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STATE OF WASHINGTON

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by

No. 78889-8

Court of Appeals No. 31544-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND K. HATCHIE

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County

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A. SUPPLEMENTAL ISSUE STATEMENTS

1. The officers entered Petitioner's home without a search warrant, ostensibly to serve a misdemeanor arrest warrant on another man. Was this entry in violation of the Fourth Amendment and Article I §7, where the officers did not have probable cause to believe that other man lived in the home? Further, even if there had been such probable cause, does an arrest warrant for a misdemeanor offense support intrusion into a citizen's home despite the heightened protections guaranteed under Article I § 7?

2. The sentencing court declared the sentence before asking Petitioner if he wished to speak. When this error was noted, the judge said she would consider what Petitioner had to say only if it was different from what counsel had already said. Were Petitioner's right to allocution and the appearance of fairness doctrine violated and was the court's willingness to reconsider insufficient to render the error harmless?

B. SUPPLEMENTAL STATEMENT OF THE CASE

1. Procedural Facts

Petitioner Raymond K. Hatchie was charged and convicted in Pierce County with manufacturing methamphetamine while armed with a firearm. CP 1-2; RCW 9.41.010, RCW 9.94A.310, RCW 9.94A.370, RCW 9.94A.510, RCW 9.94A.530, RCW 69.50.401(a)(1)(ii).¹ He appealed

¹The verbatim report of proceedings in this case consists of 19 volumes, which will be referred to as follows:

the 14 chronologically paginated volumes containing pretrial and trial proceedings of December 4-5, 8, 11, 15-18, 22-23, 2003, January 5, 7-9, 2004, as "RP;" the proceedings of December 3, as "1RP;" the 2 volumes containing the voir dire of December 16-17, 2003, as "2RP;" the opening arguments on December 17, 2003, as "3RP;" and

and, on May 23, 2006, Division Two of the court of appeals affirmed in a partially published opinion. State v. Hatchie, 133 Wn. App. 100, 135 P.3d 519 (2006). This Court granted review on the two issues addressed in the published portion of Division Two's opinion.

2. Overview of facts regarding offenses²

On June 11, 2003, Pierce County Sheriff's deputies conducted a "surveillance detail" in Tacoma in order to see who was buying "precursor items" used in the manufacture of methamphetamine. RP 420, 425-26, 674. They saw Eric Schinnell drive to three separate stores and buy such items and searched his truck registration, discovering he had an outstanding misdemeanor arrest warrant. RP 426-33, 583-84, 677-78, 1035. Officers lost sight of the truck for a short time, then spotted it and Mr. Schinnell in the driveway of a duplex on Patterson Street South. RP 422-41.

After Schinnell had gone inside, officers set up an area of "containment" and started knocking on the front door. RP 430-45, 681. Other officers went to speak to neighbors. By this time, officers had noticed several items used in making methamphetamine in Mr. Schinnell's truck, along with a revolver. RP 445, 682. After some time, the door to the duplex was opened by Donald Robbins and officers arrested him, then went inside and hauled Schinnell out from under a car in the garage. RP 445, 522-24, 691-93, 1036. Multiple items suspected to be involved in drug manufacturing were seen inside the home, and a search warrant was

the sentencing of March 12, 2004, as "SRP."

²More lengthy discussion of the facts is contained in Appellant's Opening Brief at 5-20. The facts relevant to the issues on review are discussed in more detail, *infra*.

issued on the basis of those items. RP 446, 522-51, 691-30, 1036, 1257-58.

Raymond Hatchie lived in the unit, and Mr. Schinnell implicated Mr. Hatchie, although Schinnell claimed that the actual manufacturing did not occur at Hatchie's home and Hatchie's involvement was limited to providing psuedoephedrine in exchange for methamphetamine. RP 1132-34, 1136, 1158, 1212-24.

C. SUPPLEMENTAL ARGUMENT

1. THE EVIDENCE SEIZED AS A RESULT OF THE ENTRY TO SERVE THE MISDEMEANOR WARRANT FOR SCHINNELLS SHOULD HAVE BEEN SUPPRESSED

Both the Fourth Amendment and Article I § 7, of the Washington constitution protect citizens against unreasonable searches and entries into their homes. Steagald v. United States, 451 U.S. 204, 205, 211, 101 S. Ct. 1642, 68 L. Ed.2d 38 (1981)³; State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996).⁴ In Payton v. New York, 445 U.S. 573, 589, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the Court held that it did not offend the Fourth Amendment for officers to enter a suspect's home based solely upon a felony arrest warrant. While recognizing that arrest warrants "may afford less protection than a search warrant," the Court found that the requirement that a magistrate issue a warrant based upon a determination

³The Fourth Amendment to the United States Constitution provides: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause."

