea agreement." But this step has not been taken. We decline to read RCW 9.94A.535(2)(a) as deviating from RCW 9.94A.431(2) and RCW 9.94A.537(6).

Mr. Lone laments that if a sentencing stipulation does not involve a cap, it will render his plea bargain "illusory." Appellant's Br. at 11. We disagree. Mr. Lone received the benefit of his bargain. The State joined Mr. Lone in recommending a 36-month sentence. This was a powerful benefit. As recognized by the trial court, the State's recommendations are given considerable weight and are usually followed. *See*

CP at 188 ("This Court rarely deviates from joint recommendations of the parties as to sentencing."). The SRA recognizes the benefits of plea bargaining. And in doing so, it also recognizes that plea bargain recommendations are not binding on the court. RCW 9.94A.431(2). Mr. Lone's case is simply one of the unusual cases where a sentencing court exercised its statutory authority to not to accept the parties' sentencing recommendation. The fact that the court refused to follow the parties' recommendation did not undermine the basis for the plea agreement.

The sentence is affirmed.

The panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports, and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Crime victim penalty assessment and DNA collection fee

At sentencing, the court found Mr. Lone was indigent and imposed the then-mandatory $500 crime victim penalty assessment and $100 DNA collection fee. On appeal, Mr. Lone contends, and the State concedes, that both financial penalties must be struck from the judgment and sentence. We accept these concessions, based

on recent legislative changes. *See State v. Ellis*, 27 Wn. App. 2d 1, 16-17, 530 P.3d 1048 (2023) (citing LAWS OF 2023, ch. 449, §§ 1, 4).

STATEMENT OF ADDITIONAL GOUNDS FOR REVIEW

In his statement of additional grounds for review, Mr. Lone raises two additional challenges to his exceptional sentence, both based on claims that the trial court, in imposing the 96-month sentence, relied on statements alleging facts that were untrue.

First, Mr. Lone contends the court erred in considering a letter from Connor Lone, claiming he never had assets in the Bahamas or anywhere outside of the United States of America as the letter alleges. However, the record does not reflect a witness named Connor Lone testified at sentencing or submitted a statement to the court. *See* CP at 1-319; RP (Feb. 7, 2023) at 16-64; RP (Feb. 21, 2023) at 65-111; RP (Mar. 20, 2023) at 112-139. The record includes a letter from "Roger" to the Wenatchee Police Department dated January 24, 2023, stating, "We have information that Greg had some dealings with Deutsche Bank and the Bahamas. His son thinks he is a flight risk. Should someone take his passport?" CP at 97. This is not a victim impact statement and there is no indication the court considered the letter at sentencing.

Second, Mr. Lone contends the court erred in considering the statements from Roger Lone and Kristin Byrne regarding events that allegedly transpired over 20 years

ago, claiming both of their statements were fictitious. Again, there is no indication the court relied on these statements in determining Mr. Lone's sentence.

CONCLUSION

Mr. Lone's sentence is affirmed. We remand for the limited purpose of striking the crime victim penalty assessment and DNA collection fee from the judgment and sentence. As this act is ministerial, resentencing is not required.

Pennell, J.

I CONCUR:

Staab, A.C.J.

No. 39616-9-III

FEARING, J. (dissenting) — Defrauding senior citizens of retirement savings constitutes egregious conduct that often avoids punishment. Jessica Johnston, *The Top 5 Financial Scams Targeting Older Adults*, NAT'L COUNCIL ON AGING (Dec. 8, 2023), https://www.ncoa.org/article/top-5-financial-scams-targeting-older-adults/; Nigel Barber, *Why White Collar Criminals Rarely Go to Prison*, PSYCHOLOGY TODAY (Mar. 5, 2010), https://www.psychologytoday.com/us/blog/the-human-beast/201003/why-white-collar-criminals-rarely-go-prison. Because of his preying on the elderly and taking retirement nest eggs exceeding $480,000, I do not dispute that Gregory Lone deserves an arduous sentence. But I must not cater to my instinct for retribution against Lone. The extraordinary sentence meted on Lone breaches Washington's exceptional sentence statute, RCW 9.94A.535(2)(a). Therefore, I dissent from the majority.

The State charged Gregory Lone with five counts of first degree theft, each with a special allegation of aggravating circumstances: (1) the offense constituted a major economic loss or series of losses, and (2) Lone used his position of trust, confidence, or fiduciary responsibility to facilitate commission of the offense. RCW 9.94A.535(3)(d), (n). Imposition of either of the sentence aggravators demands a jury finding beyond a reasonable doubt. RCW 9.94A.535(3); RCW 9.94A.537. No jury has determined Lone to merit an upward exceptional sentence.

