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Court of Appeals
Division I
State of Washington

No. 73411-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARIA GONZALES ESQUIVEL,

Appellant.

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

The Honorable James D. Cayce

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Maria Esquivel was convicted of five serious offenses perpetrated against Rafael Chagoya Sr. and his daughter, Valeria. In closing argument, the prosecutor told the jury that to believe Ms. Esquivel's testimony it would have to find essentially that all of the State's witnesses had lied, misconduct that must result in reversal of Ms. Esquivel's convictions.

Ms. Esquivel received exceptional sentences based upon the jury's finding aggravating factors, which Ms. Esquivel submits were unconstitutionally vague. In sentencing Ms. Esquivel, the court exceeded its statutory authority when it imposed an indeterminate "life" sentence as opposed to the required determinate sentence, and imposed a 20 year ban on contact between Ms. Esquivel and her daughter, thus infringing her constitutionally protected rights to parent.

B. ASSIGNMENTS OF ERROR

1. Ms. Esquivel's constitutionally protected right to due process and the right to a fair trial were violated by prosecutorial misconduct during closing argument.

2. The trial court exceeded its statutory authority in imposing an unauthorized indeterminate sentence of “life” on count III, first degree assault against Rafael Chagoya.

3. Ms. Esquivel’s fundamental right to parent was violated when the trial court imposed an order prohibiting contact between Ms. Esquivel and her daughter for 20 years.

4. The sentencing aggravator in RCW 9.94A.535(3)(h), as applied to Ms. Esquivel, is unconstitutionally vague and violates the Fourteenth Amendment’s Due Process Clause.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has a fundamental right to due process, which includes the right to a fair trial. Prosecutorial misconduct during closing arguments violates the defendant’s right to a fair trial. Telling the jury that to believe one witness’s testimony they would have to believe another witness was lying, constitutes misconduct. Here, in rebuttal, the prosecutor argued to the jury that to believe Ms. Esquivel the jury would have to believe that the Chagoyas, the police and Child Protective Services (CPS) investigators were lying. Is Ms. Esquivel entitled to a new trial for prosecutorial misconduct?

2. In sentencing a defendant, the trial court must impose a determinate sentence with the exact number of actual years, months, or days of total confinement. Here, the trial court imposed an indeterminate "life" sentence for a conviction of first degree assault, which required a determinate sentence. Did the trial court exceed its statutory authorization requiring resentencing Ms. Esquivel on count III to a determinate sentence?

3. The trial court's power at sentencing is statutory. By statute, the court may impose "crime-related" prohibitions as a condition of the sentence. Sentencing prohibitions that inhibit or infringe on a fundamental constitutional right, such as the right to parent, may be imposed but only where the prohibition is reasonably necessary to accomplish the essential needs of the State and public order. Less restrictive alternatives must be considered. Here, the trial court imposed a 20 year prohibition on contact between Ms. Esquivel and her minor child, E.G., without making any findings that the prohibition was reasonably necessary and without considering any less restrictive alternatives. In light of the trial court's failures, must this Court strike the prohibition as impermissibly infringing on Ms. Esquivel's fundamental right to parent?

4. A penal statute which fails to set forth objective guidelines to guard against arbitrary application is vague and violates the Fourteenth Amendment's Due Process Clause. RCW 9.94A.535(3)(a) and (h)(iii), setting forth the aggravating factors of deliberate cruelty, ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time, and/or the offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years, do not provide any standards to govern the determination of what degree of violence is normally associated with a given offense. By leaving it to the jury in Ms. Esquivel's case to define these elements, was she deprived of due process?

D. STATEMENT OF THE CASE

1. Procedural Facts

Maria Gonzales Esquivel was charged in the third amended information with one count of second degree assault involving Rafael Chagoya Sr., two counts of second degree assault involving Valeria Chagoya, one count of first degree assault involving Rafael Chagoya Sr., and one count of second degree rape involving Valeria Chagoya. CP 151-55. All of the counts contained aggravating factors: the counts

involving Rafael Chagoya Sr. alleged the offenses constituted aggravated domestic violence, manifested deliberate cruelty, involved a destructive and foreseeable impact on others, and occurred within sight or sound of Mr. Chagoya's minor children. CP 151-54. The counts involving Valeria Chagoya alleged the offenses constituted aggravated domestic violence, manifested deliberate cruelty, involved a destructive and foreseeable impact on others, occurred within sight or sound of Ms. Esquivel's minor child, and Ms. Esquivel used her position of trust, confidence, or fiduciary responsibility to commit the offenses. CP 152-55.

