NO. 100640-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DIEGO MARTINEZ MARTINEZ,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Diego Martinez Martinez abducted developmentally-disabled S.M. and forcibly raped her at knifepoint in a wooded homeless encampment. Following his conviction for first-degree rape, the court imposed an exceptional sentence of 20 years based on the jury's finding S.M. was particularly vulnerable. The conviction was affirmed on appeal.

The Court of Appeals applied well-settled principles in determining the evidence and its reasonable inferences provided substantial evidence of the deadly-weapon alternative means for first-degree rape. S.M. repeatedly testified Martinez Martinez held a knife while he raped her, she had defensive wounds to her hands, and she stated she was on the ground when she grabbed the knife to avoid being stabbed. A rational trier of fact could find her later statements she first saw the knife when she left the tent less credible because her cognitive and communicative disabilities affected her ability to answer complex questions on cross examination.

The Court of Appeals properly rejected Martinez Martinez's contention the particularly vulnerable victim aggravator is unconstitutionally vague pursuant to this Court's holding in *Baldwin* that aggravators are not subject to vagueness challenges.[1] Recent United States and Washington Supreme Court cases affirm that sentencing guidelines which do not result in mandatory changes to penalties are not subject to due process vagueness challenges. Similarly, the Court of Appeals properly applied well-settled rules in determining the use of an alleged victim's initials in jury instructions does not undermine the presumption of innocence or constitute a comment on the evidence.

Finally, this Court properly determined that recalculation of Martinez Martinez's offender score pursuant to *Blake* does not require resentencing where the record establishes Martinez Martinez's conduct was the sole basis for the exceptional

[1] *State v. Baldwin*, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003).

sentence.[2] Martinez Martinez fails to establish a basis for review under RAP 13.4(b). This Court should deny review.

II. RESTATEMENT OF THE ISSUES

A. Was there substantial evidence of the deadly-weapon alternative for first-degree rape where the victim repeatedly stated the defendant held the knife during the rapes, cuts on her hands corroborate that testimony, and a rational trier of fact could infer that any inconsistent statements resulted from her inability to understand complex questions due to her cognitive disabilities?

B. Should the Court reverse its decision in *Baldwin* that aggravating factors are not subject to vagueness challenges, despite the fact that *Baldwin* was validated in recent United States and Washington State Supreme Court decisions?

C. Consistent with the opinions of this Court, did the Court of Appeals correctly hold that use of the alleged victim's initials in the jury instructions does not violate a defendant's constitutional rights when the jury instructions communicate the State's burden, the presumption of innocence, and the prohibition on judicial comments on the evidence?

D. Did the Court of Appeals properly apply this Court's well-established rule that resentencing is unwarranted where the record clearly indicates that the court would impose the same sentence regardless of a change in the offender score?

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[2] *State v. Blake*, 197 Wn.2d 170, 173, 481 P.3d 521 (2021).

III. STATEMENT OF THE CASE

S.M. is a significantly-disabled autistic adult whose functioning can be compared to a 5-10 year-old child depending on the circumstances. 5RP 599, 640; 6RP 793. She cannot drive, live alone, or manage her own hygiene. 5RP 600, 603, 645, 686; 6RP 911. Her cognitive and communicative impairments are immediately apparent to anyone who interacts with her. 5RP 705; 6RP 640-44, 685, 748-49, 755-56, 802, 908-11. Her vocabulary is childlike, she is unable to provide a narrative response to questions, and she speaks with a flat affect and soft voice. 5RP 642-44, 685, 755-56 908-11. She is one of the lower-functioning clients of the Support Services for the Developmentally Disabled (SSDD), a non-profit that manages her finances. 5RP 640, 642, 648, 686.

S.M. was standing on the street waiting for the bus when she was approached by Martinez Martinez. 5RP 529, 557; 6RP 826. "Mean" and "drunk," he told her to come with him, and she complied. 5RP 531-32, 586, 593; 6RP 751. He purchased beer,

then took her into a wooded ravine where he lived in an encampment. 5RP 532; 6RP 817-20, 834-37. In the cover of the woods, he hit S.M. in the face, called her a bitch, took her bag, and brought her inside his tent. 5RP 533, 596; 6RP 753.

