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Supreme Court No. 101485-6
(COA No. 56265-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINTON

STATE OF WASHINGTON,

Respondent,

v.

YOSHIO K. WHITE,

Petitioner.

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

PETITION FOR REVIEW

Yoshio K. White #633518
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A. IDENTITY OF PETITIONER AND DECISION BELOW

Yoshio White asks this Court to accept review of the Court of Appeal's ("COA") decision terminating review in State v White, No. 56265-1-II. The November 1, 2022, opinion is attached as Attachment A.

B. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate under RAP 13.4(b)(2) where the White decision conflicts with a published decision of another division of the Court of Appeals?

2. Is review appropriate under RAP 13.4(b)(1) where the White decision conflicts with a Washington Supreme Court decision?

C. STATEMENT OF THE CASE

In 2021, White moved the Pierce County Superior Court ("PCSC") to vacate the judgment and sentence ("J&S") because his original sentence was based on an incorrect offender score. CP 13-16. The score originally calculated included a conviction for possession of a controlled substance. However, under State v Blake, that conviction was void and could not contribute to White's offender score. 197 Wn.2d 170 (2021)(holding that Washington's strict liability drug possession statute was unconstitutional). At the new sentencing hearing, the original sentencing judge, was no longer on the bench, Judge P. Sorensen conducted the resentencing hearing procedure. White's offender score went from a six to a five, as a result, his standard range went from 312-416 to 291-388. Additionally, White was also given an 84-month exceptional sentence above the standard range. Upon imposing 388 months, the Judge then imposed a new exceptional sentence above the standard range of 82-months. RP 29-30. White requested a sentence of 388 months with no imposing of the exceptional sentence, which is the high-end at five points. RP 29.

' Blakely v Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004)(holding that juries must find the existence of aggravating sentencing factors used to support an exceptional sentence above the standard range).

At the resentencing hearing, White expressed to the court that Blakely' precludes the court from imposing the previously imposed exceptional without impaneling a jury to determine the aggravating factor, and invoked the application of RCW 9.94A.537(2). RP 9; RP 15. But at the new sentencing hearing, the court failed to address whether it actually had authority to impose not just a new exceptional sentence above the standard range, but also whether it did not need to imapnel a jury to do so. Judge Sorensen did not provide his own reasons after imposing a new exceptional sentence other than basing it on a "percentage-wise" presuming the original judge did the same thing. RP 29. But this basis is not supported by the record of Judge Hayes'.

D. ARGUMENT

1. The Court of Appeals opinion that RCW 9.94A.537(2) is not applicable to White under his facts conflicts with a published Division Three opinion that holds otherwise.

Under RAP 13.4, a party may seek review in the Supreme Court of a Court of Appeals (COAs) decision. Where the decision of the COAs is in conflict with another decision of the COAs, a basis exists for a petition for review by the Supreme Court. RAP 13.4(b)(2). The Supreme Court settles the law when the COAs decisions are in conflict. White demonstrates that there are inconsistent opinions of the COAs related to the intent of and application of RCW 9.94A.537(2).

A jury convicted White of 1° Murder in 1996, and upon that conviction, he was sentenced to the high-end of the standard range under an offender score of six points. After a judicial finding of aggravating circumstances, Judge Hayes, of the PCSC, imposed an exceptional sentence of 84 months, on top of the standard range for a total of 500 months. Attachment B (J&S Cause No. 95-1-01876-1).

On June 23, 2021, White moved the PCSC for Relief pursuant to Blake as

J&S contained a simple drug possession conviction that had been rendered unconstitutional under Blake. CP 13-16. That court granted the action and set the matter for a new sentence at a resentencing hearing on September 21, 2021 in front of Judge Sorensen. CP 100-103. At the resentencing hearing, White invoked the application of RCW 9.94A.537(2)(".537(2)"), "[defense] would like to point the Court's attention to RCW 9.94A.537(2)." RP 15. That court set aside the invocation and responded by stating "I believe I have the authority to **impose an** exceptional sentence" (emphasis added), and it further stated that the "[court] imposed an exceptional sentence that's **less than it was in 1995.**" (emphasis added), RP 30. This disturbance of the original exceptional sentence by the trial court is an error given that the judicial decision to impose a new exceptional sentence was without the judge's own justification for doing so, and was not in compliance with the Blakely rule or .537(2).

A court imposing a sentence outside of the standard range must "set forth the reasons for its decision." Former RCW 9.94A.120(3); RCW 9.94A.535. The findings supporting an exceptional sentence are not a mere formality. The findings must be sufficiently specific to allow appellate courts to "review the reasoning underlying discretionary sentencing determinations" to ensure trial courts do not abuse their discretion. Id. The findings and the judgment comprise part of the "final record" of criminal prosecution. RCW 10.64.100. Resentencing hearings are part of that criminal proceeding, and a disturbance of a previously imposed exceptional sentence would still require the court's reasons for that disturbance.

