Supreme Court No. _____
Court of Appeals No. 57221-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,
v.

ANTHONY PASCUZZI,

Appellant.

PETITION FOR REVIEW

ON APPEAL FROM THE SUPERIOR COURT

Anthony Pascuzzi # 346937
Appellant, pro se
SCCC/H4-A-20U
191 Constantine Way
Aberdeen, WA 98520

A. IDENTITY OF PETITIONER

Anthony Pascuzzi asks this Court to accept review of the Court of Appeals ("COAs") decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

This case involves a *Blake*[1] violation. However, in terminating review, the COAs narrowed the application of *Blake* by finding that the case creates pathways to a "non-event." In addition, the COA's analysis of *Parker*[2] gives rise to a legal principle that denies relief of an unconstitutional conviction because an exceptional sentence was imposed in the case. This Court should accept review of the COA's decisions on these matters. A copy of the decision is attached as Exhibit A.

C. ISSUES PRESENTED FOR REVIEW

1. IS REVIEW APPROPRIATE UNDER RAP 13.4(b)(1) WHEN THE COA'S DECISION CONFLICTS WITH THE HOLDING OF *BLAKE*?

2. IS REVIEW APPROPRIATE UNDER RAP 13.4(b)(4) WHEN THE COA'S ANALYSIS OF *PARKER* WOULD ADVANCE A LEGAL PRINCIPLE TO DENY PASCUZZI RELIEF OF AN UNCONSTITUTIONAL CONVICTION BECAUSE AN EXCEPTIONAL SENTENCE WAS ALSO IMPOSED?

D. STATEMENT OF THE FACTS

The facts and procedural history of this case are well laid out in the preceding briefs by the State and Pascuzzi's former counsel at the COAs level, and is incorporated here. Only a few facts remain to be included.

Pascuzzi now also appeals the COA's decision terminating review. Additionally, while Pascuzzi received an exceptional sentence, it should be clear that the argument made to this point is secondary and should not be conflated with the unconstitutional

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[1] *State v Blake*, 197 wn.2d 170 (2021).
[2] *State v Parker*, 132 Wn.2d 182 (1997).

conviction resulting from a *Blake* like violation, which is the primary issue of concern. Case law is clear; when such a conviction is adversely used against an individual that elevates an offender score and raises a standard sentencing range, this error must be corrected. A judgment and sentence cannot be allowed to operate with an unconstitutional conviction as part of its supporting authority.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Because the COAs is bound by the holding of *Blake*, its decision to carve-out a "non-event" provision is in conflict.

If the decision of the lower court departs from precedent, it subjects its judicial decision to challenge under RAP 13.4(b)(1) as being conflicting. Such is the case here.

When the Washington Supreme Court establishes a rule of law through case law, the lower courts in our State are bound by that decision. *Godefroy v Reilly*, 146 Wash. 257, 262 P. 639 (1928). In other words, once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court. *Id; State v Gore*, 101 Wn.2d 481, 487 (1984) *superseded on other grounds by* RCW 9.41.040(3). To the extent that the COAs is creating new applications of *Blake* when our Supreme Court has not overruled *Blake* nor authorized the COAs independent say-so to carve out a provision that the *Blake* Court did not do itself is a conflicting decision.

Although Pascuzzi's simple drug possession conviction is an out-of-state conviction, *Blake* applies, and the application was not disputed by the State. State's Response Brief (COAs No: 57221-4-II). See *State v Markovich*, 19 Wn.app. 157, 174 (2021) review denied, 198 Wn.2d 1036 (2022); see also *State v Sullivan*, 18 Wn.App.2d 225, 229 (2021).