The State and Gregory Lone stipulated to Lone pleading guilty to five counts of first degree theft and agreeing to an exceptional sentence of thirty-six months in exchange for the State dismissing the sentence aggravators. Based on his offender score, Lone's standard sentencing range rested between twelve months plus one day and fourteen months. The majority emphasizes the statement of plea on guilty signed by Lone read that the sentencing court may impose a sentence above the standard range and that Lone stipulated that an exceptional sentence served the interests of justice. The plea statement did not warn Lone that the judge might impose an exceptional sentence above the stipulated thirty-six months. During the plea hearing, however, Lone answered that he understood that the sentencing court could impose any sentence up to the statutory maximum. The sentencing court ignored the stipulation and sentenced Lone to ninety-two months of incarceration.

The Sentencing Reform Act of 1981, chapter 9.94A RCW, generally limits a court to issuing a sentence within the offender's standard range. RCW 9.94A.505(2)(a)(i). A byzantine section of the Sentencing Reform Act, RCW 9.94A.535(2), governs this appeal and allows a sentence exceeding the standard range in limited situations:

> (2) Aggravating Circumstances—Considered and Imposed by the Court
>
> The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
>
> (a) The defendant and the state both stipulate that justice is best served by the imposition of *an exceptional sentence* outside the standard range, and the court finds *the exceptional sentence* to be consistent with and

> in furtherance of the interests of justice and the purposes of the sentencing reform act.

(Emphasis added.) The emphasized articles "an" and "the" used in this statutory subsection dominate any statutory interpretation.

This court's primary duty in statutory interpretation is to discern and implement the legislature's intent. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). When possible, we must give effect to the plain meaning of a statute as an expression of legislative intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). We also apply basic rules of grammar. *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838-39, 215 P.3d 166 (2009).

Use of a definite article is a recognized indication of statutory meaning. *Guardado v. Guardado*, 200 Wn. App. 237, 243, 402 P.3d 357 (2017); *Department of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 965, 275 P.3d 367 (2012). The use of the definite article "the" often signifies a narrowing intent, a reference to something specific, either known to the reader or listener or uniquely specified. *Hickey v. Scott*, 370 Or. 97, 107, 515 P.3d 368 (2022). Whereas definite articles like "the" restrict the noun that follows as particularized in scope or previously specified by context, the indefinite "a" has generalizing force. *Nielsen v. Preap*, 586 U.S. 392, 408, 139 S. Ct. 954, 203 L. Ed. 2d 333 (2019) (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1294 (11th ed. 2005)). The articles in a statutory text—the definite articles and the

indefinite articles—should not be overlooked or discounted, but should be treated as being chosen by design and as intending a particularizing effect. *In re A.P.*, 245 W. Va. 248, 254, 858 S.E.2d 873 (2021).

Based on ordinary sentence structure, the definite article "the" preceding the second use of "exceptional use" in RCW 9.94A.535(2)(a) must refer the reader back to the earlier employment of the term "exceptional sentence." The statute previously employs the term "exceptional sentence" only in connection with "an exceptional sentence" to which the parties agreed. Thus, the statute limits the trial court to imposing the sentence to which the parties concurred if the court desires to command an exceptional sentence based on a stipulation between the parties. The sentencing statute does not allow the sentencing court to impose a freestanding exceptional sentence chosen by the court.

The construction I impose on RCW 9.94A.535(2)(a), the only correct grammatical interpretation, promotes fairness. When an offender voluntarily stipulates to a sentence that exceeds their standard range, the sentencing court should not be granted freedom to impose any exceptional sentence, let alone a sentence more than double the stipulated sentence and five times the high end of the standard range. The offender here pled guilty in expectation that he would receive the stipulated sentence. A grant to the sentencing court of discretion beyond the plea agreement will cause many other offenders to abstain from any stipulation to an exceptional sentence. In retrospect, Gregory Lone benefitted

none from pleading guilty and should have required the State to go to trial to prove its case. I agree that, in other contexts, the recommendation of the State does not limit the sentencing court's discretion, but in these other contexts the standard range generally constricts the court's discretion.

An analogous example of statutory construction entailing the definite article "the" comes from RCW 9A.46.020, which governs the crime of harassment. The statute reads in pertinent part:

> (1) A person is guilty of harassment if:
> (a) Without lawful authority, the person knowingly *threatens*:
> . . . .
>
> and
>
> (b) The person by words or conduct places the person threatened in reasonable fear that *the threat* will be carried out.

Based on the subsection (b)'s attachment of the definite article "the" to "threat," our Supreme Court held that the State must prove that the person threatened was placed in reasonable fear of the actual threat made, not any threat uttered. *State v. C.G.*, 150 Wn.2d 604, 609, 80 P.3d 594 (2003). Stated differently, the law requires that "the threat made and the threat feared are the same." *State v. C.G.*, 150 Wn.2d at 609.