⁴Article I §7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

of probable cause was sufficient protection of the suspect's rights. 445 U.S. at 602-603. More specifically, the Court stated, "[i]f there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." 445 U.S. at 602-603. Washington has followed this reasoning regarding felonies. See State v. Williams, 142 Wn.2d 17, 24, 11 P.3d 714 (1990).

Where, however, the person named in the warrant does not live at the home, the officers' intrusion into a third party's home cannot be justified based upon an arrest warrant for a suspect, even if that suspect is inside the house. Steagald, 451 U.S. at 213-15; State v. Anderson, 105 Wn. App. 223, 230-31, 19 P.3d 1094 (2001). This is because the entry violates the rights of the third party in the privacy of his home to be protected "against the unjustified intrusion of the police." Steagald, 451 U.S. at 213-15. Absent exigent circumstances, the Fourth Amendment prohibits the entry and search of a third party's home based upon an arrest warrant for a person who does not live there. 451 U.S. at 215. Indeed, to hold to the contrary, the Steagald Court noted, would create a "significant potential for abuse," because, "[a]rmed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances" to find him. 451 U.S. at 215; see Anderson, 105 Wn. App. at 231 (the existence of a felony arrest warrant and the belief that the subject may be a guest in a third party's home is "insufficient legal authority to enter the home"); Hocker v. Woody, 95 Wn.2d 822, 825, 631 P.2d 372 (1981) (an arrest warrant for a suspect only authorizes entry into

the suspect's own home, not that of a third person, absent exigent circumstances).

In this case, Division Two found no error in failing to suppress the evidence seized as a result of the entry into Mr. Hatchie's home to serve the misdemeanor warrant on Mr. Schinnell. That conclusion was based upon the court's findings 1) that the officers had probable cause to believe Mr. Schinnell lived at the home and 2) a misdemeanor warrant was sufficient under Article 1 § 7, to support the intrusion. Those conclusions do not withstand review.

a. Relevant facts

The misdemeanor arrest warrant for Schinnell was \$500 district court warrant for driving while license suspended in the third degree. RP 15. It listed Mr. Schinnell's address as 950 North Ducka Bush in Hoodspport, not the Patterson Street South address where Mr. Hatchie lived. RP 65. The officers admitted they were aware of that fact before they decided to enter Mr. Hatchie's home. RP 65, 130. They were also aware that address for the registration on the vehicle Mr. Schinnell was driving was the North Ducka Bush address, as was the registration on a second vehicle registered to Schinnell, also parked at the duplex. RP 80.

After following Mr. Schinnell to the property, the deputies placed the house under surveillance so that no one could enter or leave. RP 23-24, 62-66, 70. They knocked on the door for about 55-70 minutes before Robbins answered. RP 62-66, 70, 132-33. The deputies admitted that, during all that time, they did not hear any noise coming from inside the residence, such as flushing or breaking glass, which might have indicated an

attempt to destroy evidence. RP 67-91. The officers also saw no evidence that anyone was attempting to leave or that there were any fires or danger. RP 67-70, 91. There was nothing which indicated any “threat” to the officers or anyone else. RP 75-76.

The officers were aware that they had to attempt to “establish” Mr. Schinnell’s “residency” in the home before they entered to serve the warrant, so they contacted neighbors. RP 116. A neighbor named “Rowland” who said he did not know Mr. Schinnell very well and only by the name “Eric” said he believed Schinnell lived there. RP 21. Officers did not establish the basis for this belief. RP 21.

A neighbor, Mr. Huntsman, thought there were six different people living at the house, had seen the red truck belonging to Mr. Schinnell there before, and had seen “Eric” around. RP 22, 82. The only “independent corroboration” that the deputy said the officers had about any of this information was that the red truck was parked in the driveway and a second vehicle registered to Mr. Schinnell was parked on the lawn. RP 21.

