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COA No. 53498-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

SOY OEUNG,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY

The Honorable Gretchen Leanderson

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REPLY BRIEF

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## A. REPLY ARGUMENT

**1. Soy Oeung is in the same position as her co-defendant Azias Ross - she did not waive her right to argue issues under new exceptional sentence authority at resentencing; rather, the court made clear it was refusing to consider those issues on October 6, 2017, but that it was granting leave to note a future hearing on the issue, notwithstanding that it was entering an order on October 6 making the sentencing corrections the court believed it was limited to.**

Following the October 6, 2017 hearing, co-defendant Azias Ross secured a future hearing, held on January 26, 2018, which the trial court correctly deemed a continuance from October 6, and at which it fully entertained Ross's arguments regarding the scope of resentencing - although it concluded that it did not have discretion to re-sentence. Thereafter, in Court of Appeals No. 51469-9-II, the State of Washington conceded that Mr. Ross was "entitled to a full resentencing." Brief of Respondent in COA No. 51469-9-II, at pp. 31-33 (filed October 11, 2019).<sup>1</sup>

Ms. Soy Oeung is similarly entitled to a full resentencing. From the beginning of this of this case, Soy Oeung and her co-

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<sup>1</sup> The State filed two briefs in response to issues raised on Mr. Ross's direct appeal (filed February 27, 2018) and in his consolidated Personal Restraint Petition, and in the second brief, stated that its previous argument that Mr. Ross was not entitled to full re-sentencing was erroneous. See Brief of Respondent in COA No. 51469-9-II, at pp. 32-33.

defendant Mr. Azias Ross were charged together, tried together, and proceeded to the Court of Appeals in consolidated cases. CP 6-10, 11-15; see State v. Soy Oeung and Azias Ross, 196 Wash. App. 1011 (2016) (COA No. 46425-0-II). On remand, their cases were set before the trial court for a hearing on the same date. 10/6/17RP at 1; 10/6/17RP at 1 (Ross).<sup>2</sup>

On that date, Mr. Ross's counsel addressed the court first, followed by Ms. Oeung's counsel. Id. It is true that documents entitled "Motion And Order Correcting Judgment and Sentence" were signed and entered by the trial court as to both Ms. Oeung, and Mr. Ross. CP 107-10 (Pierce Cty 12-1-03300-7); see Ross Motion and Order Correcting Judgment and Sentence, October 6, 2017, in Pierce Cty 12-1-03305-8 (described in Mr. Ross's trial

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<sup>2</sup> As set forth in Ms. Oeung's Opening Brief in this appeal, with regard to both defendants, the trial court corrected sentencing errors located by the Court of Appeals, but also exercised discretion in fashioning the new sentences. See AOB, at pp. 13-14, 17-19. Ms. Oeung is arguing in this appeal not only that she was entitled to the benefit of the exceptional sentence cases at the post-appeal sentencing hearings on ground that resentencing was ordered and that case decisions decided while her case was on direct appeal applied to her, but also, in the alternative, that the court's October 6, 2017 entry of a 'corrected' judgment in fact contained discretionary sentencing decisions by the court (including the imposition of community custody not previously imposed, and the lowering of the standard range in order to impose the community custody without exceeding the maximum allowable sentence), in which case it is clear that the court exercised discretion at the hearing - and thus necessarily possessed discretion. See AOB, at pp. 17-26.

court docket as “10/06/2017 ORDER CORRECTING JUDGMENT & SENTENC” [sic]).

