Supreme Court No.: 91104-5
Court of Appeals No.: 70643-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MANUEL JAUREZ-GARCIA,

Petitioner.

AMENDED PETITION FOR REVIEW

KATHLEEN A. SHEA
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Washington Statutes

Constitutional Provisions

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Mr. Juarez-Garcia requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in State v. Manuel Jaurez-Garcia, No. 70643-8-I, filed November 10, 2014. A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals affirmed Mr. Juarez-Garcia's convictions and sentence, relying on State v. Rice[1] to find that his convictions for both rape of a child and an aggravating fact based on the child's age did not violate double jeopardy. However, Alleyne v. United States[2] eliminated the distinction between "sentencing enhancements" and "aggravating factors," upon which Rice relied. Should review be granted of this significant constitutional question that raises an issue of substantial public interest? RAP 13.4(b)(3) & (4).

2. The Court of Appeals found that despite the fact that the "to-convict" instructions required the State to prove each act of rape "separate and distinct" from the other, it was not required to prove which act resulted in the victim's pregnancy. Should this Court grant

[1] 159 Wn.2d 162, 149 P.3d 360 (2006).
[2] __ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

review because the Court of Appeals' holding conflicts with State v. Hickman?[3] RAP 13.4(b)(1).

3. This Court recently held in State v. Friedlund[4] that a trial court must enter written findings of fact and conclusions of law when imposing an exceptional sentence. Should this Court grant review where the Court of Appeals found, contrary to this Court's holding, that the trial court's failure to enter mandatory written findings was harmless and not the basis for relief on appeal? RAP 13.4(b)(1).

C. STATEMENT OF THE CASE

When Manuel Juarez-Garcia met and began dating Maria Lopez, she had a young daughter, E.L. 5/29/13 RP 35. Mr. Juarez-Garcia and Ms. Lopez never married, but they lived together and had four children, whom they raised together with E.L. 5/29/13 RP 34. On July 23, 2012, the family moved from California to Washington State, where both parents worked twelve-hour days as farm labor. 5/29/13 RP 36-37.

In November 2012, when E.L. was 13 years old, E.L. reported to her school's secretary that Mr. Juarez-Garcia had sexually abused

[3] 135 Wn.2d 97, 954 P.2d 900 (1998).
[4] __ Wn.2d __, __ P.3d __, 2015 WL 196506 (filed 1/15/15).

her. 5/29/13 RP 60; 5/30/13 RP 28. The authorities were called, and E.L. was later informed by a doctor she was pregnant. 5/30/13 RP 29. E.L. terminated the pregnancy and DNA testing of the fetus showed Mr. Juarez-Garcia was the father. 5/30/13 RP 30; 5/31/13 RP 57.

At trial, E.L. described five separate acts allegedly committed by Mr. Juarez-Garcia, which occurred between July 23, 2012, when E.L. arrived in Washington, and November 27, 2012, when E.L. made the report to the school secretary. 5/29/13 RP 36; CP 5. According to E.L., these incidents took place at the farm's camp, in parking lots, and at an unidentified outdoor space. 5/29/13 RP 77, 96-97, 113-14, 117-18; 5/30/13 RP 19-20. Based on these five acts, a jury convicted Mr. Juarez-Garcia of three counts of rape in the second degree, three counts of rape of a child in the second degree, four counts of child molestation in the second degree, and one count of attempted rape in the second degree. CP 113-14.

At sentencing, the State conceded that three of the convictions of child molestation merged with the rape convictions and that the second degree rape of a child convictions constituted the same criminal conduct as the second degree rape convictions. 7/17/13 RP 172-73. Mr. Juarez-Garcia was sentenced to 116 months for the remaining child

molestation conviction and 210 months to life for the attempted rape of a child conviction, to run concurrently with 40 years to life in prison for the second degree rape convictions. 7/17/13 RP 180-81; CP 117. The court imposed an exceptional sentence of 40 years with a mandatory minimum sentence of 25 years based on the jury's finding that E.L. was under age 15 at the time of the rapes and "that the charge in Count 4 resulted in her pregnancy." 7/17/13 RP 181; CP 117. It did not enter written findings of fact or conclusions of law.

The Court of Appeals affirmed Mr. Jaurez-Garcia's convictions and sentence, finding the State did not assume the burden of proving which rape resulted in the complaining witness's pregnancy under the Hickman[5] doctrine and that there was no double jeopardy violation pursuant to State v. Rice.[6] Slip Op. at 6, 12. The court also found that the trial court's failure to enter written findings when imposing the exceptional sentence was harmless. Slip Op. at 8.

[5] State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998).
[6] 159 Wn. App. 545, 246 P.3d 234 (2011).

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. The Court should grant review because the Court of Appeals' holding that Alleyne v. United States does not invalidate the basis of its decision in State v. Rice raises a significant constitutional question and issue of substantial public interest.

