Supreme Court No. 102470-3
(COA No. 56963-9-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MARCUS THORNTON,
Petitioner.

PETITION FOR REVIEW

KATE R. HUBER
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
katehuber@washapp.org
wapofficemail@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Washington Court of Appeals Cases

Rules

A. IDENTITY OF PETITIONER AND DECISION BELOW

Marcus Thornton petitions for review of the Court of Appeals's September 19, 2023, opinion. RAP 13.4.

B. ISSUES PRESENTED FOR REVIEW

1. When Mr. Thornton was resentenced following *State v. Blake*[1], the trial court mistakenly believed it was conducting "a different sort of sentencing," would not consider Mr. Thornton's arguments about mitigation, and wrongly bound itself to the prior court's sentencing decision. The court did not meaningfully exercise its discretion, consider Mr. Thornton's request for a low end sentence, or independently determine the appropriate sentence, but simply replicated the previous sentence in the new range.

The Court of Appeals's opinion affirming the sentence conflicts with this Court's opinions holding that sentencing courts must exercise their discretion and meaningfully consider

[1] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

mitigating evidence at sentence. The opinion also conflicts with published Court of Appeals cases clarifying that a person is entitled to a de novo sentencing hearing at a *Blake* resentencing. This Court should accept review to address this conflict with other cases on this important issue of substantial public interest. RAP 13.4(b)(1), (2), (4).

2. This Court recently accepted review of similar issues in the cases of *State v. Vasquez* and the consolidated cases of *State v. Kelly* and *State v. Kelly*.[2] This Court should stay Mr. Thornton's petition pending resolution of those cases.

C. STATEMENT OF THE CASE

In 2014, the prosecution charged Marcus Thornton with murder in the first and second degrees for an altercation that occurred with a person who stole Mr. Thornton's property. CP 1, 6-7; 10/01/15 RP 1088, 1102-03. Mr. Thornton testified and explained he was defending himself and did not intend to harm

[2] *State v. Vasquez*, Case No. 102045-7, Order Granting Review, Oct. 3, 2023; *State v. Kelly*, Cases No. 102002-3 & 102003-1, Orders Granting Review, Oct. 3, 2023.

anyone. 10/01/15 RP 1087-90, 1097-98, 1102-03. The jury agreed Mr. Thornton did not act with a premeditated intent to kill the other person and acquitted him of first-degree murder. CP 12; 10/01/15 RP 1097; 07/20/21 RP 7-8. However, it convicted him of felony murder in the second degree and a deadly weapon enhancement. CP 10.

The court determined Mr. Thornton's offender score was three, resulting in a standard range of 154-254 months. CP 11; 10/01/15 RP 1086. It included in Mr. Thornton's offender score a prior conviction for unlawful possession of a controlled substance. CP 11. The court imposed a standard range sentence of 220 months, plus 24 months for the deadly weapon enhancement, for a total sentence of over twenty years' imprisonment. CP 14.

In 2021, the court resentenced Mr. Thornton following this Court's decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). CP 44-48; 07/20/21 RP 1-11. When the parties returned to the trial court for the new sentencing before

a different judge, the prosecution began by narrowing the scope of the hearing. The prosecution argued the court could not "take[] into account" any information Mr. Thornton may present to mitigate the new sentence. 07/20/21 RP 7. It argued the proceeding was "not a resentencing like a normal remand for a resentencing." 07/20/21 RP 6. Instead, the prosecution insisted it was "just an adjustment due to the *Blake* decision" and urged the court to impose the identical sentence. 07/20/21 RP 6.

The parties agreed Mr. Thornton's correct score was a two and that the resulting standard range was 144-244 months or 168-268 months with the weapon enhancement. 07/20/21 RP 6-7; CP 46. The prosecution asked the court to impose the same term as the void sentence of 244 months, despite the corrected offender score and standard range. 07/20/21 RP 6-7.

When given the opportunity to speak, Mr. Thornton accepted responsibility for the crime. 07/20/21 RP 8-9. He explained the incident was a "tragedy" and expressed remorse

that the victim lost his life and was taken from his family. 07/20/21 RP 8-9. Consistent with his trial testimony that he acted in self-defense, Mr. Thornton explained he did not intend to harm anyone. 07/20/21 RP 8-9; *see also* 10/01/15 RP 1102-03. Mr. Thornton asked the court to consider "all these things" and to impose a sentence of 168 months, which was the low end of the standard range when adjusted for the enhancement. 07/20/21 RP 7-9.