Given that *Blake* applies here, our Supreme Court decided *Blake* in February of 2021, which categorically invalidated all simple drug possession convictions in Washington State. With the ruling, all related convictions that fall into what *Blake* unconstitutionalized are rendered void and subject to removal from a defendant's criminal record. *State v Blake,* 197 Wn.2d at 195. It also allows defendants to seek resentencing relief—on collateral reviews--if an unconstitutional conviction was adversely used against a criminal defendant such that it raised an offender score and the associated standard sentencing range. See *In re Richardson,* 200 Wn.2d 845, 847 (2022). In *Richardson,* the court not only noted the difference of what makes a Judgment and Sentence ("J&S") valid or invalid based on a prior unconstitutional conviction resulting from a *Blake* violation, but it also articulated when resentencing is required based a *Blake* violation. *Id.* The court observed that a J&S may be valid where a prior unconstitutional conviction was used in a defendant's offender score. But in the context of *Blake,* the court also specifically reasoned that the determining factor for what makes a J&S invalid and demands resentencing, is where the unconstitutional conviction was used in a case to the effect that it not only elevated a defendant's offender score, but that it also elevated the associated standard sentencing range. *Id.* At 847. Through *Richardson,* the court is differentiating when *Blake* necessitates a resentencing hearing based on the usage of a prior drug possession conviction. It instructs that the factors depend on whether after the excision of the unconstitutional conviction, does the defendant's offender score and the associated standard sentencing range change. If the answer is no, then resentencing is not required. If the answer is yes, then resentencing is necessary to correct the error. *Id.*

Here, the *Blake* violation is simple. Not only does Pascuzzi's current J&S include one prior drug possession conviction—that must be removed—but he must also be resentenced because this unconstitutional conviction raised his offender score to "8" points. Clerk's Paper at 3. This in turn raised the associated standard sentencing range on his current J&S to 129-171 months. Id. The sentencing court imposed the high-end of 171 months. Excising the unconstitutional conviction drops pascuzzi's offender score to "7" points, which drops the associated standard range to 108-144 months, a substantial difference of 27-months from high end to high end. This change in offender score and standard range is exactly what *Richardson* pointed to when a *Blake* violation calls for a resentencing hearing.

In Pascuzzi's case, for the COAs to find that his *Blake* violation creates a "non event" directly conflicts with *Blake* and how our Supreme Court instructs lower courts to apply *Blake*. The analytical approach taken by the COAs regarding the application of *Blake* to the instant case suggests that *Blake*'s holding of ["unconstitutionalizing"] the simple drug possession statute is orbiter dictum, thus leaving to the COAs a pathway to carve-out a non-event provision on an event situation. This approach must be corrected as it creates conflicts with how our Supreme Court applies *Blake* in situations like Pascuzzi's. Accordingly, this court should accept review on this matter pursuant to RAP 13.4(b)(1).

2. Because the COA's decision has the potential to advance a legal principle that waters down a consequential unconstitutional conviction, it creates a substantial public interest.

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Whether Pascuzzi's exceptional sentence was properly imposed or not is a question for a later date do deal with, but the imposition of it is still relevant to the argument herein below. Under this issue presented, the Court is being asked to resolve a matter of substantial public interest. That matter concerns whether if the COA's decision in this case is allowed to stand, will it implicitly create the holding for future cases so that incorrect standard ranges resulting from incorrect offender scores based on consequential unconstitutional convictions are harmless where the case also has an exceptional sentence imposed. In other words, can the same exceptional sentence that was originally imposed be attached to a sentence after correcting an incorrect offender score and standard range? If the answer is yes—which is Pascuzzi's answer—then the COA's decision is contrary to this answer, and in opposite with the structures of the Sentencing Reform Act of 1981 ("SRA"). Thus, for this question, Pascuzzi feels that Rap 13.4(b)(4) is better suited to deal with this issue rather than RAP 13.4(b)(2).

The appropriate standard of review for a miscalculation of an offender score is de nove. See *State v McCraw*, 27 Wn.2d 281, 289 (1995).

In denying Pascuzzi relief, The COA's finding holds that because the sentencing court indicated that it would impose the same sentence "regardless of the defendant's offender score," CP at 17, an incorrect offender score is of no consequence. COA's Opinion at 6. To this effect, the COAs relies on *Parker*.