The double jeopardy clauses of the state and federal constitutions protect against multiple prosecutions for the same conduct and multiple punishments for the same offense. U.S. Const. amend. V; Const. art. I, § 9; Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993). A conviction and sentence will violate the constitutional prohibition against double jeopardy if, under the "same evidence" test, the two crimes are the same in law and fact. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998); State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

The jury found Mr. Juarez-Garcia guilty of three counts of second degree rape of a child for three separate acts against the same alleged victim, E.L. CP 96, 99, 104. In order to convict Mr. Juarez-Garcia of rape of a child, the State had to prove: (1) he had sexual intercourse with E.L.; (2) E.L. was at least 12 years old, but less than 14 years old, at the time; (3) he was not married to E.L. and; (4) he was

at least thirty-six months older than E.L. RCW 9A.44.076(1). For the same three acts against E.L., the jury convicted Mr. Juarez-Garcia of three counts of second degree rape, and answered the attached "special allegation" affirmatively, finding that E.L. was under 15 years of age at the time of the offense. See RCW 9.94A.837.

In State v. Rice, the court distinguished between "sentencing enhancements" and "aggravating factors," finding that a "special allegation" is the former. 159 Wn. App. 545, 569, 246 P.3d 234 (2011). In Rice, the defendant argued his double jeopardy rights were violated when the jury found him guilty of first degree kidnapping, with a predicate charge of first degree molestation, and affirmatively answered the special allegation that the victim was under 15 years of age. Id. at 568-69. He argued that because the predicate felony involved a child less than 15 years old, he was punished twice for the same offense. Id. at 569. Division II disagreed, finding there was no violation of double jeopardy because the special allegation was a sentencing enhancement rather than an aggravating factor. Id. at 569-70. It based this finding on a determination that the special allegation raised the minimum standard sentence rather than allowing the trial

court to impose an exceptional sentence outside the presumptive sentencing range. Id. at 569.

The Court of Appeals rejected Mr. Juarez-Garcia's argument that this analysis was subsequently invalidated by Alleyne v. United States. __ U.S. ___, 133 S.Ct. 2151, 2162, 186 L.Ed.2d 314 (2013). In Alleyne, the Court eliminated the distinction between sentencing enhancements and aggravating factors, finding that a fact which increases the legally prescribed floor of the sentencing range necessarily aggravates the punishment. Id. at 2161. When a finding of fact alters the legally prescribed punishment so as to aggravate it, it must be submitted to the jury and found beyond a reasonable doubt. Id. at 2162-63. Thus, the aggravating fact that E.L. was under 15 years of age cannot be deemed to satisfy the requirements of double jeopardy simply by referring to it as a "sentencing enhancement" instead of an aggravating factor.

The Court of Appeals found that Alleyne is "limited to the Sixth Amendment, does not mention double jeopardy, and does not indirectly impact double jeopardy analysis." Slip Op. at 11. However, the Court of Appeals failed to address the fact that its decision in Rice is based upon a distinction drawn between "sentencing enhancements" and

"aggravating factors." 159 Wn. App. at 569-70. Although Alleyne examined a different question pursuant to the Sixth Amendment, its invalidation of the distinction between sentencing enhancements and aggravating factors eliminates the basis for the Rice decision. __ U.S. __, 133 S.Ct. at 2161; 159 Wn. App. at 569-70. The Court of Appeals' opinion below to the contrary raises a significant constitutional question and issue of substantial public interest. This Court should accept review.

2. The Court should grant review because contrary to the Court of Appeals opinion below, this Court's decision in State v. Hickman requires that the State prove all elements added to the "to convict" instructions beyond a reasonable doubt.

Under State v. Hickman, elements added to the "to convict" instructions become the "law of the case," and the State is required to prove these elements beyond a reasonable doubt. 135 Wn.2d 97, 99, 954 P.2d 900 (1998). In this case, the "to convict" jury instructions properly directed the jury it must find each act constituting second degree rape "separate and distinct" from any other act constituting second degree rape in order to convict Mr. Juarez-Garcia, and gave the identical instruction regarding each charge of second degree rape of a child and second degree child molestation. CP 75-85. Thus, the jury

was correctly prohibited from using one act by Mr. Juarez-Garcia to convict him of more than one count of second degree rape, second degree rape of a child, or second degree child molestation. Because the State was required to prove each act of rape "separate and distinct" from the other acts, and because the State alleged that E.L. became pregnant as a result of one of these rapes, it was required to show which act of rape caused the pregnancy.

However, the verdict forms permitted the jury to find that E.L. became pregnant three times, as a result of each act of rape. CP 111-12. Recognizing that the evidence at trial failed to show E.L. became pregnant three times, the trial court assigned the pregnancy aggravator to one particular act, stating, "I have imposed an exceptional sentence in this case based on the jury's finding... that the charge in Count 4 resulted in her pregnancy." 7/17/13 RP 181; CP 117. There was no evidence supporting the assignment of this aggravator to count IV.

