

NO. 42286-7-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS RAY MOORE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kitty Ann Van Doorninck

No. 08-1-01328-8

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**Brief of Respondent**

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**Table of Contents**

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

1. Whether the resentencing court's exceptional sentence of 378 months on count I should be affirmed where the *Pearce* presumption of vindictiveness never arises, that presumption could be rebutted if it did arise, and the defendant has otherwise failed to prove actual vindictiveness in the imposition of that sentence? ..... 1

2. Whether the resentencing court's exceptional sentence of 378 months on count I should be affirmed where the imposition of that sentence was based aggravating factors established solely by jury verdict, and even assuming it was not, it is clear that the court would have imposed the same sentence based on those factors alone?..... 1

3. Whether the case should be remanded for correction of a scrivener's error in the judgment and sentence where that judgment and sentence incorrectly states that the exceptional sentence imposed on count I is composed of a 147-month standard range plus a 237-month additional term, instead of a 231-month additional term?..... 1

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

1. Procedure ..... 2

2. Facts..... 4

C. ARGUMENT..... 7

1. THE COURT'S EXCEPTIONAL SENTENCE OF 378 MONTHS ON COUNT I SHOULD BE AFFIRMED BECAUSE THE *PEARCE* PRESUMPTION OF VINDICTIVENESS NEVER ARISES, THAT PRESUMPTION COULD BE REBUTTED IF IT DID ARISE, AND THE DEFENDANT HAS OTHERWISE FAILED TO PROVE ACTUAL VINDICTIVENESS IN THE IMPOSITION OF THAT SENTENCE. .... 7

2.	THE COURT'S EXCEPTIONAL SENTENCE OF 378 MONTHS ON COUNT I SHOULD BE AFFIRMED BECAUSE THE IMPOSITION OF THAT SENTENCE WAS BASED ON AGGRAVATING FACTORS ESTABLISHED SOLELY BY JURY VERDICT, AND EVEN ASSUMING THAT IT WAS NOT, IT IS CLEAR THAT THE COURT WOULD HAVE IMPOSED THE SAME SENTENCE BASED ON THOSE FACTORS.....	14
3.	THE CASE SHOULD BE REMANDED FOR CORRECTION OF A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE BECAUSE THAT JUDGMENT AND SENTENCE INCORRECTLY STATES THAT THE EXCEPTIONAL SENTENCE ON COUNT I IS COMPOSED OF A 147-MONTH STANDARD RANGE SENTENCE PLUS A 237-MONTH ADDITIONAL TERM, INSTEAD OF A 231-MONTH ADDITIONAL TERM. ....	20
D.	<u>CONCLUSION</u> .....	22

## Table of Authorities

### State Cases

<i>In re Personal Restraint of Mayer</i> , 128 Wn. App. 694, 701, 117 P.3d 353 (2005).....	20
<i>State v. Flores</i> , 164 Wn.2d 1, 24 n12, 186 P.3d 1038 (2008) .....	15, 17, 20
<i>State v. Franklin</i> , 56 Wn. App. 915, 920, 786 P.2d 795(1990) .....	8, 10
<i>State v. Havens</i> , 70 Wn. App. 251, 258, 852 P.2d 1120 (1993).....	8, 9, 14
<i>State v. Hughes</i> , 154 Wn.2d 118, 131, 110 P.3d 192 (2005), reversed in part on other grounds by <i>Washington v. Recuenco</i> , 548 U.S. 212, 126 S. Ct. 2546, 165 (2006).....	14, 15
<i>State v. Jackson</i> , 150 Wn.2d 251, 276, 76 P.3d 217 (2003) .....	15
<i>State v. Larson</i> , 56 Wn. App. 323, 326, 783 P.2d 1093 (1989).....	10, 11, 12
<i>State v. Parmelee</i> , 121 Wn. App. 707, 708, 90 P.3d 1092, 1092 (2004).....	7, 8, 9
<i>State v. Suleiman</i> , 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006).....	15, 18

### Federal Cases and Other Jurisdictions

<i>Alabama v. Smith</i> , 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).....	7, 8, 9, 11, 12
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	14, 15
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004).....	15
<i>North Carolina v. Pearce</i> , 395 U.S. 711, 725, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).....	1, 7, 8, 9, 11, 12, 14, 21, 22