Furthermore, on resentencing, courts "must not" treat the proceeding "as a mere formality or useless act." State v McFarland, 18 Wn. App. 2d 528, 542 (2021). Instead, the hearing is a de novo resentencing. State v Brown, 193 Wn.2d 280, 284-86 (2019)(internal quotations omitted). In fact, "[t]he

exercise of sentencing discretion is an awesome power," as it not only involves far more than reciting some magical words or checking boxes on a form, but also because courts must appropriately apply that discretion at any and all sentencing hearings. Id. When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." State v McFarland, 189 Wn.2d 47, 56 (2017). The trial court here treated White's resentencing hearing proceeding more as "a mere formality or useless act" when it imposed a new exceptional sentence but did not comport with Blakely requirements or impanel a jury under .537(2). White was entitled at his resentencing hearing (of a new sentence) at which the court apply .537(2) to have a jury impaneled to determine the aggravating factor that the previous court relied on in imposing the previously imposed exceptional sentence at the new sentencing hearing. State v Mann, 146 Wn. App. 349, 356 (2008)(quoting THE LAW OF 2007, ch. 205 §2). This point is even more truer especially after the court had disturbed the original exceptional sentence.

Additionally, at a resentencing hearing, a J&S that imposes a new exceptional sentence by disturbing the original exceptional sentence is valid only where it is supported by proper findings by a jury, which can be determined by applying .537(2). State v Powell, 167 Wn.2d 672, 679-80 (2008). A trial court cannot disturb a previously imposed exceptional sentence (in any manner) without violating the Blakely rule. Here, the resentencing court touched the length of the original exceptional sentence where it should not have unless .537(2) was applied.

The trial court's error of failing to provide its own reasons of imposing a new exceptional sentence at the resentencing hearing does not square with its duty to do so under former RCW 9.94A.120(3) and RCW 9.94A.535. Basing its

decision "on the findings that have been upheld multiple times by the Court of Appeals" (of which was a judicial finding) is not a meaningful consideration of its sentencing discretion. And to the extent that the findings have been upheld multiple time by the COAs, the challenges to White's exceptional sentence in any previous action was never disturbed until Judge Sorensen disturbed it by judicially imposing a new exceptional sentence.

White appealed the matter to the COA challenging a Blakely error--which will be argued later in this Petition--and that he was entitled to the application of .537(2) based on the disturbance of the original exceptional sentence. The COA decided that neither challenge was applicable under White's facts. See Attachment A at 6-7. The COA's ruling upholds the trial court's disturbance of White's original exceptional sentence and allows a new exceptional sentence to be imposed without impaneling a jury (and without Judge Sorensen's own reasons for doing so) to determine the aggravating factor under .537(2). This opinion by the COAs of Division II conflicts with State v Mann, a Div. III COA's opinion on the intent of and application of .537(2). 146 Wn. App. 349 (Div. III, 2008).

White is entitled to the application of .537(2).

In White's case, the COA determined that .537(2) was not applicable. Attachment A at 7. However, the COA's analysis as to why .537(2) is not applicable lacks its own reasoning. Instead, the decision is based on a Division II ruling in State v Douglas, 173 Wn. App. 849 (Div. II, 2013). In the case--which is factually and procedurally distinguishable here--the court reads .537(2) as only applying to resentencing hearing cases of which resulted from a "Blakely-error" and did not apply to any other resentencing situation. Douglas at 855. This understanding of the application of .537(2) by Division II--in Douglas--is not consistent with legislature's enactment of .537(2).

Moreover, White's new sentencing hearing was a de novo resentencing hearing process that allowed consideration of sentencing issues. Brown, 193 Wn.2d at 284-86. Yet, in applying Douglas in this manner to White's case, not only does the COA misapprehend the intent of .537(2) created by the 2007 amendment to RCW 9.94A.537, but also its understanding of the type of cases the statute applies to is a complete misunderstanding. See THE LAWS OF 2007 ch. 205 §2. As such, Division II's approach regarding .537(2) conflicts with the intent and application of the statute as determined by a Division III decision. See State v Mann, 146 Wn. App. 349 (Div. III, 2008).

In Mann, the court's analysis focused on legislature's 2007 amendment. Mann at 359-61. Recognizing that legislature enacted a resentencing provision under .537(2), the court read the enacted provision as applying to all cases by its reasoning that .537(2) "effectly extends the original 'Blakely-fix to **all exceptional sentence cases.**" Mann at 360 (emphasis added). With this understanding, the Mann Court further read the statute as instructing that: "whenever a new sentencing proceeding is required in a case where an exceptional sentence had previously been imposed, 'the superior court may impanel a jury to consider any alleged aggravating factors listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing." Mann at 361(quoting LAWS OF 2007 ch. 205 §2). Here, White's case required a new sentencing hearing.

Division III's understanding of the application of .537(2) is the correct reading of the statute vs Divisions II's. The Douglas approach is untenable as every case where an exceptional sentence above the standard range was imposed is affected by the Blakely decision, even those pre-Blakely. But sinceBlakely has been ruled not retroactive[2], access to .537(2) based only on a Blakely

[2] State v Evans, 154 Wn.2d 438, 444 (2005).

error itself is not what legislature intended when it created the resentencing provision. The statute as Douglas reads and applies would only have it applied strictly to a Blakely error despite of the scope and intent of the amendment as determined in Mann. Id at 360-61 (explaining .537(2) will apply to all exceptional sentences cases in light of the "Blakely decision"; and that the statute "operates retroactively" at any new resentencing hearing; "regardless of the date of the original trial or sentencing.") (emphasis added). Meaning, a person receiving a new sentencing hearing, and the elements of .537(2) are existant in the case, i.e., (1) an exceptional sentence was imposed, and (2) a new sentencing hearing occurs, the statute is deemed to apply retroactively. Mann at 361.

