

NO. 34728-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW DEVORE,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

Benton County Cause No. 14-1-01303-9

The Honorable Cameron Mitchell, Judge

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BRIEF OF APPELLANT - CORRECTED

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The court erred by entering an exceptional sentence in Mr. DeVore's case.
2. The sentencing court erred by entering the Conclusion of Law that substantial and compelling reasons justify an exceptional sentence in Mr. DeVore's case. CP 129.
3. The impact of Mr. DeVore's offense on others was not "sufficiently substantial and compelling to distinguish the crime in question from others in the same category."
4. The impact of Mr. DeVore's offense on others was of the type already considered by the legislature in setting the standard sentencing range for murder.

**ISSUE 1:** An exceptional sentence cannot be based on factors the legislature considered in setting the standard range, but must be based on facts "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." Did the court err by imposing an exceptional sentence in Mr. DeVore's case, based on the impact of the murder on the victim's family, which was similar to the impact on any murder victim's family.

5. The court violated Mr. DeVore's Fourteenth Amendment right to Due Process by imposing an exceptional sentence based on an unconstitutionally vague statute.
6. The court violated Mr. DeVore's Wash. Const. art. I, § 3 right to Due Process by imposing an exceptional sentence based on an unconstitutionally vague statute.
7. The aggravating factor at RCW 9.94A.535(3)(r) is unconstitutionally vague as applied to Mr. DeVore's case.
8. The aggravating factor at RCW 9.94A.535(3)(r) is not specific enough to prevent arbitrary enforcement.
9. The aggravating factor at RCW 9.94A.535(3)(r) is not specific enough to give citizens fair warning of proscribed conduct.

**ISSUE 2:** 4. The vagueness doctrine of the due process clause ensures that penal statutes provide citizens with fair notice of

what conduct is illegal and that laws provide ascertainable standards of guilt so as to prevent arbitrary and subjective enforcement. Does the aggravating factor permitting an exceptional sentence based on a “destructive and foreseeable impact on persons other than the victim” violate due process when the legislature has not defined the terms destructive, foreseeable, or impact?

10. Mr. DeVore’s sentence of 330 months is clearly excessive.

**ISSUE 3:** An exceptional sentence must be overturned on appeal if it is clearly excessive in length. Is Mr. DeVore’s exceptional sentence based on his offense’s impact on the victim’s family clearly excessive when it is longer than the sentence he would have received if he had actually stabbed an additional person?

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

**ISSUE 4:** 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 Mr. Devore is indigent?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Matthew DeVore pled guilty at arraignment to second degree murder of his wife's new boyfriend, Thomas Christian, Sr. CP 111-22. He also pled guilty to the aggravating factor that his acts had "caused a destructive and foreseeable impact on others, including [his] wife, [Brenda Losey]." CP 111-22.

In a previous appeal, this Court held that Mr. DeVore had a right to plead guilty to the original charges and that the state could not amend the Information after his guilty plea.<sup>1</sup> CP 81-98.

At Mr. Devore's resentencing hearing, many of Christian's family members spoke about the impact of his death. RP 16-31. They said that Christian had been a positive force in their lives and that the family was not the same without him. RP 16-31.

Losey also spoke, detailing that she had been present when Mr. DeVore stabbed Christian. RP 32-34. She said that the memory haunted her and that her children had been harmed by losing their father and by losing Christian who had played a fatherly role in their lives. RP 32-34.

The court entered an exceptional sentence of 330 months. CP 104. The sentence was calculated by taking the high end of the standard range

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<sup>1</sup> The issues in the previous appeal are not relevant to this appeal of his resentencing.

(220 months) and adding 50% more time based on the effect of the murder on others. CP 129.

The court's findings of fact for the exceptional sentence indicate that it is based on the crime's impact on Losey, her family, and on Mr. Christian's other family members. CP 128-29.

This timely appeal follows. CP 123-24.

### **ARGUMENT**

**I. THE AGGRAVATING FACTOR OF A DESTRUCTIVE AND FORESEEABLE IMPACT ON OTHERS CANNOT PROVIDE THE BASIS FOR AN EXCEPTIONAL SENTENCE IN MR. DEVORE'S CASE BECAUSE THE IMPACT ON OTHERS WAS NOT "SUFFICIENTLY SUBSTANTIAL AND COMPELLING TO DISTINGUISH THE CRIME IN QUESTION FROM OTHERS IN THE SAME CATEGORY" AND THE IMPACT OF A MURDER UPON THE VICTIM'S FAMILY WAS ALREADY CONSIDERED BY THE LEGISLATURE WHEN SETTING THE STANDARD SENTENCING RANGE.**

At Mr. Devore's sentencing hearing, Christian's family spoke at length about the effect of his death on their family. RP 16-31. Losey also discussed the impact on her and on her children. RP 32-24. As a result, the sentencing court imposed an exceptional sentence based on the offense's "destructive and foreseeable impact on persons other than the victim." CP 127-29.

