

FILED  
Court of Appeals  
Division II  
State of Washington  
6/5/2020 1:14 PM

NO. 53801-6-II

---

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

---

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM MANUEL ALVAREZ CALO,

Petitioner.

---

Appeal from the Superior Court of Pierce County  
The Honorable Frank E. Cuthbertson

No. 13-1-02553-3

---

**BRIEF OF RESPONDENT**

---

MARY E. ROBNETT  
Prosecuting Attorney

Theodore Cropley  
Deputy Prosecuting Attorney  
WSB # 27453  
930 Tacoma Ave., Rm 946  
Tacoma, WA 98402  
(253) 798-7400

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. RESTATEMENT OF THE ISSUES ..... 2

    A. Did the trial court err in denying to hear Calo’s renewed request to merge his burglary in the first-degree charge with his murder in the first-degree charge on remand for ministerial corrections where there was no exercise of independent judgment?..... 2

    B. Did Calo receive ineffective assistance of counsel where the prior defense counsel correctly believed that the burglary in the first-degree charge and the murder in the first-degree charge could not be merged on appeal, and where Calo has not proved that the actions of prior defense counsel prejudiced him?..... 2

III. STATEMENT OF THE CASE..... 2

    A. Substantive Facts ..... 2

    B. Procedural Facts..... 4

        1. Sentencing..... 5

        2. First Appeal..... 6

        3. Remand ..... 6

IV. ARGUMENT ..... 7

    A. The trial court properly declined to consider Calo’s request to merge first-degree burglary with first-degree felony murder ..... 7

1.	This Court remanded the matter to the trial court for ministerial corrections that were not subject to discretionary findings by the trial court.....	11
a.	The trial court’s determination that Calo is indigent was not an independent judgment on remand.....	11
b.	The merger issue was not before the court on remand .....	13
B.	Calo received effective assistance of counsel .....	20
1.	Calo has not established either of the <i>Strickland</i> prongs .....	22
2.	Calo has not proved that prior defense counsel’s representation was not reasonable .....	22
3.	Calo has not established that he was prejudiced by prior defense counsel’s representation.....	23
V.	CONCLUSION.....	24

## TABLE OF AUTHORITIES

### State Cases

<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971) .....	9
<i>State v. Barberio</i> , 121 Wn.2d, 48, 846 P.2d 519 (1993).....	8, 15, 18, 20
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	10, 12, 13
<i>State v. Calo</i> , No. 49794-8-II, 2018 WL 6819566, at *1 (Wash. Ct. App. December 27, 2018).....	3, 5, 6, 7, 12, 14, 18
<i>State v. Collicott</i> , 118 Wn.2d 659, 827 P.3d 264 (1992) .....	9
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	21, 24
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011) .....	22
<i>State v. Kilgore</i> , 167 Wn.2d 28, 216 P.3d 393 (2009).....	7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 20
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009) .....	21, 22
<i>State v. McNeal</i> , 142 Wn. App. 777, 175 P.3d 1139 .....	9, 17
<i>State v. Phuong</i> , 174 Wn. App. 494, 299 P.3d 37 (2013).....	23
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	11, 13
<i>State v. Rowland</i> , 160 Wn. App. 316, 249 P.3d 635 (2011).....	16, 17, 18
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	21
<i>State v. Toney</i> , 149 Wn. App. 787, 205 P.3d 944 (2009) .....	9, 14, 16, 17
<i>State v. Walters</i> , 162 Wn. App. 74, 255 P.3d 835 (2011).....	9

**Federal and Other Jurisdictions**

*Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531,  
159 L.Ed.2d 403 (2004) ..... 19, 20

*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052,  
80 L. Ed. 2d 674 (1984) ..... 21, 22, 23, 24

**Statutes**

RCW 10.01.160(3)..... 10

RCW 36.18.020(2)(h) ..... 10, 13

RCW 43.43.7451 ..... 13

RCW 43.43.7541 ..... 10

RCW 9.94A.760..... 10, 13

Second Substitute House Bill 1783, 65th Leg.,  
Reg. Sess. (Wash. 2018) ..... 10

**Rules and Regulations**

GR 14.1 ..... 3

RAP 2.5(c)(1)..... 7, 8, 15

**Constitutional Provisions**

Sixth Amendment ..... 21

Other

2 L. Orland & K. Tegland, Wash. Prac., *Rules of Practice* at 481 (4th Ed.  
1991) ..... 8

## I. INTRODUCTION

In 2012, William Manuel Alvarez Calo developed a plan for several other men to steal drugs and money from an apartment in Lakewood, Washington. Upon implementation of the plan, one of the men he elicited shot and killed Jamie Diaz-Solis. Months went by with no lead in the subsequent murder investigation until Calo, attempting to get a misdemeanor charge dropped in exchange for information about the murder, inadvertently implicated himself in the murder.

