Supreme Court No. 101129-6
(COA No. 82803-7-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALLEN WILLIAMS,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

Statutes

Rules

Constitutional Provisions

A. IDENTITY OF PETITIONER

Allen Williams, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Williams seeks review of the Court of Appeals decision of June 13, 2022, a copy of which is attached as an appendix. The Court of Appeals denied the government's motion to publish on July 6, 2022.

C. ISSUES PRESENTED FOR REVIEW

1. Did Mr. Williams have the right to review of a sentencing error, where the Court of Appeals granted him relief and provided the trial court with discretion on how to correct its error?

2. On remand, did the trial court impose a sentence that exceeded its statutory authority?

3. Does depriving Mr. Williams of the right to allocution at his re-sentencing hearing require a new hearing?

4. Does depriving Mr. Williams of the right to be present at his re-sentencing hearing require a new hearing?

5. Did forcing Mr. Williams to remain in prison when he was re-sentencing violate the rule against shackling when no record was made to determine Mr. Williams was too dangerous to appear in person?

D. STATEMENT OF THE CASE

The trial court imposed a sentence that exceeded its statutory maximum for his convicted crimes at Mr. Williams original sentencing hearing. *State v. Williams*, 13 Wn. App. 2d 1080, 2020 WL 3047530, at *5, *review denied*, 196 Wn.2d 1019, 474 P.3d 1051 (2020). Mr. Williams was sentenced to 90 months in

total. *Id*. In addition, the trial court imposed community custody beyond his prison time, extending his sentence by 12 months. *Id*. This Court found the sentence unauthorized and ordered remand to allow the trial court to correct the error. *Id*. The Court of Appeals gave the trial court two options in its order. It instructed the trial court "to either amend the community custody terms or re-sentence on the applicable counts." *Id*.

Mr. Williams was not present when the trial court reconvened for re-sentencing, appearing instead by video from prison. RP 3. The court made no findings Mr. Williams consented to this procedure or otherwise agreed not to be present at his re-sentencing.

At re-sentencing, the prosecutor asked the court to strike the community custody condition from all of the counts of the judgment and sentence except for

count III, informing the court that it could otherwise impose the same sentence and that its sentence would not change from its original. RP 3. Mr. Williams' attorney did not contest this argument. RP 4.

The court never asked Mr. Williams to allocute before imposing its new sentence. RP 5. The court acknowledged Mr. Williams only after it imposed its sentence, when it asked Mr. Williams' attorney to indicate whether Mr. Williams agreed to the new terms. RP 6. The court then went off the record without hearing again from Mr. Williams. RP 6.

Mr. Williams declined to sign the amended judgment. CP 6. Mr. Williams appealed his sentence to the Court of Appeals, asserting that it continued to exceed the statutory maximum for his crimes. He also asked the Court of Appeals to order a new sentencing hearing because the trial court did not allow him to

speak at the sentencing hearing or be present. The trial court also erred by allowing the sentencing to go forward while Mr. Williams was in prison, which is the equivalent of shackling. The Court of Appeals held that his new sentence was not reviewable. App. 4. It also found no error that required a new hearing. App. 8-10.

E. ARGUMENT

1. The Court of Appeals erred in holding Mr. Williams' new sentence is not reviewable.

In *State v. Kilgore*, this Court held that where the trial court cannot exercise independent judgment, such as with ministerial corrections, there is no issue to appeal. 167 Wn.2d 48, 50, 846 P.2d 519 (1993). The Court of Appeals acknowledged Kilgore's controlling nature, which allows an appeal when the Court of Appeals affords the trial court the opportunity for choice on remand. *Id*. (citing *Kilgore*, 167 Wn.2d at 40).