To reiterate, the resentencing provision of .537(2) is an extension of the Blakely-fix, retroactively applicable to White's case at his new resentencing hearing of a new sentence.

To accept Douglas' reading of .537(2), this Court would be limiting the scope, intent, and authority of .537(2), as Douglas' reasoning renders much of the statute meaningless. It ignores the language "any case" and imposes a limitation to only those coming back on a Blakely error issue. Douglas at 855. It also ignores most if not all of the past tense language legislature used. The statute requires courts to interpret what legislature intended as "any case" and the past tense language. There is no definition provided in the statute. To resolve this issue, courts look to settled rules of statutory construction. Its primary goal is to determine legislative intent. Burns v City of Seattle, 161 Wn.2d 129, 140 (2007). If the meaning of the statute is plain, then that menaing is given effect. Id. "Plain meaning is discerned from viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the

statutory scheme as a whole." Id. Here, the Mann has recognized that RCW 9.94A.537 "is clear and unambiguous." Id at 359. And by that recognition, the court gave effect to legislative intent by the plain language used. Accordingly, White was entitled to have .537(2) applied in his case, to have a jury impaneled to determine the "alleged aggravating circumstances listed in RCW 9.94A.535(3) that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing." Mann at 361; LAWS OF 2007 ch. 205 §2.

2. The Court of Appeal's application of Rowland[3] to White's facts shows its decision conflicts with the ruling of Rowland itself.

Review will be granted under RAP 13.4 if White demonstrates that the COA's ruling in White's case conflicts with the ruling in Rowland, a Washington Supreme Court case. RAP 13.4(b)(1).

The Washington Supreme Court decided State v Rowland in 2012. At issue in the case was whether at a resentencing hearing, for a correction of a miscalculation of offender score, did the Blakely rule preclude the sentencing court from reimposing the original exceptional sentence. Id. The Court ruled that a trial court may reimpose the original exceptional sentence under certain circumstances, i.e., where the sentencing court either does not touch the factual findings supporting the exceptional sentence, or does not disturb the length of the original exceptional sentence in any manner. Id at 155-56. In other words, by negative implication, Blakely will apply at a resentencing hearing of this nature if the sentencing court touches either circumstances. Id. Here, the length of White's original exceptional sentence was disturbed by the resentencing court, as such Blakely applied.

[3] State v Rowland, 174 Wn.2d 150, 156 (2012)(holding that Blakely does not apply where the trial court does not touch the factual findings supporting the exceptional sentence nor change the length of the exceptional sentence).

The COA determined that "Rowland is dispositive" to White's facts, and in doing so, decided that Blakely did not apply. Attachment A at 6. The court based it's decision with the statement: "in Rowland, White's sentence became final before Blakely was decided, and his resentencing occurred after Blakely was decided." Attachment A at 6. The decision further added where "the resentencing court changed White's standard range ..., [it] did not reevaluate the exceptional sentence imposed beyond that range." Id.

The first conflict the COA has with Rowland is it's holding that Blakely does not apply at a resentencing hearing other than a Blakely-error- type resentencing hearing. It is the COA's position that Blakely does not apply at resentencing hearing such as White's as the conviction and sentence was "final before Blakely". Attachment A at 7. But Rowland recognizes otherwise. It's position is that Blakely will apply, at resentencing hearings that deal with the correction of an offender score, so long as the circumstances discussed above are not touched. Rowland at 155-56.

The second conflict the COA has with Rowland is the COA allows the original exceptional sentence to be disturbed so long as the factual findings supporting the aggravating circumstances was not reevaluated. But the circumstances discussed in Rowland on this point holds that neither circumstances can be disturbed. Meaning, if either is disturbed, then Blakely applies. Rowland at 155-56. In footnote 4 on page 6 of the COA's opinion, the COA notes that the sentencing court did change White's exceptional sentence, but that it did so on some idea that Judge Hayes--the original sentencing Judge--imposed the exceptional semtence on a 20% upward variance. However, this is pure speculation with no legal foundation. There is nothing in the record from Judge Hayes that indicates or expresses that he imposed the sentence he imposed under such considerations. But in any case, the fact

remains that the sentencing court did not reimpose the original exceptional sentence here like the court did in Rowland. This disturbance alone would warrant the application of Blakely under Rowland's ruling. How the COA applied Rowland to White's facts is not only a misapprehension of the case, but also its ruling conflicts with the ruling of Rowland.

Mr. Rowland's case is not dispositive, and the vital distinction between White's and Mr. Rowland's cases should not be treated as some type of orbiter dictum. The approach the COA takes regarding Rowland is too inconsistent. It would leave the application of Blakely subject to arbitrary application instead of a legal application.