The jury found Calo guilty of first-degree felony murder and first-degree burglary. Calo appealed and this Court remanded to strike mention of a merged charge and to reevaluate the implementation of legal financial obligations that had been imposed during sentencing in 2016.

Calo argues on appeal that the trial court abused its discretion for failing to once again hear his request that the court merge the two crimes during his remand by this Court for ministerial corrections to remove all mention of a merged robbery in the first-degree charge in the judgment and sentence, and to determine whether Calo is indigent and therefore was not required to pay discretionary legal fees and fines under the recent change in the law. He also claims that he received ineffective assistance of counsel

during his remand hearing due to his prior defense counsel believing that the court was not in a position to hear Calo's merger request.

Under the correct legal standard, the court was correct in its determination not to hear Calo's requests because the issue of resentencing was beyond the scope of this Court's mandate as the remand was merely ministerial in nature. The remainder of Calo's sentence was affirmed and remains intact. The subsequent claim of ineffective assistance of counsel based on the belief that this issue was not before the court should therefore be denied. Because there are no remaining appealable questions, Calo's appeal should be denied.

## **II. RESTATEMENT OF THE ISSUES**

- A. Did the trial court err in denying to hear Calo's renewed request to merge his burglary in the first-degree charge with his murder in the first-degree charge on remand for ministerial corrections where there was no exercise of independent judgment?
- B. Did Calo receive ineffective assistance of counsel where the prior defense counsel correctly believed that the burglary in the first-degree charge and the murder in the first-degree charge could not be merged on appeal, and where Calo has not proved that the actions of prior defense counsel prejudiced him?

## **III. STATEMENT OF THE CASE**

### **A. Substantive Facts**

On November 12, 2012, six men: Robin Smith, Juffary Mendez, Michael Rowland, Fidel Gaytan Gutierrez, Mazzar Robinson, and Ray

Turner arrived at Juan Hidalgo-Mendoza's apartment in Lakewood, Washington where they intended to steal drugs and money. *State v. Calo*, No. 49794-8-II, 2018 WL 6819566, at \*1 (Wash. Ct. App. December 27, 2018) (unpublished).<sup>1</sup> Upon entering the apartment, one of the men shot and killed Jaime Diaz-Solis, and all of the men immediately fled. *Id.*

Hidalgo-Mendoza was in another room when the shooting occurred. *Id.* Upon the shooting, he fled the apartment through the bedroom window and had a neighbor contact the police. *Id.* He returned to the apartment and discovered Diaz-Solis had been shot. *Id.* Hidalgo-Mendoza moved Diaz-Solis outside and then removed a gun, drugs, and \$38,000 from the apartment and put them under a neighbor's deck and in his truck. *Id.* When the paramedics arrived on scene, they attempted to revive Diaz-Solis, but were unable to do so. *Id.* Diaz-Solis died from the gunshot wound. *Id.*

In February 2013, William Manuel Alvarez Calo "was charged in Lakewood with a misdemeanor driving offense and in Pierce County with second degree identity theft and third degree driving with a suspended license." *Id.* Against the advice of his attorneys, Calo sought out the Lakewood Police detectives involved with the unsolved murder

---

<sup>1</sup> GR 14.1 allows citation to unpublished opinion of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above is Calo's first appeal in this matter and has no precedential value, is not binding on any court, and is cited only for references of the history of this case for purposes of this appeal.

investigation of Diaz-Solis in an attempt to provide the police information regarding the murder in exchange for Calo's Lakewood misdemeanor driving charges being dropped. *Id.* at \*2-3.