Martinez Martinez forced S.M. to the ground and onto her back, where he repeatedly raped her for the next several hours. 5RP 534, 536-38, 570, 590, 606-07, 616; 6RP 752-53. When S.M. screamed or called for help, Martinez Martinez hit her in the face. 5RP 543, 595; 6RP 751. He grabbed, slapped, and strangled her. 6RP 758. He held a long knife in his hand during the rapes. 5RP 530-33, 538, 538, 544, 550-51, 565-67, 583-84. S.M. believed he was going to kill her and cut her hands grabbing at the knife to avoid being stabbed. 5RP 550-51, 592-94; 6RP 751, 758-59, 809. She eventually escaped and obtained a ride home from a stranger. 5RP 540, 545, 559-60, 573; 6RP 757.

Police were contacted the next day by an employee at SSDD and Martinez Martinez was subsequently identified as a suspect. 5RP 649-50, 659, 678, 706, 754. DNA taken from

S.M.'s sexual assault kit matched Martinez Martinez. 7RP 953. Medical personnel documented injuries on S.M.'s hands consistent with pushing away a knife. 6RP 767, 808.

The State charged Martinez Martinez with first-degree rape and sexually-motivated first-degree kidnapping of a particularly vulnerable victim, and the case proceeded to trial. CP 7-9; 1RP 5. S.M. repeatedly testified that Martinez Martinez held a knife in his hand when he raped her. 5RP 530-33, 538, 544, 550-51, 565-67. She began making inconsistent statements about the knife partway through cross-examination in response to complex and leading questions. 5RP 589-96.

The jury was instructed on two alternative means for first-degree rape: (1) use of a deadly weapon, and (2) kidnapping. CP 33. The court properly instructed that each juror must find at least one means proven beyond a reasonable doubt. CP 33, 44. The to-convict instruction for rape identified S.M. by her initials. CP 33. Jurors were correctly instructed on the statutory definition of a

particularly vulnerable victim. CP 62. Martinez Martinez did not object to any of the instructions. 7RP 991, 996, 1025, 1027.

Martinez Martinez was convicted as charged. CP 7-9, 65, 69. He was sentenced for first-degree rape following the State's concession the kidnapping was the same criminal conduct. 9RP 1137, 1140-41; CP 159. The court determined Martinez Martinez had an offender score of 5, and a standard-sentencing range of 138 to 184 months to life. 9RP 1137; CP 77. One point was derived from an unlawful possession conviction later voided by *State v. Blake*, 197 Wn.2d 170, 173, 481 P.3d 521 (2021).

Finding that Martinez Martinez had taken and exerted control over someone who was "secondary to her disability, incapable of resistance," the court found substantial and compelling reasons supporting an exceptional sentence of 20 years, followed by the 24-month sentencing enhancement. 9RP 1144, 1146-47; CP 158-61.

On direct appeal, the appellate court held that: (1) there was sufficient evidence to support the deadly-weapon alternative

for first-degree rape; (2) first-degree kidnapping merged with first-degree rape and must be vacated; (3) sufficient evidence supported the particularly vulnerable victim aggravator; (4) the aggravator was not subject to a due process vagueness challenge; (5) no constitutional violation stemmed from use of the victim's initials in the jury instructions; (6) resentencing was unwarranted under *Blake* because the exceptional sentence was unrelated to the offender score; and (7) the court must consider whether to impose community-custody supervision fees. *State v. Martinez Martinez*, No. 54512-8-II, 2022 WL 102614 at *1 (Wash. Ct. App. Jan 11, 2022) (unpublished). Martinez Martinez filed a timely petition for review of holdings (1), (4), (5), and (6).

IV. ARGUMENT

A. The Appellate Court Properly Applied Well-Settled Case Law in Finding Sufficient Evidence Martinez Martinez Used a Deadly Weapon During the Rape.

The Court of Appeals relied on well-established law and legal principles in determining that substantial evidence supported the deadly-weapon alternative means. There is no

public interest in reviewing the application of these bedrock principles.