However, as the record makes clear, both defendants on October 6 asked the court for leave to note a future hearing at which each party could address the larger question of the court’s discretion to address subsequent case law pertinent to the issue of sentencing below the standard range, including State v. O’Dell, 183 Wn.2d 680, 693, 358 P.3d 359 (2015), State v. Houston-Sconiers, 188 Wn.2d 1, 24, 391 P.3d 409 (2017), and State v. McFarland, 189 Wn.2d 47, 49, 399 P.3d 1106 (2017).<sup>3</sup>

Indeed, the prosecutor noted when announcing the cases to the court that the issue of exceptional sentencing would have to await a future hearing. Just as Ross’s and Oeung’s trial and sentencing were held together, so it remained both on appeal, and post-appeal, on October 6. The transcripts of October 6, 2017 make clear that Mr. Ross’s counsel Corey Parker presented argument, regarding the right to a full resentencing hearing, to the

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<sup>3</sup> Both parties wished to raise arguments based on a range of Washington cases decided subsequent to Ms. Oeung’s June, 2014 sentencing that were pertinent to the issue of a reduced length of total sentence, including, but not limited to, principles from Houston-Sconiers broadly, and sentencing of a youthful defendant as addressed in O’Dell. For brevity, those arguments are referred to herein as the “exceptional sentence” cases and arguments.

court first on October 6, 2017, and that when Ms. Oeung's counsel Ned Jursek presented argument to the court second, the court and parties plainly understood that Mr. Jursek was joining and incorporating those arguments into his argument regarding Ms. Oeung. 10/6/17RP (Ross) at 1; 10/6/17RP at 1.

Before Mr. Parker argued, deputy prosecutor Scott Harlass (standing in for deputy prosecutor Jesse Williams) introduced the case, and made clear that the State's position was (1) that although the appellants wished to substantively address the applicability of new exceptional sentence cases today, the State did not believe that there was any entitlement to a full resentencing hearing at all, but (2) if the court concluded the issue was colorable, that the State was not prepared to address the question of entitlement to a full resentencing, but hoped the court would be agreeable to a later hearing at which that question could be litigated. 10/6/17RP (Ross) at 1-2. The prosecutor stated:

It's my understanding counsel is making a request to resentence . . . based upon Houston-Sconiers, an issue that was not -- it's outside the scope of the remand in the State's opinion. I think counsel would like to deal with that today and argue the Houston-Sconiers issue today.

10/6/17RP (Ross) at 1. The State indicated that it opposed the notion that there was an entitlement to argue the exceptional sentence cases' application to the case, but that the State was agreeable to entry of a ruling to "correct" the judgment as ordered by the Court of Appeals, followed by a later hearing to argue the exceptional sentence cases issues. 10/6/17RP (Ross) at 2. The State noted that there would be no prejudice caused by delaying until a later hearing, because the sentences would be relatively lengthy regardless of the degree to which intervening case law might result in a reduction:

But if the Court is willing to consider that issue, the State's not in a position right now to argue that, and there's no prejudice. There would be no prejudice as Mr. Ross was sentenced on multiple other counts, and it's not like he's going to get out of custody.

10/6/17RP (Ross) at 2. Mr. Ross's counsel presented argument that the case was before the court for re-sentencing and that newer exceptional sentence case law applied. After hearing Mr. Ross's arguments with regard to the exceptional sentence cases, the court stated it was not going to go beyond what it believed were the sole issues to be examined on remand. 10/6/17RP at 8. The court therefore addressed what it believed were mere corrections to the

judgment, and signed the State-drafted “Motion and Order Correcting Judgment and Sentence.” 10/6/17RP (Ross) at 13.

With regard to the noting of a future hearing to argue the issues of applicability of the exceptional sentence cases, the prosecutor rebuffed Mr. Parker’s effort to set a specific date, noting that he was unsure of deputy prosecutor Williams’ future availability, or whether the appellate unit would be handling the matter. 10/6/17RP at 10-12. The court ultimately informed the parties that they would need to confer later, and determine a date for the hearing after consultation with the prosecutor’s office, taking into consideration issues of client transport, and the court’s anticipated move to Remann Hall in 2018. 10/6/17RP at 10-12.

Then, the prosecutor introduced Mr. Jursek, representing Ms. Oeung, who was making the same arguments as Mr. Parker made for Mr. Ross:

Defendant is present in custody represented by counsel. Here today on a remand from the court of appeals. Talking a little bit on Mr. Ross’s case about the issues before the Court. Ms. Oeung’s sentence was remanded to correct some -- basically the same issues as well. I will defer to counsel. I know that he wants to make his record about some of the same things that we just dealt with.

