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PHONE: (253) 798-7400  
FAX: (253) 798-7401  
WWW.PIERCECOUNTYWA.GOV

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BY: Chum  
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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SIDFREDO EARL VALDEZ, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Susan K. Serko

No. 98-1-04418-9

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**BRIEF OF RESPONDENT**

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GERALD A. HORNE  
Prosecuting Attorney

By  
ALICIA BURTON  
Deputy Prosecuting Attorney  
WSB # 29285

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....1

1. Where the Court of Appeals vacated defendant’s original sentence and remanded the case to the trial court for a new sentencing hearing, did the trial court act within the scope of the mandate when it re-sentenced the defendant on all counts?.....1

2. Has defendant failed to show that the collateral estoppel doctrine bars the trial court from imposing a different sentence on remand where the Court of Appeals has vacated defendant’s original sentence and remanded the case for a new sentencing hearing? .....1

3. Has defendant failed to show that the trial court acted vindictively when it imposed a high-end sentence on count three instead of the low-end imposed in his original sentence where defendant’s aggregate sentence is not more severe than the prior sentence, the re-sentencing hearing was presided over by a different judge and there is no evidence of actual vindictiveness in the record? .....1

B. STATEMENT OF THE CASE. ....2

1. Procedure.....2

2. Facts .....4

C. ARGUMENT.....9

1. WHERE THE COURT OF APPEALS VACATED DEFENDANT’S ORIGINAL SENTENCE AND REMANDED THE CASE FOR A NEW SENTENCING HEARING, THE TRIAL COURT ACTED WITHIN THE SCOPE OF THE MANDATE WHEN IT RE-SENTENCED THE DEFENDANT ON ALL COUNTS.....9

2. THE COLLATERAL ESTOPPEL DOCTRINE DOES NOT BAR THE TRIAL COURT FROM IMPOSING A DIFFERENT SENTENCE ON REMAND WHERE THE APPELLATE COURT HAS VACATED DEFENDANT’S ORIGINAL SENTENCE AND REMANDED THE CASE FOR RESENTENCING..... 15

3. THERE IS NO EVIDENCE IN THE RECORD THAT THE DEFENDANT’S SENTENCE WAS THE RESULT OF JUDICIAL VINDICTIVENESS; THE RESENTENCING HEARING WAS PRESIDED OVER BY A DIFFERENT JUDGE AND THE SENTENCE IMPOSED WAS LESS SEVERE THAN THE ORIGINAL SENTENCE. .... 19

D. CONCLUSION. ....24

## Table of Authorities

### Federal Cases

<u>Alabama v. Smith</u> , 490 U.S. 794, 802, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).....	19, 20, 23
<u>Ashe v. Swenson</u> , 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970).....	16
<u>Chaffin v. Stynchcombe</u> , 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).....	20
<u>Colten v. Kentucky</u> , 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972).....	20
<u>Gauntlett v. Kelley</u> , 849 F.2d 213, 218-19 (6th Cir. 1988) .....	10
<u>Jones v. Thomas</u> , 491 U.S. 376, 109 S. Ct. 2522, 105 L. Ed. 2d 322, <u>reh'g denied</u> , 106 L. Ed. 2d 627 (1989) .....	11, 12, 13
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 721, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).....	10, 13, 19
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), <u>overruled on other grounds</u> , <u>Alabama v. Smith</u> , 490 U.S. 794, 799, 109 S. Ct. 2201, 104 L. Ed.2d 865 (1989).....	19, 20, 23
<u>Pennsylvania v. Goldhammer</u> , 474 U.S. 28, 106 S. Ct. 353, 88 L. Ed. 2d 183 (1985).....	11
<u>Texas v. McCullough</u> , 475 U.S. 134, 138, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986).....	20, 21
<u>United States v. Anderson</u> , 872 F.2d 1508, 1520 (11th Cir. 1989) .....	10
<u>United States v. Andersson</u> , 813 F.2d 1450, 1461-62 (9th Cir. 1987) .....	10
<u>United States v. Bay</u> , 820 F.2d 1511, 1513 (9th Cir. 1987) .....	22
<u>United States v. Bentley</u> , 850 F.2d 327, 329-30 (7 <sup>th</sup> Cir. 1988).....	10, 22

<u>United States v. Basic</u> , 639 F.2d 940, 947 (3d Cir. 1981), <u>cert. denied</u> , 452 U.S. 918 (1981) .....	10
<u>United States v. Cataldo</u> , 832 F.2d 869, 874 (5 <sup>th</sup> Cir. 1987), <u>cert. denied</u> , 485 U.S. 1022 (1988) .....	10, 22
<u>United States v. Cochran</u> , 883 F.2d 1012 (11 <sup>th</sup> Cir. 1989) .....	10, 22
<u>United States v. Colunga</u> , 812 F.2d 196, 198 (5th Cir. 1987) .....	10
<u>United States v. Diaz</u> , 834 F.2d 287 (2d Cir. 1987); <u>cert. denied</u> , 488 U.S. 818 (1988) .....	10, 22
<u>United States v. Fogel</u> , 829 F.2d 77, 85 (D.C. Cir. 1987) .....	10
<u>United States v. Gray</u> , 852 F.2d 136 (4 <sup>th</sup> Cir. 1988) .....	22
<u>United States v. Hagler</u> , 709 F.2d 578, 579 (9 <sup>th</sup> Cir. 1983) .....	10, 22
<u>United States v. Hawthorne</u> , 806 F.2d 493, 500-01 (3d Cir. 1986) .....	10
<u>United States v. Pimienta-Redondo</u> , 874 F.2d 9, 16 (1 <sup>st</sup> Cir.), <u>cert. denied</u> , 493 U.S. 890 (1989) .....	10, 22
<u>United States v. Shue</u> , 825 F.2d 1111, 1115 (7 <sup>th</sup> Cir. 1987) .....	10
<u>United States v. Shue</u> , 825 F.2d 1111, 1115 (7th Cir. 1987), <u>cert. denied</u> , 484 U.S. 956 (1987) .....	22
<u>Wasman v. United States</u> , 468 U.S. 559, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984) .....	20