E. CONCLUSION

White believes he has established that the resentencing court erred by judicially imposing a new exceptional sentence without impaneling a jury to determine the aggravating circumstances the previous court relied on pursuant to .537(2); and that the COA's ruling that .537(2) does not apply to White's case conflicts with Mann. Thus review is warranted under RAP 13.4(b)(2).

Additionally, White also believes that he has established that review is warranted under RAP 13.4(b)(1) as the COA's decision conflicts with Rowland in that Blakely applies because the resentencing court disturbed the original exceptional sentence without comporting to the Blakely rules.

For the reasons and arguments set out above and herein, White respectfully asks this Court to grant review, and to ultimately remand back to the sentencing court for further proceedings consistent with the application of Blakely and/or .537(2).

SUBMITTED this 4 day of January, 2023.

Yoshio White

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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 of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals - Division Two** under **Case No. 56265-1-II,** and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered by other court-approved means to the following:

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Olympia, WA 98504

DATED this 4 day of January, 2023, in Aberdeen, WA 98520.

Yoshio White
Yoshio White #633518

ATTACHMENT A
(COA's November 1, 2022 Opinion)

Filed
Washington State
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Division Two

November 1, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. YOSHIO KODOMA WHITE, Appellant.	No. 56265-1-II UNPUBLISHED OPINION

CRUSER, A.C.J. – Yoshio White was convicted of first degree murder in 1996, and was sentenced to 500 months confinement, based in part on a judicial finding of deliberate cruelty. White has been resentenced twice: first, on direct appeal, because the sentencing court relied on additional aggravating factors that were improper as a basis for his upward variance; and second, after having his offender score reduced pursuant to *Blake*.[1] White's first resentencing resulted in a 500-month sentence, and his second resentencing resulted in a 466-month sentence.

[1] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) (holding that Washington's strict liability drug possession statute was unconstitutional).

White now appeals from his second resentencing, arguing that the court impermissibly relied on a judicial finding of deliberate cruelty when it should have impaneled a jury pursuant to *Blakely*[2] and RCW 9.94A.537(2).

Because Washington law does not support a retroactive application of *Blakely* on these facts, and RCW 9.94A.537(2) does not apply to non-*Blakely* resentencings, we affirm the resentencing court.

FACTS

In 1996, a jury convicted Yoshio White of first degree murder. White's offender score was 6, and his standard sentencing range was 312-416 months. The trial court found three aggravating factors: deliberate cruelty, prior substantial criminal history showing a pattern of escalating violence, and manipulation of a witness. Its finding of deliberate cruelty was based on the fact that the victim was shot eight times, several of which "occurred after she had been shot and was lying on the ground and defenseless." Clerk's Papers at 141. The court sentenced White to 500 months, representing the sum of the high end of White's standard range plus an exceptional sentence of 84 months above the standard range.

White appealed his sentence, arguing that the trial court's finding of deliberate cruelty was not supported by the record and could not support the exceptional sentence, and that escalating violence and witness manipulation were not proper aggravating factors. *State v. White*, noted at 89 Wn. App. 1055, 1998 WL 109981, at *1-2. This court affirmed the trial court's finding of

[2] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (holding that defendants are entitled to a jury trial as to any aggravating factor used to support an exceptional sentence above the standard range).

deliberate cruelty but held that the other two aggravating factors were not proper aggravating factors. *Id.* at *2-3. This court therefore remanded White's case for resentencing. *Id.* at *3.

White's first resentencing hearing in 1999 resulted in a 500-month sentence based on the aggravating factor of deliberate cruelty. White appealed his resentencing to this court, arguing in relevant part that the evidence did not support an exceptional sentence. Comm'r's Ruling Affirming Sentence, *State v. White*, No. 24745-3-II, at 2 (Wash. Ct. App. Apr. 24, 2001). This court affirmed because the issue was raised and resolved in White's first appeal. *Id.* at 2-3. We reasoned that this court had, in White's first appeal, "specifically approved the factor of deliberate cruelty" and found "[t]hat factor, standing alone" to be sufficient to support White's exceptional sentence. *Id.* at 2. The supreme court denied review. *State v. White*, 145 Wn.2d 1013, 40 P.3d 1176 (2001). White's judgment and sentence became final on December 18, 2001, when this court issued the mandate disposing of his direct appeal.

White filed a personal restraint petition in 2005, arguing that *Blakely* entitled him to a jury determination as to any aggravating factors before he could receive an exceptional sentence. Ord. Dismissing Petition, *In re Pers. Restraint of White*, No. 32216-1-II, at 1 (Wash. Ct. App. Mar. 22, 2005). This court determined that *Blakely* did not apply retroactively to White's sentence, and therefore dismissed his petition. *Id.* at 3. In 2020, White filed another personal restraint petition, which we dismissed as time-barred. Ord. Dismissing Petition, *In re Pers. Restraint of White*, No. 54805-4-II (Wash. Ct. App. Dec. 1, 2020).