This case arose out of a period of time when the Chagoya family had lost their residence and lived with Ms. Esquivel. The family initially consisted of Rafael Chagoya Sr., his wife Maria, his daughter Valeria, his sons, Daniel, A.C., R.C., and Ab.C., and his wife's daughter R.C. A few months after the family moved into Ms. Esquivel's home Maria Chagoya moved out and ended her marriage to Rafael Sr. It was alleged that Ms. Esquivel thereafter physically and mentally abused the family over a lengthy period of time causing permanent physical damage to Rafael Sr., and Valeria.

Following a lengthy jury trial, Ms. Esquivel was convicted as charged. CP 351-76.

2. Prosecutor's improper closing argument

Rafael Sr., Maria Chagoya, Valeria, and A.C. testified at trial about Ms. Esquivel's actions. Several police officers and CPS investigators testified as well about their observations and various investigations concerning the injuries to the Chagoya family. Ms. Esquivel testified in her own defense and denied committing any of the alleged acts.

In the rebuttal closing argument, the prosecutor talked about this disparity in testimony:

> Now, the defense also wanted to talk to you about *somehow the Chagoyas must have -- after all was said and done, must have come together and concocted this grandiose story to tell you*. That in those couple times between Valeria leaving and their testimony that they were able to come together and make this plan to implicate the defendant as the person who had done all of these injuries against them.
>
> *But in order for that to be true, you'd have to believe that they had some motive to pick the one person that cared for them, that took them in, that put a roof over their head and supposedly cared for them, gave them food, gave them clothes, and offered them a place to stay when they had nowhere to go*. And that story would have to have stuck with them over the course of the years that has gone by since the defendant's arrest in August of 2011. It would have to involve a myriad of people.

> First, it would have to include an 11-year-old girl, [E.G.], the defendant's own daughter. It would have to include her father, Juan Pineda. And he would have to get up here and she would have to get up here and tell you things that were not true. They would also have to get other people to agree to *this masterful story* that the people who had come in contact with Ms. Esquivel and how she related to people like Valeria and get them to agree to characterize their relationship as somehow unfavorable.
> . . .
> *You would have to believe, then, that the Chagoyas would have to get somebody like Adair Ellison or Albert Lewis to testify falsely* about the times the defendant wouldn't leave when they asked to speak to Valeria alone. *You'd have to believe* that they had asked people like Adair Ellison to talk about that time when the defendant spoke in Spanish with Valeria during that interview, and the times that she would talk about the abuse that was happening. You'd have to get -- *they'd have to get somebody like Detective Priebe-Olson to agree to testify falsely about all the defendant's statements that she made during the course of her time with her and all the contacts that she had made with her that was contradicted by the evidence that you have*. This plan would have been completely impossible to execute over the course of this long trial involving that many people.

RP 4799-801 (emphasis added). Ms. Esquivel did not object to this line of argument.

3. Sentencing Errors

The trial court imposed exceptional sentences on all counts. CP 502, 504. The court sentenced Ms. Esquivel to "life" sentences on the first degree assault and rape counts, and the statutory maximum sentence of 120 months on the remaining counts, all consecutive to each other. CP 504; RP 4868 ("I just want the Department of Corrections to be clear and the Court of Appeals to be clear that I believe that for what you did, you should serve the rest of your life in prison."). The court subsequently "clarified" the rape sentence to be a minimum and maximum term of life imprisonment. CP 521-23.

The court also imposed an order prohibiting contact between Ms. Esquivel and her daughter E.G. for 20 years. CP 504.