### **State Cases**

<u>Commonwealth v. Goldhammer</u> , 512 Pa. 587, 593, 517 A.2d 1280, 1283 (1986), <u>cert. denied</u> , 480 U.S. 950 (1987) .....	11
<u>Nielson v. Spanaway Gen. Med. Clinic, Inc.</u> , 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998) .....	16, 17
<u>State v. Ameline</u> , 118 Wn. App. 128, 75 P.3d 589 (2003) .....	18, 19

<u>State v. Barberio</u> , 66 Wn. App. 902, 833 P.2d 459 (1992), <u>affirmed</u> , 121 Wn.2d 48, 846 P.2d 519 (1993).....	22
<u>State v. Collicott</u> , 118 Wn.2d 649, 827 P.2d 263 (1992).....	15, 18
<u>State v. Franklin</u> , 56 Wn. App. 915, 920, 786 P.2d 795 (1989) .....	19, 22
<u>State v. Hall</u> , 35 Wn. App. 302, 308, 666 P.2d 930 (1983).....	9
<u>State v. Hardesty</u> , 129 Wn.2d 303, 318-19, 915 P.2d 1080 (1996).....	10
<u>State v. Harris</u> , 78 Wn.2d 894, 896-97, 480 P.2d 484 (1971) .....	16
<u>State v. Harrison</u> , 148 Wn.2d 550, 561, 61 P.3d 1104 (2003).....	16, 17, 18
<u>State v. Kassahun</u> , 78 Wn. App. 938, 948-49, 900 P.2d 1109 (1995).....	17
<u>State v. Larson</u> , 56 Wn. App. 323, 328-29, 783 P.2d 1093 (1989) .....	9, 10, 11, 12, 22
<u>State v. Parmelee</u> , 121 Wn. App. 707, 90 P.3d 1092 (2004).....	21
<u>State v. Shove</u> , 113 Wn.2d 83, 776 P.3d 132 (1989).....	14, 15
<u>State v. Tili</u> , 148 Wn.2d 350, 360, 60 P.3d 1192 (2003).....	16
<u>State v. White</u> , 123 Wn. App. 106, 97 P.2d 34 (2004).....	13, 14, 16, 17, 18

**Constitutional Provisions**

Fifth Amendment, United States Constitution .....	15
Fourteenth Amendment, United States Constitution.....	19

**Statutes**

RCW 9.94A.520 .....	3
RCW 9.94A.589(1)(b).....	3

**Other Authorities**

<u>White</u> , 2002 WL 31697928, at *2, 2002 Wash. App. LEXIS 2970 .....	14
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the Court of Appeals vacated defendant's original sentence and remanded the case to the trial court for a new sentencing hearing, did the trial court act within the scope of the mandate when it re-sentenced the defendant on all counts?

(Appellant's Assignment of Error Nos. 1 and 2).

2. Has defendant failed to show that the collateral estoppel doctrine bars the trial court from imposing a different sentence on remand where the Court of Appeals has vacated defendant's original sentence and remanded the case for a new sentencing hearing?

(Appellant's Assignment of Error No. 3)

3. Has defendant failed to show that the trial court acted vindictively when it imposed a high-end sentence on count three instead of the low-end imposed in his original sentence where defendant's aggregate sentence is not more severe than the prior sentence, the re-sentencing hearing was presided over by a different judge and there is no evidence of actual vindictiveness in the record?

(Appellant's Assignment of Error No. 4)

B. STATEMENT OF THE CASE.

1. Procedure

On October 13, 1998, the State filed an Information charging SIDFREDO EARL VALDEZ (hereinafter "defendant") with one count of first degree burglary (count I), three counts first degree kidnapping (count II-IV) and one count of first degree robbery (count V). CP 1-5. The State charged a firearm enhancement on each count. CP 1-5.

Pursuant to plea negotiations, the State agreed to dismiss one count of first degree kidnapping and the firearm enhancements on each count. On May 12, 1999, defendant plead guilty to an Amended Information charging him with one count of first degree burglary (count I), two counts of first degree kidnapping (count II and III) and one count of first degree robbery (count IV). CP 75-77. Defendant's offender score was calculated as a six on counts I, II and IV and a zero on count III. CP 21-30.

