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Supreme Court No. 102045-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ANTHONY VASQUEZ,
Respondent,

v.

STATE OF WASHINGTON,
Petitioner.

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

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

The prosecution agreed Anthony Vasquez was entitled to a resentencing hearing following a reduction in his offender score after *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). But at that resentencing, the prosecution convinced the court the scope of the hearing was "narrow" and argued it was bound by the intent of the previous sentencing judge. As a result, the trial court refused to consider Mr. Vasquez's arguments, did not exercise its discretion, and simply replicated the prior sentence.

The Court of Appeals agreed the trial court misunderstood its discretion to consider relevant mitigating evidence and remanded for resentencing. The State seeks review of the unpublished opinion, manufacturing a nonexistent conflict with inapposite cases to argue the resentencing it *agreed* to in the trial court was improper. The opinion does not conflict with relevant cases or involve a significant constitutional question or substantial public interest. This Court should deny review.

B. IDENTITY OF RESPONDENT AND DECISION BELOW

Mr. Vasquez asks this Court to deny the prosecution's petition seeking review of the unpublished Court of Appeals decision, dated May 2, 2023.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court deny review of the Court of Appeals opinion addressing a direct appeal from a resentencing hearing where the prosecution *agreed* to the resentencing but now abandons its agreement, reverses course, and argues Mr. Vasquez was not entitled to the very resentencing it agreed to hold?

2. Should this Court deny review of the unpublished opinion in which the Court of Appeals held resentencing was required because all members of the panel unanimously agreed the trial court did not understand its discretion, wrongly thought it was limited to replicating the prior judge's intent, and improperly refused to consider Mr. Vasquez's mitigating evidence and arguments?

D. STATEMENT OF THE CASE

In 2018, the trial court sentenced Anthony Vasquez to an exceptional sentence of 55 years on convictions for murder in the first degree with a firearm enhancement, unlawful possession of a firearm in the second degree, and tampering with a witness. CP 53-75. The court determined Mr. Vasquez's offender score was 12, resulting in a standard range of 411-548 months. CP 55-56, 112, 118. The court applied the so-called free crimes aggravator, RCW 9.94A.535(2)(c), to impose an exceptional sentence of 600 months, concurrent to 60 months each on the two remaining counts. CP 56-58, 73-74. The court also added the 60-month firearm enhancement for a total sentence of 660 months. CP 56-58.

In 2021, Mr. Vasquez moved to vacate his sentence because the court sentenced him based on an erroneous offender score. CP 87-94. The court had included in his score a conviction for possession of a controlled substance. CP 55.

However, under *Blake*, that conviction was void. 197 Wn.2d 170.

One critical fact the State glosses over in its petition is its concession in the trial court that Mr. Vasquez was entitled to resentencing. CP 95-131 (State's resentencing memorandum); RP 14-31 (agreeing resentencing is required); Br. of Resp't at 5-6 (same); State's First Statement of Additional Authorities at 2 (acknowledging concession); State's PFR at 3, 6-7 (same).

When the parties returned to the trial court for the new sentencing hearing that the State agreed was required, Judge John Antosz, who had presided over Mr. Vasquez's trial and first two sentencings, had resigned and was no longer on the bench. CP 34, 67. Judge Tyson Hill conducted the resentencing. RP 10-35; CP 132-53. Judge Hill determined the court was limited in what it could consider at the new sentencing hearing, concluding the proceeding was "just brought on pursuant to *Blake*" and was "a fairly limited

resentencing hearing as far as the Court is considering it." RP 14, 23.

The prosecution convinced the court its authority at resentencing was not to determine the appropriate sentence but to "try to predict as best we can what the original sentencing judge would have done had he known the lower score." RP 22. The court agreed its discretion was "limited" and that it should "honor what Judge Antosz did being the judge who was involved in the trial, involved in the earlier sentencing." RP 32. Therefore, Judge Hill "follow[ed] what Judge Antosz I believe was trying to … impose at the last hearing." RP 32.

Although the State convinced the court that Mr. Vasquez was "limited" to addressing only "the *Blake* issue," the prosecution did not limit itself to arguments addressing the lower score. RP 32. The prosecution delivered a graphic summary of the underlying crimes. RP 21; CP 96, 101-02. It presented the victim's family to address the court. RP 23-25;

CP 108-10. Finally, it attempted to play a video of parts of the crime itself, although the court rejected that request. RP 11-18.