1. Forcible rape is elevated to a first-degree offense when a deadly weapon is used during the rape.

Martinez Martinez's use of the knife to terrorize S.M. and reinforce her compliance elevated the forcible rape to a first-degree offense. First-degree rape requires the State to prove that the defendant (1) engaged in sexual intercourse; (2) by forcible compulsion; and (3) under one of four possible aggravating circumstances. *State v. Bright*, 129 Wn.2d 257, 266, 916 P.2d 922 (1996); RCW 9A.44.040(1)(a). These aggravating circumstances are alternative means. *State v. Armstrong*, 188 Wn.2d 333, 340, 351-52, 394 P.3d 373 (2017). Alternative means exist when the legislature has determined the same offense may be committed in different manners. *State v. Woodlyn*, 188 Wn.2d 157, 163, 392 P.3d 1062 (2017).

Under RCW 9A.44.040(1)(a), a defendant commits first-degree rape when he engages in sexual intercourse by forcible compulsion and "uses or threatens to use a deadly weapon." Use

of the weapon may but need not be the means of forcible compulsion; rather, its use must occur during the assault constituting the rape. *State v. Brown*, 127 Wn.2d 749, 756, 903 P.2d 459 (1995); *Bright*, 129 Wn.2d at 267. Martinez Martinez committed forcible rape when he hit S.M. in the woods, forced her into his tent and onto the ground, and physically assaulted her when she resisted the rape. His further use of a knife during the assault constituted first-degree rape.

2. The Court of Appeals correctly held that the evidence and its reasonable inferences establish substantial evidence of the deadly-weapon alternative means.

Martinez Martinez's right to a unanimous jury under article I, section 21 of the Washington Constitution was protected because each alternative means submitted to the jury was supported by substantial evidence. *Armstrong*, 188 Wn.2d at 340. Substantial evidence exists when there is sufficient evidence for a rational trier of fact to find an alternative means beyond a reasonable doubt when viewing the evidence and all reasonable inferences therefrom in a light most favorable to the State. *Id*. at

341-44. S.M. testified unequivocally on at least four occasions during direct and cross examination that Martinez Martinez held the knife while he raped her:

> Q Where was the knife when he was raping you?
>
> A In his hand.

5RP 538 (direct).

> ***
>
> Q …So you said, earlier today, that while he was raping you, he had the knife in his hand. Is that true?
>
> A Um-hum. Yeah.
>
> Q Okay. So we're clear, when you say he was raping you, is that the part where his private part was inside your private part?
>
> A Yeah.
>
> Q And while that was going on, he at the same time had a knife in his hand?
>
> A Yeah.

5RP 565-65 (cross).

> ***
>
> Q So while that was going on, your legs are up here, around his shoulders?
>
> A Yeah.
>
> Q And at the same time, he had a knife in his hand while he was raping you; is that true?
>
> A Yeah.

5RP 567 (cross). These responses alone provide sufficient evidence for a rational trier of fact to conclude that Martinez Martinez used a knife while he raped S.M. They are consistent with S.M.'s preoccupation with the knife, fear she would be killed, description of the knife near her chest, and documented injuries from grabbing the knife to avoid being stabbed. 5RP 530-33, 538, 544, 550-51, 565-67, 583-85, 588-96; 6RP 751, 758, 808-09.

The Court of Appeals properly recognized that information about S.M.'s significant disabilities and communicative limitations informs the inferences to be drawn from her inconsistent statements. *Martinez Martinez*, 2022 WL 102614 at *10. In claiming there is insufficient evidence of the deadly-weapon alternative means, Martinez Martinez "necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *E.g.*, *State v. Bergstrom*, 199 Wn.2d 23, 502 P.3d 837, 847 (2022) (quoting *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014)).

Circumstantial evidence is as probative as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The court defers to the fact-finder on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Bergstrom*, 199 Wn.2d at 847.

When she was well into cross-examination, S.M. provided some inconsistent responses about when Martinez Martinez used the knife. The questions eliciting these responses followed a complex exchange in which counsel accused her of being untruthful when she said the knife didn't touch her *body* because she actually had touched it with her *hand*. 5RP 583-84. Through leading questions, counsel asserted S.M. hadn't *seen* the knife until she was leaving the tent. 5RP 589-91. S.M.'s confusion is evident:

> Q Yeah. At nighttime. Right. So is that the first time you saw the knife is when you were leaving the tent?
>
> A Yeah.
>
> Q Okay. So earlier you said that while he was raping you he had the knife in his hand. So those

aren't the same. Which is the truth? Do you remember?