Another deputy approached a man, Tim Peddicord, outside the residence, and established that “Eric” was likely inside the house if his truck was there. RP 178. That deputy never asked whether “Eric” lived at the residence, and neither did another deputy who spoke with the same man for 5-10 minutes. RP 154-57, 179. That deputy also spoke to another unnamed neighbor, who said only that “the main renter of the residence was a Ray Hatchie.” RP 186.

After the door to the home was opened and Mr. Robbins arrested, officers consulted about whether they should enter the house. RP 29. The

bulk of the “considerations” raised were whether Mr. Schinnell was in the home, not whether he actually lived there. RP 159. The only part of the discussion which focused on Mr. Schinnell’s status as a resident was just that the neighbors appeared to think so. RP 65.

The officers did not ask Mr. Robbins whether Mr. Schinnell lived there until after they had entered the house. RP 28, 71-72, 116. At that point, the officers finally asked, and were told that Mr. Schinnell had only stayed there a few times over the past two months. RP 38.

The officers conceded that the reason they decided to go into the home to arrest Mr. Schinnell was not just because of the existence of the warrant, but also to investigate their suspicions about the drug activity in which they thought he was involved at the house. RP 29. One deputy admitted that he would “probably not” have served the warrant and arrested Mr. Schinnell without the suspicion of drug activity. RP 152. Another deputy admitted the “ultimate purpose” of serving the arrest warrant was “to talk with [Mr. Schinnell] or investigate further these purchases of precursor chemicals.” RP 18-19, 67; see also RP 110.

At the suppression hearing, the prosecutor conceded that there were no “exigent” circumstances to justify the entry into Mr. Hatchie’s home. RP 236-37. He also admitted that it was later established that Mr. Schinnell did not reside there, but had only stayed overnight occasionally. RP 238.

In her written findings, the trial judge declared that the information gathered from Peddicord and the neighbors “indicated that Mr. Schinnell lived at the residence.” CP 133. She also referred to Mr. Robbins as

stating Mr. Schinnell was “home.” CP 133-34. In her conclusions, however, the trial judge specifically cited the law she felt was applicable for “[e]ntry into *a third party’s dwelling* to arrest the subject of a misdemeanor warrant.” CP 134 (emphasis added).

- b. The officers did not have probable cause to believe Schinnell lived at the home and thus had no authority to enter to serve the misdemeanor warrant

In affirming, the court of appeals agreed with Mr. Hatchie that the officers had to have probable cause to believe that Mr. Schinnell resided in Mr. Hatchie’s home in order for the entry based upon the misdemeanor warrant for Schinnell to be valid. Hatchie, 133 Wn. App. at 113-14. The prosecution did not cross-petition or challenge this holding in its response and thus the probable cause requirement is not at issue here. RAP 13.7(b); see State v. Collins, 121 Wn.2d 168, 178, 847 P.2d 919 (1993).⁵

Instead, what is at issue is Division Two’s conclusion that probable cause existed in this case. This conclusion is crucial. If police had probable cause to believe Mr. Schinnell lived in Mr. Hatchie’s home, then the admission of the evidence against Mr. Hatchie would be proper if a misdemeanor warrant is deemed sufficient support for the entry. See U.S. v. Ramirez, 770 F.2d 1458 (9th Cir. 1985). If, however, they did not have such probable cause, this Court need not even reach the question of whether a misdemeanor warrant was sufficient to support intrusion into the home under Article 1 § 7, because Stegald would control and prohibit the

⁵Indeed, in its response to Mr. Hatchie’s Petition, the prosecution argued that review should be denied because Division Two ruled in Mr. Hatchie’s favor on this issue. Response, at 5-6.

police entry here. See Steagald, 451 U.S. at 213-15.

In concluding that the officers had probable cause to believe that Mr. Schinnell resided at the home, the court of appeals did not address the trial court's declaration regarding entry into "a third party's dwelling." Instead, Division Two relied on the following "facts": 1) a neighbor told deputies Mr. Schinnell lived at the duplex, 2) three people told the deputies that if Mr. Schinnell's truck was there, he would be inside, 3) Mr. Schinnell had two trucks there which "suggests that" he was not "a mere guest," and 4) Robbins, "who answered the door, specifically stated that Schinnell would be 'home' if his truck was there." Hatchie, 133 Wn. App. at 115.

But the officers themselves admitted that they never asked Mr. Robbins if Mr. Schinnell lived there (and thus was truly "home") until *after* Mr. Schinnell was arrested. RP 21, 22, 82, 116. And the fact that several people said Mr. Schinnell was likely inside if his truck was there does not indicate he *lived* there, as opposed to simply visiting. Similarly, the fact that Schinnell had cars on the property could indicate that his friend was working on them with him, rather than residence.

