

No. 49760-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Brian Brush,

Appellant.

Pacific County Superior Court Cause No. 09-1-00143-8

The Honorable Judge Michael J. Sullivan

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT..... 6

I. The “psychological abuse” aggravating factor is vague and overbroad in violation of the First and Fourteenth Amendments..... 6

A. The Court of Appeals should review Mr. Brush’s constitutional challenges de novo. 6

B. The “psychological abuse” aggravating factor is unconstitutionally overbroad because it criminalizes a substantial amount of protected speech. 8

C. The aggravating factor is unconstitutionally vague because it contains no meaningful definition of the phrase “psychological abuse.” 16

D. Baldwin does not compel a different result. 20

II. The Court’s conclusion that Mr. Brush engaged in a pattern of “abuse” over a prolonged period rested in part on an incident that did not qualify as “psychological abuse” under any definition..... 26

A. Mr. Brush did not engage in “psychological abuse” by breaking up with Bonney and changing the locks on his home..... 26

B. The sentence must be vacated and the case remanded for a new sentencing proceeding..... 29

III. Mr. Brush’s exceptional sentence is clearly excessive. 30

IV. If the State substantially prevails, the Court of Appeals should decline to award any appellate costs requested. 30

CONCLUSION 31

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C.</i> , 846 F.3d 391 (D.C. Cir. 2017)	7
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	21, 22, 24
<i>Ashcroft v. ACLU</i> , 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (Ashcroft II)	9
<i>Ashcroft v. Free Speech Coal.</i> , 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (Ashcroft I).....	9
<i>Beckles v. United States</i> , ---U.S. ---, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017).....	24
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	21, 22, 24
<i>Cox v. State of La.</i> , 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) ..	8, 11
<i>Grayned v. City of Rockford</i> , 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).....	17
<i>Hodgkins ex rel. Hodgkins v. Peterson</i> , 355 F.3d 1048 (7th Cir. 2004).....	9
<i>Johnson v. United States</i> , --- U.S. ---, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).....	17, 19, 20
<i>Kentucky Dep't of Corrections v. Thompson</i> , 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989).....	23
<i>R.A.V. v. City of St. Paul, Minn.</i> , 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).....	8
<i>Reno v. Am. Civil Liberties Union</i> , 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)	18

<i>Smith v. Goguen</i> , 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974)	18
<i>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</i> , 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)	8, 11
<i>United States v. Batchelder</i> , 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979)	17
<i>United States v. Booker</i> , 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)	24
<i>United States v. Stevens</i> , 559 U.S. 460, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)	8, 12
<i>United States v. Williams</i> , 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) (Williams I)	9
<i>Virginia v. Black</i> , 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003)	14

WASHINGTON STATE CASES

<i>City of Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000)	7, 17, 19
<i>City of Seattle v. Webster</i> , 115 Wn.2d 635, 802 P.2d 1333 (1990), cert. denied, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991)	7
<i>In re Det. of Danforth</i> , 173 Wn.2d 59, 264 P.3d 783 (2011)	18
<i>In re Det. of Hawkins</i> , 169 Wn.2d 796, 238 P.3d 1175 (2010)	26
<i>Lindeman v. Kelso Sch. Dist. No. 458</i> , 162 Wn.2d 196, 172 P.3d 329 (2007)	10
<i>LK Operating, LLC v. Collection Grp., LLC</i> , 181 Wn.2d 48, 331 P.3d 1147 (2014)	6
<i>Matter of Cashaw</i> , 123 Wn.2d 138, 866 P.2d 8 (1994)	23, 24, 25
<i>Matter of K.J.B.</i> , 187 Wn.2d 592, 387 P.3d 1072 (2017)	10
<i>State v. Anderson</i> , 141 Wn.2d 357, 5 P.3d 1247 (2000)	16

<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007)	10
<i>State v. Baldwin</i> , 150 Wn.2d 448, 78 P.3d 1005 (2003).. 20, 21, 22, 23, 24, 25	
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	30, 31
<i>State v. Chavez</i> , 163 Wn.2d 262, 180 P.3d 1250 (2008)	15
<i>State v. Christensen</i> , 153 Wn.2d 186, 102 P.3d 789 (2004).....	10
<i>State v. Crediford</i> , 130 Wn.2d 747, 927 P.2d 1129 (1996)	16
<i>State v. Davis</i> , 160 Wn. App. 471, 248 P.3d 121 (2011).....	10
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003)	10
<i>State v. Engel</i> , 166 Wn.2d 572, 210 P.3d 1007 (2009).....	10
<i>State v. Homan</i> , 191 Wn. App. 759, 364 P.3d 839 (2015), <i>as corrected</i> (Feb. 11, 2016).....	14
<i>State v. Immelt</i> , 173 Wn.2d 1, 267 P.3d 305 (2011).. 6, 8, 9, 11, 12, 13, 14, 15	
<i>State v. J.C.</i> , 192 Wn. App. 122, 366 P.3d 455 (2016).....	10
<i>State v. Johnston</i> , 156 Wn.2d 355, 127 P.3d 707 (2006).....	11, 15, 16
<i>State v. Kilburn</i> , 151 Wn.2d 36, 84 P.3d 1215 (2004) <i>as amended</i> (Feb. 17, 2004)	11
<i>State v. Kintz</i> , 169 Wn.2d 537, 238 P.3d 470 (2010).....	10
<i>State v. Knutz</i> , 161 Wn. App. 395, 253 P.3d 437 (2011).....	30
<i>State v. Lamar</i> , 180 Wn.2d 576, 327 P.3d 46 (2014)	7
<i>State v. Lilyblad</i> , 163 Wn.2d 1, 177 P.3d 686 (2008).....	10
<i>State v. Maciolek</i> , 101 Wn.2d 259, 676 P.2d 996 (1984)	18
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009), <i>as corrected</i> (Jan. 21, 2010)	7