Calo spoke with the detectives on numerous occasions between February 2013 and June 2013. *Id.* Throughout this time, Calo became a paid informant for the Lakewood Police detectives. *Id.* at \*3. During these conversations, Calo implicated himself in the murder of Diaz-Solis. *See id.* Consequently, Calo's misdemeanor driving charges in Lakewood were dismissed on March 5, 2013. On March 13, 2013, he pled guilty to an amended charge on one count of second degree driving while license suspended. *Id.* at \*3. However, after March 26, 2013, the police, having previously had probable cause to believe Calo was "a co-conspirator or was rendering criminal assistance[,]” interviewed Calo who made incriminating statements that he “had a part in arranging the hit to happen.” *Id.* On June 21, 2013, after establishing probable cause to arrest Calo for the murder and conspiracy, Calo was arrested. *Id.*

#### **B. Procedural Facts**

Calo was charged with first-degree felony murder (count I), conspiracy to commit first-degree murder (count II), first-degree burglary (count III), attempted first-degree robbery (count IV), and tampering with a witness (count V). *Id.* The State proposed that the predicate offense for the

felony murder charge was either the attempted first-degree robbery of the first-degree burglary. *Id.* The trial court later dismissed the conspiracy to commit first-degree murder charge. *Id.*

The jury found Calo guilty of all charges except tampering with a witness, on which he was acquitted. *Id.* at \*6. The jury also found by special verdict that Calo committed or attempted to commit both first-degree robbery and first-degree burglary as a principal or an accomplice. *Id.*

### **1. Sentencing**

During Calo's first sentencing hearing, the trial court found that the attempted first-degree robbery "merge[d]" with the first-degree felony murder conviction. *Id.*; see 12/16/2016 RP 11. In the judgment and sentence, the trial court crossed out the attempted first-degree robbery entry in the "current offenses" section of the judgment and sentence and handwrote the word "merges" next to the crossed-out entry. *Calo*, No. 49794-8-II at \*6; see CP 33-34.

Calo and his defense attorney also asked the court to merge the first-degree burglary and first-degree felony murder charges, citing to defendant Rowland's case. See 12/16/2016 RP 3. The State addressed the burglary merger request and distinguished Calo's case from Rowland's case, where the court had declined to apply the discretionary burglary anti-merger statute due to Rowland's lack of participation in the crime. See 12/16/2016

RP 2-3. The State pointed out that Calo was one of the main players in the crime and accordingly asked the Court to apply the anti-merger statute. 12/16/2016 RP 3.

The trial court declined to merge the burglary and the felony murder charges; it did determine that the charges constituted the same criminal conduct. 12/16/2016 RP 11-12. The court sentenced Calo to 250 months on the murder, and to 120 months on each of the firearm sentencing enhancements (to run concurrently to each other) for a total of 370 months. 12/16/2016 RP 11; CP 38. The court additionally made a finding that Calo is indigent, pointing out that he has been and will continue to be incarcerated for many years and is not going to have an opportunity to make money, and waived the non-mandatory legal financial obligations. 12/16/2016 RP 12; CP 36.

## **2. First Appeal**

On direct appeal, the Court remanded to strike all references to the vacated attempted first-degree robbery conviction. *Calo*, No. 49794-8-II at \*1, 31. The Court additionally accepted the State's concession as to the wrongful imposition of legal financial obligations and directed the trial court to reexamine the filing fee, the DNA fee, and the interest provisions in light of the 2018 legal financial obligation amendments. *Id.* at \*1, 31.

## **3. Remand**

On remand, the trial court struck all references to the vacated attempted first-degree robbery conviction as instructed by this Court. *Id.* at 1, 31.; 6/21/2019 RP 1-3; *See* CP 46-51, 6-61. The trial court also found Calo indigent on the record, acknowledging that Calo has been incarcerated “for a while[,]” and struck all discretionary fees and fines, as instructed by this Court. 6/21/2019 RP 3; *see* CP 46-51, 60-61.

During this remand hearing, Calo asked the court to merge the first-degree burglary conviction with the first-degree felony murder conviction. 6/21/2019 RP 4. The court advised Calo that it was unable to do so, as that issue was not in front of the court on remand. 6/21/2019 RP 4, 6.