A He was about to stab me.

Q Right. And the question is where were you when he was about to stab you with the knife?

A I was on the ground.

Q Okay. And were you inside the tent, or were you leaving the tent?

A Leaving the tent.

Q Leaving the tent, did all the rapes occur inside the tent?

A Yeah.

Q So if the first time you saw the knife was when you were leaving the tent –

A Yes.

Q -- then he didn't have the knife in his hand while he was raping you inside the tent, does that make sense?

A Yeah.

5RP 589-91. As the appellate court noted, even then, S.M. stated she was "on the ground," and about to be stabbed, supporting the conclusion that Martinez Martinez was using the knife during the assault constituting the rape. *Martinez Martinez*, 2022 WL

102614 at *9. S.M. repeated the inconsistent statements during re-direct examination. 5RP 592-95.

Inferences drawn from evidence of S.M.'s cognitive and communicative disabilities support the conclusion her inconsistent statements in response to complex questions were less credible than the responses she provided to simple, open-ended questions. *Bergstrom*, 199 Wn.2d at 847. Police officers, a forensic interviewer, the SANE examiner, and SSDD staff testified that S.M. was susceptible to confusion when the subject matter was complicated and had limited ability to track and answer questions. 5RP 520-599, 640, 642, 685; 6RP 749, 755-56, 759, 793, 908-11. The forensic interviewer estimated S.M.'s verbal ability was similar to a five year-old child. 6RP 908-11. While S.M. was admittedly inconsistent with respect to the knife, the testimony and wounds at a minimum provided a consistent inference that Martinez Martinez used the knife during the rape. A rational trier of fact could conclude S.M.'s inconsistent responses in the context of the questioning and her disabilities

were less credible than her repeated and corroborated assertions the knife was used during the rape.

Even assuming for argument that Martinez Martinez only displayed the knife near the end of the criminal assault, when he remained close enough to S.M.'s body she instinctively reacted and cut herself, it is not a separate crime. Martinez Martinez's reliance on *Allen* is misplaced, as the Court there determined a separate kidnapping, unnecessary to and unconnected to the already-completed robbery, was a separate crime. *State v. Allen*, 94 Wn.2d 860, 864, 621 P.2d 143 (1980), *abrogated by State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983). Here, there was no interruption of the criminal episode until S.M. left the tent. The Court of Appeals rightly concluded sufficient evidence supports the conclusion the knife was used during the rape.

3. There is no basis to change well-settled principles regarding the sufficiency of the evidence and the aggravating circumstances underlying first-degree rape.

The Court of Appeals accurately stressed that there is no authority for Martinez Martinez's contentions that the last

statement a witness makes must be accepted as true and a trier of fact has no role in determining which of conflicting statements is more credible based on the totality of the evidence. *Martinez Martinez*, 2022 WL 102614 at *10. Jurors routinely evaluate conflicting statements. Recantation is common in domestic violence cases. *See State v. Magers*, 164 Wn.2d 174, 184-85, 189 P.3d 126 (2008) (ER 404(b) evidence relevant to assessing credibility of recantation in domestic violence case). Young children, to whom S.M. can be compared, contradict themselves. *See*, *e.g.*, *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 14-18, 84 P.3d 859 (2004) (discussing cases where child victims recant and make inconsistent statements). The trier of fact is responsible for weighing such testimony.

In essence, Martinez Martinez is asking this Court to accept this case to reverse longstanding evidentiary standards for evaluation of the sufficiency of the evidence. He offers no public policy consideration justifying such a radical departure from the case law. To the contrary, there is a critical public interest in

respecting the jury's ability to evaluate conflicting testimony and inferences in cases involving victims who have an intellectual disability or are children. There is similarly no reason to deviate from long-standing principles mandating courts to review evidence and all inferences therefrom in the light most favorable to the State.

B. The Appellate Decision Comports with State and Federal Supreme Court Decisions Affirming that Aggravating Factors Are Exempt from Vagueness Challenges.