In 2021, White moved to correct his offender score and to be resentenced pursuant to *State v. Blake*. The superior court adjusted his offender score from 6 to 5 because his original score included a prior drug possession conviction made voidable under *Blake*. Correspondingly, his

standard range was reduced to 291-388 months. The State recommended a sentence of 472 months. The resentencing court imposed a 466-month sentence, the sum of the high end of White's new standard range plus an exceptional sentence of 78 months (reduced from 84 months) based on the prior sentencing court's finding of deliberate cruelty. The resentencing court reduced White's exceptional upward variance to match "where he would have been percentage-wise" as compared to his original sentence. Verbatim Report of Proceedings (VRP) at 29.[3]

White now appeals his amended sentence, arguing that the resentencing court impermissibly relied on the trial court's finding of deliberate cruelty and that *Blakely* entitled him to a jury trial on that issue.

ANALYSIS

I. Applicability of *Blakely* to White's Resentencing Hearing

White argues that the sentencing court impermissibly relied on the aggravating factor of deliberate cruelty found by the trial court at his original sentencing. He contends that he was entitled to a jury trial on the issue.

A. Legal Principles

In 2004, the United States Supreme Court decided *Blakely v. Washington*, holding that criminal defendants have a constitutional right to have a jury decide the facts that support any aggravating factor underlying an exceptional sentence above the standard range. 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The supreme court in 2005 held that *Blakely* does not

[3] "In my judgment, the 472 [month sentence requested by the State] is slightly higher than where he would have been percentage-wise based on what Judge Hayes did 25 years ago. I am imposing 466 months in the Department of Corrections, 388 plus 82 [sic] months." VRP at 29-30. Although the court erroneously stated that the exceptional sentence would be 82 months, the written order reflects a 78-month exceptional sentence.

apply retroactively to convictions and sentences that were final before it was issued. *State v. Evans*, 154 Wn.2d 438, 449, 114 P.3d 627 (2005).

Washington codified *Blakely*'s holding in the 2005 amendment to the Sentencing Reform Act (SRA), which provides that "[t]he facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt." Former RCW 9.94A.537(2) (2005). The supreme court shortly thereafter held that the 2005 amendment to the SRA, by its plain language, applied only to criminal matters pending trial when the statute took effect on April 15, 2005. *State v. Pillatos*, 159 Wn.2d 459, 465, 150 P.3d 1130 (2007).

In response to *Pillatos*, the legislature in 2007 again amended the SRA, intending to give the superior courts "the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing." LAWS OF 2007, ch. 205, § 1. In relevant part, the 2007 amendment provides that:

> In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2).

In 2012, the supreme court decided *State v. Rowland*. 174 Wn.2d 150, 272 P.3d 242 (2012). In *Rowland*, the court considered whether *Blakely* applied at the appellant's resentencing hearing, where the original sentence was final before *Blakely* but the resentencing occurred after *Blakely*. 174 Wn.2d at 154. At Rowland's original sentencing, the trial court imposed a high-end standard sentence of 361 months plus an exceptional upward variance of 180 months based on a finding of deliberate cruelty. *Id.* at 152. This sentence reflected an erroneous offender score of 3. *Id.* at 152-

53. Rowland challenged his offender score in a personal restraint petition, the state conceded error, and the court of appeals remanded the case for resentencing. *Id.* At Rowland's resentencing hearing, the court recalculated his sentence to reflect a corrected offender score of 2 and reimposed his original exceptional sentence. *Id.* at 153. The supreme court explained that the resentencing judge "did not reconsider the factual findings supporting the exceptional sentence, did not make any new findings regarding deliberate cruelty, and did not change the length of the exceptional sentence." *Id.* at 155. Thus, because "no *new* exceptional sentence was imposed," *Blakely* did not apply at Rowland's resentencing hearing. *Id.* (emphasis added).

B. ANALYSIS

Rowland is dispositive. Like in *Rowland,* White's sentence became final before *Blakely* was decided, and his resentencing occurred after *Blakely* was decided. Like in *Rowland,* the resentencing court changed White's standard range to correspond with his corrected offender score, but did not reevaluate[4] the exceptional sentence imposed beyond that range. And perhaps most importantly, like in *Rowland,* the resentencing court adopted the trial court's finding of deliberate cruelty without reconsidering the factual findings underlying the exceptional sentence.

White contends that *Rowland* is distinguishable because that case did not address RCW 9.94A.537(2). But as the State points out, RCW 9.94A.537(2) is not applicable to this case, just as

[4] Although the resentencing court here *did* reduce the exceptional upward variance from 84 to 78 months, it did *not* do so based on its impression of the facts—rather, it stayed true, "percentage-wise," to what the original sentencing court imposed and did not reconsider the facts. VRP at 29. The new sentence was equivalent to the old exceptional sentence in that both represented an upward variance of 20.1% of the duration of the high end of White's standard range. Because the resentencing court maintained the original court's reasoning and imposed an equivalent exceptional sentence, it did not *reevaluate* the exceptional sentence, even though it did reduce the number of months it imposed.

it was not applicable to *Rowland*, because it is a procedural statute that applies only when *Blakely* requires a jury trial.

