NO. 99988-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JEFFREY L. BUTTERFIELD SR.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS , JUDGE

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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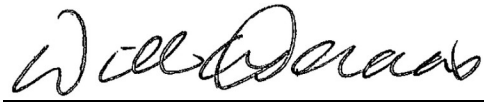
BY: 

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent.

B. COURT OF APPEALS DECISION

The Court of Appeals affirmed Mr. Butterfield's exceptional sentence in an unpublished opinion, No. 54279-0-II, filed June 15, 2021.

C. ISSUE PRESENTED FOR REVIEW

Is an exceptional consecutive sentence of 1520 months (over 126 years) clearly excessive when Petitioner was convicted of eight sex offenses involving his sexual abuse of his twin daughters from the time they four or five years old until they were sixteen, where Petitioner had an offender score of 22 and several of the crimes would have gone unpunished had the sentences been ordered to be served concurrently?

D. STATEMENT OF THE CASE

Petitioner sufficiently set forth the factual and procedural history of this case in his Petition for Review.

E. ARGUMENT

As the Court of Appeals correctly pointed out, a trial court "has 'all but unbridled discretion' in fashioning the structure and length of an exceptional sentence." *State v. France,* 176 Wn. App. 463, 308 P.3d 812 (2013) (quoting *State v. Halsey,* 140 Wn. App. 313, 165 P.3d 409 (2007).

"If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4)." RCW 9.94A.535. "To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify an sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585 (4). A trial court is only required "to set forth its for its decision to *impose* an exceptional sentence. There is no such statutory requirement as to the *length* of an exceptional sentence." *State v. Ritchie,* 126 Wn.2d 388, 392, 894 P.2d 1308 (1995) (citing to former RCW 9.94A.120(3)).

"An exceptional sentence must be reversed if the reasons for the exceptional sentence are not supported by the record or if those reasons do not justify an exceptional sentence. RCW 9.94A.210(4). If the reasons are supported by the record, and justify an exceptional sentence, then, to reverse an exceptional sentence, we must find 'that the sentence imposed was clearly excessive or clearly too lenient.' " *Ritchie,* 126 Wn.2d at 392 (quoting former RCW 9.94A.210 (4) b)).

"[T]he 'length of an exceptional sentence should not be reversed as 'clearly excessive' absent an abuse of discretion.' " *Id* (quoting *State v. Oxborrow,* 106 Wn.2d 525, 530, 723 P.2d 1123 (1986)) (other citations omitted). "Action [sentence] is excessive if it 'goes beyond the usual, reasonable, or lawful limit.' Thus, for action to be clearly excessive, it must be shown to be clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken." *State v. Oxborrow,* 106 Wn.2d 525, 531, 723 P.2d 1123 (1986); *State v. Branch,* 129 Wn.2d 635, 649-50, 919 P.2d 1228 (1996) (citing *Oxborrow,* 106 Wn.2d at 53) ("A sentence is clearly excessive if it is based on untenable grounds or untenable reasons, or an action no reasonable judge would have taken.").

When examining whether the trial court abused its discretion by imposing a sentence that is clearly excessive, the reviewing court does not engage in a proportionality review to determine whether the sentence is comparable to sentences in other similar cases. *Ritchie,* 126 Wn.2d at 396 (addressing appellant's contention that "the length of an exceptional sentence must be proportionate to sentences in similar cases," stating "[w]e reject a proportionality review for compelling reasons"). This is because the trial court's sentencing must be based solely upon the record

before the court. RCW 9.94A.585(5) ("A review under this section shall be made solely upon the record that was before the sentencing court."); *see also Ritchie,* 126 Wn.2d at 397 ("[A] proportionality review is inconsistent with [former] RCW 9.94A.210(5) which limits review solely of the record before the trial court.").

"The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed." RCW 9.94A.500(1).

Regarding the length of an exceptional sentence, this Court cited with approval Division One's opinion in *State v. Ross,* 71 Wn. App. 556, 861 P.2d 473 (1993). "The Court of Appeals, Division one, has held correctly that 'the sentencing court need not state reasons in addition to those relied upon to justify the imposition of an exceptional sentence above the standard range in the first instance to justify the length of the sentence imposed.' (Footnote omitted.). *State v. Ross,* 71 Wn. App. 556, 861 P.2d 473 (1993). We agree." *Ritchie,* 126 Wn.2d at 395. This Court

went on to state that "[t]he analysis in *Ross* explains well the status of the law:

> A careful examination of each of the words used to explain the abuse of discretion standard demonstrates why the pattern in the vast majority of cases cited above has developed. In order to abuse its discretion in determining the length of an exceptional sentence above the standard range, the trial court must do one of two things: rely on an impermissible reason (the "untenable grounds/untenable reasons" prong of the standard) or impose a sentence which is so long that, in light of the record, it shocks the conscience of the reviewing court (the "no reasonable person" prong of the standard). Indeed, once a reviewing court has determine that the facts support the reasons given for exceeding the range and that those reasons are substantial and compelling, there is often nothing more to say. The trial and appellate courts simply reiterate those reasons to explain why a particular number of months is appropriate. This is what our courts refer to when they recite that the length of the sentence must have "some basis in the record". *See, e.g.,* [*State v.*] Brown, 60 Wn. App. [60.] at 77 [, 802 P.2d 803 (1990), *review denied,* 116 Wn.2d 1025, 812 P.2d 103 (1991)]; *State v. Sanchez,* 69 Wn. App. 195, 208, 848 P.2d 735, *review denied,* 121 Wn.2d 1031, 856 P.2d 382 (1993).
>
> (Footnote omitted.) *Ross,* at 571-72, 861 P.2d 473, *Accord State v. Bedker,* 74 Wn. App. 87, m101, 871 P.2d 673 (1994)
>
> *Ritchie,* 126 Wn.2d at 395-96

Pursuant to RCW 9.94A.589(1)(a), it is assumed that the confinement on individual counts will run concurrently. An imposition of consecutive terms of confinement is an exceptional sentence.

