

81020-6
NO. 34053-4

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

STATE OF WASHINGTON, RESPONDENT

v.

MARK P. KILGORE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

No. 96-1-04678-9

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is defendant's appeal improperly before the court when he did not contest the imposition of exceptional sentences in an earlier appeal and the trial court, after remand, did not exercise its independent judgment to review or reassess the sentences previously imposed?
2. Was it appropriate for the trial court to refrain from resentencing defendant for five affirmed convictions when his sentences were not erroneous and the trial court had no authority to resentence him?
3. Were defendant's convictions final on December 11, 2002, before the United States Supreme Court issued Blakely v. Washington, on June 24, 2004?

B. STATEMENT OF THE CASE.

The current appeal is the second time appellant Mark Kilgore's, hereinafter "defendant," convictions have been before the court for review. The following is a summary of the case's procedural history:

On December 5, 1996, the State charged defendant with the following crimes:

Count I (first degree child molestation against C.M.);
Count II (first degree child rape against C.M.);
Count III (first degree child molestation against D.O.);
Count IV (first degree child rape against A.B.);
Count V (first degree child rape against A.B.);
Count VI (first degree child molestation against A.B.); and
Count VII (first degree child molestation against T.O.).

CP 1-5. On October 1, 1998, the jury found defendant guilty on all counts. CP 107-118.

On December 1, 1998, the trial court imposed an exceptional sentence of 560 months on each of the seven counts. CP 107-118. The court found the following aggravating factors were substantial and compelling reasons which justified an exceptional sentence: (1) defendant violated a position of trust; (2) the victims were particularly vulnerable; (3) the court observed no remorse on the part of defendant despite the jury verdict; (4) multiple victims and multiple incidents per victim; and (5) defendant's conduct manifested deliberate cruelty to the victims by providing them with alcohol to the point of intoxication with no concern for the safety of the children. CP 122-125 (Findings of Fact and Conclusions of Law for Exceptional Sentence), See Appendix A.

Defendant appealed from his convictions, but did not assign error to the imposition of his exceptional sentences. The Court of Appeals found the trial court had erred in suppressing evidence that someone else

had previously abused C.M. State v. Kilgore, 107 Wn. App. 160, 178, 26 P.3d 308 (2001). The Court of Appeals reversed Count I (first degree child molestation against C.M.) and Count II (first degree child rape against C.M.), but affirmed the remaining five convictions and remanded for further proceedings. Id. at 190.

The Washington Supreme Court accepted review to resolve another evidentiary issue; ultimately, it affirmed the Court of Appeals and the five convictions that had been upheld below. State v. Kilgore, 147 Wn.2d 288, 295, 53 P.3d 974 (2002) (filed on September 12, 2002). The case was remanded to the superior court in a mandate that issued on October 9, 2002. CP 8-21.

On remand, the State elected not to retry the two counts that had been reversed on appeal. The matter was brought back before the superior court for a hearing to bring the judgment into conformance with the terms of the appellate decisions. Defendant filed a brief arguing he should be resentenced in light of Blakely v. Washington, 542 U.S. 296, 125 S. Ct. 2531, 195 L. Ed. 2d 4023 (2004). Defendant argued he should be sentenced to a standard range sentence on each of his five convictions. CP 31-49. The State responded that the defendant's reliance on Blakely was misplaced because his case had not been remanded for resentencing on the five affirmed convictions. CP 50-84. The State argued that because defendant had not challenged his exceptional sentences on appeal, they were final at the time that Blakely had issued. CP 50-84. The court

agreed with the State's view of the procedural posture of the case. In a hearing on October 7, 2005, the trial court corrected the judgment and sentence to delete the two convictions that had been reversed. RP 13. The trial court stated:

The Defendant's case was final in October or November of 2002. I am not re-sentencing the Defendant based upon the decisions of the higher court. Rather, I am correcting the Judgment and Sentence, and that's what we need to accomplish.

RP 13. On October 27, 2005, the trial court issued an order to correct the judgment and sentence by striking the counts which had been reversed and adjusting defendant's offender score from an 18 to a 12. CP 102-104. Defendant's standard sentencing range did not change. CP 102-104.

On November 22, 2005, defendant filed a timely notice of appeal from his modified judgment and sentence. On June, 26, 2006, the State filed a motion to dismiss the appeal. On August 11, 2006, Commissioner Schmidt denied the State's motion to dismiss appeal without prejudice.