The State is correct that RCW 9.94A.537(2) does not apply to White's resentencing. First, this court has reasoned that "RCW 9.94A.537(2) applies only to resentencing hearings required because of a *Blakely* error." *State v. Douglas*, 173 Wn. App. 849, 855, 295 P.3d 812 (2013) (footnote omitted). It follows that RCW 9.94A.537(2) does not apply here because White was not resentenced due to a *Blakely* error, but due to his revised offender score after *Blake*. The statute therefore cannot be the distinguishing factor between White's case and *Rowland*, because it applies to neither case. *See Rowland*, 174 Wn.2d at 156. And under *Rowland*, *Blakely* could not have applied at White's resentencing because White's conviction and sentence were final before *Blakely* was decided and the resentencing court did not reconsider the underlying facts. *See Id.* at 155.

Therefore, we affirm White's 466-month sentence.

II. Statement of Additional Grounds

In his Statement of Additional Grounds (SAG),[5] White argues that (1) the prosecutor abused his power by asking the resentencing court to impose a 472-month sentence; (2) the resentencing court abused its power by imposing a 466-month sentence; (3) his attorney correctly advised the resentencing court that he was entitled to a jury on the aggravating factor; (4) *Blakely* entitles him to a sentence within the standard range; and (5) he is entitled to request that his legal financial obligation be waived or reduced.

First, White claims the prosecutor committed misconduct by seeking a 472-month sentence. To prevail on a prosecutorial misconduct claim, the defendant bears the "significant

---

[5] *See* RAP 10.10.

burden" of showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record. *See State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). The record does not reflect that the prosecutor's conduct was improper in proposing a 472-month sentence.

White next claims that his 466-month sentence was an abuse of judicial power. Judicial misconduct claims typically require showing that the judge was biased, or at a minimum, violated the appearance of fairness. *See, e.g.*, *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017); *In re Dependency of A.E.T.H.*, 9 Wn. App. 2d 502, 517, 446 P.3d 667 (2019). Because we presume that "a trial judge properly discharged [their] official duties without bias or prejudice," a court's "[j]udicial rulings alone almost never constitute a valid showing of bias." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). White's judicial misconduct claim does not merit reversal because he complains only that the sentence he received was too long.

White then repeats in his SAG that he was entitled to a jury on the aggravating factor and that *Blakely* entitles him to a sentence within the standard range. Errors that "have been thoroughly addressed by counsel" are "not proper matters for [the] statement of additional grounds under RAP 10.10(a)." *State v. Thompson*, 169 Wn. App. 436, 493, 290 P.3d 996 (2012). Because these arguments have been thoroughly addressed by White's attorney's briefing, we need not reach them in the context of White's SAG.

Finally, White argues that he was entitled to a hearing as to whether his legal financial obligation (LFO) should be waived or reduced due to his inability to pay. He cites RCW 10.82.090(2)(a) for his contention that the court has the authority to reduce his LFO by waiving the interest that accrued prior to June 7, 2018. RCW 10.82.090(2)(a) provides that "[t]he court may, on motion by the offender, *following the offender's release from total confinement*, reduce or

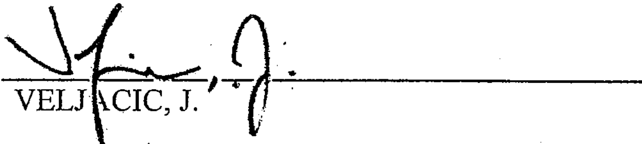
waive the interest on legal financial obligations levied as a result of a criminal conviction" including "all interest on the portions of the legal financial obligations that are not restitution that accrued prior to June 7, 2018." (emphasis added). Here, White has not been released from confinement so his LFO should not be reduced at this time.

Therefore, none of the arguments in White's SAG merit reversal.

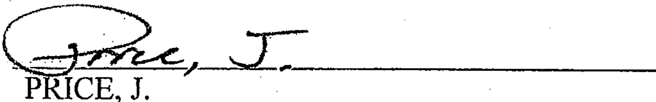
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, A.C.J.

We concur:



VELJACIC, J.



PRICE, J.

ATTACHMENT B
(J&S Case No. 95-1-01876-1)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs.	CAUSE NO. 95-1-01876-1 JUDGMENT AND SENTENCE (FELONY)
YOSHIO KODOMA WHITE, Defendant. DOB: 6/7/62 SID NO.: WA11713878 LOCAL ID:	

I. HEARING

1.1 A sentencing hearing in this case was held on 4/16/96.

1.2 The defendant, the defendant's lawyer, GARY CLOWER, and the deputy prosecuting attorneys, KAWYNE LUND and LISA WAGNER, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSES(S): The defendant was found guilty on 2/14/96 by

[] plea [X] jury-verdict [ ] bench trial of:

Count No.: 1
Crime: MURDER IN THE FIRST DEGREE, Charge Code: (D1)
RCW: 9A.32.030(1)(a)
Date of Crime: 4/13/95
Incident No.: 95 103 0234

[ ] Additional current offenses are attached in Appendix 2.1.
[ ] A special verdict/finding for use of deadly weapon was returned on Count(s).
[ ] A special verdict/finding of sexual motivation was returned on Count(s).
[ ] A special verdict/finding of a RCW 69.50.401(a) violation in a school bus, public transit vehicle, public park, public transit

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shelter or within 1000 feet of a school bus route stop or the perimeter of a school grounds (RCW 69.50.435).