A sentencing hearing was held before the Honorable Bruce W. Cohoe on November 12, 1999. Pursuant to the plea agreement, the State recommended a high-end standard range sentence on each count. CP 9-20. The court imposed the low-end on counts I (57 months), III (51

months) and IV (77 months) and the high-end on count III (130 months).<sup>1</sup> CP 21-30. Counts II and III were ordered to run consecutively for a total sentence of 181 months in the Department of Corrections. CP 21-30.

Defendant filed a direct appeal challenging the calculation of his offender score on count II. State v. Valdez, COA No. 34008-9-II. The State conceded that the offender score for count II was incorrect because it improperly included the kidnapping that was charged in count III, in violation of RCW 9.94A.589(1)(b).<sup>2</sup> This court accepted the State's concession, vacated Valdez's sentence and "remand[ed] for resentencing." CP 34-39. The Court's mandate issued on or about August 15, 2006. Id. The mandate stated that "this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion." CP 34-39.

A re-sentencing hearing was held on September 29, 2006 before the Honorable Susan K. Serko. RP 3. The State again requested a

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<sup>1</sup> The standard sentencing range for each count was:

- Count I: 57-75 months
- Count II: 98-130 months
- Count III: 51-68 months
- Count IV: 77-102 months

CP 21-30.

<sup>2</sup> Pursuant to RCW 9.94A.589(1)(b), the offender scores for serious violent offenses imposed consecutively are scored without using either as offender score for the other. The offender score of the serious violent offenses with the highest seriousness level is calculated using prior convictions and other current convictions "that are not serious violent offenses," and "the sentence range for other serious violent offenses shall be determined by using an offender score of zero." RCW 9.94A.520; RCW 9.94A.589(1)(b).

sentence at the high end of the standard range on each count. RP 5. The State informed the court that the defendant's co-defendant, Anthony McKinney, had come back for re-sentencing on the same issue and that Judge Cohoe had increased McKinney's sentence to a high-end sentence. RP 5. The State also informed the court that the victims could not be present in court, but wished the court to impose as much time as possible. RP 10. The court considered the facts of the case, McKinney's resentencing and Judge Cohoe's original sentence before imposing a low end sentence on counts I (57 months) and IV (77 months) and a high end sentence on counts II (96 months) and III (68 months).<sup>3</sup> RP 13-14; CP 40-52. The court ordered counts II and III to run consecutive to each other for a total of 164 months in prison. CP 40-52.

This timely appeal follows. CP 57-72.

## 2. Facts

The following facts are taken from the Declaration of Probable Cause:

That in Pierce County, Washington, on or about the 21<sup>st</sup> day of July, 1998, at approximately 11:30 p.m., Gerard and Mary Sullivan, and

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<sup>3</sup> The standard sentencing range for each count was as follows:

Count I: 57-75 months

Count II: 72-96 months

Count III: 51-68 months

Count IV: 77-102 months

CP 40-52.

their daughter Meaghan, were in their home in University Place. Gerard and Meaghan were in the den watching television, while Mary was in the downstairs rec room. Their front door was open because it was a hot night.

Defendants SIDFREDO EARL VALDEZ and ANTHONY JACQUES MCKINNEY entered the residence and confronted the Sullivans. Defendant VALDEZ was wearing a stocking cap with cut-out eyes over his face and both defendants were pointing firearms at the victims. The defendants gathered the Sullivans into one room and duct-taped their hands, ankles, and Gerard Sullivan's mouth. The defendants ransacked the Sullivan's house, collecting items of value. They also asked the victims for their PIN numbers on their assorted credit cards.

After remaining in the residence for approximately one hour, the defendants left with the Sullivans' driver's licenses, assorted credit cards, three televisions, one TV/VCR, a stereo receiver/amplifier, a VCR, a cordless phone, a computer a monitor, assorted jewelry, a Nintendo 64 games and cartridges, a color scanner, a fan, and the Sullivans' white 1994 Ford Explorer.

While the defendants were in the residence, Mary Sullivan heard defendant VALDEZ ask where "Monique" was at, and that they were waiting for "Mary." Gerard Sullivan heard defendant MCKINNEY mention something to defendant VALDEZ about a female waiting in the car outside. None of the victims saw anyone other than defendants

VALDEZ and MCKINNEY in their house. Gerard Sullivan heard a car horn sound and the two defendants began to leave, taking the Explorer. The next morning, the Sullivans' Ford Explorer was found abandoned in the 2600 block of Pioneer Avenue East.

On August 5, 1998, members of the Tacoma Police Department executed a narcotics search warrant at 14314 Woodlawn Avenue in Tillicum. During a search of this residence, officers found the driver's licenses of the Sullivans and some of their credit cards. The occupants of the residence were questioned. Ona Fredrick said that she had driven Henry Bell and Eric Cabaong to the residence of Jermaine Trottman in the early morning hours of July 22, 1998. Trottman lives at 3217 East Grandview, which is approximately one-half mile from where the Explorer was found abandoned. Trottman lives at that location with Brandy Pittman. When they left Trottman's residence, Bell and Cabaon talked about people at the residence who described a home-invasion robbery that they had just committed. Cabaon had credit cards that did not belong to him, and he and Fredrick's daughter, Eboni Rogers, used the credit cards later.

