Supreme Court No: 102045-7
No. 38471-3-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY RENE VASQUEZ,

Appellant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The decision granting the defendant a de novo resentencing hearing. A copy of that decision is in the Appendix at pages A 1-24.

C. ISSUES PRESENTED FOR REVIEW

1. Does a resentencing pursuant to an untimely CrR 7.8 motion to correct a facially invalid judgment and sentence due to offender score error open up all other sentencing issues under RCW 10.73.090?

2. Assuming the answer to the first issue is yes, does a trial court have discretion on the scope of resentencing pursuant to a CrR 7.8 motion?

D. STATEMENT OF THE CASE

Anthony Vasquez was initial convicted of aggravated first degree murder for sneaking up on Juan Garcia and blasting him with a slug from a shot gun at close range while Mr. Garcia's girlfriend and her small child were in the car he was seated in.[1] Accordingly he was sentenced to life in prison. The Court of Appeals reversed the aggravated part of the aggravated murder conviction and remanded the case back for resentencing. *State v. Vasquez*, 2 Wn. App. 2d 632, 637, 415 P.3d 1205, 1207 (2018)(*Vasquez I*). Mr. Vasquez was resentenced to an aggravated sentence based on his high offender score, which included one prior conviction for possession of a controlled substance. The Court applied an interpolation to sentence Mr. Vasquez based on his offender score above 9. CP 124-127. Mr. Vasquez appealed his resentencing. An unpublished decision upholding the resentencing was filed June 20, 2019, and the mandate issued

[1] For a more detailed version of the facts of the case, see *Vasquez I.*

November 13, 2019. *State v. Vasquez*, 9 Wn. App. 2d 1037 (2019)(*Vasquez II*). On February 25, 2021, more than a year after the mandate issued in Mr. Vasquez's case, the Supreme Court decided *State v. Blake*, 197 Wn.2d 170, 173, 481 P.3d 521, 523 (2021), which invalidated the controlled substance conviction that made up one point of Mr. Vasquez's offender score.

The parties agreed to resentencing Mr. Vasquez with a corrected offender score. During the resentencing hearing, at the urging of both defense counsel and the State, the Court followed the reasoning of the prior sentence, only adapting it to the new offender score. Mr. Vasquez asked the Court to consider his youth in resentencing him. The trial court declined to reconsider that issue.

Mr. Vasquez again appealed. He argued that the trial court was required to provide him with what he termed a "plenary resentencing", where any issue could be raised. The

State argued that the court could only correct the facially invalid part of the sentence, and even if that were not the case the trial court had discretion over the scope of the resentencing. The Court of Appeals, in an unpublished split decision, agreed with Mr. Vasquez. *State v. Vasquez*, 9 Wn. App. 2d 1037 (2019) (unpublished)(*Vasquez III*). Judge Siddoway filed a concurrence/dissent, arguing that the trial court had discretion over the scope of resentencing.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals decision in this case conflicts with three different lines of Supreme Court precedent. It is bound to cause significant confusion in the lower courts, disrupts finality and leaves any corrections to judgment and sentences in the lower courts open to challenge as to their scope. Review should be granted, the Court of Appeals reversed, and trial court affirmed.

1. The Court of Appeals decision conflicts with three lines of cases regarding the applicable standards for reviewing CrR 7.8 motions, the scope of correction of facially invalid judgment and sentences and trial court discretion on resentencing. RAP 13.4(b)(1, 2).

a. This resentencing was the result of an untimely collateral attack. Collateral attack rules apply, both in the trial court and on appellate review. The Court of Appeals opinion conflicts with State v. Hubbard and State v. Molnar, among others.

In the Court of Appeals the State argued this case was an untimely collateral attack in the trial court, thus collateral attack rules applied. Mr. Vasquez argued the case was a direct appeal, thus they did not apply. The Court of Appeals ignored the issue and the distinction, relying on a direct appeal case, *State v. Edwards,* 23 Wn. App. 2d 118, 514 P.3d 692 (2022). However, the distinction is critical to the analysis of this case and most *Blake* resentencings.

"[A]ny form of postconviction relief other than a direct appeal" is known as a " 'collateral attack.'" *State v. Molnar*, 198 Wn.2d 500, 508, 497 P.3d 858, 862 (2021) citing RCW

10.73.090(2). Collateral attacks filed in Superior Court are governed by CrR 7.8. *Id.* All prongs of CrR 7.8 are covered by the collateral attack time constraints, whether filed in Superior Court, the Court of Appeals, or the Supreme Court. *State v. Hubbard*, __ Wn.2d__, __ P.3d__ (April 27, 2023)(Slip Op. at 14). A case becomes final at the time an appellate court issues its mandate. RCW 10.73.090(3)(b). In Mr. Vasquez's case, that was no later than November 13, 2019, the date the mandate issued from Mr. Vasquez's last direct appeal.

On February 25, 2021, the State Supreme Court decided *State v. Blake*, 197 Wn.2d 170, 173, 481 P.3d 521, 523 (2021), which invalidated the controlled substance conviction that made up one point of Mr. Vasquez's offender score. Thus Mr. Vasquez's 7.8 motion was filed at least one year after his case became final. Because the sentencing court relied on the specific offender score in setting Mr. Vasquez's exceptional sentence, the State conceded his Judgment and Sentence was

facially invalid and he could show prejudice, and thus agreed to a correction of his offender score and sentence.[2]

Under *Hubbard*, *Molnar*, CrR 7.8 and RCW 10.73.090 the trial court was bound to follow the collateral attack rules that apply when correcting a facially invalid sentence. Because the Court of Appeals was reviewing the actions of the trial court, it was also bound to use the collateral attack rules regarding the time bar under RCW 10.73.090. An appeal of a collateral attack is also a collateral attack. It makes no sense to require the trial court to follow the collateral attack rules, and then have the Court of Appeals apply direct appeal rules on the appeal from the collateral attack. The Court of Appeals based its ruling on *State v. Edwards*, 23 Wn. App. 2d 118, 514 P.3d 692 (2022), but ignored the fact that *Edwards* was a direct appeal case, whereas this case is a collateral attack case.

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[2] This concession may have been error on the State's part, but the issue was not cross appealed, and is now part of the case at this stage.