Aggravating factors under RCW 9.94A.535 are not subject to void-for-vagueness challenges. This Court held in *Baldwin* that the due process concerns underlying the void-for-vagueness doctrine are inapplicable to sentencing guidelines that neither inform the public of penalties attached to a criminal act nor alter the minimum or maximum penalty. *State v. Baldwin*, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). A jury's finding of an aggravating factor under RCW 9.94A.535 does not require a certain outcome or vary a crime's statutory minimum or maximum—it merely gives the judge discretionary authority to

impose a sentence outside the standard-sentencing range, but within the legislatively-set maximum. *Id*. at 461. *Baldwin* remains valid following recent state and federal Supreme Court decisions.

Furthermore, the particularly vulnerable victim aggravator is sufficiently definite even if analyzed for vagueness. Martinez Martinez fails to establish any RAP 13.4(b) basis for reassessing the inapplicability of the void-for-vagueness doctrine to aggravating factors.

1. United States and Washington Supreme Court cases support the constitutionality of exempting aggravating factors under RCW 9.94A.535 from challenges to vagueness.

The United States Supreme Court has validated *Baldwin's* holding that the vagueness doctrine is inapplicable to aggravating factors which do not result in mandatory increased punishment. *Beckles v. United States*, __ U.S.__, 137 S.Ct. 886, 894, 197 L.Ed 2d 145 (2017). *Beckles* held that advisory sentencing guidelines are not subject to a due process void-for-vagueness challenge. *Id*. Due process requires clarity regarding

the range of available sentences for an offense. *Id*. Vagueness challenges are inapplicable to advisory guidelines that guide judicial determination of appropriate sentences within the sentencing range. *Id*. Aggravating factors under RCW 9.94A.535 are similarly advisory. *Baldwin*, 150 Wn.2d at 160-61. They do not require a judge to impose an increased sentence and are thus exempted from vagueness challenges under *Beckles* and *Baldwin*.

Martinez Martinez incorrectly argues that the Supreme Court decision in *Johnson* invalidates *Baldwin*. The Court in *Johnson* held that the residual clause of the Armed Career Criminal Act was void-for-vagueness. *Johnson v. United States*, 576 U.S. 591, 606, 135 S. Ct. 2551, 2563, 192 L.Ed.2d 569 (2015). But in *Beckles*, the Court considered whether or not the *Johnson* result applied to sentencing guidelines. *Beckles*, 137 S. Ct. at 892. The Court explained that the residual clause was subject to the vagueness doctrine because it *required* the sentencing court to increase the term of the defendant's sentence.

Id. In contrast, sentencing guidelines that do not fix the permissible range of the sentence but rather guide the exercise of a court's discretion are not subject to a vagueness challenge. *See Id*.

Martinez Martinez also wrongly focuses on Supreme Court decisions in *Blakely*, *Apprendi*, and *Alleyne* to argue that *Baldwin* is outdated. But these decisions address the Sixth Amendment right to jury determination of facts that can increase punishment, not application of the due process vagueness doctrine to aggravating factors. *Blakely* held that with the exception of offender score, a jury must find the existence of aggravating sentencing factors that could increase punishment. *Blakely v. Washington*, 542 U.S. 296, 305, 305 124 S.Ct. 2531, 2538, 159 L.Ed.2d 403 (2004). The procedure in Martinez Martinez's case complied with this rule. *Apprendi*, and *Alleyne*, on the other hand, hold that any fact resulting in a *mandatory* change to the sentence must be submitted to the jury. *Apprendi v. New Jersey*, 530 U.S. 466, 466, 120 S.Ct. 2348, 2350, 147

L.Ed.2d 435 (2000) (mandatory increase beyond statutory maximum); *Alleyne v. United States*, 570 U.S. 99, 186 L.Ed.2d 314, 186 L.Ed.2d 314 (2013) (mandatory increase of minimum sentence). *Apprendi* and *Alleyne* are inapplicable because the particularly vulnerable victim aggravator does not result in a mandatory sentence change.

Each Court of Appeals division recognizes the validity of *Baldwin*, following the Supreme Court decisions in *Blakely*, *Apprendi*, *Alleyne*, and *Johnson*. *State v. Burrus*, 117 Wn. App. 2d 162, 175, 484 P.3d 521 (2021), *review denied*, 198 Wn.2d 1006, 493 P.3d 746 (2021); *State v. Brush*, 5 Wn. App. 2d 40, 57, 425 P.3d 545 (2018), *review denied*, 192 Wn.2d 1012, 432 P.3d 792 (2019); *State v. DeVore*, 2 Wn. App. 2d 651, 663, 413 P.3d 58 (2018), *review denied*, 191 Wn.2d 1005, 424 P.3d 1216 (2018). As a result, there is no need to return to this well-plowed ground.