Further, the court of appeals glossed over the competing facts, known to officers before the entry, which indicated that Schinnell did *not* live there. The court declared that "individuals frequently change their residence without updating Department of Licensing records" and it would not be "surprising" for someone with an outstanding warrant to fail to keep the government updated as to his current address. 133 Wn. App. at 115-16. But that is not the point. The point is that the fact that the same, *different* address was listed as Mr. Schinnell's residence on the warrant, his

license and the registrations was known to police, prior to the entry into Mr. Hatchie's home. Given that evidence, it was incumbent upon police to do more to establish that Mr. Schinnell actually resided at the home before intruding into it.

Put simply, to enter into a citizen's home, officers must have more than just a suspicion that a suspect for whom they have a warrant "inhabits" or "occupies" a place. Perez v. Simmons, 884 F.2d 1136, 1140-42 (9th Cir. 1989), as amended by 900 F.2d 213 (1990), as corrected 998 F.2d 775 (1993); see U.S. v. Patino, 830 F.2d 1413 (7th Cir. 1987). The inquiry is different than the question of whether someone has a "reasonable expectation of privacy," something which can be proven by mere temporary occupancy. Perez, 885 F.2d at 1140-41.

Indeed, even cases applying a *lesser* standard than probable cause are instructive. In U.S. v. Route, 104 F.3d 59, 62-63 (5th Cir.), cert. denied, 521 U.S. 1009 (1997), for example, the "reasonable belief" standard was met because the police verified that the suspect's credit card applications, water and electricity bills and car registration all listed the address as his home, and the postal inspector confirmed that he received mail there. In U.S. v. Risse, 83 F.3d 212, 214 (8th Cir. 1996), police had previously contacted the suspect at the home, the suspect had told them she was living there and could be contacted there, a reliable confidential informant confirmed she was living there, and the police contacted her there just before going there to serve the arrest warrant. In U.S. v. Lauter, 57 F.3d 212, 213 (2nd Cir. 1995), the police had an arrest warrant for the suspect, knew he lived in the building, got a search warrant for the

apartment they thought was his, and learned from a reliable confidential informant whose father was the landlord of the building that the suspect had moved to a different apartment inside. In fact, the lower court found that the officers actually had *probable cause* to believe he lived there, not just a reasonable belief. 57 F.3d at 215.

These cases illustrate that the evidence in this case was not even sufficient to meet the lesser “reason to believe” standard, let alone the proper standard of “probable cause.” The protections citizens have in the most protected area of all - the home - simply cannot depend upon a neighbor’s unverified general belief that someone might live there, coupled with presence and a few vehicles at the home, especially where, as here, there is evidence that the person lives somewhere else. The court of appeals erred in concluding there was probable cause to believe Mr. Schinnell lived at Mr. Hatchie’s home, and this Court should so hold.

c. Under Article 1 § 7, a misdemeanor warrant is insufficient “authority of law” to support intrusion into the sanctity of a citizen’s home

The court of appeals also erred in concluding that a misdemeanor warrant justified intruding into a citizen’s home under the greater protections of Article 1 § 7. This Court has made it clear that the home receives heightened constitutional protection under the Washington constitution. State v. Young, 123 Wn.2d 173, 184-85, 867 P.2d 593 (1994). Indeed, this Court has declared that, “[i]n no area is a citizen more entitled to privacy than in his or her home.” State v. Kull, 155 Wn.2d 80, 84-85, 118 P.3d 307 (2005).

Payton specifically relied on the belief that it was proper to require

a defendant to “open his doors to the officers of the law” if there was “sufficient evidence of a citizen’s participation in a *felony* to persuade a judicial officer that his arrest is justified.” 445 U.S. at 602-603 (emphasis added). Some courts have nevertheless extended the holding of Payton to include misdemeanor warrants, focusing on whether there was a warrant issued by a magistrate after a finding of probable cause, rather than the nature of the offense for which the warrant was issued. See e.g., United States v. Spencer, 684 F.2d 220, 223-24 (2nd Cir. 1982), cert. denied, 459 U.S. 1109 (1983). Confusingly, the U.S. Supreme Court has declared both that Payton was “expressly limited to felony arrests” and also that entry to serve an arrest warrant “for a minor offense” is proper when there is a warrant issued upon probable cause by a “neutral and detached magistrate.” Welsh v. Wisconsin, 466 U.S. 740, 750, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

In reaching its conclusion here, Division Two focused solely on whether a misdemeanor warrant was issued by a magistrate, rather than the nature of the offense. Hatchie, 133 Wn. App. at 112-14. The court concluded that, once an arrest warrant is issued, “probable cause exists to believe that a citizen has violated the law of the land, and the citizen’s privacy concerns are outweighed by society’s interests in requiring him to answer those charges.” 133 Wn. App. at 113.

