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Supreme Court No. 102002-3
Court of Appeals No. 56461-1-II

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY MICHAEL KELLY,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Timothy Kelly, the petitioner, asks this Court to grant review of Court of Appeals' published decision terminating review, issued on March 21, 2023. Mr. Kelly's motion to reconsider was denied on April 24, 2023.[1]

In the published decision, the Court of Appeals *reversed* the trial court's decision to resentence Mr. Kelly and reduce his draconian sentence of over 32 years' imprisonment (originally based on a pyramiding of firearm related offenses stemming from burglaries where firearms were stolen) by five years.

The Court of Appeals did so on the theory that the method reducing the sentence was illegal. It did so even though the State did not object in the trial court and contributed to any error by preparing the order reducing Mr. Kelly's sentence. And notwithstanding that there were legal ways to achieve the same

[1] These rulings are attached in the appendix.

reduction and clear evidence that the trial court wanted to reduce Mr. Kelly's sentence, the Court of Appeals refused to remand the case back to the trial court.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Whether the invited error doctrine barred the State's challenge on appeal to the reduction of Mr. Kelly's sentence where the State did not argue resentencing or reduction was illegal and the State prepared the order reducing Mr. Kelly's sentence.

2. If invited error does not bar the State's challenge, should this Court overrule its decision in State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999), which incorrectly and harmfully holds that sentencing courts lack discretion to impose an exceptional sentence with regard to firearm enhancements?

3. Even if the manner by which the trial court reduced Mr. Kelly's sentence was illegal under Brown, is the proper remedy remand for a new sentencing hearing? This requires

answering whether (1) the facial invalidity exception or (2) the significant change in law exception to the one-year time bar to collateral attacks applies where the challenged sentence was based in part on prior drug possession convictions—now unconstitutional and void—and the original sentence concerned an exceptional downward sentence?

C. STATEMENT OF THE CASE

Mr. Kelly refers this Court to his statement of the case set out in his Brief of Respondent/Cross-Appellant.

To summarize, in 2006, based on convictions arising out of several burglaries, Mr. Kelly received lengthy criminal sentences in two separate cases. The first case resulted in a sentence of about 10 years, while the second case resulted in a sentence of about 32 years. Because the second case was sentenced on a different day, the two sentences were ordered to run consecutively. The three-decade sentence in the second case was based on consecutive sentences for two firearm enhancements, convictions for theft of firearms, and

convictions for unlawful possession of firearms. Despite its length, this sentence was actually an exceptional sentence downward because the trial court found that running all of the convictions for theft of a firearm consecutively would be excessive. The firearm enhancements and convictions for unlawful possession of a firearm were based on firearms stolen from the homes. Although Mr. Kelly violated the sanctity of these homes and stole property, his acts were non-violent.

In 2021, based on this Court's decision in State v. Blake,[2] which declared the drug possession statute unconstitutional, Mr. Kelly received some hope for relief. Mr. Kelly's sentence in the two cases had been based in part on convictions for drug possession, now void under Blake.

At a hearing to address the impact of Blake, the trial court recognizing Mr. Kelly's sentence was unjust and disproportionate. Based on the finding by the previous

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[2] 197 Wn.2d 170, 481 P.3d 521 (2021).

sentencing court in support of an exceptional sentence, the court ordered the two firearm enhancements to run concurrently rather than consecutively. This reduced Mr. Kelly's sentence by five years.

The prosecutor did not object or argue that the trial court lacked this legal authority. Rather, the prosecutor prepared and presented an order for the court to sign carrying out the court's ruling.

In Mr. Kelly's other case, the trial court refused to resentence him on the grounds that he had served the decade-long sentence.

Dissatisfied that Mr. Kelly's over four-decades long sentence had been reduced by five years, the prosecution filed a notice of appeal arguing for the first time that the reduction of Mr. Kelly's sentence was unlawful.

In the State's appeal, the State argued the trial court lacked discretion under this Court's decision in State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999) to reduce Mr. Kelly's

sentence by running the two five-year sentences on the firearm enhancements concurrently rather than consecutively. The State did not argue in its opening brief that resentencing Mr. Kelly was untimely and barred under RCW 10.73.090(1) and that no exception to this statute of limitations applied.

In connection to Mr. Kelly's appeal of his other case where the trial court refused to resentence Mr. Kelly, Mr. Kelly filed a cross-appeal in this case, arguing that concurrent sentences in the two cases was required and that the trial court erred in not reexamining the imposition of legal financial obligations under current law.

In a published opinion, the Court of Appeals held that the invited error doctrine did not bar the State's challenge on appeal. State v. Kelly, __ Wn. App. 2d __, 526 P.3d 39, 41-43 (2023). The appellate court agreed with the State that the trial court lacked authority to run the two five-year sentences on the firearm enhancements concurrently as part of an exceptional sentence under this Court's decision in Brown. Id. at 43-45. The

court rejected Mr. Kelly's request for remand to give the trial court an opportunity to reduce his sentence through a lawful method. The court did so based on the theory that resentencing was time barred by statue and that the facial invalidity exception was inapplicable. Id. at 45-46.

D. ARGUMENT

1. The Court should grant review to decide whether the invited error doctrine bars a State's claim on appeal of a sentencing error when the State contributed and assented to the claimed error by preparing the written order that created the error.

Under the invited error doctrine, a "party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal." Ames v. Ames, 184 Wn. App. 826, 849, 340 P.3d 232 (2014). A party invites an error by affirmatively assenting to it, materially contributing to it, or benefiting from it. State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321 (2009). For example, "a party may not request an instruction and later complain on appeal that the requested instruction was given." Id.

Here, although the prosecution requested a different sentence, it failed to object when the trial court stated it was ordering the firearm enhancements to run concurrently. Rather than object, the prosecution contributed to any error by preparing and presenting an order for the trial court to sign with the purported error. CP 106-11; RP 28-29.

The Court of Appeals' held the invited error doctrine did not apply based its decision in State v. Mercado, 181 Wn. App. 624, 631, 326 P.3d 154 (2014). There, the court recognized the invited error doctrine does not apply to *defendants* who receive a sentence *in excess* of that allowed by the law. Mercado, 181 Wn. App. 631. But here, the challenge was by the State and the challenged sentence was not in excess of that allowed by the law. In the words of this Court, it was not an agreement "to punishment in excess of that which the Legislature has established." In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). Consequently, the Court of

Appeals erred by applying the limited sentencing error exception to the invited error doctrine.

This is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). Sentencings are regular and frequent. The State should not be able to complain about a sentencing error for the first time on appeal when its assents and materially contributes to the error by preparing the order that puts in place the very error that the State challenges. The rationale for the exception regarding illegal and excessive sentences does not apply in these circumstances. The extension of the exception creates an incentive for the State to remain silent so it can appeal and create precedent. It also incentivizes shoddy work at sentencing because any error unfavorable to the State can be argued on appeal. Review should be granted.

2. **The Court should grant review to overrule its 5-4 decision in *Brown* holding that sentences on firearm enhancements may not be modified through an exceptional sentence. As recognized by two justices of this Court, *Brown* is a "travesty."**

The basis for the Court of Appeals' undoing of the reduction in Mr. Kelly's sentence was this Court's decision in State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999). There, in a narrow 5 to 4 decision, the Court stated that sentencing courts do not have the discretion to depart from mandatory firearm sentencing rules. 139 Wn.2d at 29. The basis for this was the following statutory language:

> Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

RCW 9.94A.533(3)(e).