Because the Court of Appeals ignored the fact that this case is an appeal from a collateral attack its decision conflicts with the line of cases regarding the rules on collateral attack, including *Hubbard* and *Molnar*.

> ***b. When dealing with an untimely collateral attack on a facially invalid judgment and sentence the rule is to correct the facial invalidity. It does not act as a super exception to the time bar for issues unrelated to the facial invalidity. The Court of Appeals decision conflicts with In re Pers. Restraint of Adams and In re Pers. Restraint of Snivley.***

In re Pers. Restraint of Adams, 178 Wn.2d 417, 421, 309 P.3d 451, 453 (2013), is on point and controlling of this issue. Adams filed a motion to vacate his Judgment and Sentence and resentence due to an offender score error. The State and the trial court agreed and resentenced Adams to a new term of confinement. Then he filed a new PRP, claiming ineffective assistance of counsel and that the new sentence reopened the time barred claim of ineffective assistance of counsel regarding not informing him of a plea agreement. The Court rejected the

reasoning that an invalid judgment and sentence acted a 'super exception,' opening up other time barred claims.

In *In re Pers. Restraint of Snively*, 180 Wn.2d 28, 30, 320 P.3d 1107 (2014)(per curiam) the court improperly imposed a term of community placement for one of his convictions without authority. Snively filed an untimely PRP arguing he was entitled to withdraw his plea. The court held he was limited to correcting the issue that made his judgment and sentence invalid, not opening up a time barred voluntariness issue. Notably the Court remanded for correction of his sentence, not resentencing.

Adams and *Snivley* stand for the proposition that when a court is faced with an untimely collateral attack on facially invalid judgment and sentence, the Court does the minimum it needs to do to correct the facial invalidity. It does not open up the judgment and sentence to time barred issues. Here the Court of Appeals, based on a facially invalid offender score error, is allowing Mr. Vasquez to raise a time barred youthful

sentencing issue, along with whatever other issues he wants regarding the sentence. This allows a prior drug offense to act as a super exception to the time bar, while a defendant who did not have a drug offense in his record would not have such an opportunity to seek relief on time barred issues. The Court of Appeals decision relies almost exclusively on direct appeal cases. *Adams* and *Snivley* specifically reject this outcome and the court of appeal decision conflicts with this line of cases.

c. *As noted in Judge Siddoway's concurrence/dissent, the Court of Appeals decision conflicts with State v. Barberio, State v. Kilgore and In re Pers. Restraint of Rowland.*

The Court of Appeals ruled that the trial court was required to conduct a full de novo resentencing. This conflicts with a line of cases that hold a trial court has discretion to revisit issues on a resentencing after appeal, even for cases remanded on direct appeal.

In *State v. Barberio*, 121 Wn.2d 48, 51, 846 P.2d 519, 521 (1993), the defendant was initially convicted of a rape in

the second degree and a rape in the third degree. The trial court imposed an exceptional sentence on the rape in the second degree charge. The Court of Appeals dismissed the rape in the third degree charge, and the State elected not to retry the defendant on the reversed charge. At resentencing the defense asked the trial court to review the exceptional sentence. The trial court declined to do so. The Court ruled that the trial court did not have to reach the exceptional sentence on the rape in the second degree charge in resentencing Mr. Barbario.

Here the Court of Appeals relegated *Barbario* to a special case, where the defendant previously enjoyed a full and fair opportunity to litigate an issue. However, Mr. Vasquez had a full and fair opportunity to ask for a mitigated sentence based on youth in his first resentencing. His first resentencing came after *State v. O'Dell,* 183 Wn.2d 680, 358 P.3d 359 (2015) was decided. In *Barberio* the defendant did not challenge the exceptional sentence in his first appeal and was foreclosed from challenging it in the second appeal when the trial court did not

reconsider the issue. Mr. Vasquez had the exact same opportunity to challenge his sentence as Mr. Barberio. The distinction made by the majority opinion in the Court of Appeals fails.

Nor has that distinction been made in other cases after *Barberio*. In *State v. Kilgore*, 167 Wn.2d 28, 32, 216 P.3d 393, 395 (2009), the Court of Appeals dismissed two counts, and affirmed five, and remanded back to the trial court for resentencing. Mr. Kilgore did not challenge his exceptional sentence. The trial court declined to revisit its exceptional sentence, and simply struck the two dismissed counts from the judgement and sentence. The Supreme Court held that Mr. Kilgore was not entitled to appeal his sentence based on the newly decided case of *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), because the trial judge had exercised their discretion to not readdress the exceptional sentence. "We have interpreted RAP 2.5(c)(1) to allow trial courts, as well as appellate courts, discretion to

revisit an issue on remand that was not the subject of the earlier appeal." *Kilgore*, 167 Wn.2d 28 at 38. "*Barberio* thus makes clear that when, on remand, a trial court has the choice to review and resentence a defendant under a new judgment and sentence or to simply correct and amend the original judgment and sentence, that choice itself is not an exercise of independent judgment by the trial court." *Id.* At 40.

In *In re Pers. Restraint of Rowland*, 149 Wn. App. 496, 509, 204 P.3d 953, 959 (2009), *affirmed sub nom, State v. Rowland*, 174 Wn.2d 150, 155, 272 P.3d 242, 244 (2012), the original trial court imposed an exceptional sentence. It was later determined on collateral attack that the offender score was wrong[3]. The Court of Appeals stated that the factors supporting the exceptional sentence were not the subject of the collateral attack, and thus did not need to be considered on remand, and thus no need to empanel a jury to satisfy *Blakley*. Instead of

[3] *Rowland* predated *Adams* and *Snivley*, so those cases were not considered.

remanding for a complete de novo resentencing, the Court remanded only to consider that part of the sentence affected by the incorrect offender score. The Court did exactly that, and the Supreme Court affirmed, it did not require reopening the entire sentence.

Here the State argues that the trial court could not reopen all the facially valid parts of the sentence that were final in the judgement and sentence under *Adams* and *Snivley*. However, assuming that argument to be incorrect, the trial court still had discretion under *Barbario*, *Kilgore* and *Rowland* not to reopen all the issues surrounding the sentence. The Court of Appeals decision conflicts with those cases.