10/6/17RP at 1. Contrary to the Respondent's arguments on appeal, Mr. Jursek did not agree that the court's entry of the 'corrected' judgment on that date constituted the entirety of the resentencing hearing to which Ms. Oeung was entitled. See SRB, at p. 8. Mr. Jursek no more did this than did Mr. Parker, for Mr. Ross.

Mr. Jursek, plainly referencing the court's statements in response to Mr. Parker's arguments, acknowledged that it was clear that the court would decline to take argument on the exceptional sentence cases now, or even determine whether it could do so. 10/6/17RP at 1. Counsel Jursek also noted that he had anticipated that argument regarding the exceptional sentence cases would likely need to await deputy prosecutor Williams' return to the case (as prosecutor Harlass had noted, Mr. Williams was on paternity leave. 10/6/17RP at 1). Mr. Jursek therefore asked for a future hearing to argue the exceptional sentence cases, as Mr. Parker had:

Good afternoon. Ned Jursek representing Ms. Oeung to my left. Codefendant's counsel did most of my heavy lifting for me. He also did in terms of the briefing filed as well. I did not anticipate going forward today beyond the confines of the remand itself. What I was going to propose would be a court date to address the

discretion issue, which is -- I saw as kind of a procedural issue about whether it would even be possible to go forward with the resentencing. And then once we cross that bridge, look at the potential resentencing issues. It sounds like that's ultimately what's transpired with Mr. Ross. What we would ask for, I think, would be just the same date as Mr. Ross. I'll file a brief regarding the, I guess, procedural issues as it relates to the Court's discretion. I had the benefit of talking to Mr. Williams before he left on leave. I knew that the State would be in opposition. I did not anticipate the State would be able to go forward on that issue today just because I knew Mr. Williams was going to be gone.

10/6/17RP at 1-3. The deputy prosecutor responded by stating that he was prepared to address the specific issues identified by the Court of Appeals but that, as with a future date for Mr. Ross, he was unsure at what date in the future the State would conclude that the questions of the exceptional sentence cases and the question of resentencing discretion should be considered. 10/6/17RP at 4.

I think the State's made its position perfectly that that is the sole issue that we are to address today. I can't really say much more than that. That's the State's position, that the Court cannot proceed forward with that consideration today. So where it goes from here, whether a court date is set in a month or however our appellate unit wants to handle it, Your Honor, I just can't speak on that.

10/6/17RP at 4.

As voluminously set forth in Ms. Oeung's motion to file a late notice of appeal from the October 6, 2017 and October 26, 2018 hearings, before, during, and after this time, Ms. Oeung's efforts and her appellate counsel's efforts to contact Mr. Jursek and determine his plans to brief the issues and note a hearing as the trial court had allowed him to do, were unsuccessful, until Mr. Jursek filed a brief and also noted a hearing for October 26, 2018.

In the interim, however, Mr. Parker, for Azias Ross, noted a hearing which was held January 26, 2018. The prosecutor and the parties were plainly proceeding under the correct belief that this was the continued hearing the court had given leave to note on October 6, 2017. 1/26/18RP (Ross) at 18-19, 28-29. The court heard the argument of counsel and addressed the substance of the exceptional sentence cases issues, but held that it did not have discretion to fully resentence Mr. Ross. 1/26/18RP at 35.<sup>4</sup>

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<sup>4</sup> It is telling that the prosecutor in Mr. Ross's case agreed that under that new governing law, Ms. Oeung not only had valid reasons for an exceptional sentence, but it was also clear that the original trial court believed that Ms. Oeung was the only participant as to whom the court wished it could have given an exceptional sentence downward. 1/26/18RP (Ross) at 21.