Brown is dubious. Despite the statutory language, the statute does not say the length of time imposed for a firearm enhancement cannot be modified under the exceptional

sentence provisions of RCW 9.94A.535. This makes it different from the restrictive language used by the Legislature in RCW 9.94A.540(1), which instructs that mandatory minimum terms for certain offenses “shall not be varied or modified under RCW 9.94A.535.” RCW 9.94A.540(1). Thus, that similar language is not included in the firearm enhancement provisions indicates the length of enhancements can be modified under the exceptional sentence provisions. See State v. Conover, 183 Wn.2d 706, 713, 355 P.3d 1093 (2015) (“the legislature’s choice of different language indicates a different legislative intent”). This creates ambiguity on whether concurrent sentences are permitted. State v. McFarland, 189 Wn.2d 47, 54, 399 P.3d 1106 (2017). Even if there are other reasonable interpretations, the rule of lenity requires the reasonable interpretation that is most favorable to the defendant be applied, meaning that concurrent sentences are allowed. Conover, 183 Wn.2d at 711-12; see McFarland, 189 Wn.2d at 55.

Justice Madsen's concurring opinion in Houston-Sconiers, joined by Justice Johnson, supports this analysis. There, two youths robbed others of candy on Halloween while armed with a firearm and were sentenced to decades of imprisonment due to "mandatory" firearm sentence enhancements. State v. Houston-Sconiers, 188 Wn.2d 1, 12-13, 391 P.3d 409 (2017). This Court reversed and overruled Brown as it relates to juvenile sentences. Id. at 21 & n.5. The Court reasoned that in light of Eighth Amendment jurisprudence, the statutes must be read to allow trial courts discretion to impose mitigated downward sentences for juveniles. Id. at 21, 24-26.

Justice Madsen agreed this was the right result, but reasoned this was because "the discretion vested in sentencing courts under the Sentencing Reform Act of 1981 (SRA) includes the discretion to depart from the otherwise mandatory sentencing enhancements when the court is imposing an exceptional sentence." Id. at 34 (Madsen, J., concurring). Her analysis would apply to adult defendants.

As explained by Justice Madsen, because the Legislature did not specifically forbid exceptional sentences downward for firearm enhancements, but forbade exceptional sentences in other circumstances, exceptional sentences for firearm enhancements are proper:

> Although the SRA explicitly gives sentencing courts the discretion to impose exceptional sentences, it also sets forth certain crimes with mandatory minimum sentences from which sentencing courts have no discretion to depart. RCW 9.94A.540. The legislature explicitly stated that such mandatory minimums "shall not be varied or modified under RCW 9.94A.535," the exceptional sentence provision. RCW 9.94A.540(1). The enumerated crimes for which courts do not have the power to impose exceptional sentences do not include any of the crimes or enhancements at issue in this case. *See* RCW 9.94A.540. And where a statute specifies the things on which it operates, we infer the legislature intended all omissions. *Queets Band of Indians v. State*, 102 Wn.2d 1, 5, 682 P.2d 909 (1984). Therefore, RCW 9.94A.540 did not apply in this case to deprive the sentencing court of its ability to consider an exceptional sentence.

Id. at 36. The language of RCW 9.94A.533 also does not mandate a contrary result because it "does not exclude the

enhanced sentences from modification under the exceptional sentence provision." Id. at 37.

In sum, it is improper to read additional prohibitions into RCW 9.94A.533(3)(e). The Legislature was silent as to whether the length of firearm enhancements could be modified as part of an exceptional sentence. RCW 9.94A.533(3)(e). As RCW 9.94A.540(1) shows, the Legislature knows how to prohibit this, but did not. Accordingly, RCW 9.94A.533(3)(e) should not be read to deprive sentencing courts of their discretion to impose exceptional sentences when there are firearm enhancements.

"Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values." McFarland, 189 Wn.2d at 57. But mandatory consecutive sentences for firearm enhancements has "robbed judges of the discretion that the legislature, through the SRA, expressly gives them in order to fulfill the purposes of the act." Houston-Sconiers, 188 Wn.2d at 39 (Madsen, J.,

concurring). This creates firearm sentences that "may be as long as or even vastly exceed the portion imposed for the substantive crimes." Id. at 25. This is a "travesty." Id. at 40 (Madsen, J., concurring).

This Court "will overrule prior precedent when there has been a clear showing that an established rule is incorrect and harmful or when the legal underpinnings of our precedent have changed or disappeared altogether." State v. Pierce, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) (cleaned up). Brown should be overruled because it is wrong and demonstrable harmful, as this case and others prove.

Besides being wrong for the reasons outlined by Justice Madsen, Brown failed to consider the constitutional-doubt canon of construction. Statutes must be interpreted to avoid constitutional doubts or problems. Gomez v. United States, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); Utter v. Bldg. Indus. Ass'n of Washington, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); Houston-Sconiers, 188 Wn.2d at 24; Antonin

Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 247-51 (2012) ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt").

Unless the firearm enhancements provisions are subject to modification through an exceptional sentence, unconstitutional cruel punishment is the sure result. The state and federal constitutions forbid cruel punishment. U.S. Const. amend. VIII; Const. art. I, § 14. Washington's constitutional provision has frequently been independently interpreted to provide greater protection than its federal analog. In re Pers. Restraint of Monschke, 197 Wn.2d 305, 311-13 & n.6, 482 P.3d 276 (2021); State v. Gregory, 192 Wn.2d 1, 15, 427 P.3d 621 (2018).

Lengthy consecutive sentences for firearm enhancements create disproportionate and draconian sentences. Without the escape valve of an exceptional sentence, people will receive sentences that are unconstitutionally cruel. Absent express language stating that firearm enhancements are not subject to

modification or departure through an exceptional sentence, firearm enhancements remain subject to such modification or departure. This interpretation avoids a substantial constitutional question. Thus, it is the interpretation that must be adopted. See Blake, 197 Wn.2d at 215-16 (Stephens, J., concurring) (statute should be read in a manner to avoid constitutional issue); State v. Jenks, 197 Wn.2d 708, 733, 487 P.3d 482 (2021) (Madsen, J., dissenting) (to avoid offending constitutional prohibition against cruel punishment, statute at issue should be construed to apply retroactively).

This is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). As a report from the Department of Corrections recognizes, people of color "are more likely to receive weapon enhancements than White individuals convicted for the same types of crimes" and "Black individuals received 1.5 times more enhancements, on average,

than White individuals."[3] "Concurrent versus consecutive weapons enhancements could impact sentence length disparity in the current prison population given the overrepresentation of the Black, Hispanic, and Asian and Pacific Islander populations among those with two or more weapon enhancements."[4] Permitting exceptional sentences for firearm enhancements would go a long way to helping remedy the problem of systemic racial injustice that this Court committed itself to ending in its June 4, 2020 letter. Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. (June 4, 2020).[5] Review should be granted.

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[3] *Sentence Enhancements and Race*, Karl Jones, PhD, MSW, Kevin Keogh, MA, and Connor Saxe, Department of Corrections (Mar. 1, 2022). Attached in appendix. Available at, https://doc.wa.gov/docs/publications/reports/300-RE008.pdf

[4] Id.

[5] https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf

3. The Court should grant review to decide whether either the facial invalidity exception or the substantial change in law exception to the one-year time bar on collateral attacks applies and permits resentencing in cases where a now unconstitutional and void conviction was used in the previous sentencing.