Rather than treat the hearing as a full resentencing, the trial court agreed with the prosecution that "this is a different sort of sentencing." 07/20/21 RP 9. It accepted the prosecution's argument that "it's true … this is not a typical resentencing and that we shouldn't consider anything he's done positive or negative in resentencing." 07/20/21 RP 9.

The court also did not exercise its own discretion to determine the appropriate sentence but instead tried to replicate the previous judge's sentencing within the correct range. 07/20/21 RP 9. Because "Mr. Thornton got the mid-range last

time," the court stated, "I'm going to stay with the mid-range sentence." 07/20/21 RP 9. The court did not address Mr. Thornton's request for the minimum sentence or consider the mitigation of his failed lack of intent and self-defense claims. 07/20/21 RP 9.

The court imposed a mid-range sentence of 205 months, plus 24 months for the weapon enhancement, for a total sentence of 229 months. 07/20/21 RP 9; CP 47-48.

D. ARGUMENT

The court misunderstood its discretion and denied Mr. Thornton a fair sentencing when it wrongly believed it could not consider Mr. Thornton's mitigation arguments and thought it was limited to replicating the previous court's sentencing decision.

This Court should grant review. Mr. Thornton was entitled to a full resentencing following the reduction in his offender score, but the trial court refused to consider his arguments about mitigating circumstances or any other relevant information apart from the change in score. The opinion affirming this ruling conflicts with opinions of this Court and

the Court of Appeals, and implicates the right to fair sentencing proceedings, which is an issue of substantial public interest.

1. Mr. Thornton was entitled to a full resentencing.

When a court imposes a sentence based on an incorrect offender score, the sentence is unauthorized by statute and is unlawful. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002). The court "has the power and duty to correct the erroneous sentence" in such circumstances. *Id.* at 869 (internal quotations omitted).

Once an erroneous sentence is vacated, it "no longer exists as a final judgment on the merits," and the court at a resentencing hearing must independently determine the appropriate sentence. *State v. Harrison*, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003). Such resentencings are de novo. *State v. Dunbar*, __ Wn. App. 2d __, 532 P.3d 652, 656 (2023); *State v. Edwards*, 23 Wn. App. 2d 118, 122, 514 P.3d 692 (2022).

At sentencing, the court must consider any relevant evidence or argument presented. "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, 399 P.3d 1106 (2017). This includes meaningfully considering mitigating evidence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Where a court does not exercise or misapprehends its discretion, a person is entitled to a new sentencing hearing. *Id.*; *State v. McFarland*, 18 Wn. App. 2d 528, 531, 492 P.3d 829 (2021). Similarly, where a court misunderstands the scope of its discretion, a person is entitled to a new sentencing hearing. *McFarland*, 189 Wn.2d at 56.

The "outright refusal of a trial court to consider sentencing argument is error." *State v. Mutch*, 171 Wn.2d 646, 654 n.1, 254 P.3d 803 (2011). So too is a court's belief it lacks the discretion to consider an argument. *State v. Mulholland*, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007).

2. The court misunderstood its discretion when it treated Mr. Thornton's resentencing as a question of how to adjust the prior sentence rather than a new de novo hearing at which it must independently determine the appropriate sentence.

Mr. Thornton appeared before the court for a new sentencing hearing following the change in his offender score. The trial court misunderstood the scope of the hearing and did not exercise its discretion to determine the appropriate sentence in the first instance. Instead, the court thought this was "a different sort of sentencing," believed it was limited to the impact of *Blake*, and artificially restricted the scope of the hearing to replicating the prior sentence. 07/20/21 RP 9.

First, the court did not meaningfully consider Mr. Thornton's request for a "low end" sentence. 07/20/21 RP 7. Mr. Thornton argued he did not intend to harm the decedent. 07/20/21 RP 8-9. He asked the court to consider his lack of intent, which was consistent with his failed self-defense claim. 07/20/21 RP 8-9; 10/01/15 RP 1102-03. And he asked the

court to impose a sentence of 168 months at the low end of the standard range. 07/20/21 RP 7-9.