Calo appealed, claiming that the trial court abused its discretion by failing to consider the merger. Br. of App. at 1; *see* CP 131-32. Calo additionally claims that his prior defense counsel provided ineffective assistance by failing to argue in support of Calo’s request for resentencing. Br. of App. at 1.

#### IV. ARGUMENT

##### A. **The trial court properly declined to consider Calo’s request to merge first-degree burglary with first-degree felony murder**

The Washington Supreme Court has interpreted RAP 2.5(c)(1) to allow trial courts and appellate courts the discretion to revisit an issue on remand that was not the subject of the earlier appeal. *State v. Kilgore*, 167 Wn.2d 28, 38, 216 P.3d 393 (2009). As this rule is permissive, it is not

required that a court revisit an issue which was not the subject of appeal, only that it *may* review such an issue. *State v. Barberio*, 121 Wn.2d, 48, 51, 846 P.2d 519 (1993) (emphasis in original) (citing RAP 2.5(c)(1)).

RAP 2.5(c)(1) does not revive every issue or decision that was not raised in an earlier appeal; rather, it only permits review if the trial court exercises its independent judgment and rules anew on the issue. *Id.* at 50. “Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.” *Id.* “The trial court may exercise independent judgment as to decisions to which error was not assigned in the prior review, and *these* decisions are subject to later review by the appellate court...” *Id.* (quoting 2 L. Orlank & K. Tegland, Wash. Prac., *Rules of Practice* at 481 (4th Ed. 1991) (emphasis added)).

“[A] case has no remaining appealable issues where an appellate court issues a mandate reversing one or more counts and affirming the remaining count, and where the trial court exercises no discretion on remand as to the remaining final counts.” *Kilgore*, 167 Wn.2d at 37 (citing *Barberio*, 121 Wn.2d at 51). “[W]hen, on remand, a trial court has the choice to review and resentence a defendant under a new judgment and sentence or to simply correct and amend the original judgment and sentence, that choice itself is

not an exercise of independent judgment by the trial court.” *Kilgore* at 167 Wn.2d at 40.

A trial court’s discretion to resentence on remand is constrained by the scope of the court’s mandate. *Kilgore*, 167 Wn.2d at 43 (citing *State v. Collicott*, 118 Wn.2d 659, 660, 827 P.3d 264 (1992)). “Discretion is abused when it is exercised on untenable grounds or for untenable reasons.” *State v. Walters*, 162 Wn. App. 74, 82, 255 P.3d 835, 839 (2011) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

“[U]nder *Kilgore* and *McNeal*,<sup>2</sup> [a] defendant may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but *not* when the appellate court remands for the trial court to enter only a *ministerial* correction of the original sentence.” *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009) (emphasis added). A ministerial correction is one where a court corrects a technical error and uses no discretion in doing so. After the correction, the case is final and not subject to further challenge. *Kilgore*, 167 Wn.2d at 41.

---

<sup>2</sup> *State v. McNeal*, 142 Wn. App. 777, at 787 n. 13, 175 P.3d 1139 (where Calo’s current attorney represented the appellant) determined that the defendant’s case was not final because the “resentencing on remand was an entirely new sentencing proceeding” and acknowledged that had the court merely remanded for amendment of the judgment, the analysis would be different.

In order to impose discretionary legal financial obligations (LFOs) under RCW 10.01.160(3), “the sentencing judge *must* consider the defendant’s individual financial circumstances and make an individualized inquiry into the defendant’s current and future ability to pay” and the record must reflect such an inquiry. *State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015) (emphasis added).

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018), which went into effect March 27, 2018, amended the LFO system in Washington State. The bill is now codified as RCW 9.94A.760 and *prohibits* courts from imposing costs on indigent defendants and is correspondingly applicable to cases that are on appeal and therefore not yet final. RCW 9.94A.760; *see also* RCW 36.18.020(2)(h) (\$200 filing fee and \$200 criminal shall not be imposed on indigent defendants). House Bill 1783 also eliminates any interest accrual on nonrestitution legal financial obligations.