<i>State v. Pauling</i> , 149 Wn.2d 381, 69 P.3d 331 (2003)	15
<i>State v. Punsalan</i> , 156 Wn.2d 875, 133 P.3d 934 (2006)	10
<i>State v. Schaler</i> , 169 Wn.2d 274, 236 P.3d 858 (2010)	13
<i>State v. Villanueva-Gonzalez</i> , 180 Wn.2d 975, 329 P.3d 78 (2014)	26
<i>State v. Weatherwax</i> , 188 Wn.2d 139, 392 P.3d 1054 (2017)	26, 27
<i>State v. Weller</i> , 185 Wn. App. 913, 344 P.3d 695 (2015), <i>review denied</i> , 183 Wn.2d 1010, 352 P.3d 188 (2015)	29, 30
<i>State v. Williams</i> , 144 Wn.2d 197, 26 P.3d 890 (2001) (<i>Williams II</i>) 15, 17, 18, 25, 26	
<i>Washington Educ. Ass'n v. Washington Dep't of Ret. Sys.</i> , 181 Wn.2d 212, 332 P.3d 428 (Wash. 2014)	6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I	1, 6, 7, 8, 9, 18
U.S. Const. Amend. XIV	1, 6, 17, 20
Wash. Const. art. I, §3	1, 17
Wash. Const. art. I, §5	1, 8

WASHINGTON STATE STATUTES

Laws of 2005, Ch. 68	22, 24
RCW 26.09.050	28
RCW 26.09.060	28
RCW 26.09.080	28
RCW 26.50.060	28
RCW 9.61.160	11

RCW 9.94A.120.....	20, 21
RCW 9.94A.390.....	20, 21
RCW 9.94A.530.....	25
RCW 9.94A.535.....	1, 9, 12, 13, 15, 19, 20, 22, 24, 25, 28, 29, 30
RCW 9.94A.537.....	22, 24, 25
RCW 9.94A.585.....	30
RCW 9A.46.020.....	15, 18
RCW 9A.48.070.....	13

OTHER AUTHORITIES

<i>Dictionary.com Unabridged</i> , Random House (2017).....	11
GR 34.....	31
RAP 14.2.....	30, 31
RAP 2.5.....	7, 8
<i>Roget's 21st Century Thesaurus, Third Edition</i> (2009)	11, 26

ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court impermissibly enhanced Mr. Brush's sentence under a statute that is unconstitutionally overbroad, in violation of the First and Fourteenth Amendments and Wash. Const. art. I, §5.
2. RCW 9.94A.535(3)(h)(i), which authorizes an exceptional sentence for an "ongoing pattern of psychological... abuse," is facially overbroad because it criminalizes a substantial amount of protected speech.

ISSUE 1: A statute is unconstitutionally overbroad if it criminalizes a substantial amount of speech protected by the First Amendment. Is RCW 9.94A.535(h)(i) facially overbroad because it criminalizes a substantial amount of protected speech?

3. Mr. Brush's exceptional sentence was imposed in violation of his right to due process under the Fourteenth Amendment and Wash. Const. art. I, §3.
4. The trial court impermissibly enhanced Mr. Brush's sentence under a statute that is unconstitutionally vague.
5. The "psychological abuse" aggravating factor fails to provide fair notice of the conduct that will subject a person to increased punishment.
6. The "psychological abuse" aggravating factor fails to provide sufficient standards to prevent arbitrary enforcement.
7. The "psychological abuse" aggravating factor is so subjective that it violates due process.
8. The "psychological abuse" aggravating factor is both facially invalid and unconstitutional as applied to Mr. Brush.

ISSUE 2: A sentencing statute is unconstitutionally vague if it (1) allows punishment above the standard range without giving fair notice of the conduct subject to enhanced penalties, or (2) lacks standards and invites arbitrary enforcement. Does RCW 9.94A.535(3)(h)(i) violate due process because it authorizes exceptional sentences based on a pattern of "psychological abuse" without defining that phrase?

9. The court improperly relied on Mr. Brush's June 2008 decision to end his relationship and change the locks on his own home as proof of "psychological abuse."

ISSUE 3: The sentencing court imposed an exceptional sentence based on the "an ongoing pattern of psychological or physical abuse manifested by multiple incidents over a prolonged period of time." Must the exceptional sentence be vacated because the court improperly relied on Mr. Brush's June 2008 decision to change the locks on his own home as part of the pattern of abuse?

10. Mr. Brush's 1000-month base sentence is clearly excessive under the circumstances of this case.
11. The sentencing court erred by imposing a base sentence of 1000 months.

ISSUE 4: An exceptional sentence must be reversed if it is clearly excessive. Did the trial judge abuse his discretion by imposing a base sentence of 1000 months?

12. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 5: If the State substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Brian Brush is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On September 11, 2009, Brian Brush shot his girlfriend Lisa Bonney at close range with his shotgun. CP 12, 236. A jury convicted him of murder in the first degree. CP 222.

The jury found three aggravating factors, but the Court of Appeals reversed the finding based on instructional error. Mandate filed 8/7/15, Judgment and Sentence filed 2/9/12, Supp. CP. On remand, Mr. Brush waived his right to a jury finding on the aggravating factors of ongoing pattern of domestic abuse and deliberate cruelty. RP 74-85, 98-99. The court held a bench trial. RP 95-256.

Bonney's daughter, Elizabeth Bonney, had testified at the original trial. She testified that Mr. Brush "didn't want me to stay at his house anymore and he broke up with my mom and he didn't want us to come into the house." RP (12/6/11)¹, ² 192. When he started dating Lisa Bonney, Mr. Brush owned a home in Oregon. CP 237. Bonney moved into the

¹ This citation is from the first trial and sentencing proceedings. The parties stipulated that the court could consider this evidence upon resentencing. CP 12. Appellant has requested that the entire trial transcript filed in the first appeal, cause number 43056-8-II/71067-2-I, be transferred for consideration in this matter. Citations to the first trial will include the date of the hearings cited.