E. ARGUMENT

1. **Telling the jury it would have to believe the Chagoyas and various law enforcement investigators were lying to believe Ms. Esquivel was reversible misconduct by the prosecutor.**

a. *Prosecutorial misconduct violates a defendant's constitutionally protected right to a fair trial.*

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 3 and article I, section 22 of the Washington Constitution guarantee the right to a fair trial. *State v.*

Finch, 137 Wn.2d 792, 843, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Prosecutors represent the State as quasi-judicial officers and they have a "duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). "A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.'" *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original), *quoting State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the

Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

Where defense counsel fails to object to the improper prosecutorial argument at trial, the issue may be raised on appeal where the prosecutor's misconduct was "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" and was not curable by a jury instruction. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (internal quotation marks omitted), *quoting State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

b. *The prosecutor's argument stressed to the jury that to believe Ms. Esquivel it would have to find the Chagoyas and various law enforcement investigators were lying.*

It is misconduct for a prosecutor to argue that a jury must find that the State's witnesses are either lying or mistaken in order to acquit a defendant. *State v. Fleming,* 83 Wn.App. 209, 213, 921 P.2d 1076 (1996), *citing State v. Casteneda-Perez,* 61 Wn.App. 354, 362–63, 810 P.2d 74 (1991). Misstating the basis on which a jury can acquit shifts the requirement that the State prove the defendant is guilty beyond a reasonable doubt. *Id.*

The prosecutor told the jury that, Ms. Esquivel's testimony denying responsibility was believable only if the Chagoyas and the law enforcement investigators were lying when they testified. This was plainly misconduct.

In *Fleming,* the prosecutor committed misconduct during closing argument by telling the jury that "'for you to find the defendants ... not guilty of the crime of rape in the second degree, ... you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.' " *Fleming,* 83 Wn.App. at 213. *See also State v. Barrow,* 60 Wn.App. 869, 874-75, 809 P.2d 209

(1991) ("[I]n order for you to find the defendant not guilty ... you have to believe his testimony and you have to completely disbelieve the officers testimony. You have to believe that the officers are lying.").

Here, the prosecutor made the same claim; to believe Ms. Esquivel required the jury to find the numerous State's witnesses were mistaken, confused, or had lied. This was plainly misconduct.

c. *The prosecutor's argument warrants reversal.*

If the defendant did not object at trial, the defendant may raise the issue for the first time on appeal where the prosecutor's improper argument was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *State v. Stenson,* 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012), *quoting State v. Thorgerson,* 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

"The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a

[defendant] from having a fair trial?" *Slattery v. City of Seattle,* 169 Wn. 144, 148, 13 P.2d 464 (1932). Thus, the "focus [should be] less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery,* 174 Wn.2d at 762.

Washington has long recognized the "in order to find the defendant not guilty" argument is flagrant and ill-intentioned. *Stenson,* 132 Wn.2d at 719; *Fleming,* 83 Wn.App. at 213. In light of these decisions, Ms. Esquivel is entitled to reversal of her convictions and remand for a new trial.

The misconduct was serious and prejudicial. This was an extremely lengthy jury trial where the State presented numerous law enforcement investigators who observed and interviewed the Chagoyas over the years. The most seriously injured family members, Valeria and her father, Rafael Sr., testified about their injuries and how they came to be injured. Telling the jury to find that all of this testimony was a lie in order to believe Ms. Esquivel was a major error that no curative instruction could possibly cleanse. This was not merely a case such as *Fleming, supra,* where the prosecutor told the jury it would have to find a single person lied; here the prosecutor told the jury it would have to

find a lengthy list of witnesses had lied, including police officers, doctors, and the Chagoyas themselves.

Ms. Esquivel is entitled to reversal for the flagrant and ill-intentioned prosecutorial misconduct.

2. **The trial court exceeded its statutory authority when it imposed an indeterminate sentence of "life" on count III.**

"A trial court only possesses the power to impose sentences provided by law." *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Where a statutory term, phrase or directive is unambiguous, its meaning must be taken from its plain language. *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997), *citing Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991).

The Sentencing Reform Act (SRA) requires a trial judge impose a determinate sentence, absent some exception, which is defined as follows:

> "Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the

> sentence as a determinate sentence, defined as a specific time period of total confinement, partial confinement, community supervision, or community service work, and/or a fine of a specified amount.