2. The Court of Appeals decision forces a complicated question for resentencing courts, and at the same time takes aware their discretion to handle the issue. This is a significant issue of law and of public import. The Supreme Court needs to provide guidance on what entitles a defendant to a de novo resentencing. RAP 13.4(b)(3,4).

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A criminal sentence may have many components. Any sentence may have some, none, or all of these. As a non-exhaustive list there may be a term of incarceration, a suspended sentence, conditions to that suspension, a term of community custody or supervision, conditions to that supervision, legal financial obligations (LFO's), offense specific restrictions and no contact orders. Any of these provisions may lead to legal error or even facial invalidity of the judgement and sentence. Any correction of any of these terms could validly be called a resentencing. Appellate Courts routinely remand for correction only of the error in the sentence, not correction of every aspect of it. *E.g.*, *State v. Greenfield*, 21 Wn. App. 2d 878, 889, 508 P.3d 1029, 1035 (2022)(remanded to strike community custody condition and LFO); *State v. Halverson*, 176 Wn. App. 972, 979, 309 P.3d 795, 798 (2013)(remanded to correct Judgement and Sentence by striking community custody provision); *State v. Jones*, 173 Wn. App. 1030 (2013)(unpublished)(remanded for correction

of a term of community custody.); *In re Pers. Restraint of Dilks*, __ Wn. App.__ (May 16, 2023)(unpublished)(remanded for correction of community custody term and conditions); *Matter of Amos*, 1 Wn. App. 2d 578, 601, 406 P.3d 707, 719 (2017)(unpublished portion)(remanded for trial court to determine proper remedy where gross misdemeanors were ordered to be served in DOC); *In re Pers. Restraint of McWilliams*, 182 Wn.2d 213, 218, 340 P.3d 223, 226 (2014)(case remanded to include notation regarding community custody, dissent argued for full resentencing); *In re Pers. Restraint of West*, 154 Wn.2d 204, 216, 110 P.3d 1122, 1127 (2005)(remanded to delete facially invalid part of sentence.); *In re Pers. Restraint Tobin*, 165 Wn.2d 172, 176, 196 P.3d 670, 672 (2008) (Court inadvertently listed incorrect sentence above the allowable range, remanded for "correction of the error"). Sometimes the Court's corrections of the sentence are considered ministerial, not even requiring the presence of the

defendant. *State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811, 812 (2011).

While not the foundation of "our system of ordered liberty," finality of a judgment is nevertheless an important principle. *In re Pers. Restraint of Garcia-Mendoza*, 196 Wn.2d 836, 840, 479 P.3d 674 (2020) (citations omitted). There is often tension between finality and other closely held values. *In re Pers. Restraint Garcia-Mendoza*, 196 Wn.2d at 841. "The judicial branch strives to ensure that no one is judged by a fundamentally flawed process or restrained by a fundamentally flawed judgment." *Id.* "But challenges to judgments must be timely raised." *Id.*, citing *In re Pers. Restraint of Coats*, 179 Wn.2d 123, 150, 267 P.3d 324 (2011).

Prior to this case the trial courts had the same discretion appellate courts did on deciding the proper remedy for a collateral attack, assuming *Adams* did not apply. Now the Courts are required to conduct de novo resentencing with no

parameters on what triggers this rule. Any change in the myriad elements of a sentence can validly be called a resentencing. Why does a small change in offender score trigger a de novo resentencing? Does any other type of change in a sentence trigger a de novo resentencing where all issues are brought back to the table? These are issues trial courts are facing now. The Court of Appeals decision ignores these issues and provides no guidance. The lack of guidance was probably acceptable prior to the Court of Appeals decision in this case when trial courts had discretion to decide how broad to make a resentencing and take into account the concerns of finality. However, at the same time the Court of Appeals declared that a full resentencing is required without providing guidance on when that occurs, it also took away the trial court's discretion to control the scope of resentencing. Why the Appellate Courts still retain this discretion, but the trial courts do not, is unexplained.

These de novo resentencings are not without significant cost. As the Court of Appeals notes, this would be Mr. Vasquez's fourth sentencing procedure in this case. This means the victim's family has to go through these issues again. In addition, Mr. Vasquez now gets to raise an issue that he failed to raise in the trial court in his first resentencing, whether his conduct was substantially affected by characteristics of his youth. As time goes by this becomes more and more difficult to determine. Now defense counsel will have to retain an expert to evaluate Mr. Vasquez's youthful characteristics over a decade after the fact. The State may then have to have its own expert evaluate him.

An invalid drug conviction should not undue finality of issues unrelated to that conviction. This was the holding in *Adams* and *Snivley*. If it does, the lower courts need a rational as to why. The direct holding in *Vasquez III* is that an offender score error undoes all finality as to a sentence. Many other cases with other sentencing errors do not, i.e. *In re Pers.*

Restraint of McWilliams; *In re Pers. Restraint of Rowland.* Presumably the other elements of a sentence, such as community custody and LFO's are also up for reconsideration in a de novo resentencing. Again, the question becomes why, and what distinguishes an offender score resentencing from a LFO or community custody resentencing that did not justify a de novo resentencing? In resentencing from a direct appeal, a defendant is entitled to the benefit of new rules as long as the case is not yet final. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714, 721 (2018). Thus, the analysis may well be different for cases that were not final when the error was discovered. But Mr. Vasquez's case was final for over a year.

When this Court decided *Blake* it began a Washington State Criminal Justice system resentencing project that is most likely unprecedented in scope, at least in Washington, and possibly in the nation. Many of these resentencings have happened and will continue to happen in the trial courts. Guidance as to the appropriate balance between finality and

correction needs to be provided to the lower courts. This case is an appropriate vehicle to provide that balance. It is a significant question of law and is a significant issue of public import. The structure of resentencings implicates finality and the rights of victims as well as defendants. The Court should grant review of this issue under RAP 23.4(b)(3,4).

F. CONCLUSION

The Court of Appeals majority was correct in one aspect of its decision when it said, "Washington decisions have yet to thoroughly address the extent of resentencing." *Vasquez III* Slip Op at 5. However, the Court of Appeals decision conflicts with just about every one of the limited decisions that do address the subject. A drug conviction rendered invalid by *Blake* should not result in the super exception to the time bar rejected by *Adams*. This is one of the early *Blake* resentencing cases that address the issue. It is not anywhere close to the last. Review should be granted to clarify the trial court's

resentencing authority and obligations, especially on a facially invalid untimely collateral attack. The Court of Appeals should be reversed and the trial court's conclusion that it did not have the ability to reconsider facially valid parts of the judgement and sentence should be affirmed. Alternatively, the case should be remanded to the trial court to expressly exercise its discretion on the scope of resentencing.