C. ARGUMENT.

1. DEFENDANT'S APPEAL IS NOT PROPERLY BEFORE THE COURT BECAUSE HE DID NOT RAISE THE ISSUE OF HIS EXCEPTIONAL SENTENCES IN AN EARLIER APPEAL AND THE TRIAL COURT ON REMAND DID NOT EXERCISE ITS INDEPENDENT JUDGMENT TO REVIEW THAT ISSUE.

At some point the appellate process must stop. State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983). The Washington Supreme Court from its early days has been committed to the rule that questions determined on appeal or questions which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case. State v. Sauve, 33 Wn. App. 181, 183 n.2, 652 P.2d 967 (1982); Sauve, 100 Wn.2d at 87, 666 P.2d 894 (1983) (“Where, as in this case, the issues could have been raised on the first appeal, we hold they may not be raised in a second appeal”). The Washington Supreme Court has also interpreted the Rules of Appellate Procedure (RAP) as requiring appellate restraint.

RAP 2.5(c)(1) states:

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a

similar decision was not disputed in an earlier review of the same case.

The Supreme Court has made it clear that despite its permissive language, this rule does not allow for review of every issue or decision which was not raised in an earlier appeal. State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). The Supreme Court clarified that only if, on remand, the trial court exercises its independent judgment, reviews and rules again on an issue does it become an appealable question in the second appeal. Id. The court in Barberio cited to the following commentary from the advisory committee on Rules of Appellate Procedure with approval:

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. . . .

2 L. Orland & K. Tegland, Wash. Prac., Rules of Practice 481 (4th ed. 1991).

The Supreme Court found that the rule is permissive for both the trial court and the appellate court. Barberio, 121 Wn.2d at 51. It is discretionary for the trial court to decide whether to revisit an issue which was not the subject of appeal. Id. If it does so, RAP 2.5(c)(1) states that the appellate court may, but is not required, to review such issue. However, the permissive aspect of the rule with respect to the appellate court is dependant on the trial court exercising its discretion to revisit an

issue. If the trial court opts not to revisit an issue on remand, then there is nothing for an appellate court to review and an appeal based upon such a claim should be dismissed. Barberio, 121 Wn.2d at 50-51.

In Barberio, the defendant was convicted of one count of second degree rape and one count of third degree rape. Id. at 49. The trial court imposed exceptional sentences on each count. Id. The defendant's first appeal resulted in a reversal of the third degree rape charge. Id. On remand the State elected not to retry the third degree rape charge. Id. At the hearing on remand, defendant challenged the aggravating factors found by the trial court in the first sentence, despite failing to challenge the exceptional sentences previously, and argued that his reduced offender score mandated a proportionate reduction in the exceptional sentence. Id. at 49-50. The trial court did not alter the original sentence. Id. On review the appellate court granted the prosecution's motion to dismiss appeal of the exceptional sentence. Id. at 50. The Supreme Court affirmed the dismissal holding that RAP 2.5(c)(1) only permits review of an issue not disputed in earlier review if the trial court exercises its independent judgment and rules anew on the issue. Id.

Barberio controls the instant case. The deciding factor is whether the trial court on remand in this case did in fact independently review the exceptional sentences imposed for the five counts that had been affirmed on appeal. The trial court decided not to review or reconsider its earlier sentences in regards to the counts that were affirmed. The trial court

issued an order to correct the judgment and sentence by striking the counts which had been reversed and adjusting the defendant's offender score. CP 102-104. More importantly, the trial court made clear in its oral ruling that it was not considering anew its prior exceptional sentences as to the counts that were affirmed. The trial court stated that the case had been final since 2002 and that it was not resentencing the defendant, despite defendant's urgings that the court should apply Blakely v. Washington to defendant's sentences. RP 13. Because the trial court opted not to reconsider an issue that had not been challenged in the first appeal, there is nothing for this court to review. In sum, the validity of the exceptional sentences imposed for the defendant's convictions back in 1998 is not properly before this court.

2. DEFENDANT WAS NOT ENTITLED TO RESENTENCING ON THE FIVE AFFIRMED CONVICTIONS WHEN HIS SENTENCES WERE APPROPRIATE AND THE TRIAL COURT HAD NO AUTHORITY TO RESENTENCE HIM.

Defendant was not entitled to a resentencing hearing on the five affirmed convictions because defendant's case was not remanded for resentencing on Counts III-VII and the trial court lacked authority to resentence him on those affirmed convictions. The sentences on Counts III-VII were appropriate because defendant was sentenced on each count separately, the original aggravating factors remained in effect, and

defendant's standard range remained the same, despite a reduction in his offender score.

