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Division II  
State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

DENISE SONIA P PANGELINAN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-00070-1

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BRIEF OF RESPONDENT

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DATED May 9, 2019, Port Orchard, WA

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**TABLE OF CONTENTS**

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

    A. PROCEDURAL HISTORY.....1

    B. FACTS .....4

III. ARGUMENT .....5

    A. THE TRIAL COURT USED PROPER  
PROCEDURE IN IMPOSING AN  
EXCEPTIONAL SENTENCE THAT WAS NOT  
CLEARLY EXCESSIVE UNDER THE FACTS  
OF THE CASE. ....5

    B. THE \$200 FILING FEE SHOULD BE STRICKEN  
FROM THE JUDGMENT AND SENTENCE  
(CONCESSION OF ERROR). ....10

IV. CONCLUSION.....11

## TABLE OF AUTHORITIES

### CASES

<i>In re Breedlove</i> , 138 Wn.2d 298 ( 1999).....	2
<i>State v. Branch</i> , 129 Wn.2d 635, 919 P.2d 1228 (1996).....	10
<i>State v. Fisher</i> , 188 Wn. App. 924, 355 P.3d 1188 (2015).....	6
<i>State v. France</i> , 176 Wn. App. 463, 308 P.3d 812 (2013).....	9
<i>State v. Hilvard</i> , 63 Wn.App. 413 ( 1991), <i>review denied</i> , 1 18 Wn.2d 1025 (1992).....	2
<i>State v. Murray</i> , 128 Wn. App. 718, 116 P.3d 1072 (2005).....	6
<i>State v. Pappas</i> , 176 Wn.2d 188, 289 P.3d 634 (2012).....	9
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 214 (2018).....	11
<i>State v. Ritchie</i> , 126 Wn.2d 388, 894 P.2d 1308 (1995).....	10
<i>State v. Sao</i> , 156 Wn. App. 67, 230 P.3d 277 (2010).....	10

### STATUTORY AUTHORITIES

RCW 9.94A.....	2
RCW 9.94A.421(3).....	2
RCW 9.94A.535.....	5
RCW 9.94A.535(2)(a) .....	5, 7
RCW 9.94A.535(3)(y) .....	6, 8
RCW 9.94A.537(3).....	5
RCW 9.94A.537(6).....	6, 10
RCW 9.94A.585(4).....	6
RCW 9A.04.110(4)(b) .....	9
RCW 9A.04.110(4)(c) .....	9
RCW 10.01.160 .....	11
RCW 46.61.502 .....	1
RCW 46.61.522(1).....	9

## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court erred in imposing a substantial upward departure from the standard sentencing range upon Pangelinan's plea of guilty and stipulation to an exceptional sentence where the injuries caused by the crime are substantially more egregious than are necessary to support conviction?

2. Whether the trial court erred in imposing a \$200 discretionary legal financial obligation (CONCESSION OF ERROR)?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Denise Sonia Pangelinan was charged by information filed in Kitsap County Superior Court with vehicular assault (RCW 46.61.502). CP 1. The charge included a special allegation that Pangelinan had caused injuries that "substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." CP 2.

Less than two weeks after the filing of the amended information, with assistance of counsel, Pangelinan signed a plea agreement. CP 5-10. That document recited that the standard range for the offense is 3-9 months. CP 5. That document included two stipulations: First, Pangelinan agreed that "[t]he parties stipulate that the sentencing court may consider the discovery and/or certification(s) for probable cause as

the material facts.” CP 6. Second, the plea agreement recited

x Agreed Exceptional Sentence- The Parties stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, that they will recommend the following exceptional sentence provisions, and that a factual basis exists for this exceptional sentence, predicated upon *In re Breedlove*, 138 Wn.2d 298 ( 1999) and *State v. Hilvard*, 63 Wn.App. 413 ( 1991), *review denied*, 118 Wn.2d 1025 (1992). RCW 9.94A.421(3) and RCW 9.94A.535: EXCEPTIONAL ABOVE THE STANDARD RANGE- 24 MONTHS.

CP 7. Among the provisions in the plea agreement, Pangelinan also agreed that “[t]he Defendant understands that if the parties agree to an exceptional sentence, the Defendant is waiving the right to have facts supporting such a sentence decided by a jury.” CP 9. Finally, she acknowledged that her entry into the agreement was free and voluntary and that her attorney had explained all the provisions to her. CP 9.

Pangelinan signed a Statement of Defendant on Plea of Guilty to Non-sex Offense. CP 11. Therein, she was advised that

(h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless the judge finds substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:

(i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.

(ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.

(iii) The judge may also impose an exceptional sentence above

the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.

(iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

CP 14. In paragraph 11 of the plea document, Pangelinan stated that

On or about 11/19/15 in Kitsap County I did operate a vehicle while under the influence of an intoxicating drug and caused substantial bodily harm to another. Additionally, the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.

CP 19. Here, again, Pangelinan asserted that her plea was free and voluntary. CP 19. Her attorney also signed the plea form reciting that he had read and discussed the statement with her and indicating his belief that she fully understood the statement. CP 19.

At sentencing, the trial court pronounced a sentence of 96 months.

CP 22. Although the exceptional sentence provision of the judgment and sentence is cross out and initialed by the parties (CP 22), the trial court did enter Findings of Fact and Conclusions of Law Re: Exceptional Sentence.

CP 32. The trial court found that Pangelinan had knowingly and voluntarily entered her plea with full knowledge of the consequences of the plea. CP 32-33. Significantly, the trial court concluded that

Pangelinan had agree that “the facts and circumstances of her offense justified a departure from the sentencing guidelines and constitute a basis to impose a sentence above the standard range.” CP 36. The trial court considered the aggravator that the offense was significantly more serious than the usual case and noted in particular that the excessive injuries were the amputation of a leg and permanent blindness. CP 36.

Pangelinan was allowed a late notice of appeal. The present notice of appeal was filed on January 30, 2018. CP 37.

## **B. FACTS**

Although Pangelinan stipulated to police report or statements of probable cause, those documents were not included in the present clerk’s papers. But Pangelinan’s above quoted factual basis for her plea and the trial court’s findings and conclusions suffice for the present issue.

The trial court found that, as a result of an accident caused by Pangelinan’s impaired driving, the victim lost a leg and was rendered permanently blind. CP 34.

### III. ARGUMENT

#### A. THE TRIAL COURT USED PROPER PROCEDURE IN IMPOSING AN EXCEPTIONAL SENTENCE THAT WAS NOT CLEARLY EXCESSIVE UNDER THE FACTS OF THE CASE.

Pangelinan argues that the exceptional sentence imposed is based on untenable grounds and is thus clearly excessive. This claim is without merit because the trial court had more than sufficient reasons for its upward departure and properly exercised its discretion in setting the length of the exceptional sentence.

A sentencing court may depart from the standard range “if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. Facts supporting an aggravated sentence must be found by a jury beyond a reasonable doubt “unless the defendant stipulates to the aggravating facts.” RCW 9.94A.537(3). Further, there need not be a jury finding if the parties stipulate “that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.” RCW 9.94A.535(2)(a). Upon such a stipulation, the sentencing court may sentence the offender up to the statutory maximum for the offense so long as the sentencing

court has considered the purposes of the SRA and found substantial and compelling reasons. RCW 9.94A.537(6).

One fact that constitutes substantial and compelling reasons for an upward departure is that “[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.” RCW 9.94A.535(3)(y); *see State v. Murray*, 128 Wn. App. 718, 725, 116 P.3d 1072 (2005) (personal characteristics of defendant not sufficient to “address how the circumstances of the [the] crime distinguish it from other crimes in the same category.”).

The imposition of a sentence that departs from the standard range may be reversed only if the reviewing court finds

(a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4). This provision propounds three questions and varying standards of review:

(1) Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous. (2) Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law. (3) Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

*State v. Fisher*, 188 Wn. App. 924, ¶55, 355 P.3d 1188 (2015).

In the present case de novo review of is applied whether the trial court had sufficient reason and facts to support the sentence and abuse of discretion review of the length of sentence it imposed. Neither question was answered in error in the present case.

First, the statute plainly allows the trial court to impose an exceptional sentence in the circumstances of this case. RCW 9.94A.535(2)(a) gives the trial court the power to impose an exceptional sentence “without a finding of fact by a jury.” Here, Pangelinan’s plea agreement stipulation tracks the language of section .535(2)(a); she agreed with the state that the interests of justice is best served by the imposition of an exceptional sentence outside the standard range. By the plain language of that statutory provision, upon Pangelinan’s agreement, the trial court was not required to assure that the any particular fact was found beyond a reasonable doubt. Moreover, in the same provision of the same plea agreement, Pangelinan added the arguably unnecessary agreement that there is a factual basis to impose an exceptional sentence. Thus, Pangelinan conceded both the trial court’s authority to sentence outside the standard range and that facts exist to support such a departure.