The record plainly shows that the trial court wanted to reduce Mr. Kelly's sentence. RP 23-25. Besides running the two five-year sentence on the firearm enhancements concurrently, the trial court could have achieved a five-year reduction or similar reduction by other lawful means. For example, through the exceptional sentence provision, the court could have reduced the consecutive sentences on the two convictions for unlawful possession of a firearm from 95 to 65 months each. See State v. McFarland, 189 Wn.2d 47, 52-55, 399 P.3d 1106 (2017); State v. McFarland, 18 Wn. App. 2d 528, 540-41, 492 P.3d 829 (2021). Other legal methods of reducing the total sentence can be envisioned.

Nonetheless, the Court of Appeals refused Mr. Kelly's request to remand for a new hearing to address these

possibilities. Cf. McFarland, 189 Wn.2d at 58-59 (remand for resentencing warranted where record suggested trial court would exercise discretion to impose reduced sentence). The court did so on the grounds that resentencing would constitute an untimely collateral attack that was time barred under RCW 10.73.090(1).

The Court of Appeals reasoned that the facial invalidity exception under RCW 10.73.090(1) did not apply because although the now void prior drug possession convictions were counted in the offender score, Mr. Kelly's standard sentencing ranges had not changed. Kelly, 526 P.3d at 45-46. The court relied on this Court published order in In re Pers. Restraint of Richardson, 200 Wn.2d 845, 525 P.3d 939 (2022).

But neither Richardson nor the authority cited in Richardson involved a sentence where the trial court had imposed an exceptional sentence downward. Here, the original sentencing court imposed an exceptional sentence downward because "[t]he operation of the multiple offense policy of RCW

9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of [the Sentencing Reform Act].” RCW 9.94A.535(1)(g). When a trial court applies RCW 9.94A.535(1)(g), it must have an accurate understanding of the prior offenses. Here, the elimination of the prior drug possession convictions provided greater support for a greater exceptional sentence downward, as the trial court found.

Richardson was decided by five justices through an order and without the typical merits briefing and argument that usually precedes a significant decision. Mr. Kelly respectfully submits that Richardson is wrong and that the issue should be decided by all nine members of this Court through the more typical process.

Moreover, the significant change in law exception to the time bar applies. RCW 10.73.100(6). Contrary to the Court of Appeals’ representation, it is not true that Mr. Kelly did “not claim any of the RCW 10.73.100 exceptions apply here.” Kelly, 526 P.3d at 45. In his answer to the prosecution’s second

statement of additional authorities, filed on January 25, 2023, Mr. Kelly argued that the significant change in the law exception under RCW 10.73.100(6) applied. Answer at 2-3.

Under this exception, the time limit does not apply where:

> There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100(6) (emphases added)

Under RCW 10.73.100(6), the motion for resentencing was not barred because Blake is a significant change in the law that is retroactive and material to Mr. Kelly's sentence.

Blake, which declared the drug possession statute unconstitutional, is undoubtedly a significant change in the law.

See In re Pers. Restraint of Ali, 196 Wn.2d 220, 233-234, 474 P.3d 507 (2020). As a consequence of this decision, prior simple possession convictions are unconstitutional and cannot be used in the offender score calculation.

The change in the law is material to Mr. Kelly's sentence, as the trial court impliedly found in deciding the change justified *a reduction* in Mr. Kelly's of *five years*. See id. at 234-236. Although Mr. Kelly's offender score remained above a 9, Mr. Kelly had received an exceptional sentence down before and the resentencing court believed the change in the law warranted *further* reduction. That the standard range did not change on the offenses does not matter because the issue was whether *the exceptional sentence* downward should change.

As for retroactivity, it is retroactive because Blake is a new substantive rule of constitutional law. See id. at 237. This is because the decision held that it was beyond the State's

power to enact a strict liability drug possessions statute that contained no *mens rea*.

Review should be granted on this issue because is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). Fortunately, many people have been able to obtain relief because of Blake. But there are many people whose offender score will remain at a 9 or greater despite the elimination prior drug possession convictions in the scoring. These people should get relief if a sentencing court believes it is warranted. This is consistent with Blake, which recognized the unconstitutional drug possession statute "affected thousands upon thousands of lives, and its impact has hit young men of color especially hard." 197 Wn.2d at 192. Resentencings are needed to address the problem of disproportionate sentences imposed on disadvantaged people and people of color. Review should be granted.

Upon reversal of the Court of Appeals, the case should be sent back to the trial court. As argued in Mr. Kelly's cross-

appeal and his linked case, the trial court failed to order that Mr. Kelly's sentences in the two cases be concurrent rather than consecutive given that he was being resentenced on the same day. The trial court also failed to reevaluate the imposition of legal financial obligations under current law. The Court of Appeals refused to reach these issues on the grounds that resentencing was not a proper remedy due to the time bar.

E. CONCLUSION

For the reasons outlined, this Court should grant review on these critical issues of substantial public interest.

This document contains 3,913 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 19th day of May, 2023.

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Appendix

Filed
Washington State
Court of Appeals
Division Two

April 24, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TIMOTHY MICHAEL KELLY, Appellant.	No. 56461-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Timothy Kelly moves for reconsideration of the court's March 21, 2023 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Che

FOR THE COURT:

MAXA, P.J.

Filed
Washington State
Court of Appeals
Division Two

March 21, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. TIMOTHY MICHAEL KELLY, Respondent.	No. 56461-1-II PUBLISHED OPINION

MAXA, P.J. – The State appeals the trial court's order correcting Timothy Kelly's sentence for multiple November 2006 convictions after removing two convictions for unlawful possession of a controlled substance (UPCS) from his criminal history and removing two points from his offender score pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Kelly had been sentenced in September 2009 to 387 months in confinement. At resentencing, the trial court reduced Kelly's sentence by 60 months by ordering that his two firearm sentencing enhancements be served concurrently with each other.

The State argues that the trial court had no authority under RCW 9.94A.533(3)(e) to run the firearm sentencing enhancements concurrently. Kelly argues that the invited error doctrine precludes the State from obtaining relief because the State did not object to the sentence in the trial court. In the alternative, Kelly argues that (1) we disregard prior cases holding that a trial court does not have the authority to run firearm sentencing enhancements concurrently; and (2) if the trial court lacked authority, we should remand for a new resentencing hearing. In a cross-

appeal, Kelly argues that the sentence for his November 2006 convictions should be run concurrently with his sentence for his May 2006 convictions in a different case and that the trial court should have stricken certain legal financial obligations.[1]

We hold that (1) the State is not precluded from obtaining relief under the invited error doctrine, (2) the trial court did not have authority under RCW 9.94A.533(3)(e) and prior case law to order the firearm sentencing enhancements to run concurrently, (3) Kelly is not entitled to a new resentencing hearing because any request for relief on remand would be time barred, and (4) we decline to address Kelly's cross-appeal.

Accordingly, we reverse the trial court's sentence and remand to the trial court to correct the September 2009 judgment and sentence by removing two points from Kelly's offender score but leaving unchanged Kelly's sentence, including running Kelly's two firearm sentencing enhancements consecutively to one another and to the base sentence.

FACTS

In November 2006, Kelly was convicted of two counts of first degree burglary, three counts of theft of a firearm, two counts of first degree theft, and two counts of first degree unlawful possession of a firearm. Both counts of first degree burglary included firearm sentencing enhancements of 60 months each. Kelly was 29 years old when he committed these offenses.

