NO. 101605-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOSEPH BRADY,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Bruce W. Cohoe

No. 01-1-06116-1

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Michael Brady has not proven in this record that he has made any payments toward his legal financial obligations. Citing RAP 13.4(b)(4), he asks the Court to reallocate alleged payments which would have been disbursed proportionally and lawfully under RCW 9.94A.760(2). This claim must be denied, because the usurpation of legislative power does not involve a matter of substantial public interest.

Brady alleges that *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) applies to his term of community custody. The claim (first made in No. 34715-6-II over a decade ago) has been repeatedly rejected, because the trial court's authority to impose community custody does not rely on any fact other than his conviction. His misstatement of law does not demonstrate a conflict of laws or a significant constitutional issue.

In the absence of a RAP 13.4(b) consideration, the Court must deny review.

II. RESTATEMENT OF THE ISSUES

A. Does Brady's request that the courts disregard constitutional statutes on policy grounds involve a matter of substantial public interest?

B. Does Brady's *Blakely* claim, which was decided in a previous appeal, demonstrate any conflict of laws or a significant constitutional question?

III. STATEMENT OF THE CASE

Petitioner Michael Brady remains convicted in Pierce County Sup. Ct. No. 01-1-06116-1 of 17 counts of first-degree child rape and 7 counts of first-degree child molestation. Unpub. Op. at 2; *State v. Brady*, 121 Wn. App. 1032 (2004) (unpublished). (This Court vacated the 6 counts of sexual exploitation in 2010 in No. 83699-0.)

His crimes were committed in May of 2001 so as to predate the indeterminate sentencing law first enacted by Laws of 2001, 2d Spec. Sess., ch. 12, § 303. CP 17-18. He received a determinate sentence. The most serious offense had a standard range of 240-318 months. CP 19. At his first sentencing, in

2021, the trial court imposed exceptional consecutive sentences. *Brady*, 121 Wn. App. 1032, 2004 WL 958070 at *1.

Following *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the matter was remanded for standard concurrent sentences. Unpub. Op. at 2. In 2006,

> Brady was resentenced to 318 months of confinement and 36-48 months of community custody. The trial court also imposed $1,151.92 in LFOs[1] for restitution, crime victim assessment, and criminal filing fees.

Unpub. Op. at 2.

Brady appealed from his resentencing in Ct. of Ap. No. 34715-6-II, raising additional claims under *Blakely*. Br. of Resp. at 7 (citing App. E). Specifically, he argued the lifetime no-contact order and the community custody term exceeded the 318-month, high end of the standard range, which he claimed was the applicable statutory maximum. *Id*. The court of appeals denied those claims on the merits.

> *Blakely* clarified that 'the statutory maximum' for *Apprendi* purposes is the maximum

[1] Legal Financial Obligations

> sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. *Blakely*, 542 U.S. at 303. (emphasis in original).
>
> Community custody is part of Brady's punishment, making his sentence potentially longer than the high end of his standard range. *See State v. Sloan*, 121 Wn.App. 220, 223 (2004). But that additional punishment is based on the same facts the trial court found after the bench trial, not additional facts. Former RCW 9.94A.120(11)(a)(2000), *required* the trial court to impose a term of community custody because it found Brady guilty of sex offenses, including rape of a child in the first degree, child molestation in the first degree and sexual exploitation of a minor with sexual motivation. Former RCW 9.94A.030(37)(2000). The trial court found no additional facts in imposing the term of community custody, so it did not violate *Blakely*. And Brady's sentence of 316 months of incarceration plus 36 to 48 months of community custody does not exceed the statutory maximum for Class A felonies of life imprisonment.

Br. of Resp. at 8 (quoting App. E (30-31)). He petitioned for further review, which the courts denied. *State v. Brady*, 163 Wn.2d 1044, 187 P.3d 270 (2008), *cert. denied*, *Brady v. Washington*, 555 U.S. 872, 129 S.Ct. 172, 172 L.Ed. 123 (2008).