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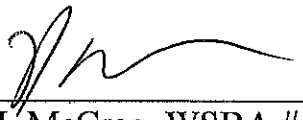
Dated this 31st day of May 2023.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ANTHONY RENE VASQUEZ, Appellant.	)	No. 38471-3-III UNPUBLISHED OPINION

FEARING, C.J. — Anthony Vasquez sought resentencing a second time based on *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). The sentencing court and the first resentencing court had included Vasquez's conviction for possession of a controlled substance in his offender score. Vasquez appeals from the second resentencing with the argument that the superior court failed to conduct a de novo sentencing that included consideration of his youth at the time of his crime. We agree and remand for another third resentencing or a fourth sentencing hearing.

FACTS

This appeal is Anthony Vasquez's third. His prosecution arises from the shooting death of Juan Garcia on September 17, 2013. Vasquez was then 23 years old. This appeal only concerns sentencing, not the underlying facts of the murder. Nonetheless, we briefly recount the facts of the crime as previously narrated in *State v. Vasquez*, 2 Wn. App. 2d 632, 415 P.3d 1205 (2018).

Juan Garcia, his girlfriend, and his five-year-old child sat in a parked car outside a grocery mart in Moses Lake, Washington. Garcia sat in the front passenger seat, his girlfriend sat in the driver's seat, and his child sat in the back seat of the vehicle. Anthony Vasquez arrived on the market's premises in his own vehicle, parked that vehicle, and exited it. He momentarily hid behind a fence before rushing towards Garcia's parked car. Vasquez approached the front passenger door of Garcia's vehicle, shot and killed Garcia at point-blank range, and fled in his own vehicle. The one shot did not physically injure Garcia's girlfriend or child.

A jury found Anthony Vasquez guilty of one count of aggravated murder in the first degree with a firearm enhancement, three counts of drive-by shooting, and one count of tampering with a witness. The three counts of drive-by shooting resulted from Juan Garcia, his girlfriend, and the child being deemed discrete victims. Based on the offender score calculated by the original sentencing court, which included a conviction later

invalidated by *State v. Blake*, the court sentenced Vasquez to an exceptional sentence of life in confinement plus sixty months.

In his first appeal filed in 2017, Anthony Vasquez requested that this court reverse his drive-by shooting convictions, strike the aggravated element attached to his first degree murder charge, and resentence him accordingly. In *Vasquez* I, issued in 2018, this court reversed Vasquez's drive-by shooting convictions, struck the sentence aggravator for aggravated murder, affirmed the remainder of his convictions, and remanded the matter for resentencing. *State v. Vasquez*, 2 Wn. App. 2d 632, 637 (2018).

The first resentencing court conducted a hearing and resentenced Anthony Vasquez to 660 months, or fifty-years, in confinement. The court ordered that the sentences for all three of Vasquez's convictions run concurrently within this period of time and that the sixty-month sentence for a firearm enhancement run consecutively. This 660-month sentence constituted an exceptional sentence based on Vasquez's recalculated offender score of 9+, which score no longer included points for aggravated enhancement to the first degree murder conviction and his drive-by shooting convictions. The resentencing court, however, counted in the offender score Vasquez's earlier conviction for possession of a controlled substance.

In a second appeal filed in June 2018, Anthony Vasquez contended that this court should remand for a second resentencing to correct a clerical error in his first resentencing's judgment and sentence. Vasquez faulted the first resentencing court's

failure to include the number of months of total confinement in his judgment and sentence. As part of a statement of additional grounds, in that second appeal, Vasquez contended that the sentencing and first resentencing courts failed to consider his youth when sentencing him in violation of the cruel and unusual punishment clause.

In *Vasquez* II, issued in 2019, this court remanded to the superior court solely for the purpose of inserting the total length of commitment in the judgment and sentence. *State v. Vasquez*, No. 36123-3-III, slip op. at 8 (Wash. Ct. App. June 20, 2019). Although the court only corrected an error, we label this correction as the second resentencing. This court wrote, when addressing any failure of the trial court to consider Anthony Vasquez's youth:

> Anthony Vasquez requests a remand for the sentencing court to consider whether his youthfulness at the time of the crime justifies an exceptional sentence below the standard range. But he neither requested an exceptional sentence below the standard range nor asserted his age as a mitigating factor at his resentencing hearing. Thus, Anthony Vasquez waived the contention.

State v. Vasquez, No. 36123-3-III, slip op. at 6-7.

PROCEDURE

We arrive at the events that give rise to this third appeal. We call this appeal *Vasquez* III. In *Vasquez* III, Anthony Vasquez appeals his second resentencing or third sentence.

The Washington Supreme Court, in 2021, declared unconstitutional Washington's

strict liability drug possession statute, under which Anthony Vasquez had been convicted years earlier. *State v. Blake*, 197 Wn.2d 170 (2021). Vasquez thereafter filed a motion for relief from judgment because his sentence was no longer valid since the sentencing court and first resentencing court based his offender score in part on his conviction for possession of a controlled substance.

At the beginning of Anthony Vasquez's second resentencing hearing, Vasquez requested that the court, under *State v. O'Dell* 183 Wn.2d 680, 358 P.3d 359 (2015), consider his youth as a mitigating factor when assessing his resentence in addition to removing his possession of a controlled substance conviction from the offender score. Nevertheless, Vasquez's counsel objected to the consideration of any aggravating factor, while arguing the resentencing hearing was limited to correcting the offender score in light of *State v. Blake*. Counsel asked that, if the court consider aggravating factors, the court also consider mitigating factors. The State contended that, under the law of the case, Vasquez could not request resentencing based on his youth because of our decision in *Vasquez* II that held Vasquez waived the argument by failing to raise it before the resentencing court at the first resentencing hearing.

During the second resentencing hearing, the superior court initially commented that its authority to resentence Anthony Vasquez was limited to correcting his offender score after *Blake*. Vasquez's counsel agreed that the only task for the resentencing court was to resentence with the possession of a controlled substance conviction removed from

the offender score. His counsel further concurred that the court lacked authority to impose a mitigating sentence based on Vasquez's youth at the time of the crime.