The trial court sentenced Kelly to a total of 338 months in confinement. But on appeal this court remanded for resentencing. On remand in September 2009, the trial court imposed an exceptional sentence below the standard range and resentenced Kelly to a total of 387 months in

[1] In a separate appeal, No. 56475-1-II, Kelly argues that the trial court erred in denying his request for resentencing on the May 2006 convictions.

confinement, with both firearm sentencing enhancements running consecutively to one another and to the sentences on the convictions. Kelly's offender score included two points for UPCS convictions.

In 2021, the trial court scheduled a post-*Blake* hearing regarding Kelly's November 2006 convictions because of the UPCS convictions included in his offender score. The trial court removed two points for the UPCS convictions from Kelly's offender score. Although Kelly's offender score decreased to a high of 23 and low of 19, the standard sentencing ranges for Kelly's convictions remained the same.

At the hearing, Kelly requested the low end of the standard sentencing ranges and for the two firearm sentencing enhancements to run consecutively, but suggested to the trial court that it had the ability to impose an exceptional sentence downward. The State requested that Kelly's sentence remain the same due to his high offender score. The State did not argue that any request for resentencing was untimely or otherwise object to the trial court resentencing Kelly.

The trial court stated that it was going to "take advantage of the exceptional sentence" that the previous sentencing court had declared, Report of Proceedings (Nov. 4, 2021) at 25, and ordered the firearm sentencing enhancements to run concurrent with one another. The court then ran one of the firearm sentencing enhancements consecutive to the base sentence. The court ruled that Kelly's sentence for the multiple convictions would remain the same as imposed in September 2009. The State did not object to the new sentence and handed forward an order for the court to sign.

On the same day, the trial court addressed Kelly's multiple May 2006 convictions in a different case, which included a conviction for UPCS. The trial court vacated the UPCS

conviction and the related sentence, but declined to resentence Kelly for the remaining May 2006 convictions.

The State appeals the trial court's order directing Kelly's two firearm sentencing enhancements to be served concurrently with one another. Kelly cross-appeals, arguing that the sentence for the November 2006 convictions should run concurrently with the sentence for the May 2006 convictions.

ANALYSIS

A. TRIAL COURT'S AUTHORITY TO RESENTENCE

A question exists here whether the trial court had authority to resentence Kelly when the request was made more than one year after the judgment and sentence became final. RCW 10.73.090(1) requires a collateral attack on a sentence to be filed within one year after the judgment and sentence became final unless the judgment and sentence was facially invalid.

As discussed below, the fact that the removal of the two UPCS convictions from Kelly's offender score did not affect the standard range sentence meant that the sentence was not facially invalid. *See In re Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759, 767, 297 P.3d 51 (2013). However, the State did not argue in the trial court, in its appellate briefing, or at oral argument that the trial court had no authority to resentence Kelly. Therefore, we do not address this issue. Instead, we address facial validity below in the context of Kelly's request for resentencing on remand.

B. INVITED ERROR DOCTRINE

Kelly argues that the invited error doctrine bars the State from obtaining relief on appeal. We disagree.

The invited error doctrine prohibits a party from setting up an error at trial and then challenging that error on appeal. *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). To determine whether the invited error doctrine applies, we consider whether the defendant "affirmatively assented to the error, materially contributed to it, or benefited from it." *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009). For example, a defendant that erroneously requests a jury instruction may not then appeal the instruction. *State v. Tatum*, 23 Wn. App. 2d 123, 128, 514 P.3d 763, *review denied*, 200 Wn.2d 1021 (2022). But merely failing to object does not invite error. *Id.* at 128-29.

In addition, the invited error doctrine does not apply when it is shown that the sentencing court exceeded its statutory authority. *State v. Mercado*, 181 Wn. App. 624, 631, 326 P.3d 154 (2014).

Here, the State did not invite any error. The State neither set up the error, affirmatively assented to the error, materially contributed to the error, nor benefited from the error. The State requested that Kelly's sentence remain the same, which had the firearm sentencing enhancements running consecutively. When the court ruled that the firearm sentencing enhancements would run concurrently with one another, the State did not object.[2] But this alone does not invite error. *Tatum*, 23 Wn. App. 2d at 128.

Kelly argues that the State contributed to the error when it prepared and presented the order for the trial court to sign. However, this action is not comparable to a party requesting a jury instruction at trial and then appealing with a claim of instructional error. The State merely

[2] Kelly only asserts that the invited error doctrine should apply and does not claim that this court is precluded from reviewing this issue because the State failed to object below.

prepared an order consistent with the court's ruling. The State did not request nor advocate for the firearm sentencing enhancements to run concurrently.

Therefore, we hold that the State is not precluded from obtaining relief under the invited error doctrine.

C. AUTHORITY TO IMPOSE CONCURRENT FIREARM SENTENCING ENHANCEMENTS

The State argues that the trial court had no authority to run the firearm sentencing enhancements concurrently. Kelly argues that the court had authority as part of an exceptional sentence. We agree with the State.

1. Legal Principles

Interpretation of a statute is a question of law we review de novo. *State v. Abdi-Issa*, 199 Wn.2d 163, 168, 504 P.3d 223 (2022). The primary goal of statutory interpretation is to determine and give effect to the legislature's intent. *Id.* To determine the legislature's intent, we first look to the plain language of the statute, considering the language of the provisions in question, how the provisions fit within the context of the statute, and the statutory scheme as a whole. *Id.* 168-69. We end the inquiry if the plain language of a statute is clear. *Id.* at 169.

Under RCW 9.94A.535[3], a court may impose an exceptional sentence below the standard range if it finds mitigating circumstances are established by a preponderance of the evidence and substantial and compelling reasons justify an exceptional sentence. The exceptional sentence imposed by the trial court at the first resentencing was based on RCW 9.94A.535(1)(g), which provides that "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive."

[3] Although the sections of chapter 9.94A cited in this opinion have been amended several times since the events at issue in this case, because the amendments do not affect our analysis we cite to the current versions of these sections.

However, RCW 9.94A.533(3)(e) provides that "[n]otwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements."

In *State v. Brown*, the Supreme Court held that the language of RCW 9.94A.533(3)(e) deprives sentencing courts of the discretion to impose an exceptional sentence with regard to firearm enhancements. 139 Wn.2d 20, 29, 983 P.2d 608 (1999). Several cases in other divisions of this court have followed the holding in *Brown*. *State v. Wright*, 19 Wn. App. 2d 37, 52, 493 P.3d 1220 (2021), *review denied*, 199 Wn.2d 1001 (2022); *State v. Mandefero*, 14 Wn. App. 2d 825, 832, 473 P.3d 1239 (2020); *State v. Brown*, 13 Wn. App. 2d 288, 291, 466 P.3d 244 (2020).

2. Analysis

Here, the trial court did not have discretion to impose an exceptional sentence by ordering the firearm sentencing enhancements to run concurrently with one another. RCW 9.94A.533(3)(e) plainly states that all firearm sentencing enhancements "shall run consecutively," and *Brown* held that sentencing courts do not have discretion to impose an exceptional sentence for firearm sentencing enhancements. 139 Wn.2d at 29. We are bound to follow Supreme Court precedent. *State v. Winborne*, 4 Wn. App. 2d 147, 175, 420 P.3d 707 (2018). And as noted above, several Court of Appeals cases have adopted the same holding.

Kelly argues that the length of sentencing enhancements can be modified under the exceptional sentence provisions of RCW 9.94A.535(1) because that statute does not state that any sentence is mandatory. He contrasts RCW 9.94A.535(1) with RCW 9.94A.540(1), which states that for certain offenses the "minimum terms of total confinement are mandatory and shall

not be varied or modified under RCW 9.94A.535." But RCW 9.94A.540(1) discusses mandatory minimum terms, not whether a sentence should be applied concurrently or consecutively.