<i>Texas v. McCullough</i> , 475 U.S. 134, 142, 106 S. Ct. 976, 981, 89 L. Ed. 2d 104 (1986).....	8, 9, 12, 14
<i>United States v. Bay</i> , 820 F.2d 1511, 1513 (9th Cir.1987) .....	10
<i>United States v. Bentley</i> , 850 F.2d 327 (7th Cir.1988), <i>cert. denied</i> , 488 U.S. 970, 109 S. Ct. 501, 102 L. Ed. 2d 537, <i>rehearing denied</i> , 488 U.S. 1051, 109 S. Ct. 885, 102 L. Ed. 2d 1008 (1989).....	10
<i>United States v. Cataldo</i> , 832 F.2d 869 (5th Cir.1987), <i>cert. denied</i> , 485 U.S. 1022, 108 S. Ct. 1577, 99 L. Ed. 2d 892 (1988).....	10
<i>United States v. Cochran</i> , 883 F.2d 1012 (11th Cir.1989) .....	9
<i>United States v. Diaz</i> , 834 F.2d 287 (2nd Cir.1987), <i>cert. denied</i> , 488 U.S. 818, 109 S. Ct. 57, 102 L. Ed. 2d 35 (1988).....	10
<i>United States v. Goodwin</i> , 457 U.S. 368, 374, 102 S. Ct. 2485, 2489, 73 L. Ed. 2d 74 (1982).....	8
<i>United States v. Gray</i> , 852 F.2d 136 (4th Cir.1988).....	10
<i>United States v. Hagler</i> , 709 F.2d 578 (9th Cir.1983), <i>cert. denied</i> , 464 U.S. 917, 104 S. Ct. 282, 78 L. Ed. 2d 260 (1983).....	10
<i>United States v. Pimienta–Redondo</i> , 874 F.2d 9 (1st Cir.1989), <i>cert. denied</i> , 493 U.S. 890, 110 S. Ct. 233, 107 L. Ed. 2d 185 (1989).....	10
<i>United States v. Shue</i> , 825 F.2d 1111, 1115 (7th Cir.1987), <i>cert. denied</i> , 484 U.S. 956, 108 S. Ct. 351, 98 L. Ed. 2d 376 (1987).....	10
<b>Statutes</b>	
RCW 9.94A.510.....	21
RCW 9.94A.515.....	21
RCW 9.94A.525.....	21

RCW 9.94A.535(3)(b) ..... 15

RCW 9.94A.535(3)(n) ..... 15

**Rules and Regulations**

CrR 7.8(a) ..... 20

RAP 7.2(e) ..... 20

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

1. Whether the resentencing court's exceptional sentence of 378 months on count I should be affirmed where the *Pearce* presumption of vindictiveness never arises, that presumption could be rebutted if it did arise, and the defendant has otherwise failed to prove actual vindictiveness in the imposition of that sentence?

2. Whether the resentencing court's exceptional sentence of 378 months on count I should be affirmed where the imposition of that sentence was based aggravating factors established solely by jury verdict, and even assuming it was not, it is clear that the court would have imposed the same sentence based on those factors alone?

3. Whether the case should be remanded for correction of a scrivener's error in the judgment and sentence where that judgment and sentence incorrectly states that the exceptional sentence imposed on count I is composed of a 147-month standard range plus a 237-month additional term, instead of a 231-month additional term?

B. STATEMENT OF THE CASE.

1. Procedure

On March 14, 2008, Thomas Ray Moore, hereinafter referred to as the “defendant,” was charged by information with first degree assault of a child in count I and fourth degree criminal mistreatment in count II. CP 1-2. Count I alleged two aggravating circumstances: (1) that “the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense” and (2) the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” CP 1-2.

On November 18, 2008, the State filed an amended information, which deleted count II, added eight counts of tampering with a witness, as counts III through X, and eliminated the aggravating circumstances from count I. CP 6-10.

Finally, on May 22, 2009, the State filed a second amended information that re-added the aggravating circumstances to count I, which were charged in the original information, but eliminated from the amended information. CP 15-20. The other counts remained unchanged. CP 15-20.

