NO. 31020-5-III

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

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STATE OF WASHINGTON,

Plaintiff-Respondent,

v.

JASON GRAHAM,

Defendant-Appellant.

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# APPELLANT'S REPLY BRIEF

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Appeal from the Spokane County Superior Court
The Hon. Maryann C. Moreno, Superior Court Judge
No. 02-1-00202-2

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Introduction

In its superficial *Response* to Jason Graham's *Opening Brief*—a *Response* which covers a mere five pages and cites a total of two cases—the State actually has the temerity and the vindictiveness to argue that the 82-plus years Graham was given at his resentencing is not enough to slake the State's thirst for retribution. Consequently, rather than responding to Graham's assignments of error and arguments, the State instead asks for affirmative relief from this Court in the form of a remand with directions to impose an even longer sentence on Graham.

Fortunately for Graham, the State forfeited any right to complain about the conduct of the resentencing when it failed to file a notice of appeal and assignments of error. And since the State did not deign to address Graham's substantive arguments on appeal, those arguments remain unchallenged and unrebutted.

This Court should reverse for the reasons set forth in Graham's *Opening Brief*.

The State Is Precluded From Asking for Affirmative Relief from This Court Because It Did Not Appeal the Trial Court's Decision to Conduct a Full Resentencing.

"A party seeking cross review ***must file a notice of appeal*** . . . within the time allowed by rule 5.2(f)." RAP 5.1(d) (emphasis supplied). Graham timely filed his notice of appeal on July 19, 2012. CP 181-99. Pursuant to RAP 5.2(f), the State then had 14 days—until August 2, 2012—to file its own notice of appeal seeking cross review. The State did not do so.[1] It was not until more than eight months later that the State, in its *Response*, first communicated its intention to seek affirmative relief from this Court.

RAP 2.4(a) specifically limits the circumstances under which a respondent in an appeal may seek affirmative relief:

> The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review ***only*** (1) if the respondent also seeks review of the decision by the ***timely filing of a notice of appeal*** or a notice

[1] Nor did the State identify assignments of error as required by RAP 10.3(b). *See, e.g.*, *State v. Vanderpool*, 99 Wash. App. 709, 714, 995 P.2d 104, *rev. denied*, 141 Wash.2d 1017 (2000) (declining to review issue raised for the first time in State's response brief, where State failed to file notice of cross review and failed to assign error regarding issue).

> of discretionary review, or (2) if ***demanded by the necessities of the case.***

(emphasis supplied).

> ***A respondent requests affirmative relief if it seeks anything other than an affirmation of the lower court's ruling.*** *State v. Sims*, 171 Wash.2d 436, 442, 256 P.3d 285 (2011). ***Respondents must cross-appeal to obtain affirmative relief.*** *Sims*, 171 Wash.2d at 442–43, 256 P.3d 285. Although appellate courts may grant affirmative relief to a respondent who did not file a cross appeal "if demanded by the necessities of the case," ***we are unaware of any published case reversing the trial court in favor of the respondent absent a cross appeal.***

*Singletary v. Manor Healthcare Corp.*, 166 Wash. App. 774, 787, 271 P.3d 356, *rev. denied*, 175 Wash.2d 1008 (2012) (emphasis supplied).

In *Sims*, the defendant was granted a SSOSA by the trial court over the State's objection. The defendant then appealed one of the conditions of his SSOSA. The State—without filing its own notice of appeal—conceded error regarding the issue raised by the defendant, but also argued that the case should be remanded so that the trial court could reconsider the granting of a SSOSA. *Sims*, 171 Wash.2d at 439-40.

The Washington Supreme Court held that the State's request for a full resentencing constituted seeking affirmative relief under RAP 2.4(a):

> Because the State is seeking partial reversal of a trial court order, not just advancing an alternative argument for affirming the trial court, it is seeking affirmative relief. . . We also note that the trial court granted Sims a SSOSA over the objection of the State. ***The State is now essentially asking to reopen the argument it lost at Sims's sentencing hearing***.