The court's findings of fact in support of the exceptional sentence discuss the effect on the murder on Christian's entire family. CP 127-29. While tragic, however, this impact is of a nature present in all murder

cases. It was accounted for when the legislature set the standard sentencing range. The sentencing court erred by increasing Mr. DeVore's sentence about the standard range based on facts inherent in the offense of murder.

Exceptional sentences are reviewed on appeal to determine, *inter alia*, whether the reasons the sentencing court supplied do not justify a sentence outside the standard range for the offense.<sup>2</sup> *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010); RCW 9.94A.585(4).

The SRA permits exceptional sentences in cases in which the offense “causes more damage than that contemplated by the statute defining the offense.” *State v. Davis*, 182 Wn.2d 222, 229, 340 P.3d 820 (2014).

An exceptional sentence is not justified, as a matter of law if it is based on “factors necessarily considered by the Legislature in establishing the standard sentence range.” *Law*, 154 Wn.2d at 93. The aggravating

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<sup>2</sup> The Court of Appeals reviews *de novo* whether a court was authorized to impose an exceptional sentence. *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005) *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). The meaning and applicability of a statutory aggravating factor is also reviewed *de novo* as a matter of law. *Davis*, 182 Wn.2d at 229. Whether the court's reasons justify a departure from the standard range is also reviewed *de novo* as a matter of law. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Illegal or erroneous sentences may be raised for the first time on appeal. *State v. Tedder*, 194 Wn. App. 753, 758, 378 P.3d 246 (2016).

factor must also “be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” *Id.*

The SRA creates an aggravating factor when an offense involves “a destructive and foreseeable impact on persons other than the victim.” RCW 9.94A.535(3)(r).

An exceptional sentence based on this factor requires an impact “of a destructive nature *that is not normally associated with the commission of the offense in question.* *State v. Webb*, 162 Wn. App. 195, 206, 252 P.3d 424 (2011) (emphasis added).

For example, the “destructive and foreseeable” impact has been upheld in a murder case involving a school shooting. *State v. Chanthabouly*, 164 Wn. App. 104, 143-44, 262 P.3d 144 (2011). In that case, the other children in the school, as well as the teachers and administrators, were affected by the shooting in a manner beyond that contemplated by the legislature in setting the standard range for murder. *Id.*

In Mr. DeVore’s case, on the other hand, the effect of Christian’s death on his family – while tragic – is the kind of impact contemplated by the legislature in setting the standard sentencing range for murder. *Law*, 154 Wn.2d at 93. The effect of Christian’s murder upon his family

members is not “sufficiently substantial and compelling to distinguish the crime in question from other[] [murder offenses].” *Id.*

The trial court erred by imposing an exceptional sentence based on the impact of Christian’s murder upon his family, which was already considered in setting the standard range. *Id.* Mr. DeVore’s case must be remanded for resentencing.<sup>3</sup> *State v. Elza*, 87 Wn. App. 336, 343-44, 941 P.2d 728 (1997) (citing *State v. Cardenas*, 129 Wn.2d 1, 13, 914 P.2d 57 (1996)).

**II. THE AGGRAVATING FACTOR PERMITTING AN EXCEPTIONAL SENTENCE IF AN OFFENSE “INVOLVED A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM” IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO MR. DEVORE’S CASE.**

A. After *Blakely*, the void-for-vagueness doctrine applies to aggravating factors that increase a sentence beyond the standard range based on factual findings.

Before *Blakely*, the Washington Supreme Court held that “the void for vagueness doctrine should have application only to laws that ‘proscribe

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<sup>3</sup> Appellate defense counsel was unable to find any precedent applying the “destructive and foreseeable impact” aggravator to a case in which an adult witnessed the murder of another adult. Even so, if this Court finds that the impact of Christian’s murder upon Losey (who witnessed the murder) does adequately distinguish this crime from other murder offenses, the case must, nonetheless, be remanded for resentencing. *Elza*, 87 Wn. App. at 343-44.