Defendant's case has been heard on direct review by this Court and the Washington Supreme Court. Defendant did not challenge his exceptional sentences on either appeal and neither court remanded for resentencing on the five affirmed convictions. Kilgore, 147 Wn.2d at 295; Kilgore, 107 Wn. App. at 190. The Supreme Court issued a mandate, which stated, "[t]his cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion." CP 8-21. The Supreme Court's opinion stated, "we affirm the Court of Appeals," but did not address resentencing. CP 8-21.

The Court of Appeals' decision also did not address resentencing, only stating, "[w]e reverse Counts I and II, affirm Counts III-VII, and remand for further proceedings." Kilgore, 107 Wn. App. at 190. It can be inferred that the language "remand for further proceedings" was in reference to the State retrying defendant on the two reversed counts. Id. at 179 (reference to guiding "the court on retrial..."), 182 (reference to "[o]n retrial, if the State does not offer evidence ..."). In sum, this case was not remanded for resentencing on Counts III-VII.

Further, when the State declined to retry defendant on the two reversed counts, the trial court lost its jurisdiction to resentence the defendant on the five affirmed convictions. After an appeal is taken, the

trial court loses its jurisdiction over the subject matter of the appeal, and cannot change its judgment or orders entered before the appeal. Sewell v. Sewell, 28 Wn.2d 394, 396, 184 P. (2d) 76 (1947). The judgment of the Supreme Court is final and conclusive upon all the parties properly before it. RCW 2.04.220. The superior court can only enforce such a judgment. It is powerless to change it. In re Ellern, 29 Wn.2d 527, 529, 188 P.2d 146 (1947). While, a superior court does have the power and duty to correct an erroneous sentence upon discovery, see In re Pers. Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001); State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999), review denied, 142 Wn.2d 1003 (2000), it does not have the unlimited power to modify a correct sentence. State ex rel. Schock v. Barnett, 42 Wn.2d 929, 932-933, 259 P.2d 404 (1953). The judgment of the Supreme Court in this case affirmed the five convictions and remanded for further proceedings on the two vacated convictions. When the State declined to retry the offenses, the trial court only had the power to remove the vacated convictions from the judgment and sentence.

The trial court did not have the authority to resentence defendant on the five affirmed convictions because the sentences imposed were appropriate. Reversing Counts I and II did not impact the sentences for Counts III-VII. The trial court imposed an exceptional sentence of 560 months on each of the seven counts. CP 107-118. The original sentencing court's written findings of fact make clear that it did not rely on the

multiple offense policy¹ as an aggravating factor supporting the exceptional sentences. CP 122-125. Further, the court made no mention of the multiple offense policy during the original sentencing hearing. SRP 1583-1587.

Defendant is correct that reversal of Counts I and II lowered his offender score requiring a correction of his original judgment and sentence. However, under the provisions of the Sentencing Reform Act, once the offender score reaches 9, the standard sentencing range remains the same regardless of how many additional prior convictions are added.² State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996).

At the 1998 sentencing hearing, defendant's offender score was calculated as being 18 for each of his offenses. CP 107-118. With the convictions on Counts I and II vacated, defendant's score was lowered to a 12 on each of the remaining counts. CP 102-104. However, this change

¹ A sentencing court may impose an exceptional sentence if it finds, in its discretion, that the operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purposes of the SRA. RCW 9.94A.390(2)(i); 9.94A.120. The exceptional sentence may be imposed by ordering consecutive sentences or by lengthening the concurrent sentences. State v. Batista, 116 Wn.2d 777, 787, 808 P.2d 1141 (1991); RCW 9.94A.390(2)(i). Cases construing the "clearly too lenient" factor have approved its use in instances where "the defendant has committed a number of crimes and his high offender score does not result in any greater penalty than if he had committed only one." State v. Stewart, 125 Wn.2d 893, 897, 890 P.2d 457 (1995). See also State v. Smith, 123 Wn.2d 51, 56, 864 P.2d 1371 (1993); State v. Stephens, 116 Wn.2d 238, 244-45, 803 P.2d 319 (1991).

² To determine the standard sentencing range, the trial court consults a grid. RCW 9.94A.310 (recodified to RCW 9.94A.510). The grid cross-references the seriousness of the current crime with the person's offender score, which is determined by assigning values to prior and concurrent crimes. Id.

in his offender score was immaterial to his standard sentencing range because defendant's offender score was still higher than 9. Accordingly, there was no legal necessity for the court to resentence defendant when the standard range remained the same for Counts III-VII. See generally State v. Tili, 148 Wn.2d 350, 358-360, 60 P.3d 1192 (2003)(rejecting argument that offender needed to be resented where the trial court incorrectly calculated his offender score before imposing the exceptional sentence when his standard range was correct); Argo, 81 Wn. App. 552 at 569 (rejecting argument that offender needed to be resented where the standard sentencing range would remain the same whether defendant's offender score was 16 or 13); See also Barberio, 121 Wn.2d at 49-50 (rejecting argument that reduction in offender score and standard range requires proportionate reduction in the length of reimposed exceptional sentence).