RCW 9.94A.030(18).

Because the SRA generally requires that sentences be determinate, "the only way to impose a life sentence for the myriad crimes for which life is the maximum penalty is to determine what the defendant's life expectancy is likely to be." *State v. Ross*, 71 Wn.App. 556, 573-74, 861 P.2d 473 (1993) (approving use of actuarial life expectancy tables as 'a reasonable method of translating' an indeterminate "life sentence" into "one that satisfies the determinate sentence requirement of the SRA"), *review denied*, 123 Wn.2d 1019 (1994).

The conviction for first degree assault required a determinate sentence as no exception applied. RCW 9A.20.021(a); RCW 9A.36.011(2); RCW 9.94A.505(2)(a)(i). The trial court's sentence of "life" was not a required determinate sentence, but instead, an indeterminate sentence as it failed to state exactly how many years, days, and/or hours of confinement Ms. Esquivel was required to serve. The court imposed an illegal sentence. Ms. Esquivel is entitled to resentencing on the first degree assault conviction.

3. **The imposition of the condition of her sentence barring Ms. Esquivel from contact with her own minor child for 20 years effectively terminated her parental rights, thus violating her fundamental right to parent.**

   a. *Sentence conditions which infringe fundamental rights must be "reasonably necessary" to accomplish the State's need.*

Under the Sentencing Reform Act (SRA), a court has the authority to impose "crime-related prohibitions" and affirmative conditions as part of a felony sentence. RCW 9.94A.505(8). "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). A court may order compliance "with any crime-related prohibitions" as a condition of community custody. RCW 9.94A.703(3)(f). Courts review the imposition of community custody conditions for an abuse of discretion, and will reverse where the decision is manifestly unreasonable or based on untenable grounds. *State v. Valencia,* 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). A condition is manifestly unreasonable if it is beyond the court's authority to impose. *See State v. Jones,* 118 Wn.App. 199, 207-08, 76 P.3d 258 (2003) (striking the condition pertaining to alcohol counseling as unauthorized under applicable

statutes). There is no need to demonstrate that the condition has been enforced; a preenforcement challenge is ripe for review. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008).

b. *The sentence condition barring Ms. Esquivel from contact with her biological child was not reasonably necessary to protect the child.*

If the sentencing condition infringes a constitutional right (such as the right to the care, custody, and companionship of one's children), that condition can only be upheld if the condition is reasonably necessary to accomplish the essential needs of the State and public order. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009) ("More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right.").

The right to the care, custody, and companionship of one's children constitutes such a fundamental constitutional right. *In re Rainey*, 168 Wn.2d 367, 374, 299 P.3d 686 (2010). Thus, sentencing conditions burdening this right "must be 'sensitively imposed' so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" *Rainey*, 168 Wn.2d at 373, *quoting Warren*, 165 Wn.2d at 32.

For instance, in *State v. Letourneau,* the defendant was convicted of second degree rape of a child. 100 Wn.App. 424, 427, 997 P.2d 436 (2000). The victim was a minor to whom the defendant was not related. *Letourneau,* 100 Wn.App. at 428-29. As a condition of her sentence, Letourneau was prohibited from unsupervised contact with her biological children until they reached the age of majority. *Id*. at 437-38. Because there was no evidence that the defendant might molest her own children, the condition was reversed as not reasonably necessary to accomplish the State's compelling interest. *Id.* 441-42.

Similarly, in *Rainey,* the Supreme Court struck a lifetime no-contact order prohibiting the defendant from all contact with his biological child. 168 Wn.2d at 381-82. The Court based its decision on the fact that the sentencing court did not articulate any reasonable necessity for the lifetime duration of that order. *Id.* at 381-82. Recognizing the "fact-specific nature of the inquiry," the court remanded to the trial court for resentencing so that the court could "address the parameters of the no-contact order under the 'reasonably necessary' standard." *Id*.