Later during the second resentencing hearing and during Anthony Vasquez's allocution, Vasquez mentioned his desire to argue the mitigating factor of his youth. The following colloquy transpired:

> THE DEFENDANT: Well, I did want to argue late (as heard), but I guess you got me. I wanted to argue the *O'Dell* mitigating factors. But I guess you guys don't want to hear that today. I just know that last time in my appeal they said that if I didn't bring it up during sentencing then I have no right and I waive my contention. So, I'm here at another resentencing and I would like to bring it up. But if you're not trying to hear it, then, I mean. . .
>
> THE COURT: Well, this is still—you have the right to allocution, so whatever it is that you want to say for the Court to consider you are welcome to say it. We just won't essentially be taking a more formal—
>
> THE DEFENDANT: Yeah.
>
> THE COURT: —argument or maybe a legal—
>
> THE DEFENDANT: And that's why I didn't ask my attorney to—
>
> THE COURT: —analysis on it.
>
> THE DEFENDANT: —to bring it up. I—I wanted to bring it up myself. And just, like I said, I just ask that the judge, the Court, is willing to consider maybe that this is a—this justifies an exceptional sentence below the standard range because of my youth. I was 23 when I committed the crime. And, I mean, I—I apologize for the family and their loss.
>
> And yeah, I've been in and out of this life my whole life. And I've never actually had a chance to mature. I've been locked up since the age of 14. And I haven't really stopped. My mom's in the courtroom. She can vouch for that. You know what I'm saying? I've never actually had a chance to be out there long enough to mature. I went to prison at 25, and I've been locked up for the last six years.
>
> I've t[a]ken classes. I've gone to school and got a job. I mean, I'm trying to better my life for the future if someday I—I have a future on the outside because as of right now at 50 years I'm not gonna—I'm not gonna have a life out there. I'm 31 already. So I'd just ask that the ju—the judge

> is willing to consider my youth at the time of the crime as a mitigating factor and just—
>
> You know, I don't want to come back on appeal every other year and have everyone have to relive this. If we can just get a—a decent sentence we can be done here and I don't have to come back anymore and we can just—everyone will be done and it will bring closure for everyone on this matter. And that's all I ask is that you—you know, if you can consider my age at the time and hopefully to give me an exceptional sentence downwards. Thank you, Your Honor.
>
> THE COURT: Okay. Thank you.

Resentencing RP at 27-29 (alteration in original).

At the conclusion of Anthony Vasquez's second resentencing hearing, the superior court resentenced Vasquez using an offender score that no longer accounted for his possession of a controlled substance conviction. The offender score remained, however, at 9+. The court resentenced Vasquez to 620 months in confinement. Thus, the court, on the second resentencing, reduced the sentence by forty months. The sentence still exceeded the standard range.

During the second resentencing hearing, the resentencing court commented about Anthony Vasquez's youth:

> I have gone over the hearing transcript from that hearing [the first resentencing hearing] and felt that he [Judge John Antosz, the sentencing hearing and first resentencing hearing judge] analyzed the situation well and felt that there really wasn't anything that had changed other than the *Blake* issue. For the Court now to suddenly take a different approach, there really wasn't a reason.
>
> I feel that Judge Antosz took into account, Mr. Vasquez, your—your age at that hearing. I think he took into account how old you were, the circumstances of your life and what was going on. And to an extent I'm doing that as well. And so I just—I feel that on balance, though, regardless,

> it doesn't appear that a downward departure is warranted based on the information at least that the Court has had. So I just wanted you to know that I was at least taking that into account in my mind. I believe that Judge Antosz was at least looking into that. But I do want to follow what Judge Antosz I believe was trying to—trying to impose at the last hearing.
>
> So what the Court is doing, the Court is signing the Findings of Fact and Conclusions that show that there is a substantial and compelling reason for an exceptional sentence based on the—essentially the unpunished crimes.

Resentencing RP at 32-33.

The second resentencing court entered written findings of fact and conclusions of law that supported its finding that substantial and compelling reasons justified Anthony Vasquez's exceptional sentence above the standard range. Under finding of fact 1, the court wrote: "Anthony Vasquez has a criminal history of 9 points prior to the commission of this offense and was on [Department of Correction] supervision" at the time of the murder. Clerk's Papers (CP) at 132. Under finding of fact 2, the court wrote: "Anthony Vasquez's high offender score results in some of the offenses committed in this case going unpunished." CP at 132.

LAW AND ANALYSIS

Anthony Vasquez asserts twin assignments of error on appeal. First, the second resentencing court deemed itself unauthorized to consider Vasquez's age as a mitigating factor and erroneously refused to consider this factor. Second, the second resentencing court followed what it believed the first resentencing court would have done rather than exercising its own discretion. Vasquez asserts other assignments of error that include

entry of an exceptional sentence above the standard range, judicial factfinding in violation of constitutional restraints, and failure to conduct a same criminal conduct analysis as to some of his convictions. We only address Vasquez's first two assignments of error.

Anthony Vasquez's assignments of error implicate the role played by a resentencing court. We must decide if the resentencing is limited to those arguments previously raised before the superior court or whether, conversely, the resentencing court may hear new evidence and entertain new arguments by the parties. We must also resolve whether the resentencing court should sentence based on his or her view of how the sentencing judge would have ruled.

In *State v. Edwards*, 23 Wn. App. 2d 118, 514 P.3d 692 (2022), this court addressed resentencing under *State v. Blake*, when the resentencing court must reduce the offender score of the accused because of earlier convictions for possession of a controlled substance. We wrote:

> We remand for resentencing pursuant to *Blake*. Resentencing shall be de novo, with the parties free to advance any and all factual and legal arguments regarding Mr. Edwards's offender score and sentencing range.

State v. Edwards, 23 Wn. App. 2d 118, 122 (2022). Division One of this court employed identical language with regard to *Blake* resentencing in three unpublished decisions. *In re Personal Restraint of Taylor*, No. 84036-3-I-I (Wash. Ct. App. Jan. 23, 2023) (unpublished), https://www.courts.wa.gov/opinions/pdf/840363.pdf; *In re Personal*

Restraint of Priebe, No. 84280-3-I (Wash. Ct. App. Jan. 23, 2023) (unpublished) https://www.courts.wa.gov/opinions/pdf/842803.pdf; *In re Personal Restraint of Cratty*, No. 83670-6-I (Wash. Ct. App. Oct. 24, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/836706.pdf. In none of the decisions did this court elucidate why it deemed de novo sentencing appropriate. We now take the opportunity to do so.