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Date of Crime	Crime Type
Att Burg 2	9/8/80	Adult	2/10/83	NV
Burg 2	3/30/83	Adult	2/10/83	NV
Burg 2	2/2/88	Adult	3/5/87	NV
UPCS	8/14/89	Adult	7/28/89	NV
Burg 2	9/30/91	Adult	3/20/91	NV
Burg 2	9/30/91	Adult	11/15/90	NV

[ ] Additional criminal history is attached in Appendix 2.2.

[ ] Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(11)):

2.3 SENTENCING DATA:

	Offender Score	Seriousness Level	Range Months	Maximum Years
Count No. I:	6	XIV	312-416	Life

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE:

[X] Substantial and compelling reasons exist which justify a sentence [X] above [ ] below the standard range for Count(s) I. Findings of fact and conclusions of law are attached in Appendix 2.4. The

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Prosecuting Attorney [ ] did [X] did not recommend a similar sentence. (to be filed)

2.5 RECOMMENDED AGREEMENTS:

[x] For violent offenses, serious violent offenses, most serious offenses, or any felony with a deadly weapon special verdict under RCW 9.94A.125; any felony with any deadly weapon enhancements under RCW 9.94A.310(3) or (4) or both; and/or felony crimes of possession of a machine gun, possessing a stolen firearm, reckless endangerment in the first degree, theft of a firearm, unlawful possession of a firearm in the first or second degree, and/or use of a machine gun, the recommended sentencing agreements or plea agreements are [ ] attached [x] as follows:

~~388~~ 416 months, 24 months community placement, $110 court costs $100 cvpa, restitution $7,015.05

2.6 RESTITUTION:

[ ] Restitution will not be ordered because the felony did not result in injury to any person or damage to or loss of property.
[X] Restitution should be ordered. A hearing is set for ______________.
[/] Extraordinary circumstances exist that make restitution inappropriate. The extraordinary circumstances are set forth in Appendix 2.5.

2.7 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS: The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability to pay:

[ ] no legal financial obligations.
[X] the following legal financial obligations:

[X] crime victim's compensation fees.
[X] court costs (filing fee, jury demand fee, witness costs, sheriff services fees, etc.)
[ ] county or interlocal drug funds.
[ ] court appointed attorney's fees and cost of defense.
[ ] fines.
[ ] other financial obligations assessed as a result of the felony conviction.

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A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

THE FINANCIAL OBLIGATIONS IMPOSED IN THIS JUDGMENT SHALL BEAR INTEREST FROM THE DATE OF THE JUDGMENT UNTIL PAYMENT IN FULL, AT THE RATE APPLICABLE TO CIVIL JUDGMENTS. RCW 10.82.090. AN AWARD OF COSTS ON APPEAL AGAINST THE DEFENDANT MAY BE ADDED TO THE TOTAL LEGAL FINANCIAL OBLIGATIONS. RCW 10.73.

2.8 SPECIAL FINDINGS PURSUANT TO RCW 9.94A.120:

[ ] The defendant is a first time offender (RCW 9.94A.030(20)) who shall be sentenced under the waiver of the presumptive sentence range pursuant to RCW 9.94A.120(5).

[ ] The defendant is a sex offender who is eligible for the special sentencing alternative under RCW 9.94A.120(7)(a). The court has determined, pursuant to RCW 9.94A.120(7)(a)(ii), that the special sex offender sentencing alternative is appropriate.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The court DISMISSES.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

$ 7,015.42, Restitution to:

1) Richard Rutledge - $1,835.42

2) Crime Victim Comp - 5,177.00

P.O Box 44520

Olympia WA 98504

Re: VN04654, Rutledge

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$__________, Court costs (filing fee, jury demand fee, witness costs, sheriff service fees, etc.);

$ 100, Victim assessment;

$ 1100, Fine; [ ] VUCSA additional fine waived due to indigency (RCW 69.50.430);

$ 150, Fees for court appointed attorney;

$__________, Washington State Patrol Crime Lab costs;

$__________, Drug enforcement fund of __________;

$__________, Other costs for: __________;

$ 7,375.42, TOTAL legal financial obligations [X] including restitution [ ] not including restitution.

Payments shall not be less than $______ per month. Payments shall commence on __________.

[ ] Restitution ordered above shall be paid jointly and severally with:

Name	Cause Number

The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement to assure payment of the above monetary obligations.

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

Defendant must contact the Department of Corrections at 755 Tacoma Avenue South, Tacoma upon release or by ______________.

[ ] Bond is hereby exonerated.

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4.2 CONFINEMENT OVER ONE YEAR: The court imposes the following sentence:

(a) CONFINEMENT: Defendant is sentenced to following term of total confinement in the custody of the Department of Corrections commencing Immediately.