Defendant cites the following cases as support for the proposition that a defendant is entitled to a new sentencing hearing following a reduction in his offender score: State v. Jackson, 129 Wn. App. 95, 109 n.14, 117 P.3d 1182 (2005); State v. Roche, 75 Wn. App. 500, 878 P.2d 497 (1994); and State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). However, these cases and the authority they rely on are distinguishable because they are concerned with changes to the standard range.

In Jackson, the court was reviewing a potential offender score drop from an 8 to a 7, which would have resulted in a change to the offender's standard range. 129 Wn. App. at 103-104 (resentencing necessary to determine the propriety of including offender's Oregon conviction). Further, the language defendant relies on in Jackson, is a direct quotation from Tili. In Tili, the offender's judgment and sentence reflected an incorrect offender score, but the court held those inaccurate figures were without effect, because the trial court had relied on the correct standard range. 148 Wn.2d at 358-360.

In Roche, the court was reviewing a potential offender score drop from a 5 to a 4, which would have resulted in a change to the offender's standard range. 75 Wn. App. at 505, 511-514 (resentencing necessary to determine the propriety of including offender's juvenile California conviction). Further, the language defendant relies on from Roche is a direct quotation from State v. Brown, 60 Wn. App. 60, 802 P.2d 803 (1990), review denied, 116 Wn.2d 1025, 812 P.2d 103 (1991). In Brown, the court held that resentencing was necessary because the miscalculation in that case would significantly affect the standard range. 60 Wn. App. at 70.

In Parker, the court also held that resentencing was necessary because the sentencing court had incorrectly calculated the standard range before imposing an exceptional sentence. 132 Wn.2d at 192-193 (resentencing necessary because trial court used higher standard range

penalties without requiring the State to prove the acts occurred after the date those ranges became effective). The authority defendant relies on is distinguishable because it stands for the proposition that resentencing is required where the standard range is incorrect. In contrast, defendant's standard range was not subject to change because his offender score remained more than the maximum score contemplated by the SRA. In sum, defendant was not entitled to resentencing on the five affirmed convictions.

3. BLAKELY V. WASHINGTON DOES NOT APPLY TO DEFENDANT'S FIVE AFFIRMED CONVICTIONS BECAUSE THEY WERE FINAL WELL BEFORE THE UNITED STATES SUPREME COURT ISSUED ITS DECISION IN THAT CASE.

On June 24, 2004, the United States Supreme Court issued Blakely v. Washington, which stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. at 301 (citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The Blakely court held that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." 542 U.S. at 303-304.

However, Blakely does not apply retroactively to cases that were final when Blakely was announced. State v. Evans, 154 Wn.2d 438, 448, 114 P.3d 627, cert. denied, 126 S. Ct. 560, 163 L. Ed. 2d 472 (2005). In Washington, a case is “final,” or no longer pending, when the judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari has elapsed. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 327, 823 P.2d 492 (1992) (quoting Kentucky v. Griffith, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)).

In this case, the trial court entered its judgment and sentence on December 1, 1998. CP 107-118. The availability of direct review of the five affirmed convictions in the state court system ended on October 7, 2002, when the Washington State Supreme Court issued its mandate. CP 8-21; RAP 12.5(b); See also State v. Hunt, 76 Wn. App. 625, 629, 886 P.2d 1170 (1995)(finding right to appeal exhausted when the appellate court issues its mandate). The time for a petition for certiorari ended on December 11, 2002, 90 days after the Washington Supreme Court issued its opinion in State v. Kilgore. 147 Wn.2d at 288 (filed on September 12, 2002); USCS Supreme Ct R 13.³ Accordingly, the holding in Blakely,

³ A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. USCS Supreme Ct R 13 (1). The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate. USCS Supreme Ct R 13 (3).

which was issued in June 24, 2004, does not apply to the sentences on defendant's five affirmed convictions that became final on December 11, 2002.

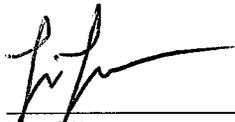
D. CONCLUSION.

For all the foregoing reasons, the State asks this court to affirm defendant's sentences below.