After trial, *see* RP 06/11/2009 RP 3-153, 06/15/2009 RP 4-115, 06/16/2009am RP 2-113, 06/16/2009pm RP 3-9, 06/22/2009 RP 3-4,

06/24/2009 RP 5-84, & 06/25/2009 3-145, on June 29, 2009, the jury returned verdicts of guilty as charged in the second amended information, CP 70-81, 06/29/2009 RP 146-148, and also returned a special verdict form indicating (1) that “the defendant kn[e]w that the victim was particularly vulnerable or incapable of resistance,” and (2) that “the defendant use[d] his position of trust to facilitate the commission of the crime.” CP 82; 06/29/2009 RP 148-50.

On July 17, 2009, the court sentenced the defendant to 318 months on count I, the high end of the standard range, to be served concurrently with 60 months on counts III through X and consecutively with 60 months for a conviction in cause number 08-1-05410-3, for a total of 378 months in total confinement. CP 101-115.

The defendant filed a timely notice of appeal the same day. CP 96-97; 07/17/2009 RP 14-16.

On appeal, this Court “remand[e]d for reversal of seven of [Defendant’s] eight witness tampering convictions.” CP 117-33.

On remand, on May 27, 2011, the trial court sentenced the defendant to 12 months on count III, the single remaining witness tampering count, instead of the 60 months ordered originally, but again imposed 378 months in total confinement on count I, this time as an exceptional sentence. CP 141-54.

The defendant filed a timely notice of appeal the same day. CP 155-70. *See* CP 171-72.

## 2. Facts

At the original July 17, 2009 sentencing hearing, the State noted that because of the conviction in 08-1-05410-3, the defendant had an offender score of 9 and a standard sentence range of 240 to 318 months on count I, and of 51 to 60 on counts III through X. 07/17/20-09 RP 4. *See* CP 83-90, 98-100, 101-15. The deputy prosecutor then recommended an exceptional sentence of 480 months, or “two times the low end of the standard range” on count I, arguing that, the circumstances of the assault were not “as egregious as a death,” but “pretty close in this case.” 07/17/2009 RP 5-8.

The defendant’s attorney pointed out that although the defendant’s offender score was 9, “[e]ight of those points are because of the witness tampering [counts], which the jury found him guilty of.” 7/17/2009 RP 9-10. He went on to recommended a standard range sentence, arguing that the 40-year term recommended by the State was “excessive” and disproportionate to the crimes of which the defendant was convicted. RP 07/17/2009 RP 8-12.

The court held as follows:

***I’m not going to impose an exceptional sentence. I think that the standard range in this case, because of the***

*offender's score, because of the behavior after the fact with the tampering of the witnesses gets us to a range that I think it appropriate. I will impose the high end of the range. I recognize that that's consecutive with the other case, so I'm satisfied that that's an appropriate amount of time.*

*I do think that [T.M.] is particularly vulnerable and, clearly, he was unable to communicate, has special needs, and you ignored those as well. You were the only person in his life who he should have been able to trust, and you violated that trust in the most egregious way.*

07/17/2009 RP 13-14 (emphasis added).

“[T]he high end of the range” was 318 months. CP 101-115. On the “other case” to which the court referred, that filed in cause number 08-1-05410-3, the court sentenced Defendant to 60 months, bringing his total confinement to 378 months. CP 101-115,

At the May 27, 2011 re-sentencing, the State again recommended an exceptional sentence on count I, this time of 366 months, twelve months on count III, and twelve months in 08-1-05410-3 to be served consecutively, for a total of 378 months in total confinement. 05/27/2011 RP 3-6.

The defendant, through his attorney, asked that the court impose standard range sentences in both causes and that the court impose such sentences concurrently. 05/27/2011 RP 10.

The court stated as follows:

I remember at the time of sentencing, because of all of the counts of tampering, that the standard range was obviously significantly higher than it is today. At the time prosecutors were adamantly arguing for an exceptional sentence upward from the 318 months that I thought was the high end of the range at the time. *And at the time I thought that the sentence was appropriate, the 318 plus the 60 on top of that, 378, and nothing has changed as far as I'm concerned.*

*There are certainly grounds for an exceptional sentence. The jury found two aggravating factors. I think 378 months is an appropriate amount of time.*

....