The majority emphasizes that Gregory Lone recognized, in a response to the sentencing court's question, that the court could execute a sentence surpassing the stipulated sentence as long as the number of months did not exceed the statutory maximum. We do not know if either the State or Lone's counsel warned Lone of this

possibility before Lone signed the plea statement or preceding the plea hearing. We do not know if Lone comprehended the court's warning or whether he instead rotely answered all questions of the court in the affirmative. Regardless, an offender may not waive the right to challenge the sentencing court's imposition of a sentence outside the court's statutory authority. *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002); *In re Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

The majority artfully dodges the presence of the definite article "the" in RCW 9.94A.535(2)(a) by, in part, asserting it may review related statutes. Nevertheless, related statutes hold no relevance when a statute's plain meaning provides the answer. To determine the meaning of a statute, we start with its plain language in the context of the statute in which it appears. *Associated General Contractors of Washington v. State*, 2 Wn.3d 846, 855, 544 P.3d 486 (2024). This principle of construction does not free the court to review language outside the statute.

The majority cites RCW 9.94A.431(2), another portion of the Sentencing Reform Act, which postulates that the sentencing court "is not bound by any recommendations contained in a plea agreement." Along these lines, the majority insists that the parties may never cap the limit to which the court may impose a sentence. Nevertheless, a more specific statute supersedes a general statute if the two statutes pertain to the same subject matter and conflict to the extent they cannot be harmonized. *State v. Numrich*,

197 Wn.2d 1, 14-15, 480 P.3d 376 (2021); *In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998). Thus, RCW 9.94A.535(2)(a) trumps RCW 9.94A.431(2). The legislature held authority to limit the discretion of the sentencing court to exceed the stipulated sentence, in the rare instance of a stipulated exceptional sentence, with the enactment of RCW 9.94A.535(2)(a).

The majority reasons that the sentencing court cannot defer to "the exceptional sentence" on which the parties agree because no exceptional sentence exists until the court imposes one. To respond to this assertion, I requote RCW 9.94A.535(2)(a):

> (a) The defendant and the state both stipulate that justice is best served by the imposition of *an exceptional sentence* outside the standard range, and the court finds *the exceptional sentence* to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(Emphasis added.) The majority's ratiocination reads the statute too literally rather than commonsensically. Courts eschew literal readings of statutes with strained consequences. *State v. Bergstrom*, 199 Wn.2d 23, 37-38, 502 P.3d 837 (2022). Courts should consider the meaning that naturally attaches and take into consideration the meaning that attaches from the context. *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). The ordinary person, untainted by law school, would only read the phrase "the exceptional sentence" with the assumption that the court concurs with the sentence on which the parties have already agreed. One thesaurus teaches about the common and ordinary use of the word "the:"

> A *definite article* is an article that indicates that a noun refers to a specific thing or to something that has been identified previously.
>
> In English, there is only one definite article: the word *the*.
>
> To give an example of how we use *the*, look at the following sentences:
>
> • Luna heard wolves howling in the forest. **The** wolves sounded sad.
>
> The second sentence uses *the* to refer to a specific pack of wolves whose identity was revealed in the previous sentence. By using *the*, we indicate that only this specific group of wolves sounded sad.

THESAURUS.COM, www.thesaurus.com/e/grammar/definite-articles/ (emphasis in original) [https://perma.cc/9W8K-PV7J]. RCW 9.94A.535(2)(a)'s use of "the" may only refer to a specific offender sentence to which the State and the defendant previously agreed.

Finally, the majority asserts that RCW 9.94A.537 recognizes that only the statutory maximum term of confinement limits a sentencing court's discretion when an exceptional sentence applies. The majority fails to read the entirety of RCW 9.94A.537(6):

> *If the jury finds*, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

(Emphasis added.) No jury entered a finding against Gregory Lone.

Fearing, J.

Fearing, J.

BURKHART & BURKHART, PLLC

December 27, 2024 - 4:18 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	39616-9
Appellate Court Case Title:	State of Washington v. Gregory Dean Lone
Superior Court Case Number:	20-1-00194-9

The following documents have been uploaded:

- 396169_Petition_for_Review_20241227161810D3989280_7554.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review_001.pdf

A copy of the uploaded files will be sent to:

- DCPAintake@co.douglas.wa.us
- emorris@co.douglas.wa.us
- emorris@co.douglas.wa.us

Comments:

Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net
Address:
1360 N. LOUISIANA ST. #A-789
KENNEWICK, WA, 99336-8113
Phone: 509-572-2409

Note: The Filing Id is 20241227161810D3989280