But that analysis improperly conflates the Fourth Amendment’s protections with those of Article 1 § 7, and fails to honor the greater privacy rights in the home guaranteed to Washington citizens. This Court has already provided guidance and indicated that there is a fundamental

difference between a felony and a non-violent misdemeanor when it comes to defining the limits of governmental authority to intrude into the privacy of the home. In State v. Chrisman, 100 Wn.2d 814, 676 P.2d 419 (1984), this Court held that Article I § 7 of the Washington constitution would be offended by allowing a minor misdemeanor to compromise the greater privacy rights citizens enjoy in their homes in Washington. Chrisman, 100 Wn.2d at 821-22. The roommate of the defendant was arrested for a misdemeanor committed in the officer's presence, and the officer then followed the roommate to his dormitory to pick up identification. 100 Wn.2d at 815-16. When the officer looked inside the room, he saw contraband, then entered and found drugs. 100 Wn.2d at 816. After this Court held that the entry and search was unconstitutional under the Fourth Amendment, the U.S. Supreme Court reversed. 100 Wn.2d at 817-19.

On remand, this Court explicitly relied on the greater protections of Article 1 § 7, noting all the ways in which the state provision provided greater protection than its federal counterpart, which included a departure based upon concern that allowing officers to rely on minor offenses for full-blown arrests would invite pretextual arrests. 100 Wn.2d at 819. While recognizing the concerns for "safety" which supported having an officer keep an arrestee in custody or in sight, the Court specifically held that, under the Washington constitution, "the closer officers come to intrusion into a dwelling, the greater the constitutional protection." 100 Wn.2d at 820. The Court concluded that, in cases where the offense involved was only "minor," the heightened protection afforded against intrusion into homes under the Washington constitution outweighed the state's interests,

which did not provide a “compelling need to enter a private residence.” 100 Wn.2d at 822; *see also*, Kull, *supra* (reaffirming Chrisman in part based upon the minor nature of the offense).

Division Two’s decision attempts to limit Chrisman and Kull by declaring those cases relevant only to the exigent circumstances exception to the warrant requirement. Hatchie, 133 Wn. App. at 111-12. But those cases are not so limited. Both cases involved situations where there was *probable cause to believe the defendant had committed a misdemeanor*, either because there was a warrant so finding, in Kull, or because the offense was committed in the officer’s presence, in Chrisman. If, as Division Two declared in this case, issuance of a misdemeanor arrest warrant by a “neutral magistrate” was sufficient to authorize entry into a home, there would have been no question, in Kull, about the propriety of the entrance, where such a warrant had been issued. The concepts underlying the issues in Chrisman and Kull, i.e., whether an intrusion into the sanctity of a home is justified based upon the commission of a minor crime, apply with equal force here. Other divisions have so held. *See* Anderson, *supra*; State v. McKinney, 49 Wn. App. 850, 746 P.2d 835 (1987).

The question is not whether there is a duly authorized paper permitting an arrest. The question is what crimes are so serious that a warrant for the arrest of someone believed to have committed them will justify a warrantless intrusion into a home, that most protected of places. *See, e.g.*, Chrisman, 100 Wn.2d at 821-22; Anderson, 105 Wn. App. at 230. This Court held, in Chrisman, that Article 1 § 7, protects the sanctity

of the home and prevents such intrusion for a minor offense unless there is a “strong justification” to support it. Chrisman, 100 Wn.2d at 821-22. That holding strikes the proper balance between the state’s interests in pursuing people it has probable cause to believe have committed a minor offense and the heightened protections of privacy citizens are guaranteed in their homes under Article 1 § 7.

