

81270-5
23946-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT/CROSS-RESPONDENT

v.

RAYMOND C. HUGHES, RESPONDENT/CROSS-APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JEROME J. LEVEQUE

SUPPLEMENTAL BRIEF OF APPELLANT/CROSS-RESPONDENT

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I.

PROCEDURAL STATEMENT

Petitioner, State of Washington, respectfully submits this supplemental brief concerning the decisions in State v. Clarke, 156 Wn.2d 880, 134 P.3d 188 (2006), and State v. Borboa, 157 Wn.2d 108, 135 P.3d 469 (2006), as authorized by this court's ruling issued July 12, 2006.

II.

ARGUMENT

A. *CLARKE AND BORBOA CONFIRM THAT THE TRIAL COURT ERRED IN FINDING THAT IT COULD NOT CONSIDER AN EXCEPTIONAL SENTENCE.*

The decisions in Clarke and Borboa confirm the appellant's position that the trial court erred in sentencing. The strictures of Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), do not apply to minimum term determinations under RCW 9.94A.712. An exceptional minimum term can be imposed without jury fact-finding. The matter must be remanded for a new sentencing hearing.

In Clarke the Court determined that §712 imposed an indeterminate life sentence on all offenders sentenced under that provision. 156 Wn.2d at 887-890. Under that scheme, trial judges set a minimum sentence only and that sentence “is irrelevant under *Blakely* analysis.” Id. at 891. Under §712, the governing cases were the United States Supreme Court decisions in McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986), and Harris v. United States, 536 U.S. 545, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002), that allowed judicial fact-finding in setting minimum sentences rather than Blakely that governs maximum sentences.

The decision in Clarke is dispositive here.¹ The trial court erred in finding that it had no ability to consider an exceptional minimum term sentence. The matter should be remanded for that opportunity.

¹ Borbora is to the same effect as Clarke and simply follows that case as binding authority in §712 sentencing proceedings. 157 Wn.2d at 117-118.

III.

CONCLUSION

For the reasons stated herein and previously, the case should be remanded for a new sentencing hearing with the trial court to consider the factual bases for an exceptional sentence.

Respectfully submitted this 31st day of July, 2006.



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