*I do think that the original sentence was the appropriate amount. I certainly would have imposed an exceptional sentence at that time, if I didn't believe that's what the standard range was. Just in terms of what I think is fair and appropriate, given what [the victim] has to live with for the rest of his life, that's going to be my sentence today.*

05/27/2011 RP 10-12 (emphasis added).

Thus, in its written judgment and sentence, the court found that “[s]ubstantial and compelling reasons exist which justify an exceptional sentence” above the standard range for count I based on aggravating factors found by the jury by special interrogatory. CP 141-54. The court therefore ordered an exceptional sentence on count I, stating in its written judgment and sentence, as it had orally, that the “[a]ctual number of months of total confinement is 378 months.” CP 141-54. However, in its written judgment and sentence, the court noted that the 378 months was

composed of a 147-month high end sentence plus 237 months based on the aggravating factors. CP 141-54.

C. ARGUMENT.

1. THE COURT'S EXCEPTIONAL SENTENCE OF 378 MONTHS ON COUNT I SHOULD BE AFFIRMED BECAUSE THE **PEARCE** PRESUMPTION OF VINDICTIVENESS NEVER ARISES, THAT PRESUMPTION COULD BE REBUTTED IF IT DID ARISE, AND THE DEFENDANT HAS OTHERWISE FAILED TO PROVE ACTUAL VINDICTIVENESS IN THE IMPOSITION OF THAT SENTENCE.

“While sentencing discretion permits consideration of a wide range of information relevant to the assessment of punishment,” the United States Supreme Court has held that “it must not be exercised with the purpose of punishing a successful appeal.” *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Rather, due process of law “requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.” *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); *State v. Parmelee*, 121 Wn. App. 707, 708, 90 P.3d 1092, 1092 (2004) (“[a] defendant’s due process rights are violated if judicial vindictiveness plays a role in resentencing after a successful appeal.”).

“To protect against vindictiveness, the United States Supreme Court, in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), held that a rebuttable presumption of vindictiveness arises when a court imposes *a more severe sentence* after a successful appeal.” *Parmelee*, 121 Wn. App. at 708 (emphasis added); *State v. Havens*, 70 Wn. App. 251, 258, 852 P.2d 1120 (1993) (quoting *State v. Franklin*, 56 Wn. App. 915, 920, 786 P.2d 795(1990) (a “more severe sentence establishes a rebuttable presumption of vindictiveness.”).

Specifically, *Pearce* held that

[w]henver a judge imposes *a more severe sentence* upon a defendant after a new trial, the reasons for his [or her] doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

*Pearce*, 395 U.S. at 726 (emphasis added).

If such reasons do not appear in the record, “a presumption arises that a greater sentence has been imposed for a vindictive purpose—a presumption that must be rebutted by “ ‘objective information... justifying the increased sentence.’ ”” *Alabama v. Smith*, 490 U.S. 794, 798-802, 109 S. Ct. 2201, 2204, 104 L. Ed. 2d 865 (1989) (quoting *Texas v. McCullough*, 475 U.S. 134, 142, 106 S. Ct. 976, 981, 89 L. Ed. 2d 104

(1986) (quoting *United States v. Goodwin*, 457 U.S. 368, 374, 102 S. Ct. 2485, 2489, 73 L. Ed. 2d 74 (1982)); *Parmelee*, 121 Wn. App. at 711.

Thus, where the presumption applies, the State must point to an “on-the-record, wholly logical, [and] nonvindictive reason for the sentence.” *Texas v. McCullough*, 475 U.S. 134, 140, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986). “Any presumption of vindictiveness [i]s rebutted by the presence of sufficient unchallenged aggravating factors that support the sentence.” *Havens*, 70 Wn. App. at 259.