This Court makes clear that finality occurs where the trial court cannot exercise its discretion on the remanded issues. *State v. Brown*, 193 Wn.2d 280, 286, 440 P.3d 962 (2019). The appellate rules do not prevent review when a trial court has discretion on how to proceed and elects an option. *Id.*

In this case, Mr. Williams had the right to review. In Mr. Williams' first appeal on this matter, the Court of Appeals instructed the trial court to "to either amend the community custody terms or re-sentence on the applicable counts." App. 4. On Mr. Williams' return, the trial court chose to modify Mr. Williams' sentence to eliminate community custody. *Id.*

Despite the Court of Appeals' decision to the contrary, this decision to eliminate community custody was a choice the trial court made. Because the trial court exercised its discretion on remand to determine

how to re-sentence Mr. Williams, the issues raised in this appeal are reviewable. *Brown*, 193 Wn.2d at 286.

In applying *Kilgore* to cases where the trial court has to decide how to proceed, the Court of Appeals mistakenly expands this Court's narrow exception to appealability. This error conflicts with the decisions of this Court, including *Kilgore* and *Brown*.

The government recognizes this expansion. When it made a motion to publish, the government argued that the re-sentencing that occurred here amounted to a ministerial correction, something this Court has never held. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011). Instead, this Court has been clear that the right to be present is only limited when the trial court makes a ministerial correction that involves no discretion. *Id.* at 48.

And clearly, the Court of Appeals' order on remand does not deprive the trial court of discretion. Instead, the trial court was ordered "to either amend the community custody terms or re-sentence on the applicable counts." This order does not deprive the trial court of discretion, nor is it ministerial. As such, the Court of Appeals erred when it denied Mr. Williams the opportunity for review. To correct this error, this Court should grant review. RAP 13.4.

2. Mr. Williams' sentence continues to exceed the statutory maximum of the Sentencing Reform Act.

The Court of Appeals does not address the underlying issue in Mr. Williams' appeal, but this Court should find that his sentence continues to exceed the statutory maximum for his crimes. Because this sentence exceeds the statutory maximum, this Court should grant review.

A "court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5); *see also* RCW 9.94A.701(9). Courts must reduce a term of community custody "whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." RCW 9.94A.701(9).

The maximum sentence a court may impose includes the combined term of incarceration and any term of community custody. *In re Pers. Restraint of McWilliams*, 182 Wn.2d 213, 216, 340 P.3d 223 (2014). Trial courts must ensure that community custody terms do not extend the total sentence beyond the

statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

Community custody is a fixed term imposed by the court. *Boyd*, 174 Wn.2d at 473. Its length may not be based on a range of time or something left to the discretion of the Department of Corrections. *See State v. Bruch*, 182 Wn.2d 854, 861-62, 346 P.3d 724 (2015); RCW 9.94A.701. When a standard range term of confinement is combined with community custody, this combined term "shall be reduced by the court" if it exceeds the statutory maximum for the crime. *Id.*

When the court imposes sentences for various offenses that run concurrently and orders a total term of confinement that exceeds the statutory maximum for one offense, it may not also order community custody to be served after the person is released from serving this excessive sentence. *State v. Nord*, 7 Wn. App. 2d 1021,

2019 WL 296071, at *4 (unpublished, cited under GR 14.1), review denied, 193 Wn.2d 1031 (2019).

In *Nord*, the defendant received two concurrent sentences: a 10-year sentence for unlawful delivery of a controlled substance and a 2-year term for unlawful possession. 2019 WL 296071 at *3. The possession sentence also included 12 months of community custody. *Id*. This Court ruled this sentence was "unlawful." *Id*. at *4.

This illegality rested on the impermissible combination of sentencing terms. The Court held the defendant's "10-year total term of confinement in addition to the 12-month community custody term exceed[ed] the 5-year maximum sentence for unlawful possession." *Id*.

Despite this Court of Appeal's order, on remand, the trial court imposed a sentence that exceeded the

statutory maximum allowed by the Sentencing Reform Act, imposing 12 months of community supervision in addition to Mr. Williams' prison sentence. CP 5. In imposing this sentence, the trial court misapprehended this Court's order, requiring re-sentencing again.