The 2018 amendment to RCW 43.43.7541 which took effect June 7, 2018, requires imposition of the DNA-collection fee “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” See RCW 36.18.020(2)(h). The amendment applies to defendants whose appeals were pending – i.e., their cases were not yet final – when the

amendment was enacted. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

**1. This Court remanded the matter to the trial court for ministerial corrections that were not subject to discretionary findings by the trial court**

Because this Court only remanded for ministerial corrections, there is no reviewable issue on appeal. *See Kilgore*, 167 Wn.2d at 41 (where a lower court merely corrects a technical error and uses no discretion in doing so, the case is final and not subject to further challenge). Calo's claim that the trial court abused its discretion by not addressing the merger issue fails for two reasons. First, Calo mischaracterizes the trial court's mandated inquiry as to Calo's indigency for imposition of LFO's as an independent judgment on remand. Second, regardless of this mischaracterization, Calo incorrectly conflates this alleged independent judgment as to LFOs to mean that the trial court was free to hear other issues that had not been addressed on his first appeal (RAP to resentencing on remand). Br. of App. at 11. Both of these arguments are fundamentally flawed and without merit, leaving no appealable questions for this Court to address, thus, this Court must dismiss Calo's appeal.

a. The trial court's determination that Calo is indigent was not an independent judgment on remand

The indigency inquiry was not an independent judgment on remand, rather, it was a ministerial correction of the original sentence required by

*Blazina*. During Calo’s first appeal, this Court affirmed all of Calo’s convictions, but remanded Calo’s case for ministerial corrections to “amend the judgement and sentence to reflect only the first-degree murder and first-degree burglary convictions and special verdicts related only to those convictions.” *Calo*, No. 49794-8-II at \*11. Additionally, this Court remanded for further ministerial corrections regarding LFOs, requiring the trial court to determine whether the criminal filing fee and the DNA collection fee can be imposed, and additionally to strike all interest on nonrestitution LFOs after June 7, 2018. *Id.* at \*1, 31.

The indigency inquiry was a ministerial correction of the original sentence required by both *Blazina*, and by way of remand. *See Kilgore*, 167 Wn.2d at 40 (correcting and amending an original judgment and sentence is not an exercise of independent judgment by the trial court on remand); *see also Blazina*, 182 Wn.2d at 837-38 (in order to impose discretionary legal financial obligations, the court must engage in an indigency inquiry to determine Calo’s current and future ability to pay); *Calo*, No. 49794-8-II at \*1, 31.

The inquiry into indigency and subsequent finding of indigency was not an independent judgment on remand nor was it an exercise of the court’s own discretion. The court worked within the scope of its mandate through the remand, the change in the law regarding LFOs, and *Blazina*, then

correctly recognized on the record that Calo is indeed indigent. *See id*; 6/21/2019 RP 3; CP 60-61. The court substantiated this indigency determination by acknowledging on the record that Calo has been incarcerated “for a while.” 6/21/2019 RP 3; *see Blazina*, 182 Wn.2d at 837-38 (within the indigency inquiry, the court must on the record consider important factors such as incarceration).

After making the relevant indigency determination, the court took the required measures and struck the \$200 court cost, the DNA fee, and the interest on his other LFOs. 6/21/2019 RP 3. Striking these fees was not discretionary for an indigent defendant. *See* RCW 43.43.7451; *see Ramirez*, 191 Wn.2d 732 at 426 (where a defendant has had their DNA collected in cases prior to the case on appeal, the DNA collection fee must be struck because the current case is not yet final). Indeed, the striking of these discretionary fees was required by law, as Calo is indigent, and the law prohibits the imposition of discretionary LFOs on such indigent defendants. RCW 9.94A.760; *see also* RCW 36.18.020(2)(h). Thus, these were not discretionary determinations, instead, they were ministerial in nature and merely corrected Calo’s sentence to reflect the recent change in the law. *See Kilgore*, 167 Wn.2d at 41 (a ministerial correction is one where a court corrects a technical error and uses no discretion in doing so).

b. The merger issue was not before the court on remand

Regardless of whether or not the inquiry into LFOs was an independent judgment on remand or a ministerial correction, the classification does not give Calo a right to raise new issues outside of the mandate.

On Calo's first appeal, this Court did not vacate the original sentence or remand for an entirely new resentencing proceeding or any resentencing at all. *See Toney*, 149 Wn. App. at 792 (a defendant can raise sentencing issues on a second appeal, if on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding). This Court did not leave room for resentencing of any of the convictions. This Court affirmed all of Calo's convictions. *Calo*, No. 49794-8-II at \*1, 31.