As in *Rainey,* the trial court here provided no explanation as to whether the no-contact order was reasonably necessary to serve a

compelling state interest. Although the State has a compelling interest in protecting children from harm, the State did not demonstrate how prohibiting all contact between Ms. Esquivel and her biological child was reasonably necessary to protect that interest, especially in light of the fact that his child was not a victim of Ms. Esquivel's offenses. *Letourneau*, 100 Wn.App. at 441-42.

In addition, the trial court completely failed to consider any less restrictive alternatives to a lifetime no-contact order. Given the fact any visits between Ms. Esquivel and her child would occur in the tightly controlled and monitored institutional setting or would happen through telephone or written contact, this is especially problematic. Because the sentencing condition implicated Ms. Esquivel's fundamental constitutional right to parent her children, the State was required to show that no less restrictive alternative would prevent harm to the children. It failed to do so. This Court should strike the 20 year no contact order to allow Ms. Esquivel to have contact with her child.

4. T**he aggravating factor in RCW 9.94A.535(3)(h)(iii) is impermissibly vague.**

a. *The vagueness doctrine of the Fourteenth Amendment's Due Process Clause applies to aggravating factors.*

The trial court accepted the State's argument that Ms. Esquivel did not have a liberty interest in an aggravating factor. In light of the decisions of the United States Supreme Court, this ruling is incorrect.

The Fourteenth Amendment applies to sentencing enhancements which increase the maximum sentence to which a person is exposed because those enhancements affect the person's liberty interest in being free of confinement. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Thus, *Apprendi* held the Fourteenth Amendment's Due Process Clause required proof beyond a reasonable doubt of those enhancements. Additionally, the Sixth Amendment right to a jury trial incorporated by the Fourteenth Amendment's Due Process Clause required those facts be proved to a jury. In *Blakely v. Washington*, the Court expressly applied that holding to aggravating factors in this State's Sentencing Reform Act (SRA). 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Because aggravating factors trigger the protection of the Fourteenth Amendment's Due Process

Clause, those factors are subject to challenge under the vagueness doctrine of the Due Process Clause.

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. 566, 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 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).

Prior to *Blakely*, in *State v. Baldwin*, the Washington Supreme Court overturned its prior decision in *State v. Rhodes*, 92 Wn.2d 755, 600 P.2d 1264 (1979), and concluded that aggravating factors were not subject to a vagueness challenge. 150 Wn.2d 448, 78 P.3d 1005 (2003). *Baldwin* offered several justifications for its conclusion. First, *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). *Baldwin* concluded that because sentencing guidelines "do not define conduct . . . nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature[,]" the void-for-vagueness doctrine "[has] no application in the context of sentencing guidelines." *Baldwin*, 150 Wn.2d at 459. Second, *Baldwin* concluded there was no liberty interest at stake in the determination of an aggravating factor, stating "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). It is clear that each of these conclusions is incorrect in light of *Apprendi* and *Blakely*.

First, *Baldwin*'s conclusion that aggravating factors "do not . . . vary the statutory maximum and minimum penalties" is indisputably incorrect following *Blakely*. There the Court held aggravating factors *do* alter the statutory maximum of the offense. *Blakely*, 542 U.S. at 306-07. Moreover, aggravating factors no longer "merely provide directives that judges should consider when imposing sentences." The vast majority of aggravating factors may no longer be considered by a sentencing court at all, unless they are first found by the jury beyond a reasonable doubt. RCW 9.94A.537. Thus, unlike the pre-*Blakely* scheme, the aggravating factors are not matters that merely direct judicial discretion at all.

Further, the conclusion that aggravating factors do not impact a liberty interest is also contrary to the conclusions reached in *Apprendi* and *Blakely*. Those cases concluded the Due Process Clause does apply to aggravating factors. First, it is by virtue of the Fourteenth

Amendment Due Process Clause that the Sixth Amendment is incorporated against the states. *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491(1968). In determining whether to incorporate a specific right within the Due Process Clause the Court asked the following:

> whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, whether it is basic in our system of jurisprudence, and whether it is a fundamental right, essential to a fair trial.

Id. 148-49 (Internal citations and quotations omitted). The Court reasoned the right to a jury trial "in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power-a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id*. at 156. Thus, the Sixth Amendment right to a jury applies to state court proceedings as a component of the Due Process Clause because of the liberty interest at stake. Moreover, because it applies equally to aggravating factors, the same liberty interests must necessarily be at stake.