“‘[T]he evil the [*Pearce*] Court sought to prevent’ was not the imposition of ‘enlarged sentences after a new trial’ but ‘vindictiveness of a sentencing judge.’” *Smith*, 490 U.S. at 799 (quoting *Texas v. McCullough*, 475 U.S. 134, 138, 106 S. Ct. 976, 979 (1986)); *Parmelee*, 121 Wn. App. at 713-14 (citing *Pearce*, 395 U.S. at 725). Consequently, the *Pearce* presumption is limited to circumstances

in which there is a “reasonable likelihood,” *United States v. Goodwin*, 457 U.S.[ 368], 373, 102 S.Ct.[ 2485], 2488, that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness.

*Smith*, 490 U.S. at 799; *Parmelee*, 121 Wn. App. at 711.

Moreover, “the *Pearce* presumption never arises when the aggregate period of incarceration remains the same or is reduced on

remand.” *State v. Larson*, 56 Wn. App. 323, 326, 783 P.2d 1093 (1989) (citing *United States v. Cochran*, 883 F.2d 1012 (11th Cir.1989) *United States v. Pimienta–Redondo*, 874 F.2d 9 (1st Cir.1989) (en banc), *cert. denied*, 493 U.S. 890, 110 S. Ct. 233, 107 L. Ed. 2d 185 (1989); *United States v. Gray*, 852 F.2d 136 (4th Cir.1988); *United States v. Bentley*, 850 F.2d 327 (7th Cir.1988), *cert. denied*, 488 U.S. 970, 109 S. Ct. 501, 102 L. Ed. 2d 537, *rehearing denied*, 488 U.S. 1051, 109 S. Ct. 885, 102 L. Ed. 2d 1008 (1989); *United States v. Diaz*, 834 F.2d 287 (2nd Cir.1987), *cert. denied*, 488 U.S. 818, 109 S. Ct. 57, 102 L. Ed. 2d 35 (1988); *United States v. Cataldo*, 832 F.2d 869 (5th Cir.1987), *cert. denied*, 485 U.S. 1022, 108 S. Ct. 1577, 99 L. Ed. 2d 892 (1988); *United States v. Hagler*, 709 F.2d 578 (9th Cir.1983), *cert. denied*, 464 U.S. 917, 104 S. Ct. 282, 78 L. Ed. 2d 260 (1983); *United States v. Shue*, 825 F.2d 1111, 1115 (7th Cir.1987), *cert. denied*, 484 U.S. 956, 108 S. Ct. 351, 98 L. Ed. 2d 376 (1987); *United States v. Bay*, 820 F.2d 1511, 1513 (9th Cir.1987)).

Thus, where a defendant is sentenced to an exceptional sentence of the same length as his original standard-range sentence, “no such presumption [of vindictiveness] is raised as the sentence [ha]s not increased.” *State v. Franklin*, 56 Wn. App. 915, 786 P.2d 795 (1990).

Nor does a presumption of vindictiveness arise where the second sentence “is fully explained by the trial court’s original sentencing intent.” *Larson*, 56 Wn. App. at 328.

Where there is no reasonable likelihood that the increase in sentence is the product of actual vindictiveness, “the burden remains upon the defendant to prove actual vindictiveness.” *Smith*, 490 U.S. at 799; *Larson*, 56 Wn. App. at 328.

In the present case, the *Pearce* presumption is not raised because the aggregate sentence was not increased; it remained the same on remand.

At the original sentencing, the court imposed a total of 378 months in confinement, 07/17/2009 RP 13-14; CP 101-115, noting that it was declining to impose an exceptional sentence only because what it believed to be the standard range at the time “gets us to a range that I think is appropriate,” and that 378 months was “an appropriate amount of time” for count I. 07/17/2009 RP 13-14.

When, after appeal, the standard range was reduced because counts IV through X were reversed, the court held firm to its original determination that 378 months was the appropriate punishment for count I, and again imposed this same term via exceptional sentence:

And at the time I thought that the sentence was appropriate, the 318 plus the 60 on top of that, 378, and nothing has changed as far as I’m concerned.

There are certainly grounds for an exceptional sentence. The jury found two aggravating factors. I think 378 months is an appropriate amount of time.

....

I do think that the original sentence was the appropriate amount. I certainly would have imposed an exceptional sentence at the time, if I didn't believe that's what the standard range was.

05/27/2011 RP 10-12.