We hold that, unless this court restricts resentencing to narrow issues, any resentencing should be de novo. During the resentencing, the resentencing judge may consider rulings by another judge during the sentencing of the offender, but the resentencing judge should exercise independent discretion. In this context we employ the terms "resentencing court" or "resentencing judge" regardless of the number of resentencings.

Generally, the law wishes to prevent relitigation of an issue after the party enjoyed a full and fair opportunity to litigate the question. *State v. Harrison*, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003). But in criminal cases, the court does not wish to strictly apply this principle. *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970); *State v. Harrison*, 148 Wn.2d 550, 561 (2003). In the interest of truth and fair sentencing, a court on a sentence remand should be able to take new matters into account on behalf of either the government or the defendant. *United States v. Kinder*, 980 F.2d 961 (5th Cir. 1992).

Remarkably, no court rule addresses the extent of resentencing in Washington court, other state courts, or federal courts. Nevertheless, most jurisdictions have assembled a body of law concerning the arguments that a party may raise on resentencing. Washington decisions have yet to thoroughly address the extent of resentencing. Therefore, we also review foreign decisions.

The resentencing court is not bound by collateral estoppel when the original sentence is no longer a final judgment on the merits. *State v. Brown*, 193 Wn.2d 280, 284-88, 440 P.3d 962 (2019); *State v. Harrison*, 148 Wn.2d 550, 561 (2003). Also, the law of the case doctrine applies only when an earlier sentencing court decided the merits of the question. *State v. Harrison*, 148 Wn.2d 550, 562 (2003). Neither a sentencing court nor this reviewing court has addressed the merits of Anthony Vasquez's request for a reduced sentence because of his youth at the time of the commission of the crime.

When a reviewing court reverses or vacates a sentence, resentencing is de novo in nature. *Bruce v. State*, 311 So.3d 51, 53 (Fla. Dist. Ct. App. 2021); *State v. D.H.*, 2019-Ohio-1017, 133 N.E.3d 922, 928; *State v. Hardy*, 250 N.C. App. 225, 792 S.E.2d 564, 567 (2016). Resentencing must proceed as an entirely new proceeding when all issues bearing on the proper sentence must be considered de novo and the defendant is entitled to the full array of due process rights. *Bruce v. State*, 311 So.3d 51, 53-54 (Fla. Dist. Ct. App. 2021).

In *Bruce v. State*, the State contended, on appeal from resentencing, that defense counsel stipulated to the offender prison release reoffender. The Florida Court of Appeals returned the case to the trial court for resentencing anyway because the trial court had failed to verify the offender's consent to the stipulation.

In *Betty v. State*, 233 So.3d 1149 (Fla. Dist. Ct. App. 2017), Ricarlo Betty, on resentencing, asked the court to consider his youth. The resentencing judge refused to conduct a de novo resentencing because it believed the original sentencing judge would not have sentenced Betty as a youthful offender. The Court of Appeals remanded for de novo resentencing.

If the court of appeals mandate limits the questions for resolution by the resentencing court, the court must limit its review. *United States v. Cannady*, 63 F.4th 259 (4th Cir. 2023); *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). Nevertheless, the remand must clearly convey the intent to limit the scope of resentencing. *State v. Hardy*, 792 S.E.2d 564, 569 (2016). By ordering resentencing without any specific instructions or any prohibitions, the reviewing court returns the case to the trial court to consider every aspect of the offender's sentences de novo. *State v.* Morrisey, 2022-Ohio-3519, 198 N.E.3d 554, 561; *People v. Lampe*, 327 Mich. App. 104, 933 N.W.2d 314, 323 (2019). Without a limitation, the resentencing court should consider sentencing de novo and entertain any relevant evidence that it could have heard at the first sentencing. *United States v. Cannady*, 63 F.4th 259 (4th Cir. 2023); *United*

States v. Helton, 349 F.3d 295, 299 (6th Cir. 2003); *United States v. Smith*, 116 F.3d 857 (10th Cir. 1997); *United States v. Atehortva*, 69 F.3d 679 (2nd Cir. 1995); *United States v. Ponce*, 51 F.3d 820 (9th Cir. 1995); *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993); *United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992); *State v. Hardy*, 792 S.E.2d 564, 567 (2016); *United States v. Stinson*, 97 F.3d 466, 468-69 (11th Cir. 1996). A resentencing remand order carries a presumption of de novo resentencing. *United States v. Helton*, 349 F.3d 295, 299 (6th Cir. 2003).

Although the United States Supreme Court has not held that resentencing is de novo in total, the court held that, when a reviewing court reverses and remands for resentencing, the district court may consider evidence of rehabilitation since the earlier sentencing. *Pepper v. United States*, 562 U.S. 476, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011).

Three federal Circuit Court of Appeals reject the majority view of a presumption of de novo resentencing. *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir. 1998); *United States v. Whren*, 111 F.3d 956 (D.C.Cir. 1997); *United States v. Parker*, 101 F.3d 527 (7th Cir. 1996). This view criticizes the majority approach as allowing an offender a second bite of the proverbial pear. *United States v. Whren*, 111 F.3d 956 (D.C. Cir. 1997). This criticism, however, should be panned since de novo resentencing works both ways. The State also gets a second opportunity to present evidence and argument not earlier forwarded.

On remand, the sentencing court should be free to consider any matters relevant to sentencing, even those that may not have been raised at the first sentencing hearing, as if it were sentencing de novo. *United States v. Crooked Arm*, 853 F.3d 1065, 1069 (9th Cir. 2017). The offender, on resentencing, may even raise an argument which the appeals court ruled waived in the initial appeal. *United States v. Caterino*, 29 F.3d 1390, 1395-96 (9th Cir. 1994) *overruled on other grounds by Witte v. United States*, 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995).