For concurrent sentences, the legislature's direction is clear. Current offenses shall be served "concurrently." RCW 9.94A.589(1)(a). Further, the statutory maximum shall not exceed the statutory maximum allowed by statute. RCW 9.94A.701(9). Following the legislature's directive, this Court of Appeals' original decision was clear. The most serious of Mr. Williams' sentences was a class C felony with a statutory maximum range of 60 months.

Mr. Williams' community custody begins when he completes his 90 months of imprisonment. RCW 9.94A.707(1). By that time, however, he will have

already served more than the five years allowed. As this Court explained in *Nord*, this sentence is unlawful, and the term exceeding his statutory maximum must be stricken. RCW 9.94A.701(9); RCW 9.94A.707(1); *Boyd*, 174 Wn.2d at 473; *Nord*, 2019 WL 296071, at *4.

Because Mr. Williams' sentence exceeds his statutory maximum sentence, the trial court erred when it imposed its sentence. The Court of Appeals also erred when it affirmed this sentence. This error, which conflicts with the legislature's intent and the opinions of this Court, is grounds for review. RAP 13.4. Mr. Williams asks that review be granted.

3. Mr. Williams had the right to allocution when the Court of Appeals remanded his case for re-sentencing.

Because the Court of Appeals held that Mr. Williams' matter was not remanded for re-sentencing, it also held that he had no right to allocution. App. 8.

As with the question of whether Mr. Williams had the right to appeal, this Court should also address whether he had the right to allocution at his re-sentencing.

The Court of Appeals cites no caselaw but holds that Mr. Williams had no right to allocution. App. 8. This holding conflicts with decisions from this Court. This Court has held that a person convicted of a crime has "the right to allocute" before the court imposes a sentence. *State v. Canfield*, 154 Wn.2d 698, 703, 116 P.3d 391 (2005). Allocution is "a significant aspect of the sentencing process" that a sentencing court "should scrupulously follow." *In re Pers. Restraint of Echevarria*, 141 Wn.2d 323, 336-37, 6 P.3d 573 (2000). Further, the legislature has expressly held that defendants have the right to allocate at their sentencing hearing. RCW 9.94A.500(1).

Again, this was not a ministerial hearing. Before imposing the new sentence, the court heard from both the government and Mr. Williams' attorney. RP 3-4. Both parties argued about how the court could address the sentencing issue the Court of Appeals had sent back down. *Id*. At no time was Mr. Williams provided with an opportunity to allocate.

Despite the attorneys' agreement about settling Mr. Williams' case, he had the right to speak. *Canfield*, 154 Wn.2d at 703. Other than acknowledging his presence on a video monitor, the court gave him no other opportunity to participate in the re-sentencing. The failure to allow Mr. Williams to allocute was not harmless and undermined the sentence imposed, as it was not the lowest available sentence. *State v. Gonzales*, 90 Wn. App. 852, 885-86, 954 P.2d 360 (1998). Review should be granted because the Court of

Appeals' decision is contrary to the opinions of this Court and the Court of Appeals. RAP 13.4.

4. Mr. Williams had the right to appear in person for his re-sentencing.

"As a matter of due process, '[a] criminal defendant has a fundamental right to be present at all critical stages of a trial.'" *State v. Jones*, 185 Wn.2d 412, 426, 372 P.3d 755 (2016) (alteration in original) (quoting *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011)). Misinterpreting *Ramos*, the Court of Appeals again held Mr. Williams had no right to be present because the trial court was only making a ministerial correction. App. 9 (citing *Ramos*, 171 Wn.2d at 48).

In granting review, this Court should clarify that article I, section 22 requires that a defendant has the right to "appear and defend" charges leveled against

them in person. *Irby*, 170 Wn.2d at 885 n. 6.[1] This Court can also find that the Sixth Amendment requires personal appearance. Further, CrR 3.4(e)(2) requires a defendant's appearance absent a clear agreement, except in limited circumstances.