² The finding included a citation to the record: "11PR192." CP 238. This was likely a reference to Volume 11 of the Report of Proceedings ("11RP").

home in April of 2008, but Mr. Brush broke up with her and had changed the locks on the house two months later. CP 238.

The State also offered the testimony of Officer Meling, who said he responded to a call from Mr. Brush 48 days prior to the killing (July 25, 2009). RP 108-110. The couple was residing together at the time. RP 110. Mr. Brush told him that Bonney assaulted him; Meling arrested Bonney. RP 110-112, 122-123. Mr. Brush later recanted and further claimed he had intentionally damaged Bonney's car. RP 113. While Mr. Brush was never charged relating to this incident, Meling testified that Mr. Brush was the aggressor. RP 125, 127.

Bonney's niece Mykayela Klingler was staying with her that night. RP 177. She told the judge that Bonney woke her up and told her to stay with her grandparents since she (Bonney) would be going to jail. RP 179-180. Bonney's daughter was not home that night, but she testified that Mr. Brush described the incident to her the next day, portraying Bonney as the aggressor. RP 196.

Two friends of Bonney's testified about incidents in August of 2009. Steven Berglund told the court that he saw Mr. Brush two blocks away from Bonney's home, and a few days later Mr. Brush drove by them. RP 130-135, 138, 142-143. Berglund described Bonney as reacting fearfully. RP 136-137. Dan Driscoll testified that he and Bonney were

eating dinner on the beach when Bonney claimed to see Mr. Brush's vehicle. RP 155-160. He said that later that evening, he and Bonney were at his parents' home when Mr. Brush knocked on the door. RP 160. According to Driscoll, Bonney at first did not want to answer the door, but that she did go out and talk to Mr. Brush. RP 161. He said that she emailed him later in the week and stated that Mr. Brush was stalking her. RP 167.

Elizabeth Bonney acknowledged that no reports were made about any of the incidents she alleged. RP 222-223.

Rich Hedlund, Mr. Brush's counselor, testified that he started working with Mr. Brush the summer of 2009. RP 226-227. As had come out at the trial, Hedlund described Mr. Brush's statement that Bonney was not the aggressor the night she was arrested, and that Mr. Brush exhibited an anger and remorse cycle. RP 226-247.

The parties stipulated to consideration of all of the evidence that was admitted at the trial. CP 12. The parties also agreed that because Mr. Brush had no criminal history, his range would be 300 to 380 months. CP 224.

The prosecutor referred to the Oregon lockout incident in his sentencing argument: "In 2008 Mr. Brush committed his first domestic violence offense involving Lisa Bonney, as well as her daughter, where he

kicked them out of the home [and] changed the locks on the home.” RP 258.

The trial judge issued the same sentence as he had done before the sentence was reversed, 1060 months, endorsing fewer aggravating circumstances this time. The written order indicated, in part:

In June of 2008, while living in Oregon, Brush changed the locks on their home, locking Lisa and Elisabeth (Lisa Bonney’s daughter) out of their home.
CP 238.

Mr. Brush timely appealed. CP 246.

ARGUMENT

I. THE “PSYCHOLOGICAL ABUSE” AGGRAVATING FACTOR IS VAGUE AND OVERBROAD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. The Court of Appeals should review Mr. Brush’s constitutional challenges *de novo*.

Constitutional violations are reviewed *de novo*. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014). Under the First Amendment, the State bears the burden of justifying a restriction on speech.³ *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

³ Ordinarily, in cases challenging statutes based on other constitutional provisions, the burden is on the party challenging the statute to show beyond a reasonable doubt that it is unconstitutional. *Washington Educ. Ass'n v. Washington Dep't of Ret. Sys.*, 181 Wn.2d 212, ___, 332 P.3d 428 (Wash. 2014).

Facial challenges are evaluated without reference to the facts. *City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991). Thus, any person charged with violating a criminal statute may bring a facial overbreadth or vagueness challenge. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000); *see also Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C.*, 846 F.3d 391, 410 (D.C. Cir. 2017).

A party may raise for the first time on review a manifest error affecting a constitutional right. RAP 2.5(a)(3). To raise a manifest constitutional error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).⁴ An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). In this case, the trial court unconstitutionally enhanced Mr. Brush’s sentence through application of a statute that violates due process and the First

⁴ The showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

Amendment. The errors may be raised for the first time on review. *Id.*;

RAP 2.5(a)(3).

B. The “psychological abuse” aggravating factor is unconstitutionally overbroad because it criminalizes a substantial amount of protected speech.

1. The State cannot show that the statute’s reach is insubstantial compared to its legitimate sweep.

The First Amendment protects both speech and expressive conduct.⁵ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The government may not burden speech or expressive conduct through an overbroad statute. *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010).

“Pure speech” is expression unaccompanied by conduct. *Cox v. State of La.*, 379 U.S. 559, 564, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

Pure speech is entitled to “comprehensive protection.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

A criminal statute is overbroad if it reaches a “substantial amount” of constitutionally protected speech or conduct. *Immelt*, 173 Wn.2d at 6. Protected speech or expressive conduct “does not become unprotected

⁵ The state constitution also protects free speech. Wash. Const. art. I, §5. The analysis is the same under both constitutions. *Immelt*, 173 Wn.2d at 6.

merely because it resembles [unprotected speech].” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (Ashcroft I).

To meet its burden of justifying restrictions on speech, the State must show that any restraint on protected speech is insubstantial compared to the statute’s legitimate sweep. *Immelt*, 173 Wn.2d at 11-12 (citing *United States v. Williams*, 553 U.S. 285, 292, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) (Williams I)).⁶

The aggravator under which Mr. Brush was sentenced penalizes a substantial amount of protected speech. It is unconstitutionally overbroad. *Immelt*, 173 Wn.2d at 11-12.