Second, in *Apprendi*, the Court said:

> [a]s we made clear in [*In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)], the "reasonable doubt" requirement "has [a] vital role in our criminal procedure for cogent reasons." 397 U.S., at 363, 90

> S.Ct. 1068. Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and ... the certainty that he would be stigmatized by the conviction." *Id.* We thus require this, among other, procedural protections in order to "provid[e] concrete substance for the presumption of innocence," and to reduce the risk of imposing such deprivations erroneously. *Id.*

Apprendi, 530 U.S. at 484. Thus, *Apprendi* specifically applied to Washington's SRA by *Blakely*, applied the Due Process Clause's protections to sentence enhancements because of the loss of liberty associated with the finding. *Apprendi* also noted "we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Id*. (Brackets in original, internal quotations omitted.) Thus, liberty interests arise from facts which establish the length of the sentence.

Apprendi and *Blakely* clearly establish that aggravating factors affect a liberty interest protected by the Due Process Clause. Indeed, as *Apprendi* expressly noted, aggravating factors impact the most basic of liberty interests - the right to be free of confinement. And it is because they affect the most basic liberty interest that enhancements and aggravating factors, just as traditional elements, must be proved beyond

a reasonable doubt. With the recognition that this most basic liberty interest is implicated any time a statute permits an increase in the prescribed range of punishment based upon a jury finding, the second of *Baldwin's* underpinnings is lost.

In reaching its conclusion that no liberty interest was affected, *Baldwin* relied principally on *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Lockett* merely held that, in death penalty cases, a legislature could not restrict juries' ability to consider the full array of potential mitigating evidence in determining whether to return a verdict to impose the death penalty. The Court found such restrictions in the Ohio statute violated both the Eighth and Fourteenth Amendments. 438 U.S. at 605. *Lockett* recognized that in noncapital cases "legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." *Id*. at 603-04. But *Lockett* says nothing about whether an individual has a liberty interest in guidelines, indeed it never mentions the term "guidelines." And even if it did, because the issue in that case was whether the legislature could restrict juries' consideration of mitigation in a capital case, any discussion of liberty interest in a standard range is dicta and not the holding of the Court. In fact the Court said:

> . . . . We emphasize that in dealing with standards for imposition of the death sentence we intimate no view regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes.

438 U.S. at 605, n.13(Emphasis added). Thus, *Lockett* did not dictate the outcome of *Baldwin* nor was it even relevant.

And while *Lockett* offered the general recognition that legislatures may establish the amount of discretion afforded sentencing judges, the SRA has largely eliminated judicial discretion at sentencing. The SRA has specifically removed a judge's ability to find aggravating factors. RCW 9.94A.537. The jury finding leads to a specific result: an increase in the prescribed range of punishment.

Further, the relevant question is not whether a person has a right to be sentenced to the standard range. Instead, a court must ask whether his maximum sentence may be increased beyond that range without the protections of the Due Process Clause. *Apprendi* and *Blakely* have recognized that a defendant plainly does have the right, his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process, to be sentenced below the maximum sentence but for the jury's finding of an aggravating fact. Because it is that jury finding

which triggers the increase in punishment, that finding is subject to the vagueness doctrine.

Following *Apprendi* and *Blakely*, it is clear that the Due Process Clause applies to the determination of whether an aggravating factor exists. The vagueness doctrine of the Due Process Clause must also apply.

b. *The aggravating factor at issue in this case is impermissibly vague as applied to Ms. Esquivel.*

In this case, the jury had no objective standard by which to measure what inheres in the crime or is normally associated with it. Here, RCW 9.94A.535(h)(iii) requires that the

> current offense involved domestic violence, . . . and one or more of the following was present: (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time; (ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

Unlike a judge, who may have years of experience with similar cases, jurors called to sit on a single case lack any framework by which to assess how a given set of facts compare to other violations of the same law. And even assuming an individual juror possessed such a

framework, it is inherently subjective, as it exists as a product of a single juror's experience. That inherent subjectiveness renders these aggravators impermissibly vague.