During resentencing, the trial court may impose the identical sentence or a greater or lesser sentence within its discretion. *State v. D.H.*, 2019-Ohio-1017, 133 N.E.3d 922, 928. The resentencing judge may not rely on a previous court's sentence determination and fail to conduct its own independent review. *State v. Hardy*, 792 S.E.2d 564, 567 (2016). Otherwise, the offender is deprived of de novo review. *State v. Hardy*, 792 S.E.2d 564, 567 (2016).

Some comments of Anthony Vasquez's second resentencing court denote that the court wished to impose a sentence that it deemed the earlier sentencing court would have issued. We also note that, assuming the second resentencing court considered Vasquez's youth, Vasquez was not able to present all the evidence he wanted because the court told him it was not going to consider his youth. Also, Vasquez's counsel did not advocate for a lower sentence due to Vasquez's youth. In fairness to the second resentencing court and Vasquez's counsel, we had not decided *State v. Edwards* yet.

The second resentencing court did not review resentencing based on any mandate from this court, but rather on a motion to resentence under *State v. Blake*. Although the motion did not expressly ask for de novo resentencing and the motion asked for resentencing under *Blake*, the motion did not expressly limit its scope. Therefore, we apply the presumption of de novo resentencing.

In *Vasquez* II, we declined to address Anthony Vasquez's youth because he did not ask for an exceptional sentence before the first resentencing judge. *Vasquez* III comes to us in a different posture because Vasquez requested that the second resentencing judge consider his youth.

We note that, on review a second time, the appellate court need not address an assignment of error not asserted on first review. *State v. Barberio*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993). We do not consider this rule applicable when Anthony Vasquez asked the second resentencing court to consider his youth and we now review the second resentencing court's ruling.

The dissent also relies on *State v. Barberio*, 121 Wn.2d 48 (1993) for the proposition that a resentencing court has discretion to entertain new arguments or evidence by either side, but may also exercise the discretion by precluding new arguments or evidence. *Barberio* involved a distinct issue. *Barberio* limits an offender's ability to relitigate the legal basis for an exceptional sentence upward when he or she enjoyed a full and fair opportunity to litigate the issue during the original sentencing and

appeal. None of Anthony Vasquez's resentencing courts have fully entertained the possibility of an exceptional sentence downward. When the superior court conducts resentencing because of the elimination of a count of conviction or the lowering of the offender score, the parameters for resentencing change. An argument that the offender deemed ineffective before may now seem viable. The law should not deem the offender to have waived a viable sentencing argument when the context governing the first proceeding differs in resentencing.

We also question any significant difference between the process envisioned by the dissent and this court's majority. The majority does not demand that the resentencing court agree to the validity of any new arguments or the credibility or weight of any new evidence. The majority only rules that, out of fairness to the offender, the resentencing court should listen and decide anew the probity of the arguments and evidence.

CONCLUSION

We remand to the superior court for a third resentencing during which the court will conduct sentencing de novo, including consideration of Anthony Vasquez's youth at the time of his crime. Because of de novo resentencing, Vasquez may raise, before the superior court, other arguments asserted on this appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.
Fearing, C.J.

I CONCUR:

Pennell, J.

State v. Vasquez
No. 38471-3-III

SIDDOWAY, J. (concurring/dissenting in part) — Given ambiguity about the third resentencing court's understanding of the discretion it had to entertain Anthony Rene Vasquez's evidence and argument of diminished responsibility because of his youth, well-settled law supports remanding for a fourth, full, resentencing. On that, I concur.

I disagree that Mr. Vasquez is entitled to the "plenary" resentencing he requests,[1] that he and others who are resentenced because convictions have been vacated in light of *State v. Blake*[2] are entitled to "de novo resentencing," or with the majority's holding in this appeal that rather than having an option, a resentencing court "*should* exercise independent discretion" on the new factual and legal arguments an offender is entitled to raise at resentencing. Majority at 10, 16 (emphasis added). Particularly where resentencing takes place before the same judge (which is not the case here), to *require* rather than permit the exercise of independent judgment unduly burdens resentencing courts and invites wasteful further appeals. I disagree with the de novo resentencing required in *Blake* remands by *State v. Edwards*, 23 Wn. App. 2d 118, 122, 514 P.3d 692 (2022). On that score, I dissent.

I. MR. VASQUEZ HAS DEMONSTRATED A NEED FOR A FOURTH RESENTENCING

In his second, 2018 appeal to this court, Anthony Rene Vasquez complained in a statement of additional grounds (SAG) that his new 660-month sentence, which he

[1] Br. of Appellant at 1-3.

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

characterized as a de facto life sentence, constituted cruel and unusual punishment. *State v. Vasquez*, No. 36123-3-III, SAG at 7 (Wash. Ct. App. Mar. 18, 2019) (on file with court). He asked that "this case be remanded back to [the] trial court for resentencing with instructions to consider Vasquez['s] youthfulness." *Id.* at 8. Mr. Vasquez was 23 years old at the time of the crimes.

The relief granted in that appeal was remand with directions to make a clerical change to Mr. Vasquez's judgment and sentence, a remand that this court stated "involves only a ministerial correction and no exercise of discretion," such that "Vasquez's presence is not required." *State v. Vasquez*, No. 36123-3-III, slip op. at 4 (Wash. Ct. App. June 20, 2019) (unpublished), https://www.courts.wa.gov/opinions /pdf/361233_unp.pdf. Mr. Vasquez's challenge to the resentencing court's failure to consider his youth was rejected with the explanation that Mr. Vasquez "neither requested an exceptional sentence below the standard range nor asserted his age as a mitigating factor at his resentencing hearing. Thus, Anthony Vasquez waived the contention." *Id.* at 6-7.

Mr. Vasquez petitioned the Supreme Court to review this court's opinion, including its decision that his right to request consideration of his youth at resentencing had been waived. Mot. for Pet. for Discretionary Rev., *State v. Vasquez*, No. 97459-4, at 4 (Wash. Jul. 19, 2019) (on file with court). Review was denied. Order, *Vasquez*, No. 97459-4 (Wash. Nov. 6, 2019) (on file with court).

Following the Washington Supreme Court's decision in *Blake*, Mr. Vasquez filed a motion for relief from judgment, since a conviction for simple possession of a controlled substance had counted toward his offender score. The State responded with a third resentencing memorandum in which it calculated his offender score without the simple possession conviction as an 11.