Calo's sentence was final at the time of remand when the trial court issued no discretion on remand related to the affirmed convictions. *See Kilgore*, 162 Wn.2d at 37 ("a case has no remaining appealable issues where an appellate court issues a mandate reversing one or more counts and affirming the remaining count, and where the trial court exercises no discretion on remand *as to the remaining final count.*") Subsequently, this appeal is meritless.

Therefore, even if the indigency finding was an independent judgment on remand, that would not open the court to hear new sentencing

issues as Calo contends. *See Kilgore*, 167 Wn.2d at 43 (a trial court's discretion to resentence on remand is constrained by the scope of the court's mandate). To be appealable, issues must be pursuant to an act of independent judgment on remand on which the trial court exercised its independent judgment, reviewed and ruled again on. *See Barberio*, 121 Wn.2d at 50 (a trial court may exercise independent judgments as to decisions where error was not assigned in the prior review, and these decisions are subject to later review by the appellate court). The court was not in a position to hear these issues and even if it was, because RAP 2.5(c)(1) does not revive every issue but rather only permits trial courts to exercise independent judgment on the issue not raised in an earlier appeal, the court did not need to address the issue. *See id.* Calo has a fundamental misunderstanding of the law and alleges that independent judgment as to the indigency inquiry opens the trial court to hear Calo's new resentencing issue. Br. of App. at 11.

For the issue of the proposed merger to be brought under an independent judgment on remand, the independent judgment by the trial court needed to be related to the merger issue. *See Barberio*, 121 Wn.2d at 50. This did not occur on remand. The court instead declined to hear the issue because that issue was not before the court. 6/21/2019 RP 4-6. That declination was not an independent judgment. *See Kilgore* at 167 Wn.2d at

40 (clarifying that “when on remand, a trial court has the choice to review and resentence a defendant under a new judgment and sentence or to simply correct and amend the original judgment and sentence, that choice itself is not an exercise of independent judgment by the trial court.”) The issue was simply beyond the court’s scope to hear because it was not before the court based on the mandate. *See Kilgore*, 167 Wn.2d at 39-41. (A trial court’s discretion to resentence on remand is constrained by the scope of the court’s mandate).

In *State v. Rowland*, the Court determined that on remand for resentencing to correct his offender score and the standard range, the defendant was entitled to raise new challenges to his offender score. 160 Wn. App. 316, 331-32, 249 P.3d 635 (2011). The Court made this determination after concluding that the resentencing court necessarily exercised its independent discretion by reconsidering the standard range. *Id.* at 328, 331. The Court cited to *Toney* for this determination (“defendant was entitled to raise new sentencing issues on a second appeal ‘if on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding...’”) 149 Wn. App. at 792. The Court clarified that the record demonstrated a clear basis for concluding that if the defendant’s offender score had been correctly calculated and the standard range correctly determined, the resentencing court would have

imposed the same exceptional sentence. The Court affirmed the exceptional sentence and remanded only to correct the offender score and standard range. *Id.* at 331-32.

In *Toney*, the court determined that in light of *Kilgore* and *McNeal*, “the defendant may raise sentencing issues on a second appeal if the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but not when the appellate court remands to enter only a ministerial correction of the original sentence.” *Toney*, 149 Wn. App. at 792. The Court then used this determination to find that the defendant’s sentence was not final “because our remand did not limit the trial court to making a ministerial correction. Rather, we unequivocally ‘remand[ed] for resentencing.’” *Id.* With such a finding, the Court determined that the defendant could appeal his resentencing. *Id.* At 793.

Unlike in *Rowland* or *Toney*, Calo’s first remand did not allow room for independent judgment or discretion. In those cases, the first appeal and remand were categorically for resentencing and were not merely ministerial in nature. *Id.* at 792; *Rowland*, 160 Wn. App. at 331-32. Furthermore, in *Rowland*, the trial court had exercised independent judgment raising an appealable issue which was directly relevant to resentencing because, by considering the standard range, the defendant had a right to appeal the offender score issues as those issues would directly impact the standard

range determination. *Id.* Here, the trial court's alleged independent judgment was not related to resentencing and thus did not give rise to an appealable issue on the merger question. *Calo*, No. 49794-8-II at \*31.; CP 60. Furthermore, there was no exercise of independent judgment on remand.