Importantly, Ms. Esquivel does not contend that the statute is vague because a different jury might reach a different result. Instead, she contends the doctrine is violated because there is no assurance that a subsequent jury would even apply the same standard regarding what inheres in or is normally associated with the crime. Because RCW 9.94A.535(3)(h) does not guard against this arbitrary and inherently subjective application, and in fact calls for it, it is void for vagueness. Ms. Esquivel's sentence, which is predicated on these unconstitutionally vague aggravators, must be reversed for imposition of a standard range sentence.

5. **This Court should order that no costs be awarded on appeal.**

a. *Ms. Esquivel may seek an order from the Court ordering that no costs be awarded in his Brief of Appellant.*

Should this Court reject Ms. Esquivel's argument on appeal, she asks that this Court to issue a ruling refusing to allow the State to seek any reimbursement for costs on appeal due to her continued indigency. Such as request is authorized under this Court's recent decision in *State*

v. Sinclair, ___ Wn.App. ___, 2016 WL 393719, slip op. at 10-12 (72102-0-I, January 27, 2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may "direct otherwise." RAP 14.2; *Sinclair*, slip op. at 5, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to "compelling circumstances." *Sinclair*, slip op. at 8, *quoting Nolan*, 141 Wn.2d at 628.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. Slip op. at 9-10. This Court must then engage in an "individualized inquiry." Slip op. at 12, *citing State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

One factor this Court found persuasive in making its determination regarding costs on appeal in *Sinclair* were the trial court's findings supporting its order of indigency for the purposes of the appeal pursuant to RAP 15.2. *Sinclair*, slip op. at 12-14. Here, the trial court entered the order of indigency and findings supporting its

order. As in *Sinclair*, there is no evidence that Ms. Esquivel's financial situation will improve. Slip op. at 14

At the time of sentencing, Ms. Esquivel was 50 years of age. CP 477. Ms. Esquivel was sentenced to maximum sentence of life. CP 477. In light of the decision in *Sinclair*, given Ms. Esquivel's indigency and imprisonment for the rest of her life, "[t]here is no realistic possibility that [she] will be released from prison in a position to find gainful employment that will allow [her] to pay appellate costs." Slip op. at 14.

Because of her current and continued indigency and likelihood that she will remain so while in prison, Ms. Esquivel asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Sinclair*, slip op. at 14.

b. *Alternatively, this Court must remand to the trial court for a hearing where the court must determine whether Ms. Esquivel has the current or future ability to pay.*

Should this Court determine that it cannot make a finding regarding ability to pay because the record is not complete, due process requires this Court to remand to the trial court for a hearing to determine Ms. Esquivel's present or future ability to pay these costs.

Any award of costs becomes part of the Judgment and Sentence, thus amending that document. RCW 10.73.160 (3) states that: "An

award of costs shall become part of the trial court judgment and sentence." A defendant has due process rights where the State seeks to modify or amend a Judgment and Sentence, including:

> (a) written notice (b) disclosure of evidence against him or her; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the court specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body; and (f) a written statement by the court as to the evidence relied on and reasons for the modification.

State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005), *citing Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Since adding any costs that might be requested by the State to Ms. Esquivel's Judgment and Sentence necessarily amends the judgment, due process requires that there be a hearing which complies with the dictates of *Abd-Rahmann* regarding her present or future ability to pay. As such, Ms. Esquivel requests that, in the absence of a finding by this Court regarding her ability to pay, this Court remand to the trial court for a hearing on her ability to pay.

F. CONCLUSION

For the reasons stated, Ms. Esquivel asks this Court to reverse her convictions and remand for a new trial due to prosecutorial misconduct. Alternatively, Ms. Esquivel asks this Court to remand for resentencing on Count III, strike the 20 year prohibition on contact between her and her daughter, and/or strike the aggravating factors as unconstitutionally vague.

DATED this 27th day of April 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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

STATE OF WASHINGTON, Respondent, v. MARIA ESQUIVEL, Appellant.	)))))))))	NO. 73411-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **OPENING 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:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] MARIA ESQUIVEL 380846 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF APRIL, 2016.

X_____

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