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State of Washington  
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NO. 36547-6-III

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

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STATE OF WASHINGTON,

Respondent,

v.

RUDY WILLIAMS,  
Appellant.

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

The Honorable Scott D. Gallina, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant assigns error to his exceptional sentence.
2. The sentencing court abused its discretion by imposing an exceptional sentence without exercising its discretion.
3. The sentencing court abused its discretion by imposing an exceptional sentence without providing a valid aggravating factor.
4. The sentencing court abused its discretion by imposing an exceptional sentence based on an aggravating factor that requires a fact-finding, but without engaging in a fact finding.
5. The trial court abused its discretion by denying appellant's motion to continue the state requested resentencing to correct a "clerical error".

Issues Presented on Appeal

1. Did the sentencing court abuse its discretion by imposing an exceptional sentence without exercising its discretion?
2. Did the sentencing court abuse its discretion by

imposing an exceptional sentence without providing a valid aggravating factor?

3. Did the sentencing court abuse its discretion by imposing an exceptional sentence based on an aggravating factor that requires a fact-finding, but without engaging in a fact finding?

4. Did the sentencing court abuse its discretion by denying appellant's motion for a continuance, where the state sought to amend the judgment and sentence to reflect "consecutive" versus "concurrent" sentences?

**B. STATEMENT OF THE CASE**

Mr. Williams was resentenced on remand after this court vacated two witness tampering charges. The court granted the prosecutor's motion to dismiss these two counts. The prosecutor asked the court to impose the same sentence for the three remaining crimes. RP 14. Over Mr. William's objections, the court imposed an exceptional sentence on the remaining 3 counts by running count 1 (assault) for 60 months, consecutive to counts 3 and 4 (witness tampering) for 30 months.

The prosecutor argued to as follows:

State is recommending essentially that -- be the same sentence that -- did (inaudible), that he be -- months on 3 Count 1. Previously the court did give him an exceptional 4 sentence on Counts 3 and 4 of 30 months on each count. The state would recommend that the court give him the same sentence, 30 months on each count, Count 3 and 4. The basis for that is the free crimes doctrine. Standard range 8 for Counts 3 and 4 are 51 to 60 months for each count.

RP 4. Mr. Williams objected and argued that the court should impose a concurrent sentence, because he had already been sentenced. RP 5-7. Ten pages later in the sentencing transcript, the state continued:

Your Honor, the state understands -- Mr. Williams, he's got a significant liberty that's at interest here, and he's arguing on behalf of that. However, his arguments are just not well-founded. And the Court of Appeals has remanded this case, it's -- affirmed the convictions on Count 1, 3 and 4, and therefore we would request, as we requested previously, that he be sentenced to -- 60 months on Count 1 and 30 months consecutive for Counts 3 and 4.

RP 14. The court did not articulate any reasons but stated: "That's going to be the order of the court, Mr. Williams. And you're free to challenge that further down the line if you decide that it's warranted." RP 14. The written findings provided the court imposed the exceptional sentenced based on the "clearly too lenient" factor,

and referred to RCW 9.94A.535(2)(c) for the conclusion of law. CP 30.

The total length of the sentence included 90 months of incarceration plus 12 months of community custody. CP 5-15, 19, 31. The judgment and sentence however indicated concurrent rather than consecutive sentences. CP 30. Less than 2 weeks later, the state moved to amend the judgment and sentence. The court granted the motion and denied Mr. William's motion for a continuance to address jurisdictional issues, informing Mr. Williams that he could appeal that decision as well. CP 19; RP 18-22.

#### C. ARGUMENTS

##### 1. THE TRIAL COURT ABUSED ITS DISCRETION WITHOUT EXERCISING ITS DISCRETION OR ESTABLISHING SUBSTANTIAL AND COMPELLING REASONS IN SUPPORT OF THE EXCEPTIONAL SENTENCE

Mr. Williams challenges the imposition of an exceptional sentence without the sentencing court articulating its reasons or exercising its discretion. The court did not explain its reasons for imposing the exceptional sentence, but the written findings provided "clearly too lenient", referring to RCW 9.94A.535(2)(c). CP 19.

The SRA is designed to provide structure to sentencing, “but does not eliminate[ ] discretionary decisions affecting [offender] sentences.” RCW 9.94A.010. Consistent with the SRA, a court “may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence.” *State v. McFarland*, 189 Wn.2d 47, 52, 399 P.3d 1106 (2017) (quoting RCW 9.94A.535).

RCW 9.94A.585 governs review of an exceptional sentence.

RCW 9.94A.585(4) states:

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

The appellate court reviews under a clearly erroneous standard whether evidence supports the reasons given by the sentencing judge to impose an exceptional sentence. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Review is de novo whether those

reasons justify a departure from the standard sentence range. *Law*, 154 Wn.2d at 93. The appellate court also reviews whether the sentence is clearly too excessive or too lenient for an abuse of discretion. *Id.*

As a general rule, the court must impose a sentence within the standard sentence range, and a sentence for multiple current convictions is concurrent. RCW 9.94A.505(2)(a)(i), .589(1)(a); *Law*, 154 Wn.2d at 94. A court may impose consecutive sentences only under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a).