On August 28, 1998, a search warrant was executed at 3217 East Grandview. Detective Knutson spoke with Brandy Pittman, who described defendant VALDEZ coming to her house about a month earlier with another person. Defendant VALDEZ was driving a white van, which was followed by a female driving a small blue car. Defendant VALDEZ

asked if anyone wanted to buy a VCR or a large black TV type item. She said that she also saw game sticks and numerous cords and wires in the vehicle. Pittman told them to leave. Pittman identified defendant VALDEZ from a photo montage. Trottman also recalled people coming to his residence approximately one month earlier, and one of the people identifying himself as "Fredo." He also recalls seeing Caaong talking with "Fredo" and the other individual.

On September 22, 1998, Detective Knutson interviewed Eric Cabaong. Cabaong described going to Trottman's house with Fredrick and Bell to pick up Trottman. He observed a white Eddie Bauer Ford Explorer parked at Trottman's house. It was occupied by a person he identified from a photo montage as defendant VALDEZ, in the driver's seat, and another male. A Ford Tempo pulled up, being driven by a female, and the other male got out, took off a bullet-proof vest and put it in the trunk of the Tempo. Defendant VALDEZ did the same. The other man got in the Tempo and defendant VALDEZ went into Trottman's house. Defendant VALDEZ told Cabaong that they had just robbed somebody and gave Cabaong some credit card.

On October 5, 1998, Detective Knutson interviewed Rachalle Jenks, who is the ex-girlfriend of defendant VALDEZ. Jenks described defendant VALDEZ coming to her house at 3:30 in the morning after the robbery had occurred. Defendant VALDEZ told that they had just robbed somebody's house in University Place, a husband and wife and a young

girl. Defendant VALDEZ said that others, including defendant MCKINNEY, were involved with him and that they had tied the victims up and had put a gun to somebody's head, told them to get on the floor, and then proceeded to rob the house. Defendant VALDEZ told her that defendant MCKINNEY had not worn a mask. He also said that they had taken a TV, VCRs, a big fan, and a computer, and that they had loaded up their truck and then taken the truck. Jenks also said that defendant VALDEZ was armed with a firearm that night.

Jenks told Detective Knutson that defendant VALDEZ had told her that defendant MONIQUE J. EMANUEL-WHEELER was also involved in the robbery. He told Jenks that defendant EMANUEL-WHEELER had dropped them off at the house, parked around the corner on the side, and had been told to return to pick them up after a certain period of time. Defendant VALDEZ then told defendant EMANUEL-WHEELER to follow the stolen vehicle after the robbery. Jenks told Detective Knutson she observed defendant EMANUEL-WHEELER in a vehicle outside her house the morning after the robbery, along with three unknown males.

Jenks identified defendant MCKINNEY and defendant EMANUEL-WHEELER from photo montages.

Mary Sullivan has identified defendant MCKINNEY'S photo as being the closest to what she remembers of the robber who was not wearing the mask. Defendant MCKINNEY closely resembles the composite drawing made of the robbery without a mask by Marie Oberg

of the Sheriff's Department. The drawing was made from the descriptions given by Gerard and Meaghan Sullivan on July 22, 1998, to Ms. Oberg. CP 6-8.

C. ARGUMENT.

1. WHERE THE COURT OF APPEALS VACATED DEFENDANT'S ORIGINAL SENTENCE AND REMANDED THE CASE FOR A NEW SENTENCING HEARING, THE TRIAL COURT ACTED WITHIN THE SCOPE OF THE MANDATE WHEN IT RE-SENTENCED THE DEFENDANT ON ALL COUNTS.

Defendant claims that the trial court lacked authority to change the sentence on count III because defendant did not appeal that count to the Court of Appeals. Defendant also claims that the court exceeded the scope of the mandate when it re-sentenced the defendant to a higher sentence on count III. Because the Court of Appeals vacated defendant's entire sentence, all counts were properly before the court for re-sentencing. The court, therefore, acted within the scope of the mandate when it re-sentenced the defendant on all the counts.

"A criminal defendant is charged with knowledge of the statutes applicable to his sentencing, and can have no legitimate expectation, protected by the double jeopardy clause, . . . that he can benefit from the terms of a sentence which is contrary to statute." State v. Larson, 56 Wn. App. 323, 328-29, 783 P.2d 1093 (1989)(citing State v. Hall, 35 Wn. App. 302, 308, 666 P.2d 930 (1983)). Specifically, by appealing a portion of a

sentence, the defendant in effect challenges the entire sentencing plan, and, thus, has no legitimate expectation in the finality of any discrete part of the original sentence, whether or not that discrete part is legal in isolation, and whether or not the defendant has begun serving it.<sup>4</sup> Stated differently, a defendant does not acquire a legitimate expectation of finality in a sentence if the defendant “was on notice that the sentence might be modified” due to a pending appeal. State v. Hardesty, 129 Wn.2d 303, 318-19, 915 P.2d 1080 (1996). “This conclusion ‘rests ultimately upon the premise that the original conviction has, at the defendant’s behest, been wholly nullified and the slate wiped clean.’” United States v. Fogel, 829 F.2d 77, 85 (D.C. Cir. 1987)(quoting North Carolina v. Pearce, 395 U.S. 711, 721, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)).