This is because the sentencing court did not draw any distinction in its findings of fact between the impact upon Losey and the impact upon the other members of his family. CP 127-29. Accordingly, it is not apparent that the court would have imposed the same sentence absent its improper reliance on factors considered by the legislature in setting the standard range. *Id.* The case must be remanded for resentencing. *Id.*

or prescribe conduct" and that it was "analytically unsound" to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences." *State v. Baldwin*, 150 Wn.2d 448, 458-59, 78 P.3d 1005 (2003) (quoting *State v. Jacobsen*, 92 Wn. App. 958, 966, 965 P.2d 1140, review denied, 137 Wn.2d 1033 (1999) (internal quotation<sup>[REDACTED]</sup>omitted)).<sup>4</sup>

The court concluded that the vagueness doctrine did not apply to statutory aggravating factors, reasoning, "before a state law can create a liberty interest, it must contain 'substantive predicates'" to the exercise of discretion and "'specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow.'" *Baldwin*, 150 Wn.2d at 460 (quoting *In re Personal Restraint of Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)).

Relying on this premise, the *Baldwin* Court concluded that sentencing guidelines "do not define conduct ... nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature[,]" and so found the void-for-vagueness doctrine does not apply in the context of sentencing guidelines. *Baldwin*, 150 Wn.2d at 459.

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<sup>4</sup> Division II has rejected a vagueness challenge to the "destructive and foreseeable impact" aggravated based wholly on reliance upon *Baldwin*. *Chanthabouly*, 164 Wn. App. at 142. This court should decline to follow Division II's logic in *Chanthabouly* for the reasons set forth below.

In light of *Blakely* and its progeny, however, the opposite is true. If "laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot," *Baldwin*, 150 Wn.2d at 460, then an accused person has a liberty interest in laws authorizing exceptional sentences based on additional factual findings.

Blakely also plainly held that aggravating factors alter the statutory maximum for the offense. *Blakely v. Washington*, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). It is for that reason that the Sixth and Fourteenth Amendments require the State plead the aggravators and prove them beyond a reasonable doubt.

Thus, even under *Baldwin's* flawed understanding of the application of the vagueness doctrine, the doctrine must apply here as the aggravator increases the maximum penalty for the offense.

Indeed, after *Blakely*, this conclusion is inescapable. The Supreme Court has repeatedly made it clear that the right to a jury determination of facts essential to punishment channels sentencing judges' discretion - not the other way around. *Blakely*, 542 U.S. at 304-05. This rule is closely tied to the other foundational premise of *Blakely*: because they increase the maximum punishment to which an accused person would otherwise be exposed, aggravating circumstances are elements. *Blakely*, 542 U.S. at

306-07; *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000).

Whether it is because an aggravated factor is an element of a new offense or merely because it increases the maximum punishment, the vagueness doctrine of the Due Process Clause must apply to statutes establishing aggravated circumstances under the SRA. *See Baldwin*, 150 Wn.2d at 459.

This Court must consider Mr. DeVore's vagueness challenge to the aggravating factor at issue in his case.

B. The "destructive and foreseeable impact" aggravating factor is unconstitutionally vague because it allows for arbitrary enforcement and fails to provide citizens a fair warning of the conduct it punishes.

The vagueness doctrine of the due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "A vague law impermissibly delegates 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 108-09.

A "statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. *Smith v. Goguen*, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966); U.S. Const. Amend. XIV; art. I, § 3.<sup>5</sup>

A criminal statute is unconstitutionally vague if either it does not ensure that "citizens have fair warning of proscribed conduct" or if it permits for arbitrary enforcement. *State v. Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010).

The aggravating factor permitting an exceptional sentence based on a "destructive and foreseeable impact on persons other than the victim" fails both prongs of the vagueness test as applied to Mr. DeVore's case. *Id.*; RCW 9.94A.535(3)(r).

The aggravating factor does not provide any kind of guidance as to what kind of impact is at issue or how destructive the impact must be. While the impact must be "foreseeable," the statute does not state who is supposed to foresee the impact – the defendant, a reasonable person, or a reasonable person in the defendant's shoes. RCW 9.94A.535(3)(r).

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<sup>5</sup> A constitutional vagueness challenge can be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); RAP 2.5(a)(3). Constitutional issues are reviewed *de novo*. *State v. Clark*, 187 Wn.2d 641, 389 P.3d 462, 466 (2017).

The statutory language also does not clarify what type of impact qualifies as “destructive” or which “persons other than the victim” should be considered. RCW 9.94A.535(3)(r).

The statutory language, as applied to Mr. DeVore’s case leaves the fact finder guessing as to several key questions: should a sentence for a murder be higher because the victim was particularly loved by his/her family? Is this true even though all families would be affected by the murder of a loved one?