Before the court imposed sentence, Mr. Vasquez moved the court to consider his young age at the time of the offense. Mr. Vasquez told the court he wanted to argue that his youth mitigated his conduct. RP 27. He apologized to the victim's family and explained he was only 23 years old when he committed the crime. RP 28. He asked the court to consider his youth to justify an exceptional sentence below the standard range. RP 27-29.

The court declared, "I won't allow the argument for a sentence below the standard range based on youth." RP 18. Although the court prohibited Mr. Vasquez from presenting mitigation evidence or argument about his youth, the court nevertheless concluded, "it doesn't appear that a downward departure is warranted." RP 32.

After refusing Mr. Vasquez's motion to consider an exceptional sentence below the standard range or a lower

sentence to account for his youth, the court reimposed an exceptional sentence above the standard range. CP 132-33, 137-39; RP 31-33. Judge Hill determined Mr. Vasquez's correct offender score without the void conviction was 11 and that the standard range was 411-548 months. CP 96-97, 137-39. Following Judge Antosz's reasoning, Judge Hill started with "the midpoint of the standard range" and determined "how it would have gone up had it extrapolated past 9 points." RP 33. Just as Judge Antosz added 40 months for each additional point beyond 9, so too did Judge Hill. RP 22, 32-33. Judge Hill started with 480 months as the midpoint of the 411-548 months standard range, added 80 months for the two points between the maximum guideline chart of nine and Mr. Vasquez's score of 11, and reached a sentence of 560 months. RP 33; CP 137-39. It then imposed the 60-month firearm

enhancement for a total sentence of 620 months.[1] RP 33; CP 17-39.

Judge Hill also signed findings of fact and conclusions of law identical to the two prior findings from Judge Antosz. *Compare* 40-41 (findings for first exceptional sentence), *and* CP 73-74 (findings for second exceptional sentence), *with* CP 132-33 (findings for instant exceptional sentence). Mr. Vasquez filed a direct appeal from the new judgment and sentence.[2] CP 154-74.

The Court of Appeals agreed Mr. Vasquez was entitled to resentencing. Slip op. majority at 16; slip opinion concurrence/dissent-in-part at 4. The panel agreed the trial court improperly refused to consider Mr. Vasquez's youth and that it erroneously believed it was bound to replicate the

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[1] The court also imposed concurrent sentences of 55 months each on the two remaining counts. CP 137-39; RP 33.

[2] As Mr. Vasquez explains below, the State inaccurately refers to Mr. Vasquez's direct appeal from his new judgment and sentence as a collateral attack.

reasoning of the original sentencing court. Slip op. majority at 11, 14-16; slip op. concurrence/dissent-in-part at 3-4. Because the trial court did not understand its discretion, the Court of Appeals remanded for a full resentencing. Slip op. majority at 14-16; slip op. concurrence/dissent-in-part at 1-4.

The majority, following *State v. Edwards*, also properly held that Mr. Vasquez was entitled to a de novo resentencing at which the court must exercise its independent discretion. Slip op. at 9-10, 14-16 (citing *State v. Edwards*, 23 Wn. App. 2d 118, 122, 514 P.3d 692 (2022)). It recognized that because the trial court was not acting pursuant to a mandate from the Court of Appeals, its discretion was not limited. Therefore, "fairness to the offender" required the trial court to consider any argument or evidence presented. Slip op. at 10-16.

E. ARGUMENT

1. Review in this Court is unwarranted because the prosecution agreed to a resentencing below.

The State agreed to a resentencing in the trial court. On appeal, the prosecution abandoned that agreement and argued

that Mr. Vasquez's resentencing was improper. Review by this Court under these circumstances is simply not warranted.

Legions of cases hold that a defendant cannot agree to a sentencing issue and then later challenge that position on appeal. *See, e.g., State v. Peltier*, 181 Wn.2d 290, 297-98, 332 P.3d 457 (2014) (defendant's express agreement to stipulated trial on charges beyond statute of limitation prevented him from challenging conviction and sentence on that ground); *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494-96, 158 P.3d 588 (2007) (defendant's agreement to offender score in plea bargain waived later challenge to sentence); *State v. Huff*, 119 Wn. App. 367, 372-73, 80 P.3d 633 (2003) (defendant's stipulation to offender score prevented him from raising same criminal conduct argument on appeal).

The same rule should apply to the State and is a basis for denying review regardless of any other argument under RAP 13.4(b). The prosecution's agreement in the trial court to the resentencing it now contests on appeal also demonstrates the

State is creating a non-existent issue for this Court, and that the actual issue on appeal was correctly resolved by the Court of Appeals.

