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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35472-5-III

STATE OF WASHINGTON, Respondent,

v.

BRENTEN MICHAEL MULROY, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. Because the U.S. Supreme Court has held that *Apprendi* applies to criminal fines, and because the domestic violence assessment may only be imposed upon a finding that a crime of domestic violence has been committed, the *Apprendi* jurisprudence applies to RCW 10.99.080.

The State contends that the domestic violence penalty does not implicate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) because it does not exceed the statutory maximum fine that could be imposed for the offenses and because *Blakely* does not apply to fines. *Respondent's Brief*, at 10-11. It relies upon *State v. Winston*, 135 Wn. App. 400, 144 P.3d 363 (2006) for support. But because *Winston* improperly conflated the domestic violence penalty with the criminal fines despite clear statutory distinctions, and because *Winston's* premise that *Blakely* does not apply to fines has been contradicted by the U.S. Supreme Court, *Winston* is wrongly decided and should not control.

With respect to the *Winston* court's conclusion that the \$100 domestic violence penalty did not exceed the statutory maximum fines of \$10,000 for a class C felony or \$50,000 for a class A felony, this

reasoning is flawed in several respects. First, under former RCW 10.99.080, the domestic violence penalty of \$100 may be imposed **in addition to** any other fines or penalties provided by law.¹ Thus, the statute *does* potentially permit imposition of a fine in excess of the statutory maximum for the crime, because the penalty is separate from and not counted toward the fine under the express statutory language. Second, the *Winston* court's reasoning overlooks the directive of *Blakely* that the statutory maximum is the maximum penalty that can be imposed without any additional findings. *Blakely*, 542 U.S. at 304. Under the language of the statute, the penalty is an additional assessment that can be imposed if, in addition to the base crime, a finding is made that the crime involves domestic violence. RCW 10.99.080(1). For these reasons, the *Winston* court misinterpreted and misapplied *Blakely* and should not be followed.

Additionally, however, the *Winston* court suggested that *Blakely* may not apply to monetary fines, but only to jail sentences. 135 Wn. App. at 410. The U.S. Supreme Court has directly contradicted this suggestion, holding expressly that the *Apprendi* jurisprudence requiring jury determinations of facts used to increase sentences applies to criminal

¹ Although RCW 10.99.080 was amended in 2015, the provisions providing that the penalty "shall be in addition to, and shall not supersede, any other penalty, restitution, fines, or costs provided by law" has remained unchanged.

finer. *Southern Union Co. v. U.S.*, 537 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012). Thus, contrary to *Winston*, *Apprendi* and *Blakely* apply to facts that permit the imposition of specific penalties such as the domestic violence assessment.

Lastly, the State attempts to rely upon facts outside of the charging document to supply the missing elements. *Respondent's Brief*, at 12-13. The cases it relies upon do not address the situation present here, where the essential elements have been omitted from the charging document. There is no dispute that, *had Mulroy been properly charged*, he could have stipulated to the facts supporting the domestic violence finding. But he was not charged with committing a domestic violence offense, and the elements the State was required to prove were not contained in the information. The only question is whether the necessary elements are found or fairly implied on the face of the charging document. *State v. Sullivan*, 196 Wn. App. 314, 323, 382 P.3d 736 (2016). Regardless of what was contained in the probable cause affidavit, the omission renders the information constitutionally defective, and the remedy is reversal regardless of actual prejudice. *Id.* at 319, 323; *State v. Zillyette*, 173 Wn.2d 784, 786, 270 P.3d 589 (2012). Here, reversal of the domestic violence designation amounts to striking it, and the associated penalty, from the judgment and sentence.

B. The State overlooks that the *Brooks* requirement expressly applies to sentences such as Mulroy's that potentially exceed the statutory maximum and require a judicial notation on the judgment and sentence, even though the Department of Corrections is ultimately responsible for ensuring compliance.

The State contends that no *Brooks* notation is required in this case because Mulroy's sentence only potentially, rather than facially, exceeds the statutory maximum for the offense. *Respondent's Brief*, at 14. The State is incorrect. Indeed, the State notes in its own footnote that the *Brooks* notation is required "when the trial court imposes an aggregate term of confinement and community custody that *potentially* exceeds the statutory maximum." *Respondent's Brief*, at 14, n. 15 (citing *In re Brooks*, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009) (emphasis added)). *Brooks* itself concerned a sentence that might exceed the statutory maximum or might not, depending on whether the defendant earned early release time. 166 Wn.2d at 666-67. Because the judgment and sentence included language clarifying that the combined period of total confinement and community custody could not exceed the statutory maximum, it gave sufficient direction to the Department of Corrections to determine when

the defendant should be released from total confinement or community custody. *Id.* at 673. Thus, by its own terms, *Brooks* applies to those sentences imposed before 2009, when the Sentencing Reform Act was amended to require judicial correction of the term of community custody, in which the combined term of confinement and community custody could (although not necessarily would) exceed the statutory maximum. These are precisely the circumstances present here.

Further, the State's reliance on *State v. Franklin*, 172 Wn.2d 831, 263 P.3d 585 (2011) is inapposite here. Several facts distinguish the outcome in *Franklin* from the present case. First, the sentencing court included a *Brooks* notation in that case. *Id.* at 834. Second, the defendant in *Franklin* sought the remedy of resentencing to require the trial court to adjust the term of community custody in accordance with newly amended RCW 9.94A.701. *Id.* at 835. Here, the judgment and sentence does not include the *Brooks* notation, and Mulroy does not seek remand for a full resentencing hearing, requesting only that the notation be included to ensure that the Department of Corrections' supervision does not extend beyond the statutory maximum sentence.

Where RCW 9.94A.701 does not apply, the remedy for a sentence that may exceed the statutory maximum is inclusion of the *Brooks*

notation in the judgment and sentence. *See, e.g., In re McWilliams*, 182 Wn.2d 213, 218, 340 P.3d 223 (2014); *State v. Winkle*, 159 Wn. App. 323, 331, 245 P.3d 249 (2011), *review denied*, 173 Wn.2d 1007 (2012); *State v. Booth*, 152 Wn. App. 364, 367, 215 P.3d 264 (2009). Here, remand to enter the *Brooks* notation is necessary.

II. CONCLUSION

For the reasons set forth herein and in his previously filed Appellant's Brief, Mulroy respectfully requests that the court STRIKE the domestic violence designation and associated penalty enhancement from his judgment and sentence, and REMAND the case for amendment of the judgment and sentence to provide that the combined term of confinement and community custody actually served shall not exceed the statutory maximum term of 60 months.

RESPECTFULLY SUBMITTED this 16 day of July, 2018.



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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

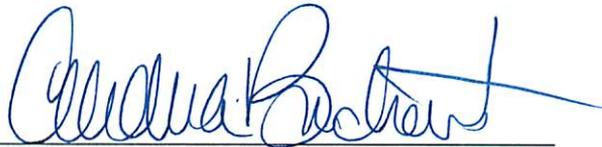
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And, pursuant to the prior agreement of the parties, by e-mail to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 16 day of July, 2018 in Walla Walla, Washington.



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