*Sims*, 171 Wash.2d at 443 (emphasis supplied). Graham's case is indistinguishable in this regard. After Graham submitted his sentencing memorandum requesting an exceptional sentence (CP 82-162), the State filed its own memorandum arguing that the trial court did not have discretion to conduct a full resentencing, and urging the court to simply amend the existing judgment and sentence. *See* CP 163-66 (*Defense Reply Memorandum Regarding Resentencing*, summarizing and rebutting State's sentencing memorandum). The State raised the same objection at the resentencing hearing. RP 12-14. By proceeding to a full resentencing, the trial court clearly rejected the State's position. If the State was aggrieved by the trial court's decision to conduct a

full resentencing hearing, it should have filed a notice of appeal to have its claim reviewed by this Court. What the State cannot do is fail to file a notice of appeal, wait for many months, and then argue for affirmative relief in its *Response*.

The only exception to the requirement that the filing of a notice of appeal is a condition precedent to the granting of affirmative relief to the respondent is if the "necessities of the case" *demand* that such relief be granted. RAP 2.4(a). The *Sims* Court noted that "Washington courts generally apply the necessities provision of RAP 2.4(a) when the petitioner's claim cannot be considered separately from issues a respondent raises in response." *Sims*, 171 Wash.2d at 444.[2] Applying that standard to Sims' case, the Court held that the necessities of the case did not demand that the State be granted affirmative relief in the form of a new sentencing hearing. The Court reached this conclusion even though the trial court had made it clear that its granting of a SSOSA was

[2] *But see In re MKMR*, 148 Wash. App. 383, 388, 199 P.3d 1098 (2009) (in the context of RAP 5.3(i), the phrase "demanded by the necessities of the case" means "an ***absolute*** necessity; that is to say, one arising from the inherent nature of the case. . .") (emphasis supplied).

contingent on its ability to impose the condition later challenged by Sims on appeal. *Sims*, 171 Wash.2d at 443-44. The Court observed that "[t]o hold otherwise, would unnecessarily chill a defendant's right of direct appeal." *Sims*, 171 Wash.2d at 444.

Graham's assignments of error can be examined, analyzed and decided without reference to the issue the State waived by failing to file a notice of appeal. Consequently, the necessities of this case do not demand that this Court grant affirmative relief to the State. Further, as in *Sims*, to hold otherwise would unnecessarily chill a defendant's right to appeal. Of course, chilling Graham's right to appeal—and punishing Graham for exercising that right—is exactly the State's objective.

The State is asking for affirmative relief in the form of a remand with instructions to impose an even more draconian sentence on Jason Graham than the 82 years the trial court imposed. The State did not file a notice of appeal seeking cross review, and the necessities of the case do not demand the granting of affirmative relief to the State. Accordingly, this Court should deny the relief requested by the State in its *Response*.

Even if the Court Were to Reach the Issue Forfeited By the State, the Trial Court Had Discretion to Conduct a Full Resentencing.

This Court's decision which resulted in remand to the trial court states: "We ***reverse the sentence*** and ***remand for resentencing*** consistent with the decision in *Williams-Walker*." *State v. Graham*, 2011 WL 3570120 (2011) (emphasis supplied). Despite this clear language ordering that Graham be resentenced, the State contends that the trial court lacked the discretion to conduct a full resentencing.

The State's position is not only frivolous, it is directly contrary to the position the Spokane County Prosecutor took in another case which is directly on point: *State v. White*, 123 Wash. App. 106, 97 P.3d 34 (2004). In *White*, the defendant was convicted of three felonies and two misdemeanors. He appealed his original felony sentence and prevailed based on an offender score issue. In that appeal, the Court ordered: "***Since Mr. White's offender score was miscalculated, we must reverse Mr. White's sentence and remand for further sentencing proceedings.***" *White*, 123 Wash. App. at 112 (emphasis supplied). On remand, the trial

court—based on White's post-sentencing misconduct (prison infractions)—denied a DOSA sentence which it had previously imposed on the felonies, and added new probation conditions on the misdemeanors. White again appealed, arguing that the trial court did not have the authority to impose new probation conditions on the misdemeanors since the misdemeanors were unaffected by the original appeal. This Court disagreed:

> In one combined trial under a single cause number, the State successfully tried Mr. White for three felonies and two non-felonies. . . The non-felony sentencing and the felony sentencing were interrelated and concurrent with each other. Even though the offender score problem was the sole issue considered in the prior appeal, ***our remand applied to the entire outcome*** of the combined trial.