Thus, the total term of aggregate period of incarceration imposed on remand was the same as that imposed at the original sentencing. Because “the *Pearce* presumption never arises when the aggregate period of incarceration remains the same or is reduced on remand,” *Larson*, 56 Wn. App. at 326, that presumption does not arise in the present case, and “the burden remains upon the defendant to prove actual vindictiveness” *Smith*, 490 U.S. at 799, to prove a due process violation.

Because the defendant has offered no proof of actual vindictiveness, see Brief of Appellant, p. 1-18, he has failed to show a due process violation in the court's resentencing, and the court's sentence of 378 months should therefore be affirmed.

However, even if the *Pearce* presumption were applied to the present case, it would be rebutted.

Indeed, the trial court gave a “wholly logical, [and] nonvindictive reason for the sentence.” *McCullough*, 475 U.S. at 140. Specifically, the

court indicated, both at the original sentencing and at the resentencing, that, based on the facts of the case, a 378-month sentence was “appropriate.” 07/17/2009 RP 13-14; 05/27/2011 RP 10-12. When, at the original sentencing, the witness tampering convictions were in place, the court could impose this sentence as a standard range sentence because, as the court noted, the defendant’s offender score “gets us to a range that I think is appropriate.” 07/17/2009 RP 13-14. However, when the case was remanded for resentencing after reversal of all but one of the witness tampering convictions, the appropriate 378-month sentence was no longer within the standard range. 05/27/2011 RP 10-12. Because the court still thought “that the original sentence was the appropriate amount,” and “[t]he jury found two aggravating factors,” the court re-imposed the 378-month sentence as an exceptional sentence. 05/27/2011 RP 10-12. As the court noted at the time, it did “think that the original sentence was the appropriate amount,” and “certainly would have imposed an exceptional sentence at that time, if [it] didn’t believe that’s what the standard range was.” *Id.*

Thus, there is nothing in the record to suggest that there was a vindictive reason for the imposition of the 329-month exceptional sentence on remand. Rather, that sentence seems to be based on the belief that the original sentence was appropriate and that the jury found

aggravating factors that justified it, even if the defendant's offender score no longer did. Because the defendant agrees that "there is no question that the jury found the aggravating factors as charged," Appellant's Opening Brief, p. 16, and "[a]ny presumption of vindictiveness [i]s rebutted by the presence of sufficient unchallenged aggravating factors that support the sentence," *Havens*, 70 Wn. App. at 259, the exceptional sentence imposed on remand was adequately supported and non-vindictive.

Thus, even were the *Pearce* presumption of vindictiveness to be applied in the present case, there is 'on-the-record, [a]wholly logical, [and] nonvindictive reason for the sentence," *McCullough*, 475 U.S. at 140, and that presumption is rebutted. As a result, the court's 378-month sentence should be affirmed.

2. THE COURT'S EXCEPTIONAL SENTENCE OF 378 MONTHS ON COUNT I SHOULD BE AFFIRMED BECAUSE THE IMPOSITION OF THAT SENTENCE WAS BASED ON AGGRAVATING FACTORS ESTABLISHED SOLELY BY JURY VERDICT, AND EVEN ASSUMING THAT IT WAS NOT, IT IS CLEAR THAT THE COURT WOULD HAVE IMPOSED THE SAME SENTENCE BASED ON THOSE FACTORS.

"In *Apprendi v. New Jersey*, the United States Supreme Court held that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

submitted to a jury, and proved beyond a reasonable doubt.” *State v. Hughes*, 154 Wn.2d 118, 131, 110 P.3d 192 (2005), *reversed in part on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 (2006) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). “[T]he statutory maximum referenced in *Apprendi* ‘is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.’” *Hughes*, 154 Wn.2d at 131 (citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004)).

“Thus, unless an aggravating factor is established solely by the jury verdict or the defendant’s stipulation, it cannot be used to support an exceptional sentence.” *Flores*, 164 Wn.2d at 20; *State v. Saleiman*, 158 Wn.2d 280, 290, 143 P.3d 795 (2006). “The trial judge [i]s left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence.” *Id.* at 290-91.