Kelly also cites to *State v. Conover*, 183 Wn.2d 706, 713, 355 P.3d 1093 (2015). In *Conover*, the Supreme Court held that school bus route stop enhancements may be run concurrently with one another because RCW 9.94A.533(6) does not explicitly say that the enhancements must run consecutively to one another. 183 Wn.2d at 712-15. But *Conover* compared section (6) with section (3)(e), which *does* explicitly state that firearm sentencing enhancements shall run consecutively to one another. *Id.* Further, the court "interpreted . . . RCW 9.94A.533 to require that 'all firearm and deadly weapon enhancements are mandatory and, where multiple enhancements are imposed, they must be served consecutively to base sentences and to any other enhancements.' " *Id.* at 714 (quoting *State v. DeSantiago*, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003)).

In addition, the language of former RCW 9.94A.310(3)(e) (now codified as RCW 9.94A.533(3)(e)) stated that all mandatory firearm sentencing enhancements "shall not run concurrently with any other sentencing provisions." In 1998, the Supreme Court interpreted this language to mean that multiple firearm sentencing enhancements could run concurrently with one another. *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 254, 955 P.2d 798 (1998). The legislature then promptly amended former RCW 9.94A.310(3)(e) to state that all mandatory firearm sentencing enhancements "shall run consecutively to all other sentencing provisions, *including other firearm or deadly weapon enhancements*." (Emphasis added.)

The Supreme Court decided *Brown* a year later. But unlike the immediate action taken after *Charles*, the legislature has not further modified the statutory language regarding mandatory firearm enhancements.

Kelly also cites to Justice Madsen's concurring opinion in *State v. Houston-Sconiers*, 188 Wn.2d 1, 12-13, 391 P.3d 409 (2017). Justice Madsen stated that "the discretion vested in sentencing courts under the Sentencing Reform Act of 1981 (SRA) [chapter 9.94A RCW] includes the discretion to depart from the otherwise mandatory sentencing enhancements when the court is imposing an exceptional sentence." *Houston-Sconiers*, 188 Wn.2d at 34 (Madsen, J., concurring). Kelly claims that this statement applies to adult defendants.

However, even if we were to agree in principle with Justice Madsen's concurrence, *Houston-Sconiers* overruled *Brown* with regard to juveniles only. *Id.* at 18-21. In *Houston-Sconiers*, the Supreme Court held that in order to comply with the Eighth Amendment, sentencing courts must have discretion to consider "mitigating circumstances associated with the youth of any juvenile defendant." *Id.* at 21. But Kelly was 29 years old when he committed the crimes at issue in this appeal, and *Houston-Sconiers* does not apply to him.

Therefore, we hold that the trial court erred in ordering the firearm sentencing enhancements to run concurrently with one another. Under RCW 9.94A.533(3)(e), the firearm sentencing enhancements must be run consecutively to one another and to the base sentence.

D. REQUEST FOR NEW RESENTENCING HEARING

Kelly argues in the alternative that he is entitled to a new resentencing hearing to give the trial court another opportunity to reduce Kelly's sentence. The State argues that resentencing is unavailable on remand because any request for resentencing would be untimely under RCW 10.73.090(1). We agree with the State.

A collateral attack is "any form of postconviction relief other than a direct appeal." RCW 10.73.090(2). Therefore, resentencing on remand would constitute postconviction relief.

Under RCW 10.73.090(1), a defendant may not collaterally attack their judgment and sentence "more than one year after the judgment becomes final if the judgment and sentence is valid on its face" unless one of the exceptions in RCW 10.73.100 applies. RCW 10.73.100 lists six exceptions to the one-year time limit. Unless a defendant shows that the judgment and sentence is facially invalid or one of the RCW 10.73.100 exceptions applies, a collateral attack is time-barred. *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532-33, 55 P.3d 615 (2002).

Kelly does not claim that any of the RCW 10.73.100 exceptions apply here. Therefore, a collateral attack on remand would be time barred unless the judgment and sentence is facially invalid.

A judgment and sentence is facially invalid only if the trial court imposes a sentence that was not authorized under the SRA. *Toledo-Sotelo*, 176 Wn.2d at 767. An incorrect offender score does not render a judgment and sentence facially invalid if the trial court accurately calculated the standard sentencing range and the sentence actually imposed is within the correct SRA-mandated standard range. *Id.* at 768.

Here, although Kelly's offender score changed due to his UPCS convictions being removed from his offender score, his standard sentencing ranges did not change. Therefore, the trial court in September 2009 accurately calculated the standard sentencing range and his sentence still was within the SRA-authorized sentencing range. In this situation, the judgment and sentence is not facially invalid. *See id.* at 768-69.

A recent order issued by a panel of the Supreme Court is consistent with this reasoning. Order, *In re Pers. Restraint of Richardson*, No. 101043-5 (Wash. Nov. 14, 2022). On discretionary review, the court held:

> Richardson's judgment and sentence is not facially invalid for purposes of exempting the personal restraint petition from the time limit. Removing from the

> offender score the prior conviction for attempted possession of a controlled substance reduces the score from 10 to 9, but at a score of 9 Richardson's standard range remains 471 to 608 months. *See* RCW 9.94A.510 (highest standard range reached at offender score of 9 or more). The superior court imposed a sentence within that range and therefore the sentence was authorized. In this circumstance, the judgment and sentence is not facially invalid. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 136, 267 P.3d 324 (2011); *In re Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759, 768-70, 297 P.3d 51 (2013).

Order at 2.[4]

Because Kelly's judgment and sentence remained facially valid after the UPCS convictions were removed from his offender score and no RCW 10.73.100 exceptions exist, his request for resentencing on remand would be time barred. Therefore, we hold that Kelly is not entitled to resentencing on remand. Instead, the trial court must be directed to reinstate the September 2009 sentence, including running the firearm enhancements consecutively.

E. KELLY'S CROSS-APPEAL

Kelly argues in his cross-appeal that the trial court should have resentenced him on his May 2006 convictions and that the sentence for those convictions must run concurrently with the new sentence in this case. He also argues that the trial court erred in failing to address whether legal financial obligations imposed in the November 2009 sentence should be stricken in light of current law. However, as discussed above, Kelly is not entitled to resentencing on remand for his November 2006 convictions. Therefore, we do not address these arguments.

CONCLUSION

We reverse the trial court's sentence and remand to the trial court to correct the September 2009 judgment and sentence by removing two points from Kelly's offender score but

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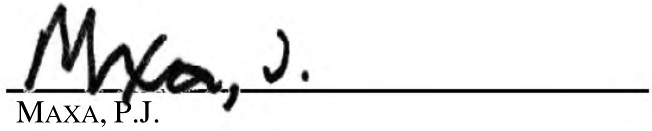
[4] The Supreme Court has ordered that this order will be published in the Washington Reports. Order, *In re Pers. Restraint of Richardson*, No. 101043-5 (Wash. Mar. 10, 2023).

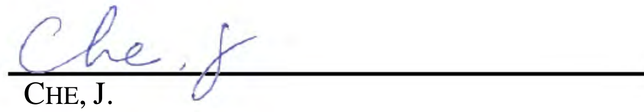
leaving unchanged Kelly's sentence, including running Kelly's two firearm sentencing enhancements consecutively to one another and to the base sentence.



MAXA, P.J.

We concur:

LEE, J.