Martinez Martinez's related argument that *Blakely*, *Apprendi*, and *Alleyne* transform aggravating factors into

elements of the crime for all purposes was rejected by this Court in *Siers*, *Allen*, and *Whitaker*. This Court in *Siers* held that aggravating circumstances are not required in the charging information, so long as a defendant receives notice of the essential elements of a charge. *State v. Siers*, 174 Wn.2d 269, 276, 274 P.3d 358 (2012). Under *Siers*, aggravators are not essential elements of the crime.

In *Allen*, this Court held that aggravating factors are elements for purposes of the Sixth Amendment right to a jury trial and the double jeopardy clause for the crime of aggravated murder. *State v. Allen*, 192 Wn.2d 526, 534, 431 P.3d 117 (2018). It explained that under *Alleyne*, "any fact that increases the mandatory minimum is an "element" that must be submitted to the jury." *Id*. (citing *Alleyne*, 570 U.S. 99). Because capital punishment aggravators increase the mandatory minimum, they "are elements of the offense of aggravated first-degree murder for double jeopardy purposes." *Id*. at 544. *Allen* did not implicate the Sentencing Reform Act aggravators. *Id.* at 530 n. 2 (stating

that "[t]hese additional aggravators are not before us."). This Court in *Whitaker* further explained that *Allen* did not transform aggravating circumstances under RCW 9.94A.535 into separately charged crimes—it is limited to aggravating circumstances under RCW 10.95.020. *State v. Whitaker*, 195 Wn.2d 333, 339, 459 P.3d 1074 (2020).

The holdings in *Siers*, *Allen*, and *Whitaker* post-date *Blakely*, *Apprendi*, and *Alleyne*, and firmly establish that aggravating circumstances under RCW 9.94A.535 do not become elements of a crime simply because they implicate the right to trial by jury. *Baldwin's* holding that aggravating circumstances are not subject to vagueness challenges remains constitutionally sound.

2. The particularly vulnerable victim aggravator is not unconstitutionally vague.

Review is also unwarranted because even if the vagueness doctrine applied, the particularly vulnerable victim aggravator under RCW 9.94A.535(3)(b) is not unconstitutionally vague as applied to the facts of this case. *State v. Duncalf*, 177 Wn.2d 289,

297, 300 P.3d 352 (2013) (courts consider whether statute is vague as applied to the facts at issue). The jury in Martinez Martinez's case was correctly instructed that:

> A victim is "particularly vulnerable" if he or she is more vulnerable to the commission of the crime than the typical victim of rape and/or kidnapping. The victim's vulnerability must also be a substantial factor in the commission of the crime.

CP 62; RCW 9.94A.535(3)(b). This required the jury to find that S.M. was more vulnerable to the commission of rape than the average victim and that her vulnerability was a substantial factor in Martinez Martinez's crime. *Duncalf*, 177 Wn.2d at 297.

The terms of the particularly vulnerable aggravator are easily understood by an ordinary person. Language challenged for vagueness "is afforded a sensible, meaningful, and practical interpretation." *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990). Terms are considered in the context in which they are used and undefined terms are considered based on their "plain and ordinary" dictionary meaning. *State v. Bahl*, 164 Wn.2d 739, 754, 193 P.3d 678 (2008). "[A]s long as a

person of reasonable understanding is [not] required to guess at the meaning of the statute, notwithstanding some possible areas of disagreement, the ordinance is sufficiently definite." *State v. Murray*, 190 Wn.2d 727, 736, 416 P.3d 1225 (2018) (internal quotations omitted).

An ordinary person easily understands the terms "particularly," "vulnerable," "substantial," and "factor." Vulnerability can be a characteristic as simple as youth. *State v. Fisher*, 108 Wn.2d 419, 424, 739 P.2d 683 (1987), *overruled on other grounds as recognized by State v. Parmelee*, 172 Wn. App. 899, 910, 292 P.3d 799 (2013). It can be disability. *State v. Mitchell*, 149 Wn. App. 716, 724, 205 P.3d 920 (2009). The dictionary definition of "vulnerable" includes "capable of being wounded: defenseless against injury" and "open to attack or damage," which reflects a commonsense understanding. *Webster's Third New International Dictionary* 2566-67 (2002). "Particularly" means "in the specific case of one person or thing as distinguished from others" and "in a special or unusual degree:

to an extent greater than in other cases or towards others." *Webster's* at 1647. S.M. was indisputably particularly vulnerable to Martinez Martinez by virtue of her disabilities.