Following the denial of his fourteenth personal restraint petition, Brady filed two motions. CP 1-54, 78-84. In the Motion

to Clarify his sentence, he argued once again that the community custody term exceeds the statutory maximum term under *Blakely*. CP 10. He recommended that the court reduce his confinement from 318 to 282 months if it wanted him to serve 36 months of community custody. CP 12. In the Motion to Waive Non-Mandatory Legal Financial Obligations, Brady asked the court to remit his appellate costs and to find that he had paid all mandatory LFOS. CP 78-82. The motion does not provide any proof of payment.

The trial court entered orders which struck certain LFOs (the criminal filing fee, the supervision fee, and nonrestitution interest) and which denied the Motion to Clarify. CP 55-59. Brady appealed. CP 60-63.

The court of appeals noted that the trial court mistakenly believed that it lacked the authority to remit appellate costs, correctly found that it lacked authority to reallocate payments which had already been distributed, and affirmed the decision denying the Motion to Clarify. Unpub. Op. at 1.

IV. ARGUMENT

To obtain discretionary review, a petitioner must demonstrate a consideration under RAP 13.4(b). Brady has not demonstrated any such consideration. Therefore, review must be denied.

A. Where there is no allegation that the statutes are unconstitutional, a court may not reject them because a party prefers a different policy.

Brady claims but does not demonstrate that it is a matter of substantial public interest that the courts should unlawfully "reallocate" payments which have already been distributed for another purpose. Pet. at 9. He does not even demonstrate this would benefit him since there is no record that he has made any payments at all. *See* Unpub. Op. at 12. Because his request would contravene existing law purely on policy grounds, Brady is recommending this Court usurp legislative authority.

Brady claims he believes the trial court has this authority, because he alleges that no authority directs the clerk on how to disburse LFO payments. Pet. at 5-7. This is specious as the court

of appeals provided Brady with that statutory authority in its opinion. Unpub. Op. at 11 (citing RCW 9.94A.760(2) and RCW 10.01.170).

> (2) Upon receipt of each payment made by or on behalf of an offender, the county clerk shall distribute the payment in the following order of priority until satisfied:
>
> (a) First, proportionally to restitution to victims that have not been fully compensated from other sources;
>
> (b) Second, proportionally to restitution to insurance or other sources with respect to a loss that has provided compensation to victims;
>
> (c) Third, proportionally to crime victims' assessments; and
>
> (d) Fourth, proportionally to costs, fines, and other assessments required by law.

RCW 9.94A.760(2); *see also* RCW 10.01.170.

Superior court clerks hold constitutional positions, independent of the judicial branch. Unpub. Op. at 10-11. The county clerk has mandatory duties including "the receipt and disbursement of funds" in a specified manner. Unpub. Op. at 10, 11 (citing RCW 2.32.070).

The trial court's authority regarding LFOs is limited to imposition and remittance, "retain[ing] authority over unpaid LFOs." RCW 10.01.160(3) and (4); Unpub. Op. at 10. The legislature has not authorized the courts to claw back funds which the clerk has legally disbursed to various entities and where those funds may have been expended under the justified expectation that they were lawfully disbursed.

Brady does not challenge any statute, all of which are presumptively constitutional. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691, 701 (2000) (courts presume a statute to be constitutional until proven otherwise beyond a reasonable doubt and afford great deference to the judgment of a coequal branch of government that is sworn to uphold the constitution). There is no lawful basis for a trial court to order the clerk to violate the law.

Because it is simply not possible to claw back funds which have been disbursed to one purpose (and likely spent) in order to redistribute them to another purpose, Brady is actually asking

that the court remit mandatory LFOs, including restitution, which it cannot do. *State v. Catling*, 193 Wn.2d 252, 438 P.3d 1174 (2019).

The court of appeals noted that the published cases upon which Brady relies only regard "unpaid" obligations. Unpub. Op. at 10. Notwithstanding this admonition, Brady continues to so rely. Pet at 6 (citing *State v. Gaines*, 16 Wn. App. 2d 52, 57, 479 P.3d 735 (2021)). He also misrepresents[2] the relevance of unpublished decisions. Pet. at 7-8 (citing *State v. Welker*, 9 Wn. App. 2d 1092 (2019) and *In re the Pers. Restraint of Cargill*, 3 Wn. App. 2d 1040 (2018)).