500 months on Count No. 1 [ ] concurrent [ ] consecutive
____ months on Count No. ____ [ ] concurrent [ ] consecutive
____ months on Count No. ____ [ ] concurrent [ ] consecutive

[X] Actual number of ~~days~~ months of total confinement ordered is: 500

[ ] This sentence shall be [ ] concurrent [ ] consecutive with the sentence in ____;

[X] Credit is given for 364 days served;

(b) [X] COMMUNITY PLACEMENT (RCW 9.94A.120(9)(b)). The defendant is sentenced to community placement for [ ] one year [X] two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer. The offender shall comply with the following terms of community placement:

WHILE ON COMMUNITY PLACEMENT OR COMMUNITY CUSTODY, THE DEFENDANT SHALL: 1) REPORT TO AND BE AVAILABLE FOR CONTACT WITH THE ASSIGNED COMMUNITY CORRECTIONS OFFICER AS DIRECTED; 2) WORK AT DEPARTMENT OF CORRECTIONS-APPROVED EDUCATION, EMPLOYMENT AND/OR COMMUNITY SERVICE; 3) NOT CONSUME CONTROLLED SUBSTANCES EXCEPT PURSUANT TO LAWFULLY ISSUED PRESCRIPTIONS; 4) NOT UNLAWFULLY POSSESS CONTROLLED SUBSTANCES WHILE IN COMMUNITY CUSTODY; 5) PAY SUPERVISION FEES AS DETERMINED BY THE DEPARTMENT OF CORRECTIONS; 6) RESIDENCE LOCATION AND LIVING ARRANGEMENTS ARE SUBJECT TO THE APPROVAL OF THE DEPARTMENT OF CORRECTIONS DURING THE PERIOD OF COMMUNITY PLACEMENT; 7) DO NOT OWN, USE OR POSSESS FIREARMS OR AMMUNITION.

(a) [ ] The offender shall not consume any alcohol;

(b) [ ] The offender shall have no contact with: ____

(c) [ ] The offender shall remain [ ] within or [ ] outside of a specified geographical boundary, to-wit: ____

(d) [ ] The offender shall participate in the following crime related treatment or counseling services: ____

(e) [ ] The defendant shall comply with the following crime-related prohibitions: ____

If D is successful in appealing the exceptional sentence the court will impose the high end of the range (416 months)

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(f) [ ] OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS:

(g) [ ] HIV TESTING. The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. (RCW 70.24.340)

(h) [X] DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The Department of Corrections shall be responsible for obtaining the sample prior to the defendant's release from confinement. (RCW 43.43.754)

[ ] PURSUANT TO 1993 LAWS OF WASHINGTON, CHAPTER 419, IF THIS OFFENDER IS FOUND TO BE A CRIMINAL ALIEN ELIGIBLE FOR RELEASE AND DEPORTATION BY THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SUBJECT TO ARREST AND REINCARCERATION IN ACCORDANCE WITH THIS LAW, THEN THE UNDERSIGNED JUDGE AND PROSECUTOR CONSENT TO SUCH RELEASE AND DEPORTATION PRIOR TO THE EXPIRATION OF THE SENTENCE.

EACH VIOLATION OF THIS JUDGMENT AND SENTENCE IS PUNISHABLE BY UP TO 60 DAYS OF CONFINEMENT. (RCW 9.94A.200(2)).

ANY DEFENDANT CONVICTED OF A SEX OFFENSE MUST REGISTER WITH THE COUNTY SHERIFF FOR THE COUNTY OF THE DEFENDANT'S RESIDENCE WITHIN 24 HOURS OF DEFENDANT'S RELEASE FROM CUSTODY. RCW 9A.44.130.

PURSUANT TO RCW 10.73.090 AND 10.73.100, THE DEFENDANT'S RIGHT TO FILE ANY KIND OF POST SENTENCE CHALLENGE TO THE CONVICTION OR THE SENTENCE MAY BE LIMITED TO ONE YEAR.

Date: 4.16.96

JUDGE

Presented by:

Deputy Prosecuting Attorney
WSB # 11716

Approved as to form:

Lawyer for Defendant
WSB # 13220

lkw

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APPENDIX F Cause No. 95-1-01876-1

The defendant having been sentenced to the Department of Corrections for a:

- ______ sex offense
- __X__ serious violent offense
- ______ assault in the second degree
- ______ any crime where the defendant or an accomplice was armed with a deadly weapon
- ______ any felony under 69.50 and 69.52 committed after July 1, 1988

is also sentenced to one (1) year term of community placement on these conditions:

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The Court may also order any of the following special conditions:

______ (I) The offender shall remain within, or outside of, a specified geographical boundary: ______________________

____

____

______ (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals:

____

____

______ (III) The offender shall participate in crime-related treatment or counseling services;

______ (IV) The offender shall not consume alcohol;

______ (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

______ (VI) The offender shall comply with any crime-related prohibitions.

______ (VII) Other: ______________________

____

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FINGERPRINTS

Right Hand
Fingerprint(s) of: YOSHIO KODOMA WHITE, Cause #95-1-01876-1

Attested by: ______________________________ CLERK

By: DEPUTY CLERK [signature] Date: 6-16-96

CERTIFICATE

I, ______________________
Clerk of this Court, certify that the above is a true copy of the Judgment and Sentence in this action on record in my office.

Dated: ______________________

____
CLERK

By: ______________________
DEPUTY CLERK

OFFENDER IDENTIFICATION

State I.D. #WA11713878

Date of Birth 6/7/62

Sex Male

Race Asian

ORI ______________

OCA ______________

OIN ______________

DOA ______________

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