The terms "substantial" and "factor" are also easily understood in a commonsense manner. In *Duncalf*, this Court held that the aggravating factor of injuries "substantially exceeding" substantial bodily harm was not vague as applied to a defendant who inflicted permanent injuries. *Duncalf*, 177 Wn.2d at 297. Under the dictionary definition, "substantially interfere" means a "real" or "material" interference. *State v. Worrel*, 111 Wn.2d 537, 544, 761 P.2d 56 (1998). The same dictionary currently defines the term "substantial" as both "being that specified to a large degree or in the main," and "an important or material matter, thing, or part." *Webster's* at 2280. "Factor" means "something (as an element, circumstance, or influence) that contributes to the production of a result." *Webster's* at 813. Under the dictionary and commonsense understandings of the terms "substantial" and "factor," S.M.'s helplessness must have

been a significant circumstance furthering Martinez Martinez's crime. S.M.'s disability in fact rendered her incapable of resisting Martinez Martinez's manipulation on the street and physical control in the ravine. Review is unwarranted where the aggravator is sufficiently definite as applied to the facts of the case.

C. It Is Well-Established That Use of Initials in Jury Instructions Does Not Undermine the Presumption of Innocence or Inject Judicial Commentary on the Evidence.

Martinez Martinez wrongly characterizes the appellate court's adoption of the reasoning in *Mansour* as flawed. *Mansour* applied well-settled principles articulated by this Court in finding that use of initials in jury instructions does not violate the presumption of innocence or constitute an improper judicial comment on the evidence. S*tate v. Mansour*, 14 Wn. App. 2d 323, 329-31, 470 P.3d 543 (2020), *review denied*, 196 Wn.2d 1040, 479 P.3d 708 (2021).

1. Using initials does not implicate the presumption of innocence or the burden of proof when the jury instructions communicate these principles.

The jury instructions in Martinez Martinez's case protected his constitutional rights by communicating the State's burden and the presumption of innocence. CP 29. The Sixth Amendment and the due process clause of the Fourteenth Amendment together require that an impartial jury find that the State has proven every element of a crime beyond a reasonable doubt. U.S. Const. amend. VI, XIV; *State v. Chacon*, 192 Wn.2d 545, 549-50, 431 P.3d 477 (2018). Jury instructions safeguard the defendant's constitutional rights when, viewed as a whole, they communicate the State's burden of proving the elements of the crime beyond a reasonable doubt and the presumption of innocence. *State v. Bennet*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Jurors are presumed to follow the court's instructions, hold the State to its burden, and presume innocence. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). Jurors are

unlikely to assume an individual is a victim simply because initials are used in the jury instructions. *Mansour*, 14 Wn. App. 2d at 331. Nothing about use of initials implies a person is actually a proven victim, particularly when there is explicit instruction regarding the defendant's presumed innocence. If considered at all, jurors are likely to assume courts follow standard practices in instructing the jury and no special meaning is imparted by the form of an alleged victim's name.

Martinez Martinez improperly asks this Court to speculate that media practices cause jurors to conclude a person designated by initials is a proven victim. But any cultural practice of protecting the identities of individuals associated with sexual assault claims also neutralizes any special meaning attached to initials. Common sense, lived experience, and publicized stories of both substantiated and unsupported allegations informs the average person's awareness that status as an alleged victim does not equate to believable claims. Martinez Martinez provides no evidence that use of initials provides any signal as to an

allegation's believability or overrides a juror's ability to follow the court's instructions. Martinez Martinez fails to show use of S.M.'s initials in the instructions presents an important constitutional question meriting review under RAP 13.4(b).