DATED: AUGUST 30, 2006.

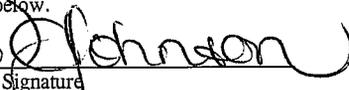
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Levi Larson
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his 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.

8/31/06 
Date Signature

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DIVISION II
06 AUG 31 PM 2:19
STATE OF WASHINGTON
BY 
DEPUTY

APPENDIX “A”

Findings of Fact and Conclusions of Law

2 SEP 13 1999
FILED
DEPT. 5
IN OPEN COURT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

SEP 9 - 1999

IN AND FOR THE COUNTY OF PIERCE

Pierce County Clerk
By *Om*
DEPUTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MARK PATRICK KILGORE,

Defendant.

CAUSE NO. 96-1-04678-9

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR
EXCEPTIONAL SENTENCE

5 SEP 10 1999

THIS MATTER having come on before the Honorable VICKI HOGAN,
Judge of the above entitled court, for sentencing on three counts
RAPE OF A CHILD IN THE FIRST DEGREE and four counts of CHILD
MOLESTATION IN THE FIRST DEGREE, the defendant, MARK PATRICK KILGORE,
having been present and represented by his attorney, Mike Schwartz,
and the State being represented by Deputy Prosecuting Attorney Kent
Liu, and the court having considered all argument from both parties
and having considered all written reports presented, and deeming
itself fully advised in the premises, does hereby make the following
Findings of Fact and Conclusions of Law by a preponderance of the
evidence.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 1

ORIGINAL

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FINDINGS OF FACT

I.

That the defendant was found guilty by jury trial of three counts of RAPE OF A CHILD IN THE FIRST DEGREE and four counts of CHILD MOLESTATION IN THE FIRST DEGREE. That the standard range sentence for RAPE OF A CHILD IN THE FIRST DEGREE is 210 to 280 months imprisonment. The standard range sentence for CHILD MOLESTATION IN THE FIRST DEGREE is 149 to 198 months imprisonment.

II.

That the factors set forth by the Prosecuting Attorney in the State's sentencing recommendation are applicable and are aggravating factors in the instant offense for the reasons set forth by the Prosecuting Attorney, to-wit:

A. The defendant violated a position of trust:

1. The defendant placed himself in a position of trust and utilized that position of trust. For the victims, D.O. and T.O., the defendant stood as a father figure. D.O. and T.O. lived with the defendant at his invitation. The defendant's wife was absent from the home and left the

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 2

defendant in a position of caretaking responsibilities for the victims, A.B., D.O. and T.O.

2. As to C.M., the defendant was residing or staying with the Mann household, and in fact, volunteered to babysit C.M. over a course of several months.

3. To A.B., the defendant stood in a step-parent relationship from 1993 to 1995. This is a prolonged period of time to demonstrate a position of trust and to utilize that position of trust.

B. The victims were particularly vulnerable, not due to their age alone, but because of the relationships between the victims and the defendant. The defendant had practically

un unchecked access to the children and used his position of trust and confidence to facilitate the offense.

C. The court has observed no remorse on the part of the defendant despite the jury verdict, and no acceptance of responsibility for the acts which were committed.

III
Other aggravating circumstances included:
A. Multiple victims and multiple accidents per victim.
B. The defendant's conduct manifested deliberate cruelty to the victims. He provided them with alcohol to the point of intoxication w/ no concern for the safety of the children.

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR EXCEPTIONAL SENTENCE - 3

CONCLUSIONS OF LAW

I.

That there are substantial and compelling reasons justifying an exceptional sentence outside the standard range.

II.

That the defendant MARK PATRICK KILGORE, should be incarcerated in the Department of Corrections for a determinate period of 560 months.

DONE IN OPEN COURT this 26th day of ^{September} ~~August~~, 1999.

Vicki L. Hooper
J U D G E

Presented by:

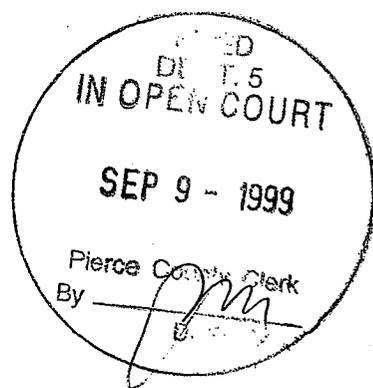
[Signature]

Kent ~~Wu~~
Deputy Prosecuting Attorney

Approved as to Form:

Mike Schwartz 21824

Mike Schwartz
Attorney for Defendant



FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 4