The Court of Appeals declined to apply the Hickman doctrine, finding that nothing in the special verdict form's wording, read together with the separate and distinct language in the to-convict instruction, required the State to prove which specific act of rape caused the victim's pregnancy. Slip Op. at 6. However, despite the requirement

within the to-convict instructions, as to the pregnancy aggravator, the State was not required to prove the crimes were "separate and distinct." CP 75-85. Instead, the jury found, in direct contradiction to the evidence, that E.L. became pregnant three times as a result of three separate rapes. CP 111-12. The trial judge attempted to remedy this inconsistency by assigning the aggravator only to count IV, but there was no evidence that the act alleged in count IV resulted in E.L.'s pregnancy. 7/17/13 RP 181; CP 117.

Indeed, at trial the State made no attempt to present evidence of exactly when E.L. became pregnant, except that it occurred at some point after E.L.'s family moved to Washington in July 2012 and before she made the report to the school secretary in November 2012. 5/29/13 RP 36-37, 60; 5/30/13 RP 28. The State failed to present this evidence despite the fact that E.L. terminated her pregnancy on December 20, 2012. 5/30/12 RP 69. After successfully excluding evidence that the fetus was 25 weeks old at the time of the termination, which suggested E.L. became pregnant several months before the rapes proved at trial,

the State presented its case against Mr. Juarez-Garcia with no evidence tying the pregnancy to a specific act of rape.[7] 5/30/12 RP 69.

The Court of Appeals' holding that the State was not required to show the pregnancy occurred as a result of a specific act of rape proven at trial is contrary to this Court's decision in Hickman and raises an issue of substantial public interest. This Court should accept review.

3. The Court should grant review because this Court's recent decision in State v. Friedlund requires the trial court enter written findings of fact and conclusions of law when imposing an exceptional sentence, contrary to the Court of Appeals decision below.

Under RCW 9.94A.535, "[w]henever a sentence outside the standard sentencing range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." The Court of Appeals acknowledged the trial court failed to enter the mandatory written findings and conclusions when it imposed an exceptional sentence upon Mr. Juarez-Garcia, but found this omission was "harmless and not a basis for relief on appeal." Slip Op. at 8.

The Court of Appeals' holding contravenes this Court's decision in State v. Friedlund, __ Wn.2d __, __ P.3d __, 2015 WL 196506 (filed

[7] As the State argued below, the incidents for which Mr. Juarez-Garcia was found guilty of rape occurred after mid-October. 5/29/13 RP 78.

1/15/15). In Friedlund, the Court of Appeals found the trial courts' failure to enter written findings was harmless because the record was clear that, in each instance, the trial court imposed the exceptional sentenced based on the jury's finding of the aggravating circumstance. __ Wn.2d __, __ P.3d __2015 WL at *2. This Court reversed, holding that when a trial court imposes an exceptional sentence but fails to enter written findings prior to appeal, the case must be remanded for the entry of such findings. __ Wn.2d __, __ P.3d __2015 WL at *1.

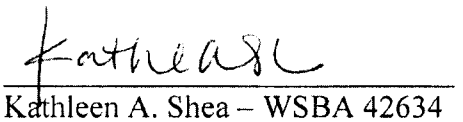
Here, the trial court's oral findings were not clear. Slip Op. at 8, n. 18. The Court of Appeals relied only on the judgment and sentence, which it determined "clearly reflects the exceptional sentence is based upon the pregnancy aggravating circumstance." Id. However, under Friedlund, "[e]ntry of written findings is essential when a court imposes an exceptional sentence." __ Wn.2d __, __ P.3d __2015 WL at *3. The Court of Appeals' finding to the contrary ignores the plain language of the statute and is contrary to the statute's explicit purpose to make "the criminal justice system accountable to the public." __ Wn.2d __, __ P.3d __2015 WL at *3; RCW 9.94A.010. Its decision is clearly contrary to Friedlund and this Court should accept review.

E. CONCLUSION

The Court should grant review of the Court of Appeals opinion affirming Mr. Juarez-Garcia's convictions and sentence.

DATED this 21st day of January, 2015.

Respectfully submitted,



Kathleen A. Shea – WSBA 42634
Washington Appellate Project
Attorney for Petitioner

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 **Washington State Supreme Court** under **Case No. 91104-5**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Rosemary Kaholokula, DPA
[skagitappeals@co.skagit.wa.us] [rosemaryk@co.skagit.wa.us]
Island County Prosecutor's Office

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 21, 2015

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: skagitappeals@co.skagit.wa.us; rosemaryk@co.skagit.wa.us; Kathleen Shea
Subject: RE: 911045-JUAREZ-GARCIA-AMENDED PETITION FOR REVIEW

Rec'd 1/21/15

From: Maria Riley [mailto:maria@washapp.org]
Sent: Wednesday, January 21, 2015 3:50 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: skagitappeals@co.skagit.wa.us; rosemaryk@co.skagit.wa.us; Kathleen Shea
Subject: 911045-JUAREZ-GARCIA-AMENDED PETITION FOR REVIEW

To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Amended Petition for Review

Kathleen A. Shea - WSBA #42634
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: kate@washapp.org

By
Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org