As Division One recognized in Larson, “[t]wo recent holdings of the United States Supreme Court resolve any doubt that a legal sentence on a multiple count charge may be increased to effectuate the trial court’s

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<sup>4</sup> Larson, 56 Wn. App. at 329; See also, United States v. Pimienta-Redondo, 874 F.2d 9, 16 (1<sup>st</sup> Cir.), cert. denied, 493 U.S. 890 (1989); United States v. Colunga, 812 F.2d 196, 198 (5<sup>th</sup> Cir. 1987); United States v. Shue, 825 F.2d 1111, 1115 (7<sup>th</sup> Cir. 1987); United States v. Busic, 639 F.2d 940, 947 (3<sup>d</sup> Cir. 1981), cert. denied, 452 U.S. 918 (1981). Accord, United States v. Cochran, 883 F.2d 1012 (11<sup>th</sup> Cir. 1989); United States v. Anderson, 872 F.2d 1508, 1520 (11<sup>th</sup> Cir. 1989); United States v. Bentley, 850 F.2d 327, 329-30 (7<sup>th</sup> Cir. 1988); Gauntlett v. Kelley, 849 F.2d 213, 218-19 (6<sup>th</sup> Cir. 1988); United States v. Diaz, 834 F.2d 287 (2<sup>d</sup> Cir. 1987); cert. denied, 488 U.S. 818 (1988); United States v. Cataldo, 832 F.2d 869, 874 (5<sup>th</sup> Cir. 1987), cert. denied, 485 U.S. 1022 (1988); United States v. Andersson, 813 F.2d 1450, 1461-62 (9<sup>th</sup> Cir. 1987); United States v. Hawthorne, 806 F.2d 493, 500-01 (3<sup>d</sup> Cir. 1986); United States v. Hagler, 709 F.2d 578, 579 (9<sup>th</sup> Cir. 1983).

original sentencing scheme when that scheme is upset by successful legal action of the defendant.” Larson, 56 Wn. App. at 329. In the first case, the Court reversed the Supreme Court of Pennsylvania and held that a defendant could be resentenced after 34 of 112 counts, including the only count for which a sentence of imprisonment had been imposed, were reversed because the statute of limitations had run. Pennsylvania v. Goldhammer, 474 U.S. 28, 106 S. Ct. 353, 88 L. Ed. 2d 183 (1985). The Supreme Court of Pennsylvania ruled on remand: “We hold therefore, that where a defendant appeals a judgment of sentence, he accepts the risk that the Commonwealth may seek a remand for resentencing thereon if the disposition in the appellate court upsets the original sentencing scheme of the trial court.” Larson, 56 Wn. App. at 330 (citing Commonwealth v. Goldhammer, 512 Pa. 587, 593, 517 A.2d 1280, 1283 (1986), cert. denied, 480 U.S. 950 (1987)).

In the second case, the Court held that a valid sentence could be enhanced even though the defendant had completely served it as a result of an intervening change in local law and a Governor’s pardon. See Jones v. Thomas, 491 U.S. 376, 109 S. Ct. 2522, 105 L. Ed. 2d 322, reh’g denied, 106 L. Ed. 2d 627 (1989). The defendant originally received a life sentence for felony murder, to be served after a 15-year sentence for the underlying felony. The Missouri Supreme Court later ruled in an unrelated case on statutory grounds that a defendant could not be

convicted of both felony murder and the underlying felony; in such cases, only one of the two convictions was valid. At the same time, the Missouri Governor commuted, to time served, the 15-year sentence which the defendant was serving. The defendant moved for post-conviction relief, arguing that he had already served a valid sentence for his crime, as a result of the state Supreme Court's decision and the Governor's pardon, and that any increase of that sentence, from time served to life, would constitute multiple punishments in violation of the double jeopardy clause. A federal appeals court agreed. The Supreme Court reversed, reinstating the trial court's decision to substitute the life sentence for the commuted sentence and to credit the defendant with time served. The Court emphasized that the trial court had sentenced the defendant under a misapprehension of law: "The issue presented here . . . involves separate sentences imposed for what the sentencing court thought to be separately punishable offenses, one far more serious than the other." Larson, 56 Wn. App. at 330 (citing Thomas, 491 U.S. at 384). Moreover, the Court determined, the resentencing was not "the imposition of an additional sentence" but rather "a valid remedy" for an improper sentence. Thomas, 491 U.S. at 385-86. Responding to a dissent by Justice Scalia, the Court held that the defendant's expectation in the finality of his sentence had not been upset:

Respondent plainly had no expectation of serving only an attempted robbery sentence when he was convicted by the Missouri trial court. . . . [H]is expectation at that point was to serve both consecutive sentences. Once it was established that Missouri law would not allow imposition of both sentences, respondent had an expectation in serving “either 15 years (on the one sentence) or life (on the other sentence).”

Jones, 491 U.S. at 386 (citations omitted). In essence, the slate had been “wiped clean” and the trial court was free to impose any valid sentence under local law, limited only by the statutory maximum. Pearce, 395 U.S. at 720-21; see Jones, 105 L. Ed. 2d at 331.