The statute permits enhancement based on “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.” RCW 9.94A.535(h)(i). The phrase “psychological... abuse” is not defined in the Sentencing Reform Act.

In interpreting a statute, the court’s “fundamental goal...is to ‘discern and implement the legislature’s intent.’” *Matter of K.J.B.*, 187

⁶ The comparison must be made without reference to any affirmative defenses. Affirmative defenses cannot cure an overbreadth problem. *Ashcroft v. ACLU*, 542 U.S. 656, 670-671, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (Ashcroft II); *see also Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1056 (7th Cir. 2004) (“[A] realistic threat of arrest is enough to chill First Amendment rights.”)

Wn.2d 592, 596, 387 P.3d 1072, 1075 (2017) (quoting *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). The court’s inquiry “always begins with the plain language of the statute.” *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789 (2004).

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009); *see also State v. Punsalan*, 156 Wn.2d 875, 879, 133 P.3d 934 (2006) (“Plain language does not require construction.”). A court “will not engage in judicial interpretation of an unambiguous statute.” *State v. Davis*, 160 Wn. App. 471, 477, 248 P.3d 121 (2011). Nor may a reviewing court “add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 202, 172 P.3d 329 (2007). Courts may also consult a thesaurus. *See, e.g., State v. J.C.*, 192 Wn. App. 122, 130, 366 P.3d 455 (2016); *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010).

The word “psychological” is defined (in part) as “pertaining to, dealing with, or affecting the mind.” *Dictionary.com Unabridged*, Random House (2017).⁷ Its synonyms include “emotional,” “intellectual,” “mental,” and “subjective.” *Roget's 21st Century Thesaurus, Third Edition* (2009).⁸ When used as a noun, the word “abuse” means (in part) “bad or improper treatment; maltreatment” or “harshly or coarsely insulting language.” *Dictionary.com*.⁹

Thus, the plain meaning of “psychological abuse” encompasses any kind of emotional mistreatment. The statute thus authorizes enhanced penalties for pure speech¹⁰ and expressive conduct that is “akin to ‘pure speech,’” and penalizes a large amount of constitutionally protected speech. *Tinker*, 393 U.S. at 508.

The State bears the burden of showing that the state’s overbreadth is insubstantial. *Immelt*, 173 Wn.2d at 11-12. The State cannot meet its burden here.

⁷ Available at <http://www.dictionary.com/browse/psychological> (accessed: August 1, 2017).

⁸ Available at <http://www.thesaurus.com/browse/psychological> (accessed: August 1, 2017).

⁹ Available at <http://www.dictionary.com/browse/abuse> (accessed: August 1, 2017).

¹⁰ See, e.g., *Cox*, 379 U.S. at 564 (distinguishing “pure form[s] of expression” from “expression mixed with particular conduct”). See also, e.g., *State v. Johnston*, 156 Wn.2d 355, 360, 127 P.3d 707 (2006) (RCW 9.61.160 “regulates pure speech”); *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004) *as amended* (Feb. 17, 2004).

As in *Immelt*, “[a] moment's reflection brings to mind” many instances of protected speech that fall within the statute’s reach. *Id.*, at 9. For example, a woman who repeatedly criticizes her wife’s carpentry skills during a summer construction project could be said to engage in an ongoing pattern of psychological abuse over a prolonged period. The same is true of a teenager who refuses to turn down his music despite his parents’ requests, as well as a conservative Trump supporter who criticizes his parents for their liberal views.

Promises of prosecutorial restraint cannot save the statute. Courts will not “uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly.” *Stevens*, 559 U.S. at 480.¹¹

The statute’s breadth is more than substantial. By its plain language, RCW 9.94A.535(3)(h)(i) reaches a vast amount of pure speech. As the examples show, any domestic violence crime can be enhanced by “ongoing patterns” that are commonplace features of family or household relationships.

By contrast, the statute’s “legitimate sweep” is limited at best. It is unclear what the legislature could legitimately target as “psychological

¹¹ Indeed, the prosecutor in this case characterized Mr. Brush’s actions as “domestic violence” when he broke up with Bonney and changed the locks on his own home. RP 258. This can hardly be characterized as an example of prosecutorial restraint.

abuse.” The enhanced penalties for ongoing patterns of physical or sexual abuse already cover most activities outside the realm of protected speech.

If the legislature intended the statute to encompass criminal harassment amounting to psychological abuse, it could have used language targeting “true threats.” *See, e.g., State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (reversing conviction for failure to instruct jurors on the state’s burden to prove a “true threat.”). If the legislature hoped to punish acts of malicious mischief that constitute psychological abuse, it could have included language such as that used in the malicious mischief statute. RCW 9A.48.070. But the legislature failed to place any limits on the kind of speech or behavior that could contribute to a finding of “psychological abuse.” RCW 9.94A.535(3)(h)(i).

Furthermore, even if the legislature had meant to reach “true threats” and malicious mischief amounting to psychological abuse, it failed to limit the statute to those crimes. RCW 9.94A.535(3)(h)(i). Instead, the aggravator applies to anything that amounts to “psychological abuse,” whether “abuse” stems from criminal conduct or protected speech. RCW 9.94A.535(3)(h)(i).

The statute’s overbreadth is substantial. *Immelt*, 173 Wn.2d at 6. The aggravator reaches a significant amount of protected speech and can

be legitimately applied to only a narrow range of criminal behavior such as harassment or malicious mischief.

Because it is substantially overbroad, the statute is unconstitutional. *Id.* Mr. Brush’s exceptional sentence must be reversed, and the case remanded for sentencing within the standard range. *Id.*

2. The Court of Appeals must invalidate the statute because the statute does not provide a sufficient basis for a limiting construction.