Instead, *Calo's* case resembles the benchmark cases *Barberio* and *Kilgore*. In *Barberio*, the defendant was convicted of second degree rape and third degree rape, and the court imposed an exceptional sentence. 121 Wn.2d at 49. The Court reversed the third degree rape conviction, affirmed the second degree rape conviction, and left the unchallenged exceptional sentence intact. *Id.* On remand, the resentencing court imposed the same exceptional sentence despite the defendant's argument that his lower sentencing range required the court to reduce his exceptional sentence. *Id.* at 49-50. Because the court did not exercise its independent judgment on remand, the Court determined there were no remaining appealable issues. *Id.* at 51.

In *Kilgore*, the Supreme Court concluded that the trial court did not abuse its discretion by declining to resentence the defendant. 167 Wn.2d at 28. There, the defendant was originally convicted of three counts of rape of a child and four counts of child molestation in 1998. *Id.* at 32. The trial court found five aggravating factors and imposed 560 months' exceptional, concurrent sentences on each of the seven counts. This Court reversed two

counts, but affirmed five, and remanded for further proceedings; the Supreme Court affirmed. The mandate became final for purposes of retroactivity analysis on January 5, 2003, before the Supreme Court's decision in *Blakely*.<sup>3</sup>

On remand in October 2005, the defendant argued that the trial court had to resentence him under *Blakely*, but the trial court declined and signed an order striking the two counts, correcting the judgment and sentence, and correcting his offender score, but made clear it was only correcting the judgment and sentence to reflect the reversed count and not reconsidering the exceptional sentence on the remaining intact counts. *Id.* at 41. The court also ruled that the defendant was not entitled to a new sentencing hearing. *Id.* at 34. The Washington Supreme Court concluded that the trial court did not abuse its discretion in declining to resentence the defendant because despite the number of his convictions being reduced, his presumptive sentencing range remained the same and the trial court exercised no independent judgment. *Id.* at 40, 42-43. The court clarified that the decision to correct a judgment and sentence is not an appealable act of independent judgment because it is the original judgment and sentence entered by the

---

<sup>3</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004) requires a jury to decide factual issues in order to increase a sentence beyond the statutory maximum. This applies retroactively only to cases pending on direct review or are not yet final.

original trial court that controls the defendant's conviction and term of incarceration. *Id.* At 40-41.

Like *Barberio* and *Kilgore*, here, the trial court did not exercise independent judgment. The trial court worked within the scope of its mandate and partook in the ministerial corrections of Calo's case involving the striking of the mention of the merged robbery conviction, and the indigency inquiry leading to the striking of all discretionary LFOs. *See Id.* at 39-41 (a trial court's discretion to resentence on remand is constrained by the scope of the court's mandate). Because these were merely ministerial corrections, the trial court did not have the discretion to resentence Calo. *See id.* By correctly working within the scope of the courts mandate and keeping intact the original sentence through affirming the convictions on appeal, Calo's case is final and his appeal should therefore be dismissed. *See id.* at 40 (where a trial court exercises no independent judgment on remand, there is no issue to review on appeal because the original judgment and sentence remains final and intact) (the decision to correct a judgment and sentence is not an appealable act of independent judgment by the trial court because the original judgment and sentence remains intact).

Because Calo's claims are not subject to appeal and the sentence is final, the State asks this Court to dismiss Calo's appeal.

**B. Calo received effective assistance of counsel**

A claim of ineffective assistance of counsel is a mixed question of fact and law that is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show: (1) that counsel’s representation was deficient and fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced the defendant. *Id.* (applying two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

To establish deficient performance so egregious as to necessitate reversal of a conviction, the defendant must show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. In order to establish that the deficient performance prejudiced the defendant, the defendant must show that counsel’s errors were so serious that it could not have produced a just result. *Id.* at 686-87.

Courts assume counsel is effective, and the defendant must show there was no legitimate strategic or tactical reason for counsel’s actions. *Sutherby*, 165 Wn.2d at 883. Counsel’s performance is not deficient if it can be characterized as a legitimate trial strategy or tactic. *State v. Kylo*, 166

Wn.2d 856, 863, 215 P.3d 177 (2009). “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. There is a “strong presumption that counsel’s performance was reasonable.” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Kyllo*, 166 Wn.2d at 862). Judicial scrutiny of a defense attorney’s performance must be “highly deferential” and a “fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Strickland*, 466 U.S. at 689.