However, “not every aggravating factor need be valid in order for a reviewing court to uphold an exceptional sentence.” *State v. Flores*, 164 Wn.2d 1, 24 n12, 186 P.3d 1038 (2008) (citing *Hughes*, 154 Wn.2d 118, 134, 110 P.3d 192 (citing *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003)). “If a reviewing court is satisfied the trial court would have

imposed the same sentence based on an aggravating factor that withstands appellate scrutiny, it may uphold the exceptional sentence.” *Id.*

In the present case, the aggravating factors of particularly vulnerable victim, RCW 9.94A.535(3)(b), and abuse of trust, RCW 9.94A.535(3)(n), were charged by information, CP 15-20, and established solely by jury verdict after trial. CP 82. In fact, the defendant admits that “there is no question that the jury found the aggravating factors as charged,” but argues that the court “relied on facts it found *other* than the aggravating factors the jury found, in imposing the exceptional sentence.” Appellant’s Opening Brief, p. 16-17 (emphasis in the original). The record demonstrates otherwise.

The defendant challenges specifically the court’s finding of fact V, which reads:

The court finds substantial and compelling reasons to impose an exceptional sentence outside the standard range. The factors most compelling include: [the victim,]T.M. was only four years of age at the time of the assault; T.M. was completely depended on the defendant [his father] for warmth, food, hygiene and love; T.M. was completely defenseless at the time of the assault; T.M. was incapable of escaping; T.M. was incapable of getting help. T.M. was not shown any mercy by the defendant at the time of the assaults. The defendant betrayed T.M.’s trust as his father and by inflicting multiple extraordinary injuries.

CP 173-76.

While the defendant characterizes these as facts not found by the jury, they may just as easily be characterized as a recapitulation of facts found by the jury by special verdict.

Stating that the victim “was only four years of age at the time of the assault, “was completely dependent on the defendant [his father] for warmth, food, hygiene and love,” “was completely defenseless at the time of the assault,” “was incapable of escaping,” and “was incapable of getting help,” CP 173-76, is simply another way of stating what the jury found, “that the victim was particularly vulnerable or incapable of resistance.” CP 82.

Similarly, stating that the victim “was not shown any mercy by the defendant at the time of the assaults,” and that “[t]he defendant betrayed [his] trust as his father and by inflicting multiple extraordinary injuries,” is simply another way of stating what the jury found: that “the defendant use[d] his position of trust to facilitate the commission of the crime.” CP 82.

Thus, the court itself did not find any aggravating factors; it simply recapitulated those found by verdict by the jury after trial. Because aggravating factors established “solely by the jury verdict” can “be used to support an exceptional sentence,” *Flores*, 164 Wn.2d at 20, these two factors could properly be used by the resentencing court to sentence the

defendant to an exceptional sentence here. In fact, the court made clear that it was relying only on the factors found by the jury to support the defendant's exceptional sentence in its conclusion of law I:

[t]he aggravating factors that were proven beyond a reasonable doubt at trial are a substantial and compelling reason that justifies the imposition of an exceptional sentence above the standard range.

CP 176.

Because the court here did no more than come to "the legal conclusion" that the factors "alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence," *State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006), it did not error in relying on such factors to support the imposition of an exceptional sentence here. Therefore, the 378-month exceptional sentence imposed by the court should be affirmed.

However, even if it were assumed that the factors listed in the court's finding of fact V were, as the defendant contends, the constitutionally invalid product of the court's own independent fact-finding, it is clear that the court would have imposed the same sentence, regardless, based on the aggravating factors found by the jury.

The court was unequivocal in its oral statements at resentencing that:

[A]t the time [of the original sentencing] I thought that the sentence was appropriate, the 318 plus the 60 on top of that, 378, and nothing has changed as far as I'm concerned.

*There are certainly grounds for an exceptional sentence. The jury found two aggravating factors. I think 378 months is an appropriate amount of time.*

....

I do think that the original sentence was the appropriate amount. I certainly would have imposed an exceptional sentence at that time, if I didn't believe that's what the standard range was.

05/27/2011 RP 10-12.

Thus, it is clear from the court's oral decision that its basis for the exceptional sentence in this case was the two aggravating factors found by the jury, not anything the court later listed in its written finding of fact V.