Where possible, a court addressing an overbreadth challenge must construe the challenged statute to avoid overbreadth problems.

Immelt, 173 Wn.2d at 7. If such a limiting construction proves impossible, the overbroad provisions must be invalidated. *Id.*; *see also Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).

A court may not impose a limiting construction “unless the challenged law's language provides a sufficient basis for such a construction.” *State v. Homan*, 191 Wn. App. 759, 776, 364 P.3d 839 (2015), *as corrected* (Feb. 11, 2016) (citing *Immelt*). Here, the statutory language is too broad to allow the court to impose a limiting construction. *See Immelt*, 173 Wn.2d at 13 (“the language of the horn ordinance provides no basis for a sufficiently limiting construction to avoid an overbreadth problem.”)

Under *Immelt*, no limiting construction is possible because the statutory language “provides no basis” for a constitutional interpretation. *Id.* The legislature’s failure to use the word “threat” precludes a construction limiting the statute’s application to psychological abuse achieved through “true threats.” *Cf. Johnston*, 156 Wn.2d at 364; *State v. Pauling*, 149 Wn.2d 381, 69 P.3d 331 (2003).

Furthermore, the Supreme Court has already invalidated an overbroad statute criminalizing threats against a person’s “mental health.” *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001) (*Williams II*) (addressing former RCW 9A.46.020(1)(a)(iv) (1992)). Even if limited to “true threats” amounting to “psychological abuse,” RCW 9.94A.535(3)(h)(i) would suffer the same problem as the statute addressed in *Williams II*. *Id.*

The aggravating factor must be invalidated. *Id.*

3. If the Court of Appeals does not invalidate the statute, it must impose a limiting construction that significantly constrains the aggravator’s reach.

The judiciary has the power to recognize implied elements of an offense.¹² *See, e.g., State v. Anderson*, 141 Wn.2d 357, 362, 5 P.3d 1247

¹² In fact, the judiciary may define all the elements of a crime where necessary. *See State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008) (upholding judicially created definition of assault against a separation of powers challenge).

(2000); *State v. Crediford*, 130 Wn.2d 747, 755, 927 P.2d 1129 (1996).

Such non-statutory elements may be implied to “avoid the constitutional defect that arises if the statute has an overly broad scope.” *Crediford*, 130 Wn.2d at 755.

The statute here can only be saved if the court implies additional elements limiting its reach to unprotected speech and criminal behavior. It is difficult to imagine concise language that would accomplish this.

Instead, a limiting construction would have to qualify the phrase “psychological abuse” by appending a list of prohibited behavior, such as criminal harassment (“true threats”), disorderly conduct (“fighting words”), and malicious mischief.

If the court imposes a limiting construction in this case, it must reverse Mr. Brush’s exceptional sentence and remand the case for a new sentencing hearing. *See, e.g., Johnston*, 156 Wn.2d at 366 (remanding for a new jury trial with proper instructions). On remand, the limiting construction must be applied to the aggravating factor if the State seeks an exceptional sentence. *Id.*

- C. The aggravating factor is unconstitutionally vague because it contains no meaningful definition of the phrase “psychological abuse.”
 - 1. The “psychological abuse” aggravating factor fails to provide fair notice of the conduct subject to enhanced punishment and

fails to provide judges and juries sufficient standards to prevent arbitrary application.

A statute violates due process if it is vague. U.S. Const. Amend. XIV; Wash. Const. art. I, §3; *Williams II*, 144 Wn.2d at 203. Vague statutes are void and unenforceable. *Id.*

The doctrine applies “not only to statutes defining elements of crimes, but also to statutes fixing sentences.” *Johnson v. United States*, --- U.S. ---, ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (citing *United States v. Batchelder*, 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979)). A sentencing statute is unconstitutionally vague if it “fails to give ordinary people fair notice of the conduct it punishes,” or if it is “so standardless that it invites arbitrary enforcement.” *Id.* This includes arbitrary “enforcement” by judges and juries. *Id.* at ___; *Lorang*, 140 Wn.2d at 31.

The legislature may not “delegate ‘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 30-31 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), emphasis omitted in *Lorang*). Due process forbids criminal statutes “that contain no standards and allow police officers, judge, and jury to subjectively decide what

conduct the statute proscribes or what conduct will comply with a statute in any given case.” *State v. Maciolek*, 101 Wn.2d 259, 267, 676 P.2d 996, 1000 (1984).

Vague statutes that implicate the First Amendment raise special concerns because of the “obvious chilling effect on free speech.” *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72, 117 S. Ct. 2329, 2344, 138 L. Ed. 2d 874 (1997). Thus, “[w]here a statute’s literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.” *Smith v. Goguen*, 415 U.S. 566, 573, 94 S. Ct. 1242, 1247, 39 L. Ed. 2d 605 (1974).¹³

In *Williams II*, the defendant was convicted of harassment under former RCW 9A.46.020 (1992). *Williams II*, 144 Wn.2d at 203-206. The statute prohibited threats to harm a person’s “mental health.”¹⁴ Former RCW 9A.46.020(1)(a)(iv) (1992). The Supreme Court found the statute unconstitutionally vague. *Id.*, at 205-206. The court pointed out that the

¹³ A vagueness challenge that does not implicate the First Amendment “is evaluated as applied to the challenger, using the facts of the particular case.” *In re Det. of Danforth*, 173 Wn.2d 59, 72, 264 P.3d 783 (2011). The statute here implicates the First Amendment, as outlined elsewhere in this brief. Even if it did not, an as-applied challenge would succeed. *Williams II*, 144 Wn.2d at 203

¹⁴ The statute provided that “[a] person is guilty of harassment if... without lawful authority, the person knowingly threatens” to maliciously do any act “which is intended to substantially harm the person threatened or another with respect to his or her... mental health.” Former RCW 9A.46.020(1) (1992).

statute “offer[ed] law enforcement ‘no guide beyond the subjective impressions of the person responding to a citizen complaint.’” *Id.* (quoting *Lorang*, 140 Wn.2d at 31. As a result, average citizens had “no way of knowing what conduct is prohibited by the statute because each person’s perception of what constitutes the mental health of another will differ based on each person’s subjective impressions.” *Id.*, at 206.¹⁵

The same is true of the phrase “psychological abuse.” RCW 9.94A.535(3)(h)(i). The statute provides no definition of the phrase “psychological abuse.” RCW 9.94A.535(3)(h)(i). This leaves citizens without fair warning of what conduct could result in enhanced penalties. *Id.*, at 205-206.

