

No. 66057-8-1

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

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STATE OF WASHINGTON,

Respondent,

v.

CLINTON ROBINSON,

Appellant.

---

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

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REPLY BRIEF OF APPELLANT

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FILED  
CLINTON ROBINSON  
GREGORY C. LINK  
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GREGORY C. LINK  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. ARGUMENT..... 1

    1. RCW 9.94A.535(3)(t) PERMITTING AN  
    EXCEPTIONAL SENTENCE TO BE IMPOSED IF  
    “THE DEFENDANT COMMITTED THE CURRENT  
    OFFENSE SHORTLY AFTER RELEASE FROM  
    CONFINEMENT” VIOLATES DUE PROCESS  
    VAGUENESS PROHIBITIONS ..... 1

        a. Aggravating factors are subject to vagueness  
        challenges in the same way as other elements  
        of the offense are..... 2

        b. The aggravating factor is impermissibly vague ..... 6

    2. THE COURT ERRONEOUSLY REQUIRED THE  
    JURY TO REACH A UNANIMOUS VERDICT ON  
    THE SPECIAL VERDICT ..... 8

B. CONCLUSION ..... 9

## TABLE OF AUTHORITIES

### **Washington Supreme Court**

<u>In re Personal Restraint of Cashaw</u> , 123 Wn.2d 138, 866 P.2d 8 (1994).....	4
<u>O’Day v. King County</u> , 109 Wn.2d 796, 749 P.2d 142 (1988) .....	7
<u>State v. Baldwin</u> , 150 Wn.2d 448, 78 P.3d 1005 (2003).....	1, 2, 4, 5
<u>State v. Bashaw</u> , 169 Wn.2d 133, 234 P.3d 195 (2010).....	8, 9
<u>State v. Goldberg</u> , 149 Wn.2d 888, 72 P.3d 1083 (2003).....	8

### **Washington Court of Appeals**

<u>State v. Combs</u> , 156 Wn.App. 502, 232 P.3d 1179 (2010).....	7
<u>State v. Jacobsen</u> , 92 Wn.App. 958, 965 P.2d 1140, <u>review denied</u> , 137 Wn.2d 1033 (1999) .....	3
<u>State v. Nunez</u> , 160 Wn.App. 150, 248 P.3d 103 (2011).....	9
<u>State v. Ryan</u> , 160 Wn.App. 944, 252 P.3d 895 (2011).....	9

### **United States Supreme Court**

<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) .....	1, 2, 3
<u>Giacco v. Pennsylvania</u> , 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966) .....	6
<u>Grayned v. City of Rockford</u> , 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) .....	6
<u>Kolender v. Lawson</u> , 461 U.S. 352, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983) .....	7
<u>Ohio v. Jacobellis</u> , 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) .....	7
<u>Smith v. Goguen</u> , 415 U.S. 574, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973) .....	6

A. ARGUMENT

1. RCW 9.94A.535(3)(t) PERMITTING AN EXCEPTIONAL SENTENCE TO BE IMPOSED IF "THE DEFENDANT COMMITTED THE CURRENT OFFENSE SHORTLY AFTER RELEASE FROM CONFINEMENT" VIOLATES DUE PROCESS VAGUENESS PROHIBITIONS.

In State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), the Court concluded an aggravating factor in support of an exceptional sentence was not subject to a vagueness challenge because the factor did not alter the maximum punishment which could be imposed.

Mr. Robinson contends, that in light of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the premise upon which Baldwin relied is incorrect and the conclusion is no longer viable. He contends the aggravating factor that he committed the current offense shortly after his release from confinement is unconstitutionally vague.

The State responds that because the fact at issue here is merely a sentencing fact, it is not subject to the vagueness doctrine in the same way an "element" of the offense would be. Brief of Respondent at 5-7. The State also contends that because a jury's finding of an aggravating factor does not require the trial court to

impose an exceptional sentence the vagueness doctrine does not apply. Brief of Respondent at 7. The State last contends the aggravating factor at issues here is not vague, but fails to articulate any standard that defines what “shortly after” means. Brief of Respondent at 9-10.