2. **The prosecution's arguments addressing untimely collateral attacks do not apply to Mr. Vasquez's direct appeal from a new judgment and sentence.**

   a. Mr. Vasquez's direct appeal from a new judgment and sentence entered at a resentencing hearing the prosecution agreed Mr. Vasquez was entitled to is not restricted by rules governing collateral attacks.

On April 15, 2021, less than two months after this Court issued *Blake*, Mr. Vasquez filed a CrR 7.8 motion for relief from judgment and requested a new sentencing hearing. CP 87-91. The prosecution agreed Mr. Vasquez was entitled to resentencing. RP 14-31; CP 95-97.

The trial court held a resentencing and entered a new judgment and sentence on September 30, 2021. CP 134-53. This judgment and sentence properly excluded the void possession of a controlled substance conviction. CP 136. However, the trial court improperly refused to consider Mr. Vasquez's arguments and evidence that his youth mitigated his

conduct. RP 18, 27-29, 31; Slip op. majority at 1, 11, 14-16; slip op. concurrence/dissent-in-part at 1-4. Mr. Vasquez filed a direct appeal from that new judgment and sentence. CP 154-74.

Despite the prosecution's agreement that Mr. Vasquez was entitled to a resentencing, it seeks this Court's review based on its changed position and new argument that Mr. Vasquez was not entitled to the resentencing. The prosecution now claims Mr. Vasquez's direct appeal from his new judgment and sentence is not a direct appeal but rather a collateral attack. The prosecution's change of position is not only wrong but gives the impression that it can seek review on a new theory that contradicts its position at trial simply because it is useful to do so on appeal. This Court should deny review.

The prosecution starts with the incorrect premise that Mr. Vasquez's direct appeal is not actually a direct appeal because the underlying action precipitating the resentencing hearing was a CrR 7.8 motion. The Court of Appeals did not ignore this issue, as the prosecution claims. *See* State's PFR at 5. Instead,

the Court of Appeals agreed Mr. Vasquez's direct appeal was, in fact, a direct appeal and rejected the prosecution's unfounded arguments.

First, the Court of Appeals referred to Mr. Vasquez's matter as an *appeal* throughout the opinion. *E.g.*, Slip op. majority at 1 ("Vasquez *appeals* from the second resentencing …") (emphasis added), *id.* at 2 ("This *appeal* is Vasquez's third.") (emphasis added), *id.* at 4 ("this third *appeal*") (emphasis added), *id.* at 16 ("this *appeal*") (emphasis added); Slip op. concurrence/dissent-in-part at 1 & 4 (referring to "this *appeal*") (emphasis added).

Second, the Court of Appeals applied cases addressing direct appeals to grant Mr. Vasquez relief and remand for resentencing. For example, the majority applied *Edwards* and other direct appeal cases to conclude that Mr. Vasquez was entitled to relief on this direct appeal and to remand for resentencing. Slip op. majority at 9 (citing *Edwards*, 23 Wn. App. 2d 118). Similarly, the concurrence applied *State v.*

Barberio, a direct appeal case, to conclude that Mr. Vasquez was entitled to relief on this direct appeal and to remand for resentencing. Slip op. concurrence/dissent-in-part at 3-4 (citing *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 48 (1993)).

The prosecution's claim that Mr. Vasquez's direct appeal is actually a collateral attack and that the Court of Appeals "ignored the issue and the distinction" is simply wrong. State's PFR at 5. The Court of Appeals may not have explicitly rejected the State's theory but it did so nonetheless by applying direct appeal standards of review and relying on other direct appeal cases on point.

Mr. Vasquez's prior judgment and sentence was invalid because the court sentenced him based on a void conviction. CP 55. No portion of Mr. Vasquez's previous judgment and sentence remains, and the trial court entered a new judgment and sentence after the resentencing hearing. CP 134-53. Where a sentence is vacated, it "no longer exists as a final judgment on the merits," and the court is not bound by prior decisions on the

sentence. *State v. Harrison*, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003). Thus, this matter is an appeal from Mr. Vasquez's new judgment and sentence. CP 154-74.

"Washington law broadly guarantees the right to appeal sentences, even after resentencing." *State v. Delbosque*, 195 Wn.2d 106, 125, 456 P.3d 806 (2020). A direct appeal is not converted to a collateral attack because the error requiring the resentencing was originally presented in a CrR 7.8 motion. Once the court resentences a person and he appeals from a new judgment and sentence, the appeal is a direct appeal. That the prosecution now wishes it had objected to the resentencing does not change that fact.