The statute permitting an exceptional sentence based on a “destructive and foreseeable impact” upon persons other than the victim of a crime is unconstitutionally vague in violation of Due Process. *Valencia*, 169 Wn.2d at 791. Mr. DeVore’s exceptional sentence must be vacated and his case remanded for resentencing within the standard range. *Id.*

### **III. MR. DEVORE’S EXCEPTIONAL SENTENCE IS CLEARLY EXCESSIVE.**

The trial court sentenced Mr. DeVore to 330 months in prison. CP 129. This length of time was calculated by taking the high end of the standard range, which was 220 months, and adding an additional 50% based on the offense’s impact on persons other than the victim. CP 127-29.

The sentencing court’s findings focused on the impact of the murder upon Christian’s loved ones, including upon Losey. CP 127-29.

But the additional 110 months was more time than Mr. DeVore would have received if he had actually stabbed Losey. The exceptional sentence in Mr. DeVore's case is clearly excessive.

An exceptional sentence must be reversed on appeal if it is clearly excessive. RCW 9.94A.585(4); *Stubbs*, 170 Wn.2d at 123.

A sentence is clearly excessive if it is clearly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lindahl*, 114 Wn. App. 1, 19, 56 P.3d 589 (2002).

Here, Mr. DeVore's sentence is higher than it would have been if he had actually stabbed Losey, rather than just stabbed Christian in front of her. If Mr. DeVore had been convicted of first-degree assault against Losey, the presumptive mid-range sentence would have been 103 months. WASH. SENTENCING GUIDELINES COMM'N, ADULT SENTENCING MANUAL 214 (2016). Even if his sentences for shooting (but not killing) Losey and for murdering Christian had been run consecutively, Mr. DeVore still would have had a lower sentence than his exceptional sentence in this case.

Indeed, if Mr. DeVore had committed second-degree assault against Losey at the same time that he stabbed Christian, his sentence for that offense would only have been six to nine months. WASH.

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MANUAL 216 (2016).

The court abused its discretion by adding 110 months to Mr. DeVore's sentence -- based on the offense's impact on others -- which was significant more time than he would have received if he had actually stabbed an additional person. RCW 9.94A.585(4); *Lindahl*, 114 Wn. App. at 19. Mr. DeVore's case must be remanded for resentencing. *Id.*

**IV. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS UPON MR. DEVORE BECAUSE HE HAS NO PRESENT OR FUTURE ABILITY TO PAY, AS FOUND BY THE TRIAL COURT.**

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016).<sup>6</sup>

Appellate costs are "indisputably" discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in

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<sup>6</sup> Though the recent amendments to RAP 14.2 arguably negate the requirement for an indigent appellant to raise this issue in his/her Opening Brief, Mr. DeVore raises it, nonetheless, out of an abundance of caution. See RAP 14.2 (as amended by 2017 WASHINGTON COURT ORDER 0001).

*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 explicitly found that Mr. DeVore did not have the present or future ability to pay legal financial obligations (LFOs). RP (9/9/16) 58. Accordingly, the trial court waived all non-mandatory LFOs in his case. CP 102.

The trial court also found Mr. Devore indigent at the end of the proceedings in superior court. CP 125-16.

That status is unlikely to change, especially with the imposition of a lengthy prison term. 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.

Additionally, the newly amended RAP 14.2 specifies that the trial court’s finding of indigency stands unless the state presents evidence that the accused’s financial circumstances have changed:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

RAP 14.2 (*as amended by 2017 WASHINGTON COURT ORDER 0001*).

Mr. DeVore is currently serving a prison sentence of 330 months. CP 104. The state is unable to provide any evidence that his financial situation has improved since he was found indigent by the trial court.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested. RAP 14.2; *Blazina*, 182 Wn.2d 827.

### **CONCLUSION**

The trial court erred by imposing an exceptional sentence based on the impact of the offense on others because that impact is already accounted for in the standard sentencing range for murder. The aggravating factor based on a foreseeable destructive impact on others is unconstitutionally vague. Mr. DeVore's exceptional sentence of 330 months is clearly excessive. Mr. DeVore's case must be remanded for resentencing within the standard range.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. DeVore who is indigent and whom the trial court found unable to pay legal financial obligations.

Respectfully submitted on April 21, 2017,



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## CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

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I filed the Appellant's Corrected Opening Brief electronically with the Court of Appeals, Division III, 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 Seattle, Washington on April 21, 2017.



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**ELLNER LAW OFFICE**  
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