A sentencing court must meaningfully consider mitigation. *Grayson*, 154 Wn.2d at 342. Mitigating evidence includes a failed defense. *State v. Schloredt*, 97 Wn. App. 789, 801-02, 987 P.2d 647 (1999). An unsuccessful defense may be a mitigating factor regardless of its viability at trial. *State v. Jeannotte*, 133 Wn.2d 847, 848, 852, 947 P.2d 1192 (1997); *State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993). Such evidence may affect a sentence within or below the standard range. Here, Mr. Thornton argued his lack of intent was something the court should consider to mitigate his sentence. 07/20/21 RP 8-9.

But rather than consider the circumstances of the crime and Mr. Thornton's argument, the court did not exercise its discretion to meaningfully consider Mr. Thornton's request for a low end sentence. Instead, the court limited itself to replicating "the mid-range" sentence that "Mr. Thornton got …

last time" within the correct range. 07/20/21 RP 9. The court stated, "I'm going to stay with the mid-range sentence." 07/20/21 RP 9. It did not consider Mr. Thornton's arguments or request for a low end sentence. 07/20/21 RP 9.

The court did not treat the proceeding as a full resentencing at which it must exercise its authority to independently determine the appropriate sentence, free from the prior court's assessment. Instead, the court believed it was limited to the impact of *Blake* and that it was "a different sort of sentencing." 07/20/21 RP 9. It agreed with the prosecution that "we shouldn't consider anything he's done positive or negative in the resentencing." 07/20/21 RP 9. The court did not independently determine the appropriate sentence. It sought to "stay with the mid-range sentence" that the original trial court imposed previously. 07/20/21 RP 9.

A correction to a person's offender score requires a full resentencing. But the court erred in artificially limiting the scope of Mr. Thornton's hearing and determining that it was

conducting "a different sort of sentencing" in which it "shouldn't consider" anything other than the change in the offender score. 07/20/21 RP 9.

3. The Court of Appeals improperly excused the trial court's abuse of discretion, in conflict with opinions holding courts must meaningfully consider mitigating evidence and conduct de novo sentencing hearings after *Blake*.

The Court of Appeals agrees that the inclusion of a void conviction in Mr. Thornton's offender score rendered the score incorrect and the resulting sentencing unlawful, entitling him to a full resentencing. Slip op. at 3. But the appellate court nevertheless ignores the trial court's refusal to consider Mr. Thornton's arguments about mitigation. It also pretends the court made an independent determination of the appropriate sentence even though it stated "I'm going to stay with the mid-range sentence" because "Mr. Thornton got the mid-range last time." 07/20/21 RP 9.

Mr. Thornton was well within his rights to ask the court to consider the mitigating circumstances of his failed self-

defense claim and impose a lower sentence. But the court told him this was "a different sort of sentencing" and that it would "stay with the mid-range sentence" because that is what the court imposed "last time." 07/20/21 RP 9. The court's refusal to consider mitigating evidence conflicts with this Court's cases that require courts to meaningfully consider mitigating evidence at sentencing. *Grayson*, 154 Wn.2d at 342; *McFarland*, 189 Wn.2d at 56.

The Court of Appeals's opinion also conflicts with the published opinion in *Dunbar*, 532 P.3d 652. Mr. Dunbar, like Mr. Thornton, returned to court for resentencing following *Blake*. *Dunbar*, 532 P.3d at 654. Unlike Mr. Thornton, Mr. Dunbar's standard range on the convictions did not change because his scores remained in the mid-20s, well above a 9. *Id.* The resentencing court would not consider Mr. Dunbar's evidence of rehabilitation and deferred to the original sentencing judge's decision. *Id.* at 654-55.

The Court of Appeals held Mr. Dunbar was denied his right to a de novo resentencing hearing and reversed. *Id.* at 658. It ruled resentencing judges "should be able to take new matters into account" including evidence of rehabilitation, and that courts must "entertain any relevant evidence" impacting sentencing. *Id.* at 656. Indeed, sentencing courts must "consider any matters relevant to sentencing, even those that may not have been raised at the first sentencing hearing" because it is a de novo sentencing. *Id.* at 658.

A de novo sentencing also means the "resentencing judge may not rely on a previous court's sentence determination and fail to conduct its own independent review." *Id.* Judges must "exercise independent discretion" and not merely defer to the prior judge's sentencing decision. *Id.* at 656.