Similarly, in State v. White, 123 Wn. App. 106, 97 P.2d 34 (2004), White made a claim similar to defendant’s here when he appealed his sentence arising from a trial on combined felony and misdemeanor charges. After a combined sentencing hearing, the trial court entered separate judgment and sentence forms for the felonies and non-felonies. White appealed his offender score on the felony charges, but did not challenge his misdemeanor sentences. White’s offender score claim was legitimate so the Court of Appeals remanded the case for re-sentencing. At the re-sentencing hearing, the court imposed a harsher sentence on the felony and added probation time to the misdemeanors. At the re-sentencing hearing and on appeal, White claimed that the Court of Appeals decision affected only the felony sentence and not the misdemeanor sentences and that the court, therefore, lacked authority to change the sentence on the misdemeanors. On appeal from the re-

sentencing, the Court of Appeals determined that, “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.” White, 123 Wn. App. at 112. In reaching this decision, the court relied on the language in its opinion that: “Since Mr. White’s offender score was miscalculated, we must reverse Mr. White’s *sentence* and remand for further sentencing proceedings.” White 123 Wn. App. at 112 (citing White, 2002 WL 31697928, at \*2, 2002 Wash. App. LEXIS 2970 (emphasis added)).

Similarly, in this case, the Court of Appeals *vacated* defendant’s *sentence* and remanded for a *resentencing* hearing.<sup>5</sup> In doing so, the Court of Appeals properly placed all counts back before the trial court for sentencing. Defendant had no legitimate expectation in the finality of any particular sentence because he was the one that subjected his sentence to the review process.

Defendant relies on State v. Shove, 113 Wn.2d 83, 776 P.3d 132 (1989), for the proposition that a valid sentence cannot be modified and thus, the court here lacked the authority to increase the sentence on count three. Brief of Appellant, at 6. Shove is distinguishable on its facts. The judgment in Shove was not *vacated* prior to the court’s modification of

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<sup>5</sup> Contrary to defendant’s claim, the Court did not limit the resentencing to count two. Br. Of Appellant, at 5.,

sentence. In that case, the court modified an *existing, valid* sentence – a procedure that is not contemplated by the SRA. Here, no sentence existed because the Court of Appeals vacated it. Thus, there was no sentence to modify. Shove is distinguishable and does not support the defendant's claim.

For the foregoing reasons, the trial court did not err in re-sentencing the defendant on all counts and most certainly did not exceed the scope of the mandate.

2. THE COLLATERAL ESTOPPEL DOCTRINE DOES NOT BAR THE TRIAL COURT FROM IMPOSING A DIFFERENT SENTENCE ON REMAND WHERE THE APPELLATE COURT HAS VACATED DEFENDANT'S ORIGINAL SENTENCE AND REMANDED THE CASE FOR RESENTENCING.

Relying on State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992)(Collicott II), defendant claims that the trial court was collaterally estopped on remand from imposing a high-end sentence on count III because the court did not impose a high-end sentence at the original sentencing hearing. As set forth below, defendant cannot prevail on this claim because the collateral estoppel doesn't apply to the circumstances of this case.

The doctrine of collateral estoppel is embodied in the Fifth Amendment to the United States Constitution guaranty against double

jeopardy. White, 123 Wn. App. at 111 (citing State v. Tili, 148 Wn.2d 350, 360, 60 P.3d 1192 (2003)). Collateral estoppel (or issue preclusion) means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Id.

Before collateral estoppel will apply to preclude the relitigation of an issue, all of the following requirements must be met: (1) the issue in the prior adjudication must be identical to the issue currently presented for review, (2) the prior adjudication must be a final judgment on the merits, (3) the party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication, and (4) barring the relitigation of the issue will not work an injustice on the party against whom the doctrine is applied. State v. Harrison, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003)(citing Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998)).

Collateral estoppel applies in criminal cases, but Washington courts follow federal precedent that the doctrine is not to be applied with a “hypertechnical” approach but rather “with realism and rationality.” Harrison, 148 Wn.2d at 561 (citing Ashe v. Swenson, 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)(cited with approval in State v. Harris, 78 Wn.2d 894, 896-97, 480 P.2d 484 (1971)); see also, State v.

Kassahun, 78 Wn. App. 938, 948-49, 900 P.2d 1109 (1995). The act of “an appeal does not suspend or negate ... collateral estoppel aspects of a judgment entered after trial in the superior courts,” but collateral estoppel can be defeated by later rulings on appeal. Harrison, 148 Wn.2d at 561 (citing Nielson, 135 Wn.2d at 264). Where the appellate court “reverses” or “vacates” a sentence, the finality of that judgment is destroyed. Harrison, 148 Wn.2d at 562. Accordingly, the prior sentence ceases to be a final judgment on the merits and collateral estoppel does not apply. Harrison, 148 Wn.2d at 562 (citing Nielson, 135 Wn.2d at 263-63).