**1. Calo has not established either of the *Strickland* prongs**

Calo has not satisfied either prong of the *Strickland* test. He did not prove that counsel’s representation was deficient or fell below an objective standard of reasonableness; he also did not prove that the deficient performance prejudiced him. *See Strickland*, 466 U.S. at 687. Calo cites to no persuasive authority as to the second *Strickland* prong, instead, Calo merely cites to *Kilgore* and alleges that the discretionary ruling regarding the LFO would permit the court to readdress the merger issue. *See Br. of App.* at 12.

**2. Calo has not proved that prior defense counsel’s representation was not reasonable**

In *State v. Phuong*, the Court determined that where the defense attorney failed to argue at sentencing that the defendant's convictions for attempted rape and unlawful imprisonment constituted the same criminal conduct for purposes of calculating his offense score, that this prejudiced the defendant. 174 Wn. App. 494, 548, 299 P.3d 37 (2013). The Court determined that this failure constituted ineffective assistance of counsel because there was a reasonable probability that, had defense counsel argued the same criminal conduct, that the trial court would have found that the crimes did encompass the same criminal conduct. *Id.*

In contrast to *Phuong*, even if Calo's prior defense counsel had raised the issue of merger, which he did when explaining to the court Calo's request, the record reflects that the trial court was unwilling to hear the issue. 6/21/2019 RP 4-6. Furthermore, the initial sentencing proceeding indicates that the trial court had heard the issue previously and was unpersuaded by it then. 6/21/2019 RP 4-6. The prior defense counsel likely did not press the issue of merger because he was aware of the court's inability to hear that issue of merger in light of the relevant case law. This determination embodies reasonableness and professionalism by advocating in accordance with the law. *See Strickland*, 466 U.S. at 687.

**3. Calo has not established that he was prejudiced by prior defense counsel's representation**

Because the trial court was unable and unwilling to hear the merger issue and had previously ruled in the initial sentencing hearing that the burglary was part of the same criminal conduct as the merged robbery and murder charges, Calo has not satisfied the second “prejudice” prong of the *Strickland* test, and therefore, has not prevailed on his ineffective assistance of counsel claim. *See* 6/21/2019 RP 9-6; 12/16/16 RP 11-12; *see Strickland*, 466 U.S. at 687; *Emery*, 174 Wn.2d at 755 (The failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim). Consequently, this Court must affirm Calo’s convictions.

#### V. CONCLUSION

Because Calo has not raised any appealable issue as to merger and has not showed that he received ineffective assistance of counsel, his appeal should be denied.

RESPECTFULLY SUBMITTED this 5th day of June, 2020.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney

---

s/ THEODORE M. CROPLEY  
State Bar Number 27453  
Pierce County Prosecuting Attorney’s Office  
930 Tacoma Ave. S., Room 946  
Tacoma, WA 98402-2171  
Telephone: (253) 798-6708  
E-mail: [theodore.cropley@piercecountywa.gov](mailto:theodore.cropley@piercecountywa.gov)

Malena Boome  
s/ Malena Boome  
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her 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.

06/05/20      s/Aeriele Johnson  
Date              Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**June 05, 2020 - 1:14 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53801-6  
**Appellate Court Case Title:** State of Washington, Respondent v. William M. Alvarez-Calo, Appellant  
**Superior Court Case Number:** 13-1-02553-3

**The following documents have been uploaded:**

- 538016\_Briefs\_20200605131250D2184258\_7643.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Alvarez Calo Response Brief Final Draft.pdf*

**A copy of the uploaded files will be sent to:**

- Kelder@tillerlaw.com
- ptiller@tillerlaw.com

**Comments:**

---

Sender Name: Aeriele Johnson - Email: aeriele.johnson@piercecountywa.gov

**Filing on Behalf of:** Theodore Michael Cropley - Email: Theodore.Cropley@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:  
930 Tacoma Ave S, Rm 946  
Tacoma, WA, 98402  
Phone: (253) 798-7400

**Note: The Filing Id is 20200605131250D2184258**