Here, the court resentenced Mr. Thornton but expressly refused to exercise independent discretion. It limited its review to altering the offender score and repeating the previous court's sentence determination. The court restricted itself to "stay with

the mid-range" that "Mr. Thornton got … last time." 07/20/21 RP 9. It did not treat the hearing as a de novo proceeding and said "we shouldn't consider anything that he's done positive or negative in resentencing" because "this is a different sort of sentencing." 07/20/21 RP 9.

As *Dunbar* demonstrates, Mr. Thornton was entitled to a full resentencing hearing. But contrary to *Dunbar*, the court here did not conduct a de novo sentencing proceeding. The court failed to exercise its independent discretion to determine the appropriate sentence when it did not consider Mr. Thornton's mitigation arguments and did not exercise its independent judgment but deferred to the previous sentencing court. This Court should accept review to address to address this important issue of substantial public interest and resolve the conflict with opinions of this Court and the Court of Appeals.

4. This Court should grant review or stay the case pending its resolution of the issues in *Vasquez* and *Kelly*.

Alternatively, Mr. Thornton requests this Court stay consideration of his petition until resolution of *State v. Vasquez* and *State v. Kelly*.

E. CONCLUSION

For all these reasons, this Court should accept review or stay this petition pending resolution of *State v. Vasquez* and *State v. Kelly*. RAP 13.4(b).

Counsel certifies this brief complies with RAP 18.17 and the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 2,476 words.

DATED this 12th day of October, 2023.

Respectfully submitted,

KATE R. HUBER (WSBA 47540)
Washington Appellate Project (91052)
Attorneys for Petitioner
katehuber@washapp.org
wapofficemail@washapp.org

APPENDIX A

September 19, 2023, unpublished opinion

Filed
Washington State
Court of Appeals
Division Two

September 19, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARCUS BERNETT THORNTON, Appellant.	No. 56963-9-II UNPUBLISHED OPINION

LEE, J. — Marcus B. Thornton appeals his sentence following resentencing, arguing that the superior court erred by deferring to the original sentencing judge and not granting him a full resentencing hearing. Thornton also argues that the superior court erred by imposing legal financial obligations (LFOs) because he is indigent. We affirm Thornton's standard range sentence, but remand to the superior court to consider the challenged LFOs consistent with the current law.

FACTS

On September 24, 2015, a jury found Thornton guilty of second degree murder with a deadly weapon sentencing enhancement. Thornton had an offender score of 3 based on prior convictions for second degree assault (2 points) and unlawful possession of a controlled substance (1 point). Thornton's standard sentencing range with the deadly weapon sentencing enhancement was 178-278 months. The trial court imposed a standard range sentence of 244 months. The trial court also imposed $800 of LFOs: $500 crime victim assessment, $100 deoxyribonucleic acid (DNA) database fee, and $200 criminal filing fee, as well as interest on all LFOs.

On July 20, 2021, the superior court heard arguments to correct Thornton's judgment and sentence based on *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). At the hearing, the State argued that, despite the change in the standard sentencing range, the superior court should impose the same sentence as the trial court at Thornton's original sentencing. Thornton's counsel requested a low-end standard range sentence, noting that at trial a jury had found him not guilty of first degree murder and he still had a substantial amount of time to serve. Thornton told the superior court that he took full responsibility for his actions the night of the murder, that he did not intend to harm anyone before the fight happened, and he wanted to take it back. The superior court stated:

> Okay. Well Mr. Thornton got the mid-range last time. In keeping with my, essentially, way of thinking about things, I'm going to stay with the mid-range sentence . . . . I will just point out that, while it's true that [the State says] that this is not a typical resentencing and that we shouldn't consider anything that he's done positive or negative in resentencing, a number of times in these hearings, there has been a realization that perhaps the offender score originally was wrong or that a point was missed the first time around or that the defendant has obtained intervening conviction that adds time to his sentence, so I don't necessarily disagree with the notion that this is a different sort of sentencing. It is a sentencing, nonetheless, and I'm going to impose 205 months plus 24, which is 229, as the new sentence.

Verbatim Rep. of Proc. (VRP) (Jul. 20, 2021) at 9. Nobody raised or addressed LFOs at the hearing.