In White, supra, the Court of Appeals, Division Three, finding an offender score problem, vacated and remanded White’s sentence arising from a trial on felony and misdemeanor charges. White, 123 Wn. App. at 109. Originally, the trial court imposed a DOSA sentence on the felony and concurrent sentences on the misdemeanors without probation time. Id. On remand, the court refused to impose a DOSA and added probation terms to the misdemeanor portion of White’s sentence. Id. On appeal, White claimed that the court was collaterally estopped from adding probation and those same principles also required the trial court to again grant a DOSA sentence. Id. Division Three disagreed. Citing Harrison, the court held that “[c]ollateral estoppel does not apply because this court’s reversal and remand of the felony sentence wiped that slate clean.”

White, 123 Wn. App. at 114 (citing Harrison, 148 Wn.2d at 561-62 (“the original sentence no longer exists as a final judgment on the merits”)).

Like the court in White, the Court of Appeals here “vacated” defendant’s sentence and “remanded” the case for a new sentencing hearing. CP 34-39. Collateral estoppel principles therefore do not apply because the defendant’s original sentence ceased to be a final judgment on the merits.

Defendant’s reliance on Collicott II is also misplaced. Washington courts have long recognized that the lead opinion in Collicott II did not command a majority of the court on the collateral estoppel issue. See White, supra; State v. Ameline, 118 Wn. App. 128, 75 P.3d 589 (2003); State v. Harrison, 148 Wn.2d 550, 560, 61 P.3d 1104 (2003). Five justices concurred in the analysis of “same criminal conduct” but specifically disavowed the discussion of collateral estoppel as unnecessary to the decision. Collicott II, 118 Wn.2d at 670 (Durham, J., concurring). Accordingly, the discussion of collateral estopping is dicta and therefore not binding on this court. Harrison, 148 Wn.2d at 560.

3. THERE IS NO EVIDENCE IN THE RECORD THAT THE DEFENDANT’S SENTENCE WAS THE RESULT OF JUDICIAL VINDICTIVENESS; THE RESENTENCING HEARING WAS PRESIDED OVER BY A DIFFERENT JUDGE AND THE SENTENCE IMPOSED WAS LESS SEVERE THAN THE ORIGINAL SENTENCE.

Relying on North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), defendant claims that his sentence after remand was the result of judicial vindictiveness.

The due process clause of the Fourteenth Amendment to the United States Constitution proscribes increased sentences motivated by a judge’s vindictive retaliation after reconviction following a successful appeal. State v. Franklin, 56 Wn. App. 915, 920, 786 P.2d 795 (1989) (citing North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 799, 109 S. Ct. 2201, 104 L. Ed.2d 865 (1989)). Under Pearce, a more severe sentence establishes a rebuttable presumption of vindictiveness. Franklin, 56 Wn. App. at 920; State v. Ameline, 118 Wn. App. 128, 133, 75 P.3d 589 (2003)(citing Pearce, 395 U.S. at 723-26); Alabama v. Smith, 490 U.S. 794, 802, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Subsequent cases have limited the scope of the Pearce holding. “While the Pearce opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness ‘do[es] not apply in every case where a convicted defendant

receives a higher sentence on retrial.” Alabama v. Smith, 490 U.S. at 799 (quoting Texas v. McCullough, 475 U.S. 134, 138, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986)). The cases following Pearce have recognized several exceptions and limited its application.<sup>6</sup> For example, the presumption of vindictiveness does not arise in situations where different judges were involved in sentencing:

Pearce itself apparently involved different judges presiding over the two trials, a fact that has led some courts to conclude by implication that the presumption of vindictiveness applies even where different sentencing judges are involved. That fact, however, may not have been drawn to the Court’s attention and does not appear anywhere in the Court’s opinion in Pearce. Clearly the Court did not focus on it as a consideration for its holding. Subsequent opinions have also elucidated the basis for the Pearce presumption. We held in Chaffin v. Stynchcombe, 412 U.S. 17[, 93 S.Ct. 1977, 36 L.Ed.2d 714] (1973), for instance, that the presumption derives from the judge’s “personal stake in the prior conviction,” a statement clearly at odds with reading Pearce to answer the two-sentencer issue. We therefore decline to read Pearce as governing this issue.

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<sup>6</sup> See Colten v. Kentucky, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972) (holding that the presumption of vindictiveness did not apply to a more severe sentence imposed in a “two-tier” court system, where the defendant was first tried in a court of limited jurisdiction and then “appealed” for a de novo hearing in the superior court); Chaffin v. Stynchcombe, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973)(holding that the presumption of vindictiveness did not arise when a jury imposed the more severe sentence); Wasman v. United States, 468 U.S. 559, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984)(holding that the presumption of vindictiveness did not apply when there was an intervening criminal conviction that affected the trial court’s decision to impose a harsher sentence); McCullough, 475 U.S. 134 (holding that the presumption of vindictiveness did not preclude a harsher sentence after the second trial when the judge entered findings justifying the longer sentence); Smith, 490 U.S. 794 (holding that the presumption does not apply when, after a trial on the merits, a higher sentence is imposed than the previous sentence imposed based on a guilty plea).

Texas v. McCullough, 475 U.S. at 140 n.3 (citations omitted); State v. Parmelee, 121 Wn. App. 707, 90 P.3d 1092 (2004) (“Because there is not a reasonable likelihood that actual vindictiveness plays a role in sentencing when a different judge imposes the more severe sentence, the presumption of vindictiveness does not arise here”).