Indeed, more recently, this Court recognized the fundamental differences between misdemeanors and felonies and the effect those differences have on the level of governmental intrusion which will be allowed. In State v. Duncan, 146 Wn.2d 166, 177, 43 P.2d 513 (2002), this Court noted the rule requiring an arrest warrant for a misdemeanor

illustrates the higher burden this Court imposes upon officers when investigating lesser crimes. Accepting the presumption that more serious crimes pose a greater risk of harm to society, we place an inversely proportional burden in relation to the level of the violation. Thus, society will tolerate a higher level of intrusion for a greater risk and higher crime than it would for a lesser crime.

146 Wn.2d at 177 (emphasis added).

The officers in this case conceded that they searched Mr. Schinnell’s records in order to find an excuse to pull him over. RP 56-61. When they lost track of him, however, they sought to turn that excuse - the misdemeanor warrant - into a justification to enter the home of another. And they admitted that a major motivation for that entry was to look for evidence of the drug manufacturing they thought might be occurring inside.

RP 18-19, 29-30, 51-61, 67, 110, 152.⁶ The decision of Division Two, upholding the entry into the sanctity of the home, the most protected of places, based upon an arrest warrant for a minor offense, fails to properly honor the heightened protections of Article I § 7, this Court has repeatedly noted, including in Chrisman. This Court should reverse.

2. THE COURT OF APPEALS DECISION RENDERED
THE RIGHT TO ALLOCUTION MEANINGLESS

Division Two also erred in holding that Mr. Hatchie's right to allocution was not violated, and in failing to follow the well-reasoned decision of Division Three in State v. Crider, 78 Wn. App. 849, 899 P.2d 24 (1994).

a. Relevant facts

At sentencing, Mr. Hatchie requested an exceptional sentence below the standard range. CP 126-29; SRP 4-11. The prosecution asked for a higher sentence, faulting Mr. Hatchie for failing to take advantage of the "Breaking the Cycle" programs offered prior to trial. SRP 3, 16-17.

After Judge Grant heard from counsel, she said:

All right. The Court is ready to rule. The standard sentence range will be adopted and 55 months plus the three years for the deadly weapon firearm enhancement, unless your client has something else to add or say, [defense counsel], on his own behalf. I am really concerned. I did look at that BTC record and [the prosecutor] is correct, it was totally unsatisfactory. There appears to be no attempt by your client to say that he wants help and I realize if you are involved in drugs and you're an addict, that sometimes it's often hard to accept or request for help but here was an opportunity he certainly could have exercised.

⁶Indeed, it appears that the failure of officers to serve misdemeanor arrest warrants in general unless there is some other motive to do so is epidemic throughout the state. See Van De Veer, The Honorable P., *No Bond, No Body, and No Return of Service: The Failure to Honor Misdemeanor and Gross Misdemeanor Warrants in the State of Washington*, 26 Seattle U. L. Rev. 847 (2003).

SRP 19. The prosecutor then reminded the court that “probably before” it made “a final ruling on sentence, we should ask formally whether Mr. Hatchie wishes to allocute.” SRP 19-20. Because the court had already ruled, counsel said allocution was “really for nothing now,” and the judge said she would consider what Mr. Hatchie had to say if it was something counsel had “not said, that I don’t know about.” SRP 20. Mr. Hatchie then spoke to the court, and the court questioned him about why he had not participated in the BTC program before trial. SRP 21. Judge Grant then stated that she would “knock off a couple months” of the original sentence and reduce it to “a 53 month plus three years for” the enhancements. SRP 22.

b. The court of appeals decision was in error

This Court has recognized the statutory right to allocution as an important right of a defendant at sentencing. RCW 9.94A.500(1); In re Echevarria, 141 Wn.2d 323, 6 P.3d 573 (2000). In holding the right had not been violated in this case, Division Two specifically refused to follow rulings of both Division Three and Division One on the scope of the right. Hatchie, 133 Wn. App. at 117-19. While recognizing that those divisions have both held a defendant is “automatically entitled to a new sentencing hearing when allocution comes after pronouncement of a sentence,” Division Two held Mr. Hatchie was “provided a meaningful opportunity to address the court before sentence was imposed” because he was allowed to speak before the final, written sentence was entered. 133 Wn. App. at 118. The court also held that, because a defendant can waive the right by failing to object to its deprivation at sentencing, there is “no remedy” when he is

offered allocution “albeit after the court has orally indicated its intended sentence.” 133 Wn. App. at 119.