*Id*. at 112 (emphasis supplied). In his second appeal White also argued that the trial court was collaterally estopped from revisiting the DOSA sentence it had originally imposed. Again, this Court disagreed: "Collateral estoppel does not apply because ***this court's reversal and remand of the felony sentence wiped that slate clean.***" *Id*. at 114 (emphasis supplied); *see also State v. Harrison*, 148 Wash.2d 550, 562, 61 P.3d 1104, 1110 (2003), in which the Washington Supreme Court held that the defendant was not

precluded from re-litigating the imposition of an exceptional sentence on remand after he successfully appealed based on another issue:

> On Harrison's first appeal, the court "reverse[d] Harrison's sentences and remand[ed] for resentencing with the State's recommendation of an offender score of 7." ***His entire sentence was reversed, or vacated, since "reverse" and "vacate" have the same definition and effect in this context-the finality of the judgment is destroyed.*** Accordingly, Harrison's prior sentence ceased to be a final judgment on the merits.

(emphasis supplied) (internal citations omitted); *State v. Toney*, 149 Wash. App. 787, 792, 205 P.3d 944 (2009), *rev. denied*, 168 Wash.2d 1027 (2010) (drawing distinction between "remand for resentencing," which authorizes an entirely new sentencing proceeding, and a remand which authorizes "the trial court to enter only a ministerial correction of the original sentence"); *State v. Davenport*, 140 Wash. App. 925, 931-32, 167 P.3d 1221 (2007), *rev. denied*, 163 Wash.2d 1041 (2008) (distinguishing between a remand for resentencing and a remand to correct the judgment and sentence; "At the resentencing hearing, the trial court had the discretion to

consider issues Davenport did not raise at his initial sentencing or in his first appeal.").[3]

This Court *reversed* Graham's sentence and *remanded for resentencing*. The Court did not limit the remand to "correcting" or "amending" the prior judgment. Rather, the only limitation on the resentencing was that it must be consistent with *State v. Williams-Walker*, 167 Wash.2d 889, 225 P.3d 913 (2010). There was nothing about the exceptional sentence requested by Graham at resentencing that conflicted with *Williams-Walker*. Nor was there anything about the sentence actually imposed by the trial court which ran afoul of *Williams-Walker*. The trial court acted well within its discretion when it conducted a full resentencing hearing.

[3] *Kilgore*, the lone case cited by the State on this issue, further supports Graham's position. In *Kilgore*, unlike the situation here, the original appellate court order said nothing about resentencing the defendant on remand. Rather, the court simply remanded "for further proceedings." The Washington Supreme Court held that while the trial court had the option to revisit Kilgore's exceptional sentence on remand, it was not an abuse of discretion for the trial court to decline to revisit that issue. *State v. Kilgore*, 167 Wash.2d 28, 35, 38-42, 216 P.3d 393 (2009).

## II. CONCLUSION

The sole argument advanced by the State in its *Response* was waived when the State failed to file a notice of cross appeal. The State has offered no substantive response to Graham's assignments of error and arguments in support. This Court should reverse and remand for resentencing.

DATED this 17th day of July, 2013.

Respectfully Submitted:

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## CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on July 17, 2013, I served a copy of the attached brief on counsel for the State of Washington and on the appellant by causing the same to be mailed, first-class postage prepaid, to:

Andrew Metts
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And to:

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s/ Steven Witchley
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