Other than the fact of a prior conviction, facts supporting aggravated sentences must be determined in accordance with RCW 9.94A.537. RCW 9.94A.535. Under RCW 9.94A.537(3), the facts supporting aggravating circumstances must be proved to a jury beyond a reasonable doubt.

RCW 9.94A.535(2)(c) states a court may impose an exceptional sentence without findings by a jury where “[t]he defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” This provision is referred to as the

“free crimes” aggravator. *State v. France*, 176 Wn.2d 463, 469, 308 P.3d 812 (2013).

The court may impose an exceptional sentence “if the number of current offenses results in the legal conclusion that the defendant’s presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses.” *France*, 176 Wn.2d at 469.

The offender score is calculated with prior and current convictions. RCW 9.94A.525(1), .589(1)(a). The maximum offender score is 9. RCW 9.94A.510; *State v. Alvarado*, 164 Wn.2d 556, 561, 192 P.3d 345 (2008).

a. Failure to Exercise Discretion is Abuse of Discretion

“A trial court abuses discretion when ‘it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.’ *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (*quoting State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)) (exceptional sentence reversed where the trial court refuse to consider the defendant for a DOSA) .

In *McFarland*, the supreme court reversed the sentencing court that incorrectly believed that it did not have discretion to run

multiple firearm-related sentences concurrently. *McFarland*, 189 Wn.2d at 51, 56. The that sentencing courts have discretion to impose concurrent firearm-related sentences even when there is a statutory presumption that such sentences run consecutively. *Id.* The court explained that the sentencing court abuses its discretion when it fails to exercise discretion to determine if the standard range consecutive sentence is “clearly excessive in light of the purpose” of the Sentencing Reform Act. *McFarland*, 189 Wn.2d at 55.

In summary, *McFarland* held, “every defendant is entitled to have an exceptional sentence actually considered” and the sentencing court errs when it “operates under the ‘mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.’” *McFarland*, 189 Wn.2d at 56 (quoting *Grayson*, 154 Wn.2d at 342).

In *McFarland* and *Grayson*, the supreme court reasoned that because the sentencing court has discretion, it must actually exercise its discretion. *McFarland*, 189 Wn.2d at 56; *Grayson*, 154 Wn.2d at 342. Here, similar to *Grayson*, the sentencing court did

not consider imposing concurrent sentences and similar to *McFarland*, the sentencing court did not consider whether it could impose a different sentence, but rather simply reordered the same consecutive sentence previously imposed for three of the remaining five crimes without any apparent consideration. RP 14.

While *McFarland* dealt with the sentencing court's ability to exercise discretion not to impose the presumptive consecutive sentences for multiple firearms, and *Grayson* addressed the court's failure to consider a DOSA, both cases apply to Mr. Williams' case. First, in Mr. Williams' case as in *McFarland and Grayson*, the sentencing court was required to exercise its discretion. *McFarland*, 189 Wn.2d at 56; *Grayson*, 154 Wn.2d at 342. This means actually considering not to impose consecutive sentences. *Id.* Second, and more compelling than in *McFarland*, the crimes in Mr. Williams' case did not carry a presumptive consecutive sentence because they did not involve firearms, which the sentencing should have understood to mean, it had the discretion to impose concurrent sentences. Third, and finally, the decision to impose consecutive sentences is permissive not mandatory, but the sentencing court did not seem to understand this fact.

Here, following the principles in *McFarland* and *Grayson*, this court should reverse Mr. Williams' consecutive sentence because the sentencing court did not exercise its discretion or consider imposing concurrent sentences.

b. Clearly Too Lenient Is an Invalid Aggravating Factor

A sentencing court's statutory authority under the SRA is a question of law reviewed de novo. *State v. Parmelee*, 172 Wn. App. 899, 909, 292 P.3d 799 (2013). Sentences are determined in accordance with the law in effect when the offense was committed, absent clear legislative intent to the contrary. RCW 9.94A.345; RCW 10.01.040.

In *Alvarado*, 164 Wn.2d at 563-64 (citing *State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005)), the state supreme court explained that following *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2003) and *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (abrogated on other grounds regarding harmless error by *Recuenco*), "[t]he conclusion that allowing a current offense to go unpunished is *clearly too lenient* is a factual determination that *cannot* be made by the trial court following *Blakely*." *Hughes*, 154

Wn.2d at 140. (emphasis in original).

In 2005, the legislature amended RCW 9.94A.535(2)(c)'s "current offenses going unpunished" language to omit "clearly too lenient", and this amended version does not allow the trial court to engage in a fact finding. *Alvarado*, 164 Wn.2d at 566. The Court recognized that "there is a difference between the "clearly too lenient" language in current RCW 9.94A.535(2)(b) and former "free crimes" provisions and the mathematical calculation that allows an exceptional sentence under RCW 9.94A.535(2)(c)." *Alvarado*, 164 Wn.2d at 566.