This holding was in error. At the outset, the court of appeals did not even mention the “appearance of fairness” doctrine. 133 Wn. App. at 117-19. Yet that doctrine is inextricably linked with the right to allocution, as Mr. Hatchie noted below. See Crider, 78 Wn. App. at 852-53; BOA at 67-70.

Further, Division Two’s decision effectively rendered the statutory right meaningless, ignoring its important purpose. The right stems from the common law and is a “significant aspect of the sentencing process.” Echevarria, 141 Wn.2d at 335-37. The purpose is not simply to allow the defendant to speak at some time at sentencing but to speak *before* the court pronounces sentence, to plea for mercy and in order to ensure that the sentencing court will consider the defendant’s position on sentencing *prior* to imposing sentence. See State v. Canfield, 154 Wn.2d 698, 701, 116 P.3d 391 (2005); State v. Lord, 117 Wn.2d 829, 897, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992).⁷

Indeed, in Canfield, this Court recently found a limited right to allocution even in the absence of a statutory grant, based in part upon the due process requirement of an “opportunity to be heard.” Canfield, 154 Wn.2d at 701.⁸ In reaching that conclusion, the Court noted that the “right

⁷As the U.S. Supreme Court has noted, “[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.” Green v. United States, 365 U.S. 301, 304, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961).

⁸Canfield fashioned this right in the context of parole revocation proceedings. 154 Wn. 2d at 701.

of the accused to make a personal statement” at initial sentencing is “vital,” given the “absolute liberty interest at stake.” 154 Wn.2d at 705.

For the “opportunity to be heard” to be *meaningful*, however, it must occur before the decision has been made. The court of appeals effectively converted the right into an opportunity to ask for *reconsideration* by saying it was sufficient to allow an opportunity to speak before the written judgment was entered, even if it is after the oral opinion has been given. But the issue of whether a party should rely on an oral opinion before that opinion is reduced to writing is far different than the question of whether a defendant, facing the judge at sentencing, is permitted a meaningful opportunity to speak on his own behalf before being sentenced.

As the Crider Court wisely noted:

an opportunity to speak extended for the first time after sentence has been imposed is “a totally empty gesture.” Even when the court stands ready and willing to alter the sentence when presented with new information (and we assume this to be the case here), from the defendant’s perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position.

78 Wn. App. at 861. The defendant is placed “in the difficult position of asking the judge to reconsider an already-imposed sentence.” State v. Aguilar-Rivera, 83 Wn. App. 199, 203-204, 920 P.2d 623 (1996).

Nor was the error “harmless.” In very limited circumstances, where remand could not result in a different sentence, Divisions One and Three have held that the error in failing to allow the defendant his right to allocution was “harmless.” See State v. Gonzales, 90 Wn. App. 852, 854, 954 P.2d 360, review denied, 136 Wn.2d 1024 (1998) (defendant received

the bottom of the standard range; Court specifically relying on his failure to ask for exceptional down in finding error harmless); State v. Avila, 102 Wn. App. 882, 898, 10 P.3d 486 (2000), review denied, 143 Wn.2d 1009 (2001) (sentence well below statutory maximum and likely already served so remand would serve no purpose). However, those limited circumstances are not present here. The sentence the court imposed was not at the bottom of the standard range. And Mr. Hatchie was seeking a sentence below the standard range - a request which the court had already decided to deny *before* giving Mr. Hatchie his right to allocution. While the court decided to “knock off” a few months in response to what Mr. Hatchie said, the court had already decided to deny the request for the exceptional sentence down. Further, the court specifically said it would only listen to what Mr. Hatchie had to say if it was different than what his attorney already said. But the right to allocution is personal and is not satisfied by the court’s listening to counsel. Green, 365 U.S. at 304. Because Mr. Hatchie was deprived of his full right to allocution and the error was not harmless, this Court should remand for resentencing.

D. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this _____ day of _____, 2007.

Respectfully submitted,

~~FILED AS ATTACHMENT~~

~~TO E-MAIL~~

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Brief to opposing counsel and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows:

To: Michelle Luna-Green, Pierce County Prosecutor's
Office, 946 County City Building, 930 Tacoma Ave. S.,
Tacoma, WA. 98402;

To: Mr. Raymond Hatchie, DOC 868776, Olympic
Corrections Center, 1123 Hoh Main Line, Forks, WA. 98331.

DATED this _____ day of _____, 2007.

FILED AS ATTACHMENT
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