CHE, J.

Sentence Enhancements and Race

Authors: Karl Jones, PhD, MSW, Kevin Keogh, MA, and Connor Saxe
Date: March 1, 2022

Key Findings

- Black, Hispanic, American Indian, and Asian and Pacific Islander individuals are more likely to receive weapon enhancements than White individuals convicted for the same types of crimes.
- Given a weapon enhanced sentence, Black individuals received 1.5 times more enhancements, on average, than White individuals.
- The probability of a VUCSA enhancement did not vary significantly by race and ethnicity.
- Concurrent versus consecutive weapons enhancements could impact sentence length disparity in the current prison population given the overrepresentation of the Black, Hispanic, and Asian and Pacific Islander populations among those with two or more weapon enhancements.

Background

Efforts in the legislature and courts to address exceptional prison sentences affected by sentencing enhancements directly impact the department's prison caseload and ability to provide reentry programs, as well as racial disparities in criminal justice outcomes reflected in the state's incarcerated population. This report describes the relationship between race and ethnicity and weapons and Violation of the Uniform Controlled Substance Act (VUCSA) enhancements in the prison population admitted since 2016.

Methods

Data Source(s). OMNI as of February 5, 2022.

Population. Given all RCW violations leading to a weapon or VUCSA enhanced sentence in the past five years, data included all individuals found guilty of such a violation whether their sentence was enhanced or not. An additional dataset included all incarcerated individuals in a prison facility on January 31, 2022.

Analytic Approach. The 1) probability of any enhancement, and 2) number of enhancements was modeled as dependent on individuals' race and ethnicity and offense type. Sentence length was modeled as dependent on race and ethnicity, most serious offense, age, conviction history, and number of enhancements. Finally, impacts on sentence length affected by concurrent versus consecutive weapon enhancements were estimated conditional on race and total enhancement time.

Results

Following a description of the overall probability of a sentence enhancement by offense type, results describe 1) the probability of any weapons enhancement, and the number of weapons enhancements by individuals' race and ethnicity, 2) the probability of any VUCSA enhancement by race and ethnicity and 3) the estimated impact of enhancements, race, age, conviction history, and offense seriousness on sentence length.

Probability of weapons enhancements. Table 1 shows the frequency and probability of weapons enhancements for offense types accounting for 91% of weapons enhanced sentences since 2016.

Table 1. Probability of weapon enhancements by offense type, 2016-2021

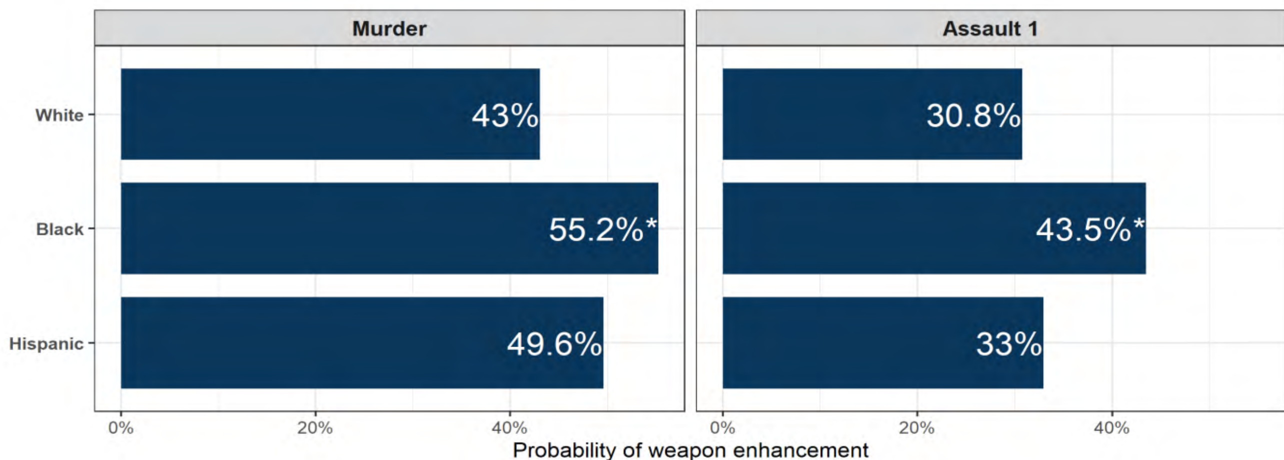
	Sentenced	With Weapons Enhancement	Probability of Enhancement
Murder	654	300	45.9%
Assault 1	377	138	36.6%
Manslaughter	218	58	26.6%
Assault 2	2,838	643	22.7%
Robbery 1	1,204	187	15.5%
Burglary 1	351	48	13.7%
Robbery 2	998	71	7.1%
Deliver drugs or possess with Intent	3,019	96	3.2%
Assault 3	2,781	52	1.9%

NOTE: Subcategories for murder and manslaughter offenses (i.e., Murder 1, Murder 2) are combined.

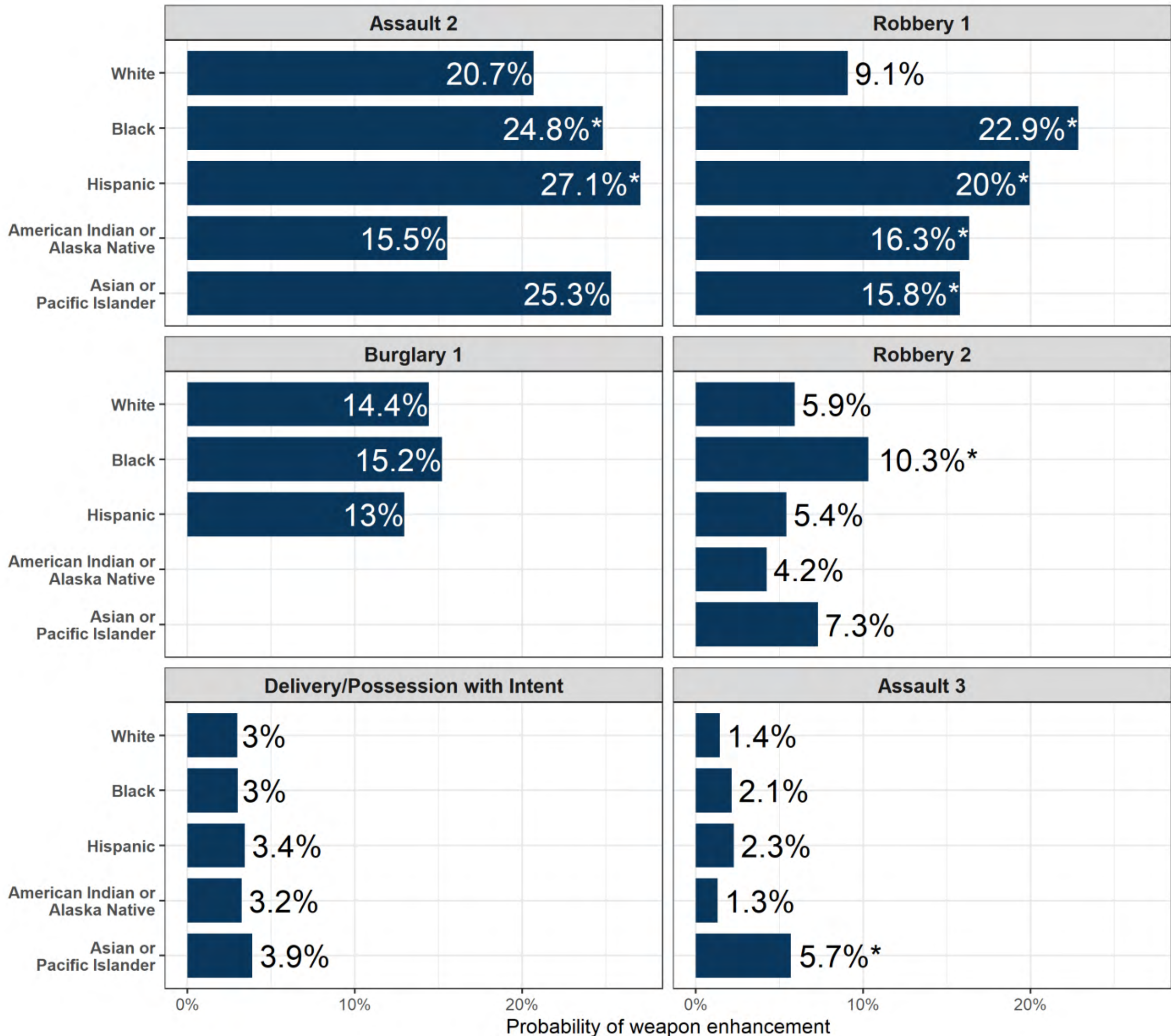
Differences in the probability of an enhancement affected by race and ethnicity are described below and shown in Figure 1.

