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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY DEPUTY

No. 34867-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sang Van Nguyen,

Appellant.

Pierce County Superior Court

Cause No. 01-1-02568-8

The Honorable Judge Linda Lee

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: 740-1650

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ARGUMENT

I. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. NGUYEN'S OFFENDER SCORE AND STANDARD RANGE.

Respondent first argues that Mr. Nguyen's sentence cannot be challenged for the first time in this appeal. Brief of Respondent, p. 3-4. This is incorrect. An erroneous sentence can be challenged at any time, because in Washington, "[c]ourts have the duty and power to correct an erroneous sentence upon its discovery." *In re Call*, 144 Wn.2d 315 at 332, 28 P.3d 709 (2001); *see also State v. Loux*, 69 Wn.2d 855 at 858, 420 P.2d 693 (1966). The purpose of this rule is to allow appellate courts to bring sentences into conformity with the SRA. *State v. Ford*, 137 Wn.2d 472 at 478, 973 P.2d 452 (1999). This court should address Mr. Nguyen's claims of error.

Respondent has failed to address the merits of the argument. Because of this, the sentence must be vacated and the case remanded for a new sentencing hearing.

II. RCW 9.94A715 AND RCW 9.94A. ARE UNCONSTITUTIONAL BECAUSE THEY AUTHORIZE CONFINEMENT BEYOND THE STATUTORY MAXIMUM, WITHOUT A JURY DETERMINATION OF ALL FACTS USED TO ENHANCE A DEFENDANT'S SENTENCE.

Respondent asserts that Mr. Nguyen's sentence is constitutional, because "the total time served between incarceration and community

custody [does not] exceed the statutory maximum of the sentence for the crime." Brief of Respondent, p. 5, *citing State v. Zavala-Reynoso*, 127 Wn.App. 119, 110 P.3d 827 (2005) *and State v. Sloan*, 121 Wn.App. 220, 87 P.3d (2004). While Mr. Nguyen's sentence does pass the test set forth in these cases, the Supreme Court's *Apprendi and Blakely* decisions imposed additional requirements. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). In *Apprendi*, the Court ruled that prison sentences could not exceed the maximum allowed sentence in the absence of a jury verdict authorizing additional prison time. In *Blakely*, the Court held that the relevant maximum for *Apprendi* purposes is the top of the standard sentencing range.

Mr. Nguyen's confinement and community custody, although less than the statutory maximum, exceeds the *Blakely* maximum. The trial court's order authorizes confinement in excess of the standard range without any additional court action. Accordingly, the sentence must be reversed, and the case remanded for resentencing.

Respondent also argues that the issue is not justiciable because Mr. Nguyen "does not have a genuine interest in the issue raised." Brief of Respondent, p. 6. This is incorrect. The judgment and sentence authorizes additional imprisonment without further court proceedings

through the action of RCW 9.94A.715 and RCW 9.94A.737. Because the judgment and sentence exposes him to additional confinement without further court proceedings, his interest in the outcome of his appeal is direct and substantial.

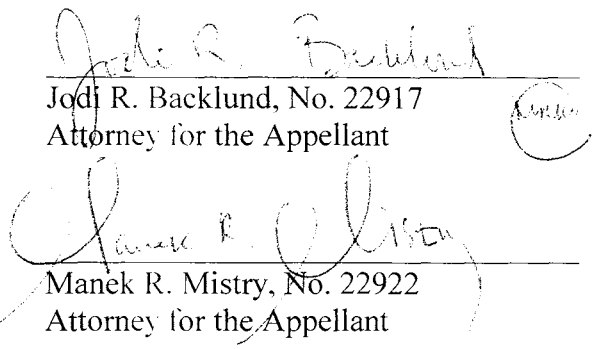
Respondent also argues that "[t]he constitutional issues raised by defendant are not ripe." Brief of Respondent, p. 8. This is incorrect. As noted above, the sentencing court entered an order that authorizes additional confinement without further court action. The order is final; its consequences are real. Accordingly, the issue is ripe for review.

CONCLUSION

For the foregoing reasons, the sentence must be vacated and the case remanded to the sentencing court.

Respectfully submitted on December 18, 2006.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant

Manek R. Mistry, No. 22922
Attorney for the Appellant

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Sang Van Nguyen, DOC# 838668
Unit BMU, Tier1, Cell D-9
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

and to:

Pierce County Prosecuting Attorney
930 Tacoma Ave South, RM 946
Tacoma, WA 98402-2171

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 18, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 18, 2006.

Jodi R. Backlund

Jodi R. Backlund, No. 22917
Attorney for the Appellant