It also permits arbitrary enforcement by judges and juries. *Johnson* --- U.S. at ___; *Lorang*, 140 Wn.2d at 31. Each judge or juror will define “psychological abuse” in accordance with their own personal prejudices. One person might believe a defendant commits psychological abuse by ending a relationship and changing the locks on his house; another might decide such actions do not qualify. The statute is “so standardless that it invites arbitrary enforcement.” *Johnson*, --- U.S. at ___.

¹⁵ Similarly, in *Lorang*, a municipal code provision prohibited harassing phone calls made “without purpose of legitimate communication.” *Lorang*, 140 Wn.2d at 22. The Supreme Court invalidated the provision, pointing out that “[t]he average citizen has no standard with which to measure ‘legitimate communication’ against [sic].” *Id.*, at 30. Nor did the municipal code “provide a clear and objective guide to law enforcement.” *Id.*

RCW 9.94A.535(3)(h)(i) is unconstitutionally vague. *Id.*

Accordingly, “[i]ncreasing a defendant’s sentence” under the statute “denies due process of law.” *Johnson* --- U.S. at ____.

The 1000-month exceptional sentence here was imposed in violation of Mr. Brush’s Fourteenth Amendment right to due process. *Id.* The sentence must be vacated and the case remanded for sentencing within the standard range. *Id.*

D. *Baldwin* does not compel a different result.

The vagueness doctrine applies to RCW 9.94A.535(3)’s list of aggravating factors. *See Johnson*, --- U.S. at _____. This is so notwithstanding a 2003 decision finding the doctrine inapplicable to similar provisions in effect at that time. *State v. Baldwin*, 150 Wn.2d 448, 457-461, 78 P.3d 1005, 1010 (2003).

Baldwin addressed a prior version of the Sentencing Reform Act (SRA) and does not control here. At the time of the *Baldwin* decision, a sentencing judge could impose an exceptional sentence for any “substantial and compelling” reason. *Id.*, at 458, 460-461 (citing former RCW 9.94A.120 and former RCW 9.94A.390). Based on the broad discretion afforded a sentencing judge under the SRA, the *Baldwin* court found the vagueness doctrine inapplicable to sentencing provisions. *Id.*, at 458-459.

The sentencing landscape has undergone a radical change since 2003. U.S. Supreme Court decisions and amendments to the SRA now place limits on judicial sentencing discretion. The justifications underlying *Baldwin* no longer exist.

Baldwin's first premise was that the sentencing statutes in effect at the time did not require the imposition of any specific penalty following conviction of a crime:

Sentencing guidelines do not inform the public of the penalties attached to a criminal conduct [sic] nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature. A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct *because the guidelines do not set penalties*.

Id. (emphasis added) (citing former RCW 9.94A.120 and former RCW 9.94A.390).

This is no longer true. In 2004, the U.S. Supreme Court invalidated Washington's sentencing scheme. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Under *Blakely* (and its antecedent *Apprendi*¹⁶), due process and the constitutional right to a jury trial prohibit imposition of an exceptional sentence unless the prosecution proves aggravating factors to a jury beyond a reasonable doubt. *Blakely*,

¹⁶ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

542 U.S. at 301- 314. The state legislature subsequently amended the SRA to comport with *Blakely*'s holding. Laws of 2005, Ch. 68. (the “*Blakely* fix.”)

As *Blakely* and the 2005 legislation made clear, a sentencing judge's discretion is constrained by the “statutory maximum” – the top of the standard range set by the legislature. *Id.*, at 301-305. The judge may impose an exceptional sentence based only on statutorily limited aggravating factors found by a jury beyond a reasonable doubt. *Id.*, at 301; RCW 9.94A.535; RCW 9.94A.537.

Following *Apprendi*, *Blakely*, and the 2005 *Blakely* fix, sentencing guidelines *do* “inform the public of the penalties attached to a criminal conduct [sic].” *Baldwin*, 150 Wn.2d at 459. They *do* vary the “statutory maximum... penalties assigned to illegal conduct by the legislature.” *Id.* *Blakely* reversed the *Baldwin* court's first premise—that the “guidelines do not set penalties.” *Id.*; *see Blakely*, 542 U.S. at 301- 305.

The *Baldwin* court's second premise was that the SRA did not create a constitutionally protected liberty interest in a standard range sentence. *Baldwin*, 150 Wn.2d at 460. As with the court's first premise, this is no longer true. *Blakely* prompted the legislature to enact reforms (the 2005 *Blakely* fix) that create a liberty interest which did not exist in 2003.

A state law creates protected liberty interests when it places “substantive limits on official decision making.” *Matter of Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8, 11 (1994). A statute with such substantive limits

can create an expectation that the law will be followed, and this expectation can rise to the level of a protected liberty interest. For a state law to create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decisionmaker that if the [law’s] substantive predicates are present, a particular outcome must follow.” Thus, laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.

Cashaw, 123 Wn.2d at 144 (citations omitted) (quoting *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S.Ct. 1904, 1910, 104 L.Ed.2d 506 (1989)).