Black. Black individuals had a higher probability of receiving a weapons enhancement across all offense types compared to White individuals convicted for the same types of offenses except Burglary 1 and drug-related offenses.

Figure 1. Probability of weapon enhancement by offense type and race and ethnicity.



*95% or greater probability that group estimate exceeds that of White population. Estimates are median posterior probability of enhancement dependent on race and offense type interaction. Group size < 50 are not shown.



*95% or greater probability that group estimate exceeds that of White population. Estimates are median posterior probability of enhancement dependent on race and offense type interaction. Sentenced population < 50 are not shown. White population was the only group > 50 for Manslaughter convictions.

Hispanic. Hispanic individuals had a higher probability of receiving a weapons enhancement than White individuals given an Assault 2 or Robbery 1 conviction.

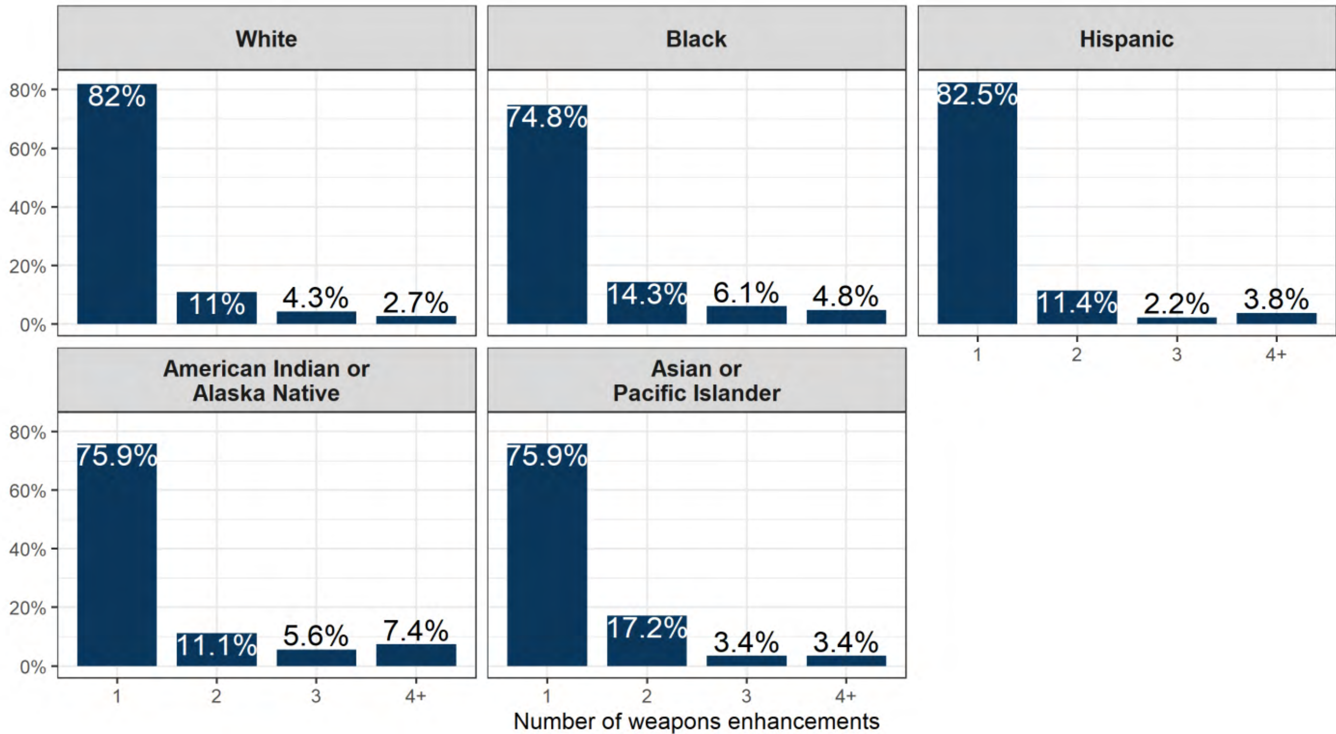
American Indian and Alaska Native. Given a Robbery 1 conviction, American Indian and Alaska Native individuals more likely to receive a weapons enhancement than White individuals convicted for the same offense.

Asian and Pacific Islander. Asian and Pacific Islander individuals had a higher probability of receiving a weapons enhancement than White individuals given a Robbery 1 or Assault 3 conviction.

Group differences in the probability of an enhancement for Manslaughter, Burglary 1, or drug offenses were not observed or were uncertain given the data.

Number of weapons enhancements. Figure 2 shows the distribution of the number of weapons enhancements for convictions with any weapons enhancement by race and ethnicity. Black individuals were estimated to have 1.5 times more enhancements, on average, than White individuals given a weapon enhanced sentence.

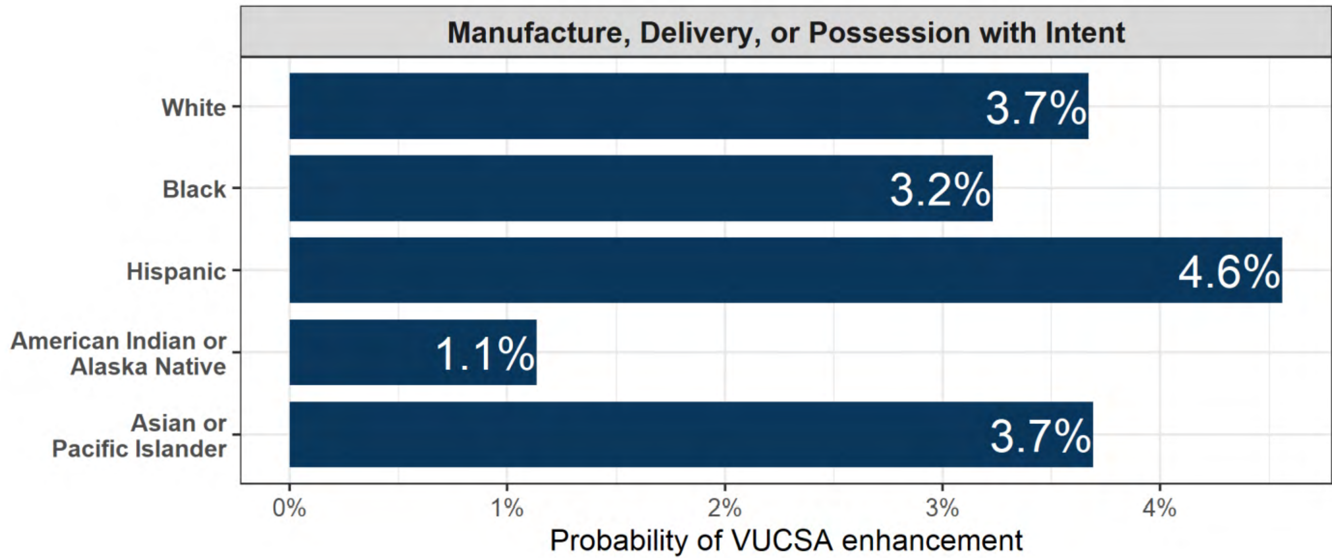
Figure 2. Proportion of weapon enhanced sentences by number of enhancements and race and ethnicity.