As the majority opinion recounts, at the third resentencing hearing, defense counsel announced at the outset that Mr. Vasquez would like the court to consider his youth as a mitigating factor, citing *State v. O'Dell.*[3] The prosecutor took the position that Mr. Vasquez could not request consideration of whether his age supported diminished culpability because the rejection of that claim of error in his second appeal was law of the case. Defense counsel conceded that the court lacked authority to consider youth as a mitigating factor. While the court allowed Mr. Vasquez to speak to the issue to a certain extent, and in announcing its sentence stated that it, "to an extent" was considering Mr. Vasquez's youth as well, it is not clear that the court fully understood its discretion to permit mitigation to be argued, and to consider it. Rep. of Proc. at 32, 27-29.

Law of the case did not preclude hearing evidence and argument that youth was a mitigating factor. A trial court, on remand, "'may exercise independent judgment as to decisions to which error was not assigned in the prior review, and those decisions are subject to later review by the appellate court.'" *State v. Barberio*, 121 Wn.2d 48, 50, 846

[3] 183 Wn.2d 680, 358 P.3d 359 (2015).

P.2d 519 (1993) (quoting the advisory committee on the Rules of Appellate Procedure, 2 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE at 481 (4th ed. 1991)). Error had not previously been assigned to any *decision* that Mr. Vasquez's age was not a mitigating factor. This court, and the Supreme Court, had merely rejected his request for resentencing where he had not asked that youth be considered by the first resentencing judge. I agree with the majority that this appeal is in a different posture.

Given the ambiguity whether the third resentencing court fully understood its discretion, I agree that we should remand for a fourth resentencing.

II. REQUIRING RESENTENCING COURTS TO REVISIT PREVIOUSLY UNAPPEALED ISSUES IS CONTRARY TO CONTROLLING CASE LAW, UNDULY BURDENS RESENTENCING COURTS, AND INVITES WASTEFUL FURTHER APPEALS

The decision last year in *Edwards* requiring "de novo" resentencing on *Blake* remands held that a defendant is entitled to raise any factual or legal challenge to the judicial determinations that went into their prior offender score and sentencing range. Under *Edwards*, a defendant can require the trial court to revisit any issue of validity, comparability, wash out, or same criminal conduct that went into those determinations. In this appeal, Mr. Vasquez assigns error not only to the trial court's failure to consider his youth as a mitigating factor, but also to its failure at his third resentencing to engage in a new "same criminal conduct" analysis of his prior crimes. Br. of Appellant at 41-47. He also raises a constitutional challenge for the first time to the court's imposition of an

exceptional sentence based on the free crimes aggravator, arguing that the Washington Supreme Court wrongly held in *State v. Alvarado*, 164 Wn.2d 556, 566-67, 192 P.3d 345 (2008), that application of the factor does not require prohibited judicial factfinding. Br. of Appellant at 47-56. The majority does not address those issues, holding that "[b]ecause of de novo resentencing" Mr. Vasquez will be able to address those issues to the superior court. Majority at 16.

By requiring the exercise of independent judgment on all such issues at resentencing, *Edwards* widely opened the door to further appeals, including the fourth appeal we can anticipate in this case. And it did so in a huge class of resentencings that can, in many cases, involve very little change to an offender score or sentencing range.

The majority now extends the requirement of de novo resentencing to "any resentencing," unless restricted by the appellate court. Majority at 10.

Thirty years ago, our Supreme Court held otherwise in *Barberio*. It held that at resentencing the trial court "may" exercise independent judgment as to decisions to which error was not assigned in the prior review. 121 Wn.2d at 50. It held "[c]learly the rule is permissive . . . . It is discretionary for the trial court to decide whether to revisit an issue which was not the subject of appeal." *Id.* at 51. It spoke of the "necessity" of a rule that denies review at a later stage of "clear and obvious issue[s] which could have been decided . . . in the first appeal." *Id.* at 52.

In *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009), our Supreme Court reaffirmed a resentencing court's discretion whether to revisit decisions to which error was not assigned in a first appeal, in a case illustrating the importance of that discretion to finality. Rejecting Kilgore's argument to adopt tests created by federal courts to determine finality where cases have been remanded following partial reversals, the court adhered to *Barberio*, holding that while "[t]he pendency of a case otherwise final under RAP 12.7 *can* be revived pursuant to RAP 2.5(c)," 167 Wn.2d at 36-38 (emphasis added),

> We have interpreted RAP 2.5(c)(1) to allow trial courts, as well as appellate courts, discretion to revisit an issue on remand that was not the subject of the earlier appeal. This is consistent with RAP 12.2, which allows trial courts to entertain postjudgment motions authorized by statute or court rules, as long as the motions do not challenge issues already decided on appeal. If the trial court elects to exercise this discretion, its decision may be the subject of a later appeal, thereby restoring the pendency of the case.

Id. at 38-39 (citation and footnotes omitted).

The significance in *Kilgore* was that since the trial court on remand had merely corrected Kilgore's judgment to remove two reversed convictions that the State had elected not to retry, he could not bring a post-*Blakely*[4] challenge to an exceptional sentence he had not challenged in his first appeal. The court observed that "[t]he fact that the trial court had discretion to reexamine Kilgore's sentence on remand is not sufficient

[4] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

to revive his right to appeal. Our rules of appellate procedure require that the trial court exercise its discretion in order to give rise to an appealable issue." *Id.* at 43.

Giving resentencing courts discretion, but not the obligation, to entertain new challenges to their prior sentencing determinations strikes the right balance, in my view. More importantly, *Barbiero* and *Kilgore* provide controlling constructions of our appellate rules and common law. The concept of a full resentencing as opposed to a ministerial correction is addressed by a large body of case law. *E.g.*, *State v. Ramos*, 171 Wn.2d 46, 246 P.3d 811 (2011) (per curiam). Presumably, the majority intends de novo resentencing to supplant full resentencing. I disagree with *Edwards* and with its extension by the majority in this case and therefore dissent in part.

Siddoway, J.

CERTIFICATE OF SERVICE

On this day I served a copy of the State's Petition for Review in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Kate Huber
katehuber@washapp.org

Dated: May 31, 2023.

Janet Millard

GRANT COUNTY PROSECUTOR'S OFFICE

May 31, 2023 - 4:36 PM

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