Additionally, courts addressing the issue of the Pearce presumption uniformly hold that the presumption never arises when the *aggregate*

period of incarceration remains the same or is reduced on remand.<sup>7</sup>

“When the total sentence does not go up, but remains consistent with the trial court’s original intent, there is not hint of retaliation and certainly no reasonable probability of actual vindictiveness.” Larson, 56 Wn. App. at 328. In this case, the court imposed an aggregate sentence of 164 months

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<sup>7</sup> State v. Larson, 56 Wn. App. at 326 (281-month sentence on one count replaced with 360 month sentence on same count, but total time imposed was less than the aggregate period of incarceration ordered originally); State v. Franklin, 56 Wn. App. 915, 786 P.2d 796 (1989)(after sentence vacated for error in offender score, court again imposed 411 month sentence, even though that sentence was now considered an exceptional sentence); State v. Barberio, 66 Wn. App. 902, 833 P.2d 459 (1992), affirmed, 121 Wn.2d 48, 846 P.2d 519 (1993)(after appellate court dismissed one count and vacated sentence, sentencing court imposed same sentence as exceptional sentence); See also, United States v. Cochran, 883 F.2d 1012 (11<sup>th</sup> Cir. 1989)(concurrent sentences improperly enhanced to 30 years originally, replaced on remand with unenhanced concurrent and consecutive sentences totaling 25 years); Pimienta-Redondo, 874 F.2d 9 (1<sup>st</sup> Cir.)(en banc)(consecutive sentences replaced on remand with doubled single sentences after appellate court ruled that two crimes charged constituted a single offense); cert. denied, 110 S.Ct. 233 (1989); United States v. Gray, 852 F.2d 136 (4<sup>th</sup> Cir. 1988)(25-year aggregate term, including 3- and 5-year concurrent sentences and 20-year consecutive sentence, replaced with consecutive 3- and 5-year sentences following retrial and acquittal of count supporting original 20-year consecutive sentence); United States v. Bentley, 850 F.2d 327 (7<sup>th</sup> Cir.)(concurrent 12-year sentences exceeded 5-year maximum for reach count, replaced on remand with consecutive sentences aggregating 12 years), cert. denied, 488 U.S. 970 (1988), rehearing denied, 488 U.S. 1051 (1989); United States v. Diaz, 834 F.2d 287 (2d Cir. 1987) (concurrent sentences replaced with consecutive sentences after conviction supporting only consecutive sentence was reversed on appeal; aggregate period of incarceration remained the same), cert. denied, 488 U.S. 818 (1988); United States v. Cataldo, 832 F.2d 869 (5th Cir. 1987) (consecutive sentences on two counts replaced by doubled sentence on single count; presumption of vindictiveness either does not arise or is sufficiently rebutted by trial court's original sentencing intent), cert. denied, 485 U.S. 1022 (1988); United States v. Hagler, 709 F.2d 578 (9th Cir.) (sentence increased on remand to match identical aggregate term originally imposed following reversal of five counts), cert. denied, 464 U.S. 917 (1983); United States v. Shue, 825 F.2d 1111, 1115 (7th Cir. 1987), cert. denied, 484 U.S. 956 (1987); United States v. Bay, 820 F.2d 1511, 1513 (9th Cir. 1987) (same result even when multiple counts do not stem "from a common scheme or single course of continuing conduct").

on remand, compared to the 181-month sentence at the original sentencing hearing. The sentence on remand was thus less than the original sentence imposed and the Pearce presumption does not apply.

Without the presumption, a defendant seeking relief on a claim of judicial vindictiveness must show actual vindictiveness. Smith, 490 U.S. at 799-800. In Smith, the Court held that a presumption of vindictiveness does not arise unless there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness. “Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness.” Smith, 490 U.S. at 799-800. Defendant here does not point to any facts that would indicate vindictiveness on the part of the sentencing court. The judge on remand sentenced defendant based on the facts of the case, the State and victims’ recommendation, the co-defendant’s situation and the plea agreement. RP 5-10, 13. Nothing in the record suggests or shows actual vindictiveness by the trial court.

The trial court here retained broad discretion to impose a sentence within the standard range in accordance with the correct offender score. There is no presumption of vindictiveness because the re-sentencing hearing was conducted by a different judge and the sentence imposed was actually less than the original sentence. Nor is there evidence of vindictiveness in the record. Instead, the record suggests that the trial court considered the facts of the case, the co-defendant’s sentence, the

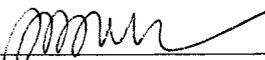
wishes of the victims, the State's recommendation and the original intent of Judge Coho when it imposed a high-end sentence on count III. RP 5, 10-11, 13. There is no evidence of retaliation and certainly no reasonable probability of actual vindictiveness. Defendant's claim of judicial vindictiveness thus fails.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm the defendant's conviction and sentence.

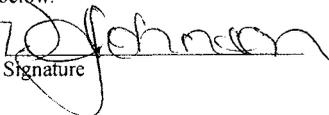
DATED: APRIL 24, 2007

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
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ALICIA BURTON  
Deputy Prosecuting Attorney  
WSB # 29285

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/24/07   
Date Signature

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STATE OF WASHINGTON  
BY DEPUTY