In 2003, Washington courts were “free to exercise discretion in fashioning a sentence.” *Baldwin*, 150 Wn.2d at 460. The SRA’s “only restriction on discretion [was] a requirement to articulate a substantial and compelling reason for imposing an exceptional sentence.” *Id.* The sentencing court’s reason “need not be” an aggravating factor listed in the SRA. *Id.*, at 460-461.

The *Baldwin* court concluded that

[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline

statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest.

Id., at 461. This, the court found, was fatal to any vagueness claim. *Id.*, at 459-461.

Now, however, that the SRA does not grant sentencing judges the same “degree of discretion” addressed by the *Baldwin* court. *Cashaw*, 123 Wn.2d at 144. The sentencing guidelines and exceptional sentence provisions do more than merely “structure discretionary decisions.” *Baldwin*, 150 Wn.2d at 461.¹⁷

Since *Blakely* and the 2005 legislative fix, the top of the standard range is the “statutory maximum” set by the legislature. *Blakely*, 542 U.S. at 301-305; RCW 9.94A.535; RCW 9.94A.537. A “particular outcome must follow” when the State fails to prove one of the aggravating circumstances outlined in RCW 9.94A.535. *Cashaw*, 123 Wn.2d at 144.

The current statutes thus create a constitutionally protected liberty interest in a standard range sentence. The SRA now “places substantive

¹⁷ By contrast, the federal sentencing guidelines have been rendered “effectively advisory” by the U.S. Supreme Court, bringing them into compliance with *Apprendi* and *Blakely*. *United States v. Booker*, 543 U.S. 220, 245, 125 S. Ct. 738, 757, 160 L. Ed. 2d 621 (2005). Because of this, the vagueness doctrine does not apply to the federal guidelines. *See Beckles v. United States*, ---U.S. ---, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017). *Beckles* is thus akin to *Baldwin*: both addressed a sentencing scheme “granting a significant degree of discretion” to sentencing judges. *Cashaw*, 123 Wn.2d at 144. *Beckles* does not control here for the same reason that *Baldwin* is inapplicable.

limits on official decisionmaking” when it comes to imposing a sentence above the standard range. *Cashaw*, 123 Wn.2d at 144. This “create[s] an expectation that the law will be followed.” *Id.*

Washington sentencing statutes “contain ‘substantive predicates’ to the exercise of discretion and ‘specific directives to the decisionmaker that if the [law’s] substantive predicates are present, a particular outcome must follow.’” *Id.* The SRA requires a court to impose a standard range sentence unless the State alleges and proves beyond a reasonable doubt one of the aggravating factors listed in RCW 9.94A.535(3). RCW 9.94A.530; RCW 9.94A.537.

Unlike the law under consideration in *Baldwin*, the provisions applicable to Mr. Brush place substantive limits on decisionmaking. Mr. Brush therefore had a constitutionally protected liberty interest subject to the vagueness doctrine. *Cashaw*, 123 Wn.2d at 144.

The phrase “psychological abuse” is unconstitutionally vague. *Williams II*, 144 Wn.2d at 205-206. RCW 9.94A.535(3)(h)(i) is void, and cannot support Mr. Brush’s exceptional sentence. *Id.* The sentence must be vacated and the case remanded for sentencing within the standard range. *Id.*

II. THE COURT’S CONCLUSION THAT MR. BRUSH ENGAGED IN A PATTERN OF “ABUSE” OVER A PROLONGED PERIOD RESTED IN PART ON AN INCIDENT THAT DID NOT QUALIFY AS “PSYCHOLOGICAL ABUSE” UNDER ANY DEFINITION.

A. Mr. Brush did not engage in “psychological abuse” by breaking up with Bonney and changing the locks on his home.

Here, the statutory language— “psychological abuse” —is unconstitutionally vague, as outlined above. *Williams II*, 144 Wn.2d at 205-206. The meaning of “psychological abuse” is subjective; the phrase cannot be defined in any useful way. *Id.* Nonetheless, Mr. Brush’s conduct does not fall within any legitimate definition.

If a statute is “susceptible to two or more reasonable interpretations, it is ambiguous,” and courts “may turn to additional tools of statutory construction in determining the meaning of the statute.” *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). In criminal cases, the rule of lenity requires courts to construe any ambiguity in favor of the defendant. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 978, 329 P.3d 78, 79 (2014); *State v. Weatherwax*, 188 Wn.2d 139, 155, 392 P.3d 1054 (2017).

The phrase “psychological abuse” can be interpreted to mean “maltreatment,” or it could be interpreted to require proof of “damage,” “harm,” or “injury.” *Roget’s 21st Century Thesaurus*.¹⁸ The language is

¹⁸ Available at <http://www.thesaurus.com/browse/abuse> (accessed August 1, 2017).

ambiguous¹⁹ and must be construed in Mr. Brush's favor. *Weatherwax*, 188 Wn.2d at 155.

Applying the rule of lenity, "psychological abuse" must be defined to include conduct that results in psychological damage, harm, or injury. The aggravator cannot be so broad as to encompass maltreatment unaccompanied by any harmful result. *Id.*

The phrase "psychological abuse" can also be interpreted to require proof of specific intent to cause such damage, harm, or injury. Alternatively, it could be interpreted to require general intent – an intent to abuse, without regard to any result. Under the rule of lenity, specific intent to cause psychological harm must be an element that the State must prove before the aggravator can apply. *Id.*

Mr. Brush's June 2008 breakup with Bonney does not qualify as "psychological abuse." A person who changes the locks on his own residence following a breakup is not psychologically abusing those he excludes.