The State’s argument on each point is incorrect. The aggravating factors set forth in RCW 9.94A.535 are subject to a vagueness challenge in the same way that every other element of an offense would be. This is true even though a court retains the discretion to impose a standard range sentence despite a jury’s verdict finding the existence of aggravating fact. The aggravating factor that Mr. Robinson committed the current offense shortly after his release from confinement is impermissibly vague.

a. Aggravating factors are subject to vagueness challenges in the same way as other elements of the offense are. Before Blakely, Baldwin held ‘the void for vagueness doctrine should have application only to laws that “proscribe or prescribe conduct” and ... it was “analytically unsound” to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences.’ 150 Wn.2d at 459 (quoting State v. Jacobsen, 92 Wn.App. 958, 966, 965 P.2d 1140, review denied,

137 Wn.2d 1033 (1999) (internal quotation omitted)). From this premise, Baldwin concluded that sentencing guidelines “do not define conduct ... nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature[,]” and so found the void-for-vagueness doctrine “[has] no application in the context of sentencing guidelines.” Baldwin, 150 Wn.2d at 459.

The State’s response embraces the result of Baldwin all the while ignoring its reasoning. The State never addresses the significance Baldwin placed upon the erroneous premise that aggravating factors do not alter the maximum penalty for an offense. The incorrectness of that premise is now beyond dispute. Blakely held that aggravating factors in fact do alter the statutory maximum of the offense. 542 U.S. at 306-07.

The State chooses instead to contend that because an aggravating factor does not direct a particular punishment it is not subject to a vagueness challenge. Brief of Respondent at 6-7. Baldwin stated “before a state law can create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decision maker that if the regulations’ substantive predicates are present, a particular outcome must

follow.” Baldwin, 150 Wn.2d at 460 (quoting In re Personal Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)).

The State’s reliance upon this dicta in Baldwin is misplaced.

First, any discussion of a liberty interest is irrelevant to the application of the vagueness doctrine to a penal statute. By definition a penal statute involves the most basic of liberty interests: the freedom from State imposed confinement. Second, because an aggravating factor allows a court to extend the term of confinement beyond that otherwise permitted, it defines the lawfulness of the confinement. By contrast, the parole statutes at issue in Cashaw concerned whether a defendant had a right to be freed prior to the expiration of his lawfully imposed sentence. 123 Wn.2d at 145-47. In the first scenario a defendant must be afforded the opportunity to challenge the constitutionality of the confinement, e.g. whether it is premised upon a vague statute. In the second scenario, however, since the defendant’s confinement is lawful there is no constitutional directive that he be permitted to demand something less than what was lawfully ordered, unless he can demonstrate a statutory directive that requires a different outcome.

If a defendant could only raise a vagueness challenge to elements which require a particular result, no such challenge could

ever be raised to challenge the elements of an offense in jurisdictions which do not employ determinate sentencing, such as the federal court, where a conviction does not mandate a particular sentence. The same could be said of the element of any felony offense in Washington which does not trigger a mandatory minimum, as a court is always free to exercise its discretion to impose any sentence within the standard range. Certainly the vast majority of misdemeanors would be immune from vagueness challenges because a jury finding as to any element does not require the court to impose a particular sentence, or for that matter does not require the court impose any sentence at all.

The State's argument rests upon a belief that vagueness challenges came into being only with the advent of determinate sentencing and/or minimum terms. That is plainly not the case. A statute is not immune from a vagueness attack simply because a judge retains discretion despite a jury verdict.