Sentencing is a critical stage that requires the defendant's appearance. *State v. Everybodytalksabout*, 161 Wn.2d 702, 710, 166 P.3d 693 (2007); *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). Not only does it allow the judge the opportunity to hear from the defendant, but it also provides for the right of the defendant to confer with counsel privately. *State v. Peña Fuentes*, 179 Wn.2d 808, 811, 318 P.3d 257 (2014).

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[1] This right is more broad than the right to appear provided by the United States Constitution. If this Court grants review, a more complete analysis of this issue will be conducted.

Mr. Williams was deprived of his right to be present. RP 3. Instead, he was left in prison and had to watch his hearing by video. *Id*. No agreement was made to waive his appearance, as court rules and the constitution required. No one even spoke to Mr. Williams, except when the court went off the record after its ruling. RP 6.

Mr. Williams had the right to be present at his re-sentencing. *Ramos*, 171 Wn.2d at 49. When the court proceeded with the hearing without his presence, it deprived him of his important constitutional rights. Because the Court of Appeals' decision affirming this process conflicted with opinions from this Court and deprived Mr. Williams of his constitutional rights, this Court should grant review. RAP 13.4.

5. Appearing remotely from prison constitutes a deprivation of the right to be unfettered.

The right to be present includes "the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty." *State v. Jackson*, 195 Wn.2d 842, 851, 467 P.3d 97 (2020) (quoting *State v. Williams*, 18 Wash. 47, 49, 50 P. 580 (1897)); U.S. Const. amend. XIV; Const. art. I, § 22.

In affirming the trial court's process, the Court of Appeals restricted the right to appear unfettered at re-sentencing. App. 10. This Court should review whether its recognition of how the vestiges of shackling deprive a person of their right to a fair hearing, including at re-sentencing.

When Mr. Williams appeared from prison, the trial court could not see him as anything other than an incarcerated man. *Jackson*, 195 Wn.2d at 852. That the hearing in question involved sentencing has no bearing on how it impacted the trial court, as this Court has made clear that the right to be free of shackles applies regardless of whether a jury is present. *Id*. at 858.

Nor can this Court ever know what impact Mr. Williams' presence, where he would have had an opportunity to speak and confer with his attorney, would have had on the re-sentencing hearing. The Court of Appeals speculates that it would have made no difference, but there is no way to know this. App. 10. And while the Court of Appeals discounts the impact of imprisonment on control and oppression, this Court should not. *Id*. Instead, this Court should grant review to hold that the decision to keep Mr. Williams in

prison for his re-sentencing constituted shackling and requires a new sentencing hearing. RAP 13.4.

F. CONCLUSION

Based on the preceding, Mr. Williams requests that review be granted pursuant to RAP 13.4(b).

This petition is 2,765 words long and complies with RAP 18.17.

DATED this 28th day of July 2022.

Respectfully submitted,

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APPENDIX

Table of Contents

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALLEN JAMES WILLIAMS, Appellant.	No. 82803-7-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Allen Williams challenges the trial court's order amending his judgment and sentence following remand to correct a sentencing error. In Williams's first appeal, this court affirmed his convictions but held that the combined term of confinement and community custody exceeded the statutory maximum as to five of his six convictions. Williams argues that remand is again required because his amended sentence continues to exceed the statutory maximum and because the trial court allowed him to appear at the remand hearing via videoconferencing from prison and did not affirmatively give him an invitation to speak. Williams also raises issues in his statement of additional grounds. Finding no error, we affirm.

FACTS

In January 2019, following a bench trial, the court convicted Williams of six counts of felony domestic violence violation of a no-contact order (VNCO), one count of driving under the influence (DUI), and one count of escape in the third

degree. Based on an offender score of 19, the court imposed an above-range exceptional sentence consisting of 60-month concurrent standard range sentences on five of the VNCO convictions (as charged in counts 1, 5, 6, 7, and 8) and a consecutive 30-month sentence on the remaining VNCO conviction (as charged in count 4) for a total of 90 months of confinement. The court also imposed 12 months of community custody for each VNCO count.