2. Initials do not constitute a comment on the evidence.

The Court of Appeals properly adopted the holding of *Mansour* in finding that use of initials did not resolve a contested factual issue or constitute a comment on the evidence. Judicial officers must refrain from commenting on the factual merits of a case. Const. art. IV §16. Only when a jury instruction essentially resolves a contested factual issue does it constitute an improper comment on the evidence. *See State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). The alleged victim's name is not a contested fact or an element of the crime. *State v. Levy*, 156 Wn.2d 709, 722, 132 P.3d 1076 (2006).

Jurors are explicitly instructed that the judge is prohibited from expressing a personal opinion on the case. CP 26. Presumed to follow the instructions, jurors are unlikely to infer a judicial

opinion on the merits of the case based on the use of initials in a jury instruction. *Kalebaugh*, 183 Wn.2d at 586. Martinez Martinez wrongly asks this Court to grant review on the assumption jurors will conclude a judge is sending a covet message about personal belief in the defendant's guilt by the use of initials. This assumption has already been soundly refuted.

D. This Court's Decisions Recognize that Resentencing Is Not Merited When the Trial Court Would Impose the Same Sentence Regardless of a Recalculated Offender Score.

The Court of Appeals correctly held that the sentencing court's emphasis on Martinez Martinez's conduct as justification for its exceptional sentence, to the exclusion of all other considerations, shows that a recalculated standard-sentencing following *Blake* would not change the court's sentence. *Martinez Martinez*, 2022 WL 102614 at *16. A court may impose an exceptional sentence outside the standard-sentencing range for substantial and compelling reasons. RCW 9.94A.535. A jury's finding the defendant knew the victim was particularly

vulnerable may support such a sentence. RCW 9.94A.535; 9RP 114-47.

Martinez Martinez's offender score at sentencing was calculated at 5 points, conferring a 138 to 184 months to life standard-sentencing range. *Blake* subsequently voided Martinez Martinez's prior conviction for possession of a controlled substance. *Blake*, 197 Wn.2d at 173. His offender score is now 4 points, and the standard-sentencing range is 129 to 171 months to life. RCW 9.94A.510. The high-end of the range is reduced by 13 months.

A revised offender score or standard sentencing range does not require remand when "the record makes clear that the trial court would impose the same sentence," regardless of these calculations. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003); *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). This is the case here. The sentencing court emphasized it had never before imposed an exceptional sentence absent a stipulation, but found the reasons for such a sentence in Martinez

Martinez's case "substantial" and "compelling." 9RP 1144. In meticulous detail, the court described why this was so. 9RP 1144-47. The court found that Martinez Martinez committed his crimes against a person "with the mental capacity somewhere between the ages of 5 and 7 or 8 years old," who was, "secondary to her disability, incapable of resistance." 9RP 1146. Worse still, Martinez Martinez had an opportunity to change his mind when he interacted with S.M. on the street, but went on to severely abuse a person he knew was unable to protect herself. 9RP 1145-46.

The court determined these acts and circumstances warranted an exceptional sentence of 20 years. 9RP 1147; CP 158-61. That sentence, plus the 24-month deadly weapon enhancement, resulted in a total sentence of 264 months to life. *Id*.

The Court of Appeals properly concluded that the stark absence of any mention of criminal history, offender score, or past offenses in the oral record demonstrates its unimportance to

the court's reasoning. *Martinez Martinez*, 2022 WL 102614 at *16. The written findings reiterate the conduct-based justification for the exceptional sentence. CP 160. Neither the State nor the court used the then-correct standard-range as a departure point for calculation of an appropriate sentence. CP 76-134, 158-61; 9RP 1138, 1145-47. The fact the judge followed the law in verifying Martinez Martinez's criminal history and determining his sentencing range prior to sentencing is not evidence it was used as a basis for the exceptional sentence. Unlike a prior violent offense, a non-violent drug possession conviction does not in itself suggest a longer sentence is merited in a first-degree rape case. Martinez Martinez fails to show that the Court of Appeals improperly evaluated the totality of the record when it concluded that a 13-month recalculation of the high-end of the sentencing range would not change the court's sentence. The Court's simple application of well-established rules to the facts does not merit review.

V. CONCLUSION

For the foregoing reasons, this Court should deny Martinez Martinez's petition for review.

This document contains 5,800 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 6th day of April, 2022

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

4-6-22	*s/Therese Kahn*
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PIERCE COUNTY PROSECUTING ATTORNEY

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