This is also evident from the court's written conclusion of law I, that "[t]he aggravating facts that were proven beyond a reasonable doubt at trial are a substantial and compelling reason that justifies the imposition of an exceptional sentence above the standard range. CP 176. Again, there is no mention in the conclusions of law of the facts listed in finding of fact V. CP 176.

Thus, it is clear that the court imposed the sentence based on the aggravating factors found by the jury and that it would have regardless of what it listed in its written finding of fact V. Because, where "a reviewing court is satisfied the trial court would have imposed the same sentence

based on an aggravating factor that withstands appellate scrutiny, it may uphold the exceptional sentence,” *Flores*, 164 Wn.2d at 24n12, the exceptional sentence here should be upheld, even if it were assumed that the factors listed in the court’s finding of fact V were the invalid product of the court’s own independent fact-finding,

3. THE CASE SHOULD BE REMANDED FOR CORRECTION OF A SCRIVENER’S ERROR IN THE JUDGMENT AND SENTENCE BECAUSE THAT JUDGMENT AND SENTENCE INCORRECTLY STATES THAT THE EXCEPTIONAL SENTENCE ON COUNT I IS COMPOSED OF A 147-MONTH STANDARD RANGE SENTENCE PLUS A 237-MONTH ADDITIONAL TERM, INSTEAD OF A 231-MONTH ADDITIONAL TERM.

The remedy for a scrivener’s, or clerical, error is remand to the trial court for correction of the error in the judgment and sentence. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005) (*citing* CrR 7.8(a) (“[c]lerical mistakes in judgments, orders or other parts of the record and errors there in arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders.”); *See* RAP 7.2(e).

In the present case, the resentencing court made clear its intention to impose an exceptional sentence on count I of 378 months. It indicated orally that it “thought that the sentence was appropriate, the 318 plus the

60 on top of that, 378[-month sentence], and nothing has changed as far as I'm concerned," and therefore that it was imposing 378 months as an exceptional sentence. 05/27/2011 RP 10-12. The court stated this again in its written findings of fact and conclusions of law, writing in Conclusion of Law II that "Defendant Thomas Ray Moore should be incarcerated in the Department of Corrections for a determinate period of 378 months on Count One." CP 176. Finally, in its judgment and sentence, the court again stated that the "[a]ctual number of months of total confinement ordered is 378 months." CP 141-54.

However, as the defendant correctly points out, Appellant's Opening Brief, p. 7-8, the judgment and sentence indicates that this 378 month sentence is composed of the 147-month standard range term plus a 237 month exceptional term. CP 141-54. 147 months is the correct high end of the standard range for the defendant on count I. *See* RCW 9.94A.515, RCW 9.94A.525, RCW 9.94A.510. However, 147 plus 237 is 384.

Therefore, while the court's 378-month exceptional sentence should be affirmed, the case should be remanded for correction of the scrivener's error in the judgment and sentence to reflect that the 378-month sentence is composed of the 147-month standard range term plus a 231 month term for the exceptional sentence.

D. CONCLUSION.

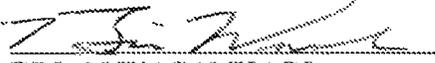
The resentencing court's exceptional sentence of 378 months on count I should be affirmed because the *Pearce* presumption of vindictiveness never arises, that presumption could be rebutted if it did arise, and the defendant has otherwise failed to prove actual vindictiveness in the imposition of that sentence.

The resentencing court's exceptional sentence of 378 months on count I should be affirmed because the imposition of that sentence was based aggravating factors established solely by jury verdict, and even if it were not, it is clear that the resentencing court would have imposed the same sentence based on those factors alone.

However, the case should be remanded for correction of a scrivener's error in the judgment and sentence because that judgment and sentence incorrectly states that the exceptional sentence imposed on count I is composed of a 147-month standard range plus a 237-month additional term, instead of a 231-month additional term.

DATED: July 27, 2012

MARK LINDQUIST  
Pierce County  
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Certificate of Service:

The undersigned certifies that on this day she delivered by *airfile* 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.

7/25/20 J. Johnson  
Date Signature

# PIERCE COUNTY PROSECUTOR

## July 27, 2012 - 2:36 PM

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Court of Appeals Case Number: 42286-7

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