Probability of VUCSA enhancements. Nearly all VUCSA-enhanced sentences since 2016 (145 out of 152, or 95%) were related to manufacture, delivery, or possession with intent to deliver controlled substances. Of the nearly 4,000 people admitted to prison with a related RCW violation since 2016, 3.8% were admitted with a VUCSA-enhanced sentence*. Probability of VUCSA enhancement, shown in Figure 4, did not vary significantly by race and ethnicity.

* Compared to weapons enhancements, VUCSA enhancements were associated with a larger set of "Manufacture, Delivery or Possession with Intent" RCW violations.

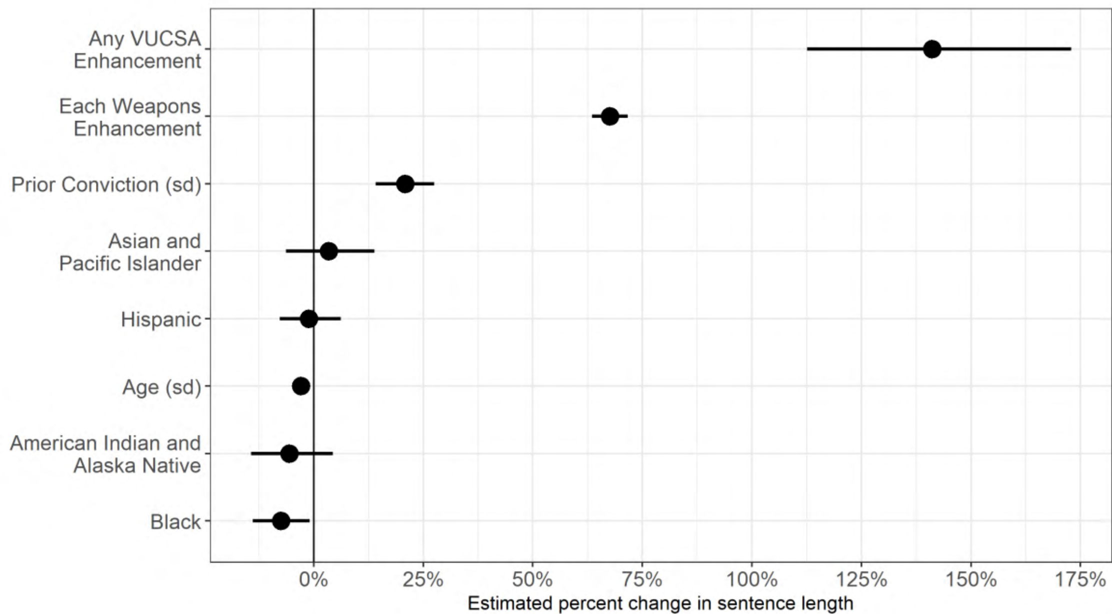
Figure 3. Probability of VUCSA enhancement by and race and ethnicity.



Sentence length. Sentence length was modeled as dependent on seriousness level of the most serious convicted offense, any VUCSA enhancement, the total number of weapons enhancements, individuals' conviction history, age, and race and ethnicity where average sentence length was assumed to vary across seriousness levels. Estimated percent change in sentence length associated with select variables is shown in Figure 4.

Given average age and conviction history and allowing effects of race and ethnicity to vary across offense seriousness levels, the association between race and ethnicity and sentence length was uncertain given the data. Weapon and VUCSA enhancements, however, significantly increased sentence length. Each weapon enhancement, for instance, was estimated to affect a 62% increase in sentence length, while a VUCSA enhancement was expected to more than double sentence length.

Figure 4. Point estimates and 90% credible interval of percent change in sentence length.



NOTE: Point estimates are posterior medians.

Concurrent versus consecutive weapon enhancements. The potential impact of concurrent versus consecutive weapon enhancements was estimated with analysis of covariance (ANCOVA), modeling the difference between individuals' total enhancement time and their maximum enhancement time as dependent on race and total enhancement time.

As shown in Table 2, an average 97 month decrease in sentence length affected by concurrent versus consecutive weapon enhancements did not vary significantly by race or ethnicity. However, differences affected by concurrent enhancements would potentially impact racial disparity in sentence length given the Black, Hispanic, and Asian or Pacific Islander populations' overrepresentation among those with multiple weapons enhancements.

Table 2. Estimated difference in enhancement time affected by concurrent versus consecutive weapon enhancements in population incarcerated on January 31, 2022 with multiple weapon enhancements.

	Total Incarcerated (%)	Multiple weapons enhancements (%)	Percent with multiple enhancements	Estimated difference (months)
Total	12,880 (100%)	924 (100%)	7.2%	-97.1
White	7,061 (54.8%)	353 (38.8%)	5.0%	-98.6
Black	2,286 (17.7%)	288 (31.6%)	12.6%	-97.1
Hispanic	2,019 (15.7%)	143 (15.7%)	7.1%	-94.3
American Indian or Alaska Native	828 (6.4%)	43 (4.7%)	5.2%	-93.3
Asian or Pacific Islander	550 (4.3%)	83 (9.1%)	15.1%	-97.5

Limitations

Although analyses account for variability affected by controls (e.g., offense type, offense seriousness, conviction history, age), methods to balance variables by matching on race and ethnicity were not used. Matching would likely increase estimate precision. Additionally, although data represent convictions since 2016 from across the state of Washington, time and geography were not included as factors affecting enhancements and sentence length. While potentially introducing issues with small numbers, accounting for time and place would improve localized estimation of race effects.

Summary

Analysis of the relationship between weapon and drug enhancements, sentence length, and race and ethnicity found significant group differences among individuals with similar offenses in 1) the chances of receiving a weapon enhancement, and 2) given a weapon enhanced sentence, the total number of enhancements received. Concurrent versus consecutive weapons enhancements would potentially impact racial disparities in sentencing given the overrepresentation of Black, Hispanic, and Asian and Pacific Islander individuals among those with two or more weapon enhancements.

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. 56461-1-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

☒ appellant Pamela Loginsky, DPA
[pamela.loginsky@piercecountywa.gov]
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Pierce County Prosecutor's Office

☒ respondent

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: May 19, 2023

WASHINGTON APPELLATE PROJECT

May 19, 2023 - 4:30 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56461-1
Appellate Court Case Title:	State of WA, Appellant/Cross-Respondent v. Timothy M. Kelly, Respondent/Cross-Appellant
Superior Court Case Number:	05-1-01173-6

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