Whether it is because it is an element of a new offense or merely because the aggravating factor in this case increases the maximum punishment, the vagueness doctrine of the Due Process Clause must apply. See Baldwin, 150 Wn.2d at 459; see also,

State v. Schmidt, 208 P.3d 214 (Ariz. 2009) (concluding aggravating factor unconstitutionally vague).

b. The aggravating factor is impermissibly vague.

The vagueness doctrine of the due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Id. at 108-09. A “statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites “unfettered latitude” in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The vagueness doctrine is most concerned with ensuring the existence of minimal guidelines to govern enforcement. Kolender v. Lawson, 461 U.S. 352, 358, 75

L.Ed.2d 903, 103 S.Ct. 1855 (1983); O'Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988).

The State asserts “it is readily apparent that the aggravating circumstance is no unconstitutionally vague when consider in the context of Robinson’s conduct.” Brief of Respondent at 9. Various cases have found the State proved or did not prove the existence of this aggravating element. See e.g., State v. Combs, 156 Wn.App. 502, 232 P.3d 1179 (2010) (finding State did not prove element where defendant committed attempting to elude police officer six months after release from conviction on drug possession). But, rather than define the limits, the court compared the definition of the element to the definition of pornography provided by Justice Potter Stewart, “I know it when I see it.” Combs, 156 Wn.App. at 507, n.5 (citing Ohio v. Jacobellis, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964)) The question is not what a particular prosecutor, believes is “readily apparent,.” or whether a given panel of judges “knows it when they see it.” Instead, the only relevant question is what standard informed the jury when it was tasked with placing the victim’s injuries on this imaginary spectrum of injuries. The State has not identified such a standard because it cannot.

Because RCW 9.94A.535(3)(t) does not guard against this arbitrary and inherently subjective application, and in fact requires it, it is void for vagueness. Mr. Robinson's sentence, which is predicated on this unconstitutionally vague aggravator, must be reversed for imposition of a standard range sentence.

2. THE COURT ERRONEOUSLY REQUIRED  
THE JURY TO REACH A UNANIMOUS  
VERDICT ON THE SPECIAL VERDICT

When the jury is asked to make an additional finding beyond the substantive offense, the jury need not be unanimous to find the State has not sufficiently proven the aggravating factor. State v. Bashaw, 169 Wn.2d 133, 145, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In both Bashaw and Goldberg, jurors were told their answer in a special verdict form, addressing an additional aggravating factor, must be unanimous for either a "yes" or "no" answer. Bashaw, 169 Wn.2d at 139; Goldberg, 149 Wn.2d at 894. In both cases the Court held such an instruction is incorrect, and unanimity is required only when the jury answers "yes."

The rule from Goldberg then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence.

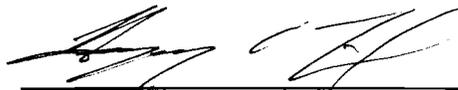
Bashaw, 169 Wn.2d at 146. Rather, any jury's less than unanimous verdict "is a final determination that the State has not proved that finding beyond a reasonable doubt." Id.

The State contends Bashaw does not apply to Mr. Robinson's case. As the State notes this Court has recently rejected the State's arguments in State v. Ryan, 160 Wn.App. 944, 252 P.3d 895 (2011).<sup>\*</sup> As in Ryan, the Court should reject the State's arguments here as well.

B. CONCLUSION

This Court must reverse Mr. Robinson's sentence.

Respectfully submitted this 17<sup>th</sup> day of August, 2011.



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GREGORY C. LINK – 25228  
Attorney for Appellant

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<sup>\*</sup> The Supreme Court recently granted a petition for review in Ryan as well as in State v. Nunez, 160 Wn.App. 150, 248 P.3d 103 (2011), in which Division Three reached a contrary result on whether this claim may be raised for the first time on appeal.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 66057-8-I
v.	)	
	)	
CLINTON ROBINSON,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> DEBORAH DWYER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> CLINTON ROBINSON 343395 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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STATE OF WASHINGTON  
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**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF AUGUST, 2011.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710