On appeal, Williams argued insufficient evidence supported all but one of the VNCO convictions, the court imposed a clearly excessive exceptional sentence, and the terms of community custody caused his sentence to exceed the statutory maximum on all but one of the VNCO convictions. State v. Williams, No. 79652-6-I, slip op. at 1 (Wash. Ct. App. June 8, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/796526.pdf. This court affirmed Williams's convictions and concluded that his sentence was not clearly excessive. Id. at 9. But it agreed Williams's concurrent 60-month sentences on the VNCO convictions as charged in counts 1, 5, 6, 7, and 8, when combined with their 12-month terms of community custody, exceeded the 60-month statutory maximum. Id. When a standard range term of confinement is combined with community custody, this combined term "shall be reduced by the court" if it exceeds the statutory maximum for the crime. Former RCW 9.94A.701(9) (2010). Accordingly, this court remanded to the trial court "to either amend the community custody terms or resentence on the applicable counts." Id. at 10.

A hearing on remand took place on May 26, 2021. Williams appeared via videoconferencing from prison. The State asked the court to amend the judgment and sentence by striking the 12-month community custody term from the five VNCO counts on which the court had imposed 60 months of confinement. The State argued the 12-month community custody term should remain on count 4, the VNCO count on which the court had imposed only 30 months of confinement. Because the sentence on count 4 was consecutive to those on the other VNCO counts, the resulting amended sentence would still consist of 90 months of confinement followed by 12 months of community custody. Defense counsel concurred. The court entered the order.

Williams appeals.

DISCUSSION

I. Sentence

Williams argues that his amended sentence continues to exceed the statutory maximum. He contends that remand is again required to strike the 12-month term of community custody from count 4. The State argues that Williams is barred from challenging his original sentence on a second direct appeal following this court's limited remand to correct a sentencing error, and also that the amended sentence does not exceed the statutory maximum. We agree with the State.

A defendant is generally barred from raising issues in a second appeal that were or could have been raised in the first appeal. State v. Sauve, 100 Wn.2d 84,

87, 666 P.2d 894 (1983). RAP 2.5 allows a party to raise an issue not raised in an earlier appeal where "the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue." State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). But a trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate. State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). Where the appellate court vacates the original sentence or broadly remands for a new sentencing hearing, the defendant may raise sentencing issues not brought in the first appeal. State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009).

In contrast, the trial court does not retain the same discretion "when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence." Id. Trial courts must strictly comply with directives from appellate courts that leave the trial court no discretion. State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006). Where a trial court exercises no independent judgment on remand, there is no issue to review on appeal. Kilgore, 167 Wn.2d at 40. In such a case, "it is the original judgment and sentence entered by the original trial court that controls the defendant's conviction and term of incarceration." Id. at 40-41.

Here, our opinion specifically and narrowly instructed the trial court on remand "to either amend the community custody terms or resentence on the applicable counts." Williams, No. 79652-6-I, slip op. at 10. The record

demonstrates the court and the parties understood the purpose of the hearing was limited to amending the community custody terms on the five challenged counts. At the beginning of the hearing, the State noted, "[T]his matter comes on to basically amend a sentence that was imposed beyond the statutory maximum." Defense counsel "concur[red] entirely" with this approach:

> I think that the intent of the Court is clear in the Judgment and Sentence by simply striking the requirements of community custody from the counts that are at 60 months. There's no need for the Court to make any additional findings. And as I explained to Mr. Williams, sort of the sentences remained unchanged. He's going to . . .
>
> . . . .
>
> . . . serve 90 months as determined by [the] Department of Corrections and then 12 months of community custody as by statute. I think that squares all the circles that are required.

The court responded, "All right. On counts one, five, six, seven, and eight, I will maintain the sentence of 60 months in custody and amend the community custody to zero months." The court also indicated that if Williams did not authorize defense counsel to sign the document on his behalf, "I am going to sign it anyway because it doesn't modify any of the conditions really in relation to the sentence." At the conclusion of the hearing, the court did not enter a new judgment and sentence. Instead, it entered an "Order Amending Judgment and Sentence" striking community custody as to counts 1, 5, 6, 7, and 8 "since sentence was for [the] 60 month statutory maximum." The order expressly stated that "ALL other provisions of the Judgment and Sentence remain in force and effect."