Brady argues that a court may contravene the existing statute based on its own policy ideas. Pet. at 7 (arguing that there must be a specific statute prohibiting the court from undoing

[2] Brady alleges *Welker* "resolved [the issue] on other grounds." Pet. at 8. In fact, the issue was not before the court of appeals at all where Welker had not challenged the reallocation of paid obligations. Nor is *Cargill* "similar" where no reallocation was ordered, but only the reversal of the initial imposition of costs.

legislative intent). In other words, Brady is urging this Court to violate the separation of powers doctrine. *See Washington State Legislature v. Inslee*, 198 Wn.2d 561, 579, 498 P.3d 496 (2021) (a fundamental function of the legislature is to set policy and to draft and enact laws). "Judicial deference to the legislature's decision on how to format its bills—especially its appropriations bills—best comports with separation of powers principles." *Id.*

The legislature has made many changes in the law on legal financial obligations, some of which apply retroactively. *See e.g.* Laws of 2022, ch. 29; Laws of 2018, ch. 269. To this date, it has not enacted a law requiring or even permitting the courts to recover already disbursed funds. It is unlikely to do so where the paperwork alone is likely to cost significantly more than the reimbursements and where offenders would be better served by other bills, e.g. HB 1024 (requiring that an incarcerated person's wage be no less than the state minimum wage). It is not a matter of public interest that the courts cancel legislatively mandated acts based on policy differences.

B. There is no conflict in case law or significant constitutional question which would interpret *Blakely* as limiting the community custody term, a provision that does not rely on any fact other than conviction.

The denial of Brady's *Blakely* challenge to his community custody term was the law of the case long before he filed his Motion to Clarify. There is no basis for review.

Brady's argument has been and continues to be that his term of incarceration and his term of community custody may not exceed 318 months, because his standard range was 240-318 months. That simply is not the law. While he relies on *Blakely*, he completely misrepresents the case.

In *Blakely*, the United States Supreme Court applied the rule which it had expressed in *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000): "Other 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." *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004).

The dispute in *Blakely* was the meaning of "statutory maximum." The Washington legislature had intended, and Washington courts had consistently interpreted that term to reference RCW 9A.20.021. *Blakely*, 542 U.S. at 303. The *Blakely* majority decided that " 'statutory maximum' **for *Apprendi* purposes**[3] is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303 (italics in the original, bold emphasis added). In other words, the maximum term of incarceration which the court could impose based on Blakely's guilty plea was the high end of the standard range. *Id.* at 304. It could not impose an exceptional sentence, which could only be justified by the finding of a factor separate from those used in determining the standard range. *Id.* (quoting *State v. Gore*, 143 Wn.2d 288, 315-16, 21 P.3d 262, 276 (2001)).

[3] *Blakely* did not change the meaning of "statutory maximum" for other purposes, e.g., RCW 9.94A.701(10).

By definition, the addition of a community custody term cannot exceed the statutory maximum "for *Apprendi* purposes," because its imposition does not require any additional finding of fact other than those required for conviction. Unpub. Op. at 12, 14-15 (citing *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006)).

Based on his own misunderstanding of *Blakely*, Brady asks for his community custody term to be clarified under former RCW 9.94A.715 pursuant to his false statement of law. Because the premise fails, there is no need for clarification. Moreover, Brady does not appear to understand former RCW 9.94A.715. The provisions at subsection (1)(a) and (b) regard when the term begins, not how long it lasts.

V. CONCLUSION

The State requests this Court deny review.

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RESPECTFULLY SUBMITTED this 30th day of January, 2023.

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1/30/2023	*s/ Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

January 30, 2023 - 4:29 PM

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Appellate Court Case Title:	State of Washington v. Michael Joseph Brady
Superior Court Case Number:	01-1-06116-1

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