Under the statutory scheme, then, Pangelinan’s plea agreement stipulation provided the trial court with the reason for and justification of the exceptional sentence. No more is required and the inquiry should

move to the length of sentence.

However, there is more: along with the interests of justice stipulation, Pangelinan's plea statement included an exact quote of the language of RCW 9.94A.535(3)(y) and thereby her clear admission that an exceptional sentence is warranted because the injuries she caused substantially exceeded the level of bodily injury necessary to prove the crime. This admission thus provided the trial court with a second reason supported by the record to impose an upward departure and supplied the facts necessary to justify such a departure (recalling here that Pangelinan stipulated that there is a factual basis). Thus the trial court had both lawful reasons and justification by Pangelinan's stipulation and by her admission.

All that remains is the question of the length of the sentence. In exercising it's the discretion, it is not in the least improper for the trial court to inquire about and consider the actual injuries that substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. It is difficult to see how this would not be the case when Pangelinan twice expressly admitted that such facts exist. Pangelinan clearly knew of the amputation and blindness before she stipulated and admitted that those facts exist.

Further, under the heading of "substantial and compelling," even with the stipulations and admissions in the record, it fell to the trial court

to determine whether the injuries sustained did in fact “substantially exceed the level of bodily injury.” Here, the minimum harm required for a conviction is “substantial bodily harm.” RCW 46.61.522(1); *see* CP 1. That phrase is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b). But here the victim suffered permanent loss of his leg and permanent loss of his sight. This clearly “substantially exceeds” the definition of substantial bodily harm.” In fact, it meets the definition of “great bodily harm,” which obtains when an injury “causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c); *see State v. Pappas*, 176 Wn.2d 188, 193, 289 P.3d 634 (2012) (En banc).

Having been provided with reasons and justification for the exceptional sentence, “The trial court has all but unbridled discretion in fashioning the structure and length of an exceptional sentence.” *State v. France*, 176 Wn. App. 463, 470, 308 P.3d 812 (2013) (internal quotation and cite omitted) *review denied* 179 Wn.2d 1015 (2014). As noted above, the statute provides that once correct grounds for a departure are extant, the trial court may sentence up to the statutory maximum for an offense.

RCW 9.94A.537(6). Moreover, once the reasons for the departure are established, the trial court is not required to articulate its reasons for the length of the exceptional sentence; “[t]here is no such statutory requirement as to the *length* of an exceptional sentence.” *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995)(emphasis by the court).

Under the abuse of discretion standard that applies to the “clearly excessive” inquiry, “[a] sentence is clearly excessive if it is based on untenable grounds or untenable reasons or if it is an action no reasonable judge would have taken.” *State v. Sao*, 156 Wn. App. 67, 80, 230 P.3d 277 (2010), *citing State v. Branch*, 129 Wn.2d 635, 649–650, 919 P.2d 1228 (1996). In the present case, the trial court was confronted with injuries that vastly exceed those necessary to prove the offense. Considering a large upward departure in light of the loss of a leg and the loss of sight is not untenable or unreasonable. There was no abuse of discretion.

**B. THE \$200 FILING FEE SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE (CONCESSION OF ERROR).**

Pangelinan next claims that the trial court erred in imposing a \$200 filing fee as a legal financial obligation. This claim has merit because Pangelinan is indigent and subsequent caselaw prohibits the imposition of this discretionary legal financial obligation (LFO) against indigent

persons.

Pangelinan had appointed counsel below and proceeds in the present appeal under an order of indigency. CP 50-51. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 214 (2018) interprets legislative amendments to the legal financial obligation statute, RCW 10.01.160, as prohibiting imposition of discretionary LFO on indigent persons. The \$200 filing fee imposed herein was discretionary and should not have been imposed. The trial court should be ordered to strike that debt from the judgment and sentence.

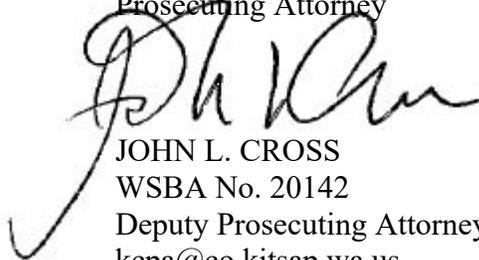
#### IV. CONCLUSION

For the foregoing reasons, Pangelinan's sentence should be affirmed except that the \$200 filing fee should be stricken.

DATED May 9, 2019.

Respectfully submitted,

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**Transmittal Information**

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