There is no evidence the breakup and changing of the locks involved maltreatment, insulting language, or anything else that qualifies as abuse. The action Mr. Brush took is common when a relationship ends

¹⁹ Indeed, it is so subjective as to be beyond ambiguous.

and may even be sanctioned by court order. *See, e.g.*, RCW 26.09.050; RCW 26.09.060(2)(c); RCW 26.09.080(4) *see also* RCW 26.50.060(1)(b) (authorizing protection order that excludes the respondent “from the dwelling that the parties share.”)

Nor is there any evidence of mental damage or injury, or specific intent to cause such injury. Nothing in the evidence suggests that Ms. Bonney or her daughter suffered any kind of emotional or other psychological harm.

The prosecutor argued that Mr. Brush committed “his first domestic violence offense involving Lisa Bonney” by changing the locks on his own house. RP 258; CP 237. The court included the June 2008 breakup in its findings and relied on this finding to conclude that the murder “was part of an ongoing pattern of psychological [or] physical... abuse of the victim manifested by multiple incidents over a prolonged period of time.” CP 232, 238, 244.

This was error. The court should not have considered the June 2008 breakup when reaching its conclusion on the aggravating factor. CP 224-225, 232, 244. The record does not suggest the incident was “psychological abuse” within the meaning of RCW 9.94A.535(3)(h)(i). It cannot support the court’s conclusion that Mr. Brush engaged in a pattern

of abuse characterized by multiple incidents over a prolonged period of time. RCW 9.94A.535(3)(h)(i).

- B. The sentence must be vacated and the case remanded for a new sentencing proceeding.

Without the breakup and lock-changing in June of 2008, the sentencing court had before it incidents that spanned a period of only a few weeks. CP 237-243. By considering the breakup and lock-changing, the court extended that period to more than a year. CP 237-243.

The record does not show the trial judge would have found a “prolonged period of time” in the absence of the June 2008 breakup. Nor does the record show the court would have imposed a base sentence of 1000 months if the aggravator stemmed from incidents spanning nearly two months.

Because of this, the exceptional sentence must be vacated and the case remanded for a new sentencing hearing. *See, e.g., State v. Weller*, 185 Wn. App. 913, 931, 344 P.3d 695, 705 (2015), *review denied*, 183 Wn.2d 1010, 352 P.3d 188 (2015) (remand for resentencing after one of two aggravating factors held invalid). On remand, the factfinder must determine if Mr. Brush’s conduct amounts to “multiple incidents [of abuse] over a prolonged period of time,” without consideration of the 2008 breakup.

III. MR. BRUSH’S EXCEPTIONAL SENTENCE IS CLEARLY EXCESSIVE.

An exceptional sentence must be reversed if it is “clearly excessive.” RCW 9.94A.585(4). The reasons for an exceptional sentence must be “substantial and compelling.” RCW 9.94A.535. A sentence is clearly excessive if its length, in light of the record, “shocks the conscience.” *State v. Knutz*, 161 Wn. App. 395, 410–11, 253 P.3d 437, 444 (2011) (internal quotation marks and citations omitted).

The 1000-month base sentence is clearly excessive under the facts of this case. Nothing in the record suggests Mr. Brush deserved a sentence that exceeds the top of the standard range by more than 56 years. CP 224-225. The exceptional sentence must be reversed and the case remanded for a new sentencing hearing. *Weller*, 185 Wn. App. at 931; RCW 9.94A.585(4).

IV. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

The Court of Appeals should decline to award appellate costs because Brian Brush “does not have the current or likely future ability to pay such costs.” RAP 14.2. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Brush indigent. CP 272. That status is unlikely to change, especially with the addition of a murder conviction and a sentence that exceeds 88 years. CP 225. Although the sentencing judge adopted a boilerplate finding that Mr. Brush had the ability or likely future ability to pay legal financial obligations, the court did not impose any LFOs. CP 227.

The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839. Here, the trial court’s finding of indigency “remains in effect.” RAP 14.2.

If the State substantially prevails on this appeal, this court should deny any appellate costs requested. RAP 14.2.

CONCLUSION

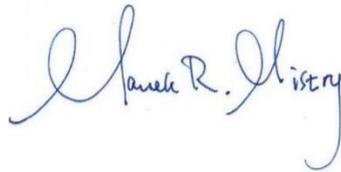
For the foregoing reasons, Mr. Brush’s exceptional sentence must be vacated, the aggravating factor stricken, and the case remanded for sentencing within the standard range. In the alternative, the case must be remanded for a new sentencing hearing. If the State substantially prevails, the Court of Appeals should decline to impose appellate costs.

Respectfully submitted on August 9, 2017,

BACKLUND AND MISTRY

Handwritten signature of Jodi R. Backlund in blue ink.

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

Handwritten signature of Manek R. Mistry in blue ink.

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

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Brian Brush, DOC #337561
Washington State Penitentiary
1313 North 13th Ave
Walla Walla, WA 99362

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pacific County Prosecuting Attorney
mmclain@co.pacific.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 August 9, 2017.



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

BACKLUND & MISTRY

August 09, 2017 - 8:08 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49760-3
Appellate Court Case Title: State of Washington, Respondent v. Brian K. Brush, Appellant
Superior Court Case Number: 09-1-00143-8

The following documents have been uploaded:

- 1-497603_Briefs_20170809080725D2531507_1408.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 497603 State v Brian Brush Opening Brief.pdf
- 1-497603_Designation_of_Clerks_Papers_20170809080725D2531507_4350.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was 497603 State v Brian Brush Supp DCP.pdf
- 1-497603_Motion_20170809080725D2531507_1304.pdf
This File Contains:
Motion 1 - Other
The Original File Name was 497603 State v Brian Brush Motion to Transfer Record.pdf

A copy of the uploaded files will be sent to:

- mmclain@co.pacific.wa.us

Comments:

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com
Address:
PO BOX 6490
OLYMPIA, WA, 98507-6490
Phone: 360-339-4870

Note: The Filing Id is 20170809080725D2531507