Williams asserts review is appropriate because the trial court conducted a full resentencing hearing. He contends the court had to exercise discretion on remand to determine how to proceed. But the decision to correct a judgment and sentence is not an appealable act of independent judgment by the trial court. "[W]hen, on remand, a trial court has the choice to review and resentence a defendant under a new judgment and sentence or to simply correct and amend the original judgment and sentence, that choice itself is not an exercise of independent judgment by the trial court." Kilgore, 167 Wn.2d at 40. In such a case, "it is the original judgment and sentence entered by the original trial court that controls the defendant's conviction and term of incarceration." Id. at 40-41. It is clear that the court on remand did not exercise independent judgment regarding Williams's sentence. Williams did not challenge the community custody term on count 4 in his first appeal. That sentence is now final. Because the trial court exercised no discretion on this issue, Williams cannot challenge it in this appeal.

Appellate courts have authority "to address arguments belatedly raised when necessary to produce a just resolution." See State v. McFarland, 189 Wn.2d 47, 57, 399 P.3d 1106 (2017) (citing RAP 2.5(a)). We need not consider invoking this authority here, as Williams's sentence does not exceed the statutory maximum for his crimes. "[W]hen imposing an exceptional sentence the court has discretion to sentence defendants to the statutory maximum of each individual crime and run multiple convictions consecutively." State v. Weller, 197 Wn. App. 731, 735, 391

P.3d 527 (2017). "In such a situation, the total maximum allowable sentence exceeds the statutory maximum for each individual conviction." Id. Here, Williams's sentence on count 4 (30 months of confinement plus 12 months of community custody) and his amended sentence on the remaining VNCO counts (60 months of confinement) are each individually less than the statutory maximum. Because the sentence on count 4 runs consecutively to those on the remaining counts, the total sentence does not exceed the allowable statutory maximum.

Williams relies on this court's unpublished opinion in State v. Nord, but that case does not support a different conclusion. No. 77435-2-I, slip op. (Wash. Ct. App. January 22, 2019) (unpublished), https://www.courts.wa.gov/opinions/pdf/774352.PDF. In Nord, the sentencing court imposed 10 years of confinement for unlawful delivery and 2 years for unlawful possession to run concurrently, plus a 12-month term of community custody. Id. at 3. Because the 10-year total term of confinement combined with the 12-month community custody term exceeded the 5-year maximum sentence for unlawful possession, this court held that remand was required to correct the unlawful sentence. Id. at 9. But here, unlike Nord, the court imposed a consecutive sentence. Williams's amended sentence is lawful.

II. Right to Allocute and Be Present

Williams argues the trial court erred by allowing him to appear at the hearing via videoconferencing from prison and by allowing him to appear without giving him an opportunity to be heard. These claims present questions of law that this

court reviews de novo. In re Pers. Restraint of Brooks, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009).

Williams first argues remand is required because the trial court failed to provide him with an opportunity to be heard at his resentencing hearing. A person convicted of a crime has "the right to allocute" before the court imposes a sentence. State v. Canfield, 154 Wn.2d 698, 703, 116 P.3d 391 (2005). Allocution is "a significant aspect of the sentencing process" that a sentencing court "should scrupulously follow." In re Pers. Restraint of Echevarria, 141 Wn.2d 323, 336-37, 6 P.3d 573 (2000). RCW 9.94A.500(1) expressly allows argument from the defendant at a sentencing hearing. However, as previously discussed, the hearing at issue in this case was not a sentencing hearing. Rather, the purpose of the hearing was to enter an order amending Williams's judgment and sentence pursuant to this court's mandate. His sentence did not change and he was not at risk of losing any additional liberty. Moreover, nothing in the record indicates that Williams asked to speak. Williams cites no authority supporting a right to allocution under these circumstances.