The prosecution's repeated claims that Mr. Vasquez's direct appeal is "an untimely collateral attack" were properly rejected by the Court of Appeals and provide no basis for review under RAP 13.4(b). State's PFR at 5, 8.

b. <u>The Court of Appeals opinion does not conflict with *State v. Hubbard* or *State v. Molnar*, contrary to the prosecution's claims.</u>

Because Mr. Vasquez filed a timely notice of appeal, statutory limitations imposed on collateral attacks are irrelevant because this is not a collateral attack. CP 154-55. The State recognizes it did not cross-appeal and agrees it conceded in the trial court Mr. Vasquez was entitled to resentencing. State's PFR at 6-7. By continuing to refer to this direct appeal from a new judgment and sentence as an untimely collateral attack, the prosecution seeks to confuse this Court about the procedural posture of the case. The Court of Appeals properly heard Mr. Vasquez's case as a direct appeal.

Further, while the State tries to manufacture a conflict between this unpublished opinion and *State v. Hubbard* and *State v. Molnar*, neither case conflicts with the Court of Appeals's opinion. State's PFR at 5-8 (citing *State v. Hubbard*, __ Wn.2d __, 527 P.3d 1152 (2023) and *State v. Molner*, 198 Wn.2d 500, 497 P.3d 858 (2021)). *Hubbard* addresses a trial

court's statutory authority to act "*outside* a direct appeal or a timely collateral attack." 527 P.3d at 1154 (emphasis added). Mr. Vasquez's case is a timely direct appeal. *Hubbard* does not apply.

Moreover, the prosecution ignores another critical distinction between this case and *Hubbard*. In *Hubbard*, the State *objected* to the sentencing modification hearing and the State *appealed* the resulting order, challenging the trial court's authority. *Id.* at 1155-56. Here, conversely the State *conceded* the trial court must hold a resentencing. And the State did *not* cross-appeal here because, having agreed to the resentencing, it had no basis to do so.

Similarly, in *Molner*, the trial court denied the defendant's motion for resentencing, and no resentencing was held, whereas here, the prosecution *agreed* to the resentencing and the court resentenced Mr. Vasquez. 198 Wn.2d at 506. *Hubbard* and *Molner* are inapplicable to Mr. Vasquez's case, and the Court of Appeals opinion does not conflict with them.

c. The Court of Appeals opinion does not conflict with *In re Pers. Restraint of Adams* or *In re Pers. Restraint of Snively*, contrary to the prosecution's claims.

Although not at issue on this direct appeal from a new judgment and sentence entered at a resentencing hearing, it bears mention that Mr. Vasquez's underlying CrR 7.8 motion was not untimely, contrary to the prosecution's misuse of the term. The plain language of the statute limits the time bar for collateral attacks to cases where "the judgment and sentence is valid on its face." RCW 10.73.090(1). Mr. Vasquez's previous judgment and sentence is not "valid on its face" because it contained an unlawful sentence based on an inaccurate offender score. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002). Therefore, the statute imposes no time bar, even if this were a collateral attack instead of a direct appeal. *See* RCW 10.73.090(1) (time bar applies only to facially valid judgment and sentences); *see also* RCW 10.73.100(6) (recognizing exception to time bar for facially

valid judgment and sentences based on significant, material change in the law).

In re Pers. Restraint of Adams does not involve a direct appeal from a resentencing; it involves a personal restraint petition after a resentencing. 178 Wn.2d 417, 421, 309 P.3d 451 (2013). There, the trial court originally sentenced Mr. Adams based on an incorrect offender score. *Id.* Mr. Adams later moved to vacate his judgment and sentence, and the court resentenced him with the correct offender score. *Id.*

Mr. Adams did *not* appeal from his new judgment and sentence, unlike Mr. Vasquez. Instead, he later filed a collateral attack, arguing he received ineffective assistance of counsel—an argument he did *not* raise at the resentencing. *Id.* This Court affirmed the dismissal of Mr. Adams's petition. *Id.* at 427. Contrary to the prosecution's arguments, *Adams* does not address the permissible scope of a resentencing hearing, which is the issue in Mr. Vasquez's case, because Mr. Adams did not raise the issue at his resentencing, unlike Mr. Vasquez.