The new statute accords with *Blakely*, which recognized that the determination of whether particular circumstances (once established) warrant an exceptional sentence remains a legal judgment for the court. *Blakely*, 542 U.S. at 305 n. 8 (see also *Hughes*, 154 Wn.2d at 137). The new statute also walks the line drawn in *Hughes*, which consistent with *Blakely*, recognized that a sentencing judge has the authority to rely on a "free crimes" factor to impose an exceptional sentence. *Hughes*, 154 Wn.2d at 139.

However, it held that reliance on this factor under former RCW.94A.535(2)(i) required a jury determination because it was

incident to a factual finding that a sentence was “clearly too lenient.” *Hughes*, 154 Wn.2d at 138-40. The court emphasized that former RCW 9.94A.535(2)(I) did not allow an exceptional sentence based solely on the defendant’s prior criminal history and current offenses but required additional fact finding. *Hughes*, 154 Wn.2d at 139-40; *State v. Ose*, 156 Wn.2d 140, 149, 156, 124 P.3d 635 (2005).

In Mr. William’s case, he was tried by the bench, but rather than impose an exceptional sentence based on “free crimes” the court issued findings indicating it based its decision on “clearly too lenient” factor, which requires a fact finding. Unlike the “clearly too lenient”, the new free crimes factor is limited to mathematical equation without reference to facts - but the courts written findings do not indicate that it relied on the “free crimes” factor. RP 14; CP 19, 30.

The only mention of “free crimes”, comes from the prosecutor, but the trial court did not express agreement with the prosecutor’s analysis, rather the judge simply ruled following the request for an exceptional sentence; “[t]hat’s going to be the order of the court” RP 4, 14. The written order reflects the sentencing

court imposed the exceptional sentence based on the “clearly too lenient” factor, without a fact finding inquiry. *Id.*

Under *Alvarado*, the sentence is invalid without a fact finding. Accordingly, this Court must vacate the sentence and remand for a new sentencing hearing.

2. THE SENTENCING COURT ABUSED ITS DISCRETION BY DENYING APPELLANT’S MOTION FOR A CONTINUANCE TO RESPOND TO THE STATE’S MOTION TO AMEND THE JUDGMENT AND SENTENCE

“A grant or denial of a motion for a continuance is a decision that rests within the sound discretion of the trial court.” *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982). The trial court may consider a number of factors including “surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.” *State v. Downing*, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004).

The Court of Appeals reviews a trial court’s denial of a motion to continue for an abuse of discretion. *Downing*, 151 Wn.2d at 272. A trial court abuses its discretion when its decision was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Downing*, 151 Wn.2d at 272 “The decision to

deny the defendant a continuance will be disturbed on appeal only upon a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted.” *Kelly*, 32 Wn. App. at 114. The Court considers the totality of the circumstances related to a continuance request, especially the reasons presented to the trial court at the time of the request. *Kelly*, 32 Wn. App. at 114-15.

Certain amendments the day of trial may be cause for a continuance, particularly where the amendment raises a new charge. *State v. Purdom*, 106 Wn.2d 745, 748-49, 725 P.3d 622 (1986). Here, the amendment was to the judgment and sentence, rather than to the information, but the impact was more significant because Mr. William’s sentence increased significantly from 60 months to 90 months. CP 19, 30; RP 14.

In deciding the motion for continuance, the sentencing court below did not consider Mr. William’s argument that he needed time to prepare a response to the proposed amendment on jurisdictional grounds. RP 19. Instead, the trial court simply granted the state’s motion to amend the judgment and sentence, and informed Mr. Williams he could appeal the denial of his motion, because the

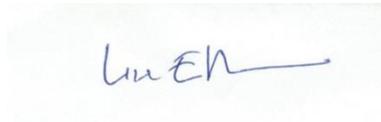
amendment was to correct a “clerical error”. RP 19-20. The trial court abused its discretion by refusing to weigh Mr. Williams need to prepare for the resentencing, rather than simply accepting that a continuance would be inconvenient for the state. The remedy is to vacate the sentence and remand for a new hearing for Mr. Williams to prepare his argument.

D. CONCLUSION

Mr. Williams respectfully requests this Court vacate his exceptional sentence based on the sentencing court’s abuse of discretion, and find that Mr. Williams was prejudiced by the denial of the motion to continue, and remand for a new sentencing hearing.

DATED this 19<sup>th</sup> day of August 2019.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

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LISE ELLNER, WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Asotin County Prosecutor's Office bnichols@co.asotin.wa.us and Rudy Williams/DOC#761174, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on August 19, 2019. Service was made by electronically to the prosecutor and Rudy Williams by depositing in the mails of the United States of America, properly stamped and addressed.

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Signature

**LAW OFFICES OF LISE ELLNER**

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