The superior court entered an order removing the unlawful possession of a controlled substance conviction from Thornton's criminal history, resulting in an offender score of 2 and a total standard sentencing range of 168-268 months. The superior court imposed a sentence of 229 months' total confinement. The superior court's order also stated "that all other terms and conditions of the original Judgment and Sentence dated October 1, 2015, shall remain in full force and effect as if set forth in full herein." Clerk's Papers at 48.

Thornton appeals.

ANALYSIS

A. STANDARD RANGE SENTENCE

Thornton appeals his sentence, arguing that the superior court erred by failing to make an independent determination as to his sentence. We disagree.

Generally, a sentence within the standard sentencing range may not be appealed. RCW 9.94A.585(1). However, "this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision." *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

Thornton asserts that the superior court failed to make an independent determination as to his sentence, but the record belies this assertion. The superior court clearly stated that it recognized that this was an independent sentencing hearing. VRP (Jul. 20, 2021) at 9 ("It is a sentencing, nonetheless."). Further, the superior court imposed a sentence consistent with its "way of thinking about things," rather than deferring to the previous sentence. VRP (Jul. 20, 2021) at 9.

Also, the superior court did not refuse to consider any specific sentencing request made by Thornton. Thornton's attorney simply requested a low-end standard range sentence, noting that Thornton had been found not guilty of first degree murder and was facing a long sentence. And Thornton stated that he took responsibility for his actions and he was sorry that the victim died. After Thornton made his request for a low-end standard range sentence, the superior court imposed a standard range sentence at the resentencing hearing based on the court's own "way of thinking about things." VRP (Jul. 20, 2021) at 9.

Therefore, contrary to Thornton's assertion, the superior court committed no legal error at the resentencing hearing. Accordingly, Thornton's standard range sentence is not appealable.

B. LFOs

Thornton also argues that because he is indigent, the superior court erred by imposing the following LFOs: $500 crime victim assessment; $200 criminal filing fee; $100 DNA fee; community custody supervision fee; and interest to accrue on all LFOs, not just restitution. In the interests of justice, we remand to the superior court to consider the challenged LFOs consistent with the current law.[1]

Under RAP 2.5(a), we "may refuse to review any claim of error which was not raised in the trial court." Further, unpreserved LFO errors are not the type of sentencing errors that requires review as a matter of right. *State v. Blazina*, 182 Wn.2d 827, 833-34, 344 P.3d 680 (2015).

Here, Thornton did not address LFOs at his resentencing. Therefore, Thornton has failed to preserve his challenge to the LFOs. However, we may exercise our discretion to address unpreserved LFOs errors. *Id.* at 834-35. There have been various changes to the law regarding imposition of LFOs,[2] and the State has no objection to remanding for the superior court to impose LFOs consistent with those changes. Accordingly, despite Thornton's failure to preserve his challenge to the LFOs, we remand to the superior court to consider the challenged LFOs consistent with the changes in the law.

---

[1] Thornton also argues that the crime victim assessment is unconstitutional. Effective July 1, 2023, the crime victim assessment may no longer be imposed on a defendant who is found to be indigent. RCW 7.68.035(4); LAWS OF 2023, ch. 449 § 1. Because we remand for the superior court to consider the challenged LFOs consistent with the changes in the law, we decline to address Thornton's constitutional challenge to the crime victim assessment. *See Reykdal v. Espinoza*, 196 Wn.2d 458, 460 n.1, 473 P.3d 1221 (2020) ("'Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds.'" (quoting *Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001))).

[2] For example, the statutory authority to impose a DNA collection fee has been removed by our legislature. *See* RCW 43.43.7541.

We affirm Thornton's standard range sentence but remand to the superior court to consider the challenged LFOs consistent with the current law.

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.

Lee, J.

We concur:

Cruser, A.C.J.

Price, J.

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. 56963-9-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:

☒ respondent Brittany North, DPA
[brittany.north@piercecountywa.gov]
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: October 12, 2023

WASHINGTON APPELLATE PROJECT

October 12, 2023 - 4:34 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56963-9
Appellate Court Case Title:	State of Washington, Respondent v. Marcus Bernett Thornton, Appellant
Superior Court Case Number:	14-1-03813-7

The following documents have been uploaded:

- 569639_Petition_for_Review_20231012163350D2713040_0403.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.101223-16.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- brittany.north@piercecountywa.gov
- pcpatcecf@piercecountywa.gov
- teresa.chen@piercecountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Kate Huber - Email: katehuber@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20231012163350D2713040