Williams next argues the trial court violated his right to appear in person at the hearing. "As a matter of due process, '[a] criminal defendant has a fundamental right to be present at all critical stages of a trial.'" State v. Jones, 185 Wn.2d 412, 426, 372 P.3d 755 (2016) (alteration in original) (quoting State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011)). Thus, "[a] defendant has a constitutional right to

be present at sentencing, including resentencing." State v. Ramos, 171 Wn.2d 46, 48, 246 P.3d 811 (2011). But a defendant has no constitutional right to be present "when a hearing on remand involves only a ministerial correction and no exercise of discretion." Id. Williams likens his case to that of the defendant in Ramos. There, our Supreme Court held that the defendant had the right to be present at his resentencing hearing because "the trial court's duty on remand is not merely ministerial" and the court must exercise its discretion. Id. at 49. But here, unlike in Ramos, the hearing was strictly ministerial and the trial court did not exercise discretion.

Williams also contends that the court failed to follow CrR 3.4(e)(2), which authorizes videoconference hearings only for proceedings listed by court rule or "by agreement of the parties, either in writing or on the record." Williams asserts that the parties did not formally agree to proceed without his presence in court. The State argues this claim is not reviewable because the writings scheduling the hearing and discussing how Williams would appear are not part of the record.

As a general rule, this court will not consider a claim of error raised for the first time on appeal unless the defendant shows it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). We agree

with the State the alleged error is not manifest in the record before this court and Williams has not demonstrated prejudice.

Williams further argues State v. Jackson, 195 Wn.2d 841, 467 P.3d 97 (2020) prohibits any videoconferencing from prison. The Jackson court held that shackling the defendant in his pretrial hearings without an individualized determination that shackles were necessary violated his constitutional rights and that the error was not harmless. Id. at 845. The court's analysis focused on the history of shackles and restraints as a means of control and oppression in American history. Id. at 850-51. Nothing in the record indicates that Williams was shackled while appearing on video. We decline to read Jackson for the broad proposition that any videoconference appearance from prison violates the defendant's constitutional rights.

III. Statement of Additional Grounds

Williams filed a pro se statement of additional grounds for review (SAG). See RAP 10.10. He appears to argue his constitutional rights were violated because (1) the State withheld exculpatory portions of the video and audio recordings of his traffic stop and (2) the trial court admitted into evidence completed calls Williams made from jail to the person protected by the no-contact order, even though she did not testify at trial.

Although the precise nature of Williams's claims is unclear, both appear to be directed to alleged evidentiary errors that occurred during trial. Williams raised

similar claims in his SAG in the first appeal, which this court rejected. Williams's current arguments amount to a new challenge to the merits of his convictions and are beyond the scope of this court's narrow remand to correct a sentencing error. Accordingly, we do not reach them. See Barberio, 121 Wn.2d at 50 (appellate court will consider a new issue on the second appeal only if the trial court, on remand, exercised independent judgment and reviewed and ruled again on the issue); State v. Mandanas, 163 Wn. App. 712, 716, 262 P.3d 522 (2011) (defendant generally barred from raising issues that were or could have been brought in first appeal).

Affirmed.

Birk, J.

WE CONCUR:

Chung, J.

Mann, J.

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

STATE OF WASHINGTON,

Respondent,

v.

ALLEN JAMES WILLIAMS,

Appellant.

No. 82803-7-I

ORDER DENYING MOTION TO PUBLISH

The respondent, State of Washington, has filed a motion to publish. The court has considered the motion and has reconsidered its prior determination not to publish the opinion filed for the above entitled matter on June 13, 2022, finding that it is not of precedential value and should not be published. Now, therefore, it is

ORDERED that the motion to publish is denied.

Birk, J.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82803-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Nathaniel Sugg
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Washington Appellate Project

Date: July 28, 2022

WASHINGTON APPELLATE PROJECT

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Filed with Court:	Court of Appeals Division I
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Appellate Court Case Title:	State of Washington, Respondent v. Allen James Williams, Appellant
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