In re Pers. Restraint of Snively also involves issues unrelated to Mr. Vasquez's appeal. 180 Wn.2d 28, 320 P.3d 1107 (2014). In *Snively*, the petitioner argued an erroneous sentence permitted him to withdraw his guilty plea. *Id.* at 30. This Court rejected that contention and recognized the "sole remedy for [a] sentencing error is correction of the judgment and sentence." *Id.* Because the petitioner had not asked for his sentence to be corrected, this Court did not order it. *Id.* at 32 n.2. *Snively* also does not speak to the scope of resentencing.

Again, while the prosecution attempts to fabricate a conflict between this unpublished opinion and these cases, no conflict exists. This Court should deny review.

3. The Court of Appeals correctly held Mr. Vasquez was entitled to a de novo resentencing.

The majority opinion properly adheres to precedent and persuasive authority and holds Mr. Vasquez is entitled to a de novo resentencing. The cases on which the prosecution relies do not support its claim that trial courts may arbitrarily cabin their authority and refuse to consider relevant issues at a

resentencing. The cases the prosecution cites address a trial court's authority following a limited remand on a mandate from the court of appeals; they do not address a trial court's authority at a resentencing in the first instance following a reduction in offender score.

Again, the prosecution seeks to conjure a conflict where there is none. For example, *State v. Kilgore* was remanded for a retrial of certain specified counts. 167 Wn.2d 28, 33-34, 216 P.3d 393 (2009). Because the prosecution declined to retry Mr. Kilgore, and he had not challenged his exceptional sentence on appeal, the trial court did not err in declining to reconsider the previously imposed sentence. *Id.* at 41.

Similarly, in *Barberio*, the defendant did not challenge his exceptional sentence on appeal. 121 Wn.2d at 49. When the reviewing court reversed one conviction, the prosecution elected not to retry Mr. Barberio, and the court maintained the same exceptional sentence. Id. at 49-50.

Finally, in *State v. Rowland*, the court reimposed an exceptional sentence following a resentencing due to an erroneous offender score. 174 Wn.2d 150, 153, 272 P.3d 242 (2012). In that case, unlike Mr. Vasquez's case, the change in offender score did not affect the aggravating factor because it was a finding of deliberate cruelty, not the free-crimes aggravator. *Id.* at 152.

Unlike the cases the prosecution cites, in which the courts maintained exceptional sentences based on unchanged aggravating circumstances, Mr. Vasquez was entitled to a full resentencing following *Blake*. *State v. Jennings*, 199 Wn.2d 53, 67, 502 P.3d 1255 (2022); *Edwards*, 23 Wn. App. 2d at 122. Resentencings following *Blake* "shall be de novo, with the parties free to advance any and all factual and legal arguments." *Edwards*, 23 Wn. App. 2d at 122.

The Court of Appeals's adherence to *Edwards* does not deprive trial courts of their ability to follow a limited remand from the Court of Appeals. The prosecution grossly

misconstrues the opinion's holding. *See* State's PFR at 10-21. When an appellate court remands for a strict purpose, a trial court may properly follow that directive. Many of the cases the prosecution cites in its parade of horribles and effort to create conflicting case law are examples where the Court of Appeals granted relief on a specific claim and issued a mandate limiting remand to correcting that specific issue. *See* State's PFR at 15-17.

The prosecution argues the opinion in Mr. Vasquez's case throws the validity of those cases into question. This is not so. Mr. Vasquez's case was not before the trial court following a limited remand from the court of appeals, nor did it involve correcting a ministerial error. The *Vasquez* opinion does not compromise the State's cited cases and does not hold trial courts must disregard specific directives from the appellate courts and consider issues apart from those defined in a limited mandate. Indeed, the opinion explicitly and properly noted, "If the court of appeals mandate limits the questions for resolution

by the resentencing court, the court must limit its review." Slip op. at 12 (citing inter alia *Kilgore*, 167 Wn.2d at 42).

The Court of Appeals's opinion in Mr. Vasquez's case is not the broad referendum the State pretends it is. It does not compromise the finality of judgments. Instead, it requires Mr. Vasquez receive a resentencing to which he is entitled, nothing more.

F. CONCLUSION

The prosecution agreed to a resentencing in the trial court. Any argument based on the State's abandonment of that agreement is not a proper basis for review by this Court. Further, the Court of Appeals's unpublished opinion does not conflict with the cases the prosecution claims, nor does it present a significant question of constitutional law or substantial public interest. This Court should deny review. RAP 13.4(b).

In compliance with RAP 18.17(b), counsel certifies the word processing software calculates the number of words in

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DATED this 29th day of June, 2023.

Respectfully submitted,

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