> An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:
>
> 1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
>
> 2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
>
> 3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717, 720 (2005); *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997) (citing former RCW 9.94A.210(4), *State v. Branch*, 129 Wn.2d 635, 645–46, 919 P.2d 1228 (1996) and *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991).

In the Appellant's case, the State asked the sentencing court to find "substantial and compelling" circumstances to impose an exceptional sentence based on RCW 9.94A.535(2)(c). Without such a finding and the imposition of an exceptional sentence the Appellant's sentences would run concurrently, meaning that some conduct would go unpunished due to the Appellant's high offender score.

A defendant's standard range sentence reaches its maximum limit at an offender score of "9 or more." RCW 9.94A.510. An offender score is computed based on both prior and current convictions. RCW

9.94A.525(1). For the purposes of calculating an offender score when imposing an exceptional sentence, current offenses are treated as prior convictions. *State v. Newlun*, 142 Wn. App. 730, 742, 176 P.3d 529 (2008). Where a defendant has multiple current offenses that result in an offender score greater than nine, further increases in the offender score do not increase the standard sentence range. *See State v. Alvarado*, 164 Wn.2d 556, 561–63, 192 P.3d 345 (2008).

However, a trial court may impose an exceptional sentence under the free crimes aggravator when "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). In other words, if the number of current offenses results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses, then the court may impose an exceptional sentence. *Newlun*, 142 Wn. App. at 743, 176 P.3d 529. *See State v. France*, 176 Wn. App. 463, 468–69, 308 P.3d 812, 815–16 (2013).

The trial court has "'all but unbridled discretion'" in fashioning the structure and length of an exceptional sentence." *France*, 176 Wn. App. at 470; *State v. Halsey*, 140 Wn. App. 313, 325, 165 P.3d 409 (2007)

(quoting *State v. Creekmore*, 55 Wn. App. 852, 864, 783 P.2d 1068 (1989)).

Petitioner argues that a sentence of 126 years is manifestly unreasonable as he cannot possibly serve a sentence beyond his lifespan and cites *Oxborrow, supra,* at 531, in support. Petition for Review page 5. On page 531 of its opinion in *Oxborrow* this Court discusses the "Minnesota rule", which generally limits exceptional sentences to twice the presumptive range; this Court declined to adopt the rule. *Oxborrow,* 106 Wn.2d at 531. *Oxborrow* does not support Petitioner's position.

Petitioner further points out that he will be 86 years old if he lives beyond the minimum term of 318 months, but provides no authority that age is a factor in determining if an exceptional sentence is excessive.

Finally, Petitioner asks this Court to "review whether an exceptional sentence which extends beyond a lifetime is clearly excessive." Petition for Review page 6. As the Court of Appeals correctly pointed out, "Butterfield does not explain how, given that concurrent sentences would already result in what he contends is a de facto life sentence, an even longer sentence shocks the conscience . . . particularly in light of the fact that several of Butterfield's eight current offenses would not have otherwise been punished due to his exceptionally high offender

score and in light of the particular heinous nature of these offenses." Opinion No. 54279-0-II at 7-8.

Trial courts have imposed, and the appellate courts of this state have upheld, consecutive life sentences. *See State v. McNeil,* 59 Wn. App. 478, 798 P.2d 817 (1990).

When looking at the three questions posed by *State v. Law*, the reasons given by the sentencing court are clearly supported in the record. In this case, the Appellant was convicted of eight felony sex offenses. Including all the crimes at bar, the Appellant has an offender score of 22 on each count. CP 58. This greatly exceeds the maximum offender score of 9. As each other current offense counts for three points, the Appellant reached his maximum offender score after accounting for counts 1-4. This clearly leaves half of the convictions incurring no additional punishment. As outlined above, an offender score in excess of nine is a basis that justifies a departure from the standard range. Thus, the first two part of the *Law* inquiry have been satisfied.

The question for this Court is whether the sentence imposed in this case was "clearly too excessive." *State v. Law*, 154 Wn.2d at 93. The facts in this case established that the Appellant sexually abused his two daughters for more than a decade. If not for the exceptional sentence,

several crimes would go unpunished. A reasonable court could conclude that that it is Mr. Butterfield's conduct that shocks the conscience, not the court's sentencing decision.

Considering the totality of the facts and circumstances of this case, the sentence imposed was not an abuse of the court's discretion.

F. CONCLUSION

For all the foregoing reasons, the Petition for Review should be denied.

DATED this 11th day of August, 2021.

Respectfully Submitted,

By: 

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WAL / akb

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

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