**2. Soy Oeung is entitled to remand for the resentencing hearing to which she was entitled by the trial court's October 6, 2017 order allowing the noting of a future, continued hearing to address the issue of the scope of resentencing. If the court concludes that it does not have discretion to resentence Ms. Oeung, Ms. Oeung is entitled to direct appeal from such a decision.**

The court's error on October 26, 2018 was its refusal to entertain the arguments that it had told Mr. Jursek on October 6, 2017, that it would hear. Respondent states that "Oeung claims that at [the October 6, 2017] hearing she asked for a continuance [but] [t]he record does not support this allegation." SRB, at p. 8. That is incorrect. Ms. Oeung's counsel explicitly sought a continuance to submit briefing and argue issues of sentencing discretion and Ms. Oeung's substantive sentences, at a future hearing to be noted. 10/6/17RP at 1-2. The deputy prosecutor indicated that he wished to consult with the appellate unit but deferred to the court with regard to the setting of a future hearing for Oeung. 10/6/17RP at 3.

Further, the minute entry for October 6 noted that defense counsel Jursek "requests a subsequent date be sent [sic] to resentence on two counts (to be set and heard at the same time as Ross 12-1-03305-8)." Supp. CP \_\_\_\_ [12-1-03300-7 at 10/6/2017 –

Minute Entry]. Nonetheless, the trial court stated on October 26, 2018:

The Court of Appeals had remanded for what I believed to be a ministerial correction to errors in the judgment and sentence. Those were corrected. The order was entered on October 6, 2017, and it corrected the J and S, and it was also nunc pro tunc. So it did correct the J and S, and that was not appealed; and, therefore, that is final. So what I'm looking at is that I believe that these are legal arguments that you are making, and I do believe that it should be transferred to the court of appeals as a personal restraint petition, and that is where you can continue to make your legal argument, sir.

10/26/18RP at 16. But Ms. Oeung's motion heard on October 26, 2018 was not a CrR 7.8 motion or otherwise any collateral attack on the sentencing order entered by the court on October 6, 2017. The court failed to provide the resentencing hearing to which Ms. Oeung was entitled. Although a CrR 7.8 motion is a collateral attack, RCW 10.73.090(2), Ms. Oeung's motion was not a CrR 7.8 motion, nor a collateral attack in any other form. RCW 10.73.090(3)(b). A Superior Court's purported order of transfer of the motion to the Court of Appeals for consideration as a PRP is either an automatic ministerial task, or legal error. State v. Flaherty, 177 Wn.2d 90, 93, 296 P.3d 904 (2013).

Although there is no question that Ms. Oeung's trial counsel could have noted the motion earlier, he filed two briefs during the time before he noted the motion and when it was heard on October 26, 2018. CP 111, 114. The trial court's statements that its prior October 6, 2017 order was the ministerial correction that was all it had the authority to enter, that the court entered an order *nunc pro tunc* on that date, that the order was final, and that Mr. Jursek was before the court on October 26, 2018, presenting a collateral attack, were in error. AOB, at pp. 17-26. The court, on October 6, had expressly granted leave to Mr. Jursek to brief and note a motion regarding a full resentencing following direct appeal. It was error to deny Ms. Oeung the opportunity to make the same argument that Mr. Ross was permitted to make on January 26, 2018, and as to which, on review, the Respondent conceded that the defendant was entitled to full resentencing. The proper remedy for the error of denying Ms. Oeung the continued resentencing hearing to which she was entitled by the court's own order is for this Court to declare the court's ruling that the October 6, 2017 order was final to be error, and remanding the case for the resentencing hearing to which Ms. Oeung was entitled.

## **B. CONCLUSION**

Based on the foregoing and on her Appellant's Opening Brief, Soy Oeung requests that this Court reverse and remand for resentencing.

Respectfully submitted this 9th day of June, 2020.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 53498-3-II
v.	)	
	)	
SOY OEUNG,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF JUNE, 2020, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF JUNE, 2020.



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# WASHINGTON APPELLATE PROJECT

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