When analyzing Pascuzzi's case in the context of *Parker* in combination with the indicated "regardless of the offender score" expression, the COA's opinion flips the burden so that Pascuzzi had to show that "29 months" was the actual exceptional sentence imposed rather than 200 months. COA's Opinion at 6. This occurred because

the sentencing court wrote that it imposed the 200-month exceptional sentence. Taking this passing comment, the COAs believed Pascuzzi was actually given a 200-month exceptional sentence. *Id.* This is clearly incorrect, and the COA's opinion is juggling semantics and misapplying *Parker* to reach a reasoning of denial. A review of Pascuzzi's record demonstrates that he was sentenced under "8" points and the standard range sentence imposed against Pascuzzi under "8" points was 171 months. CP at 3. The sentencing court then imposed an additional 29 months as the exceptional sentence above the standard range. Pascuzzi was not, as incorrectly observed by the COAs, given a 200-month exceptional sentence above his standard range. That was his total sentence. Taking this incorrect analysis of Pascuzzi's facts, the COAs read *Parker* in a vacuum to find that even if Pascuzzi has an incorrect offender score and incorrect standard range, it is irrelevant because the sentencing court expressed that it would impose the same sentence. However, when *Parker* dealt with this issue, it did not find that an incorrect offender score or incorrect standard range cannot be corrected. *Parker* specifically found that such miscalculations must be corrected in order to comply with the structures of the SRA. *Parker* at 192-93. It then went on to hold that, as it relates to the exceptional sentence itself, if the record does not indicate that the "same exceptional sentence" would be imposed, then the exceptional sentence is also improperly imposed. *Id* at 193. To this effect, the COAs misconstrues *Parker* because in applying the case to Pascuzzi, it is not separating the legal error associated with Pascuzzi's miscalculated offender score and related miscalculation standard range from the exceptional sentence issue.

As noted by *Parker*, RCW 9.94A.730 refers to the standard range as the presumptive sentence, which is a Legislative determination of the applicable punishment for the crime

as ordinarily committed. While the imposition of an exceptional sentence is directly related to the correct determination of the standard range, that determination can **only be made after** the offender score is correctly calculated. *Id.* (citing *State v Worl*, 129 Wn.2d 416 (1996); *State v Collicott*, 118 Wn.2d 649, 660 (1992)(*Collicott II*). The Court reasons that because it is the function of the judiciary to impose sentences consistent with Legislative enactments, when courts do not **first** properly calculate the offender score courts are acting outside of its judiciary powers. *Collicott II*, 118 Wn.2d at 649. For sentencing purposes, this means not only are courts bound to act within the structure of the SRA, but when it fails to properly calculate the offender score as required by the SRA, it is legal error. *State v Roberts*, 117 Wn.2d 576, 587 (1991). Regarding the imposition of exceptional sentences based on an incorrect offender score, the exceptional sentence itself will be upheld so long as the reason is valid and clearly not excessive. See *State v Ritchie*, 126 Wn.2d 388, 393 (1995). However, an incorrect offender score and an incorrect standard range must first be corrected as the starting point for any correct sentence. *Id; Collicott II.*

If the COA's decision is allowed to stand, it would effectively advance a legal principle that allows courts too circumvent the structures of the SRA as well as case law in line with *Parker*.

A correction of Pascuzzi's offender score places him at "7" points instead of "8". This in turn corrects his standard range to 108 – 144 months from 129 – 171. From high-end to high-end, that is a difference of 27 months. Attaching the exceptional sentence of 29 months places Pascuzzi's total sentence at 173 months. Given this drastic change in Pascuzzi's sentence, he has met the requirements that entitle him to relief along with his

procedural burdens contrary to the COA's finding on the issue. Accordingly, this Court should accept review on this matter to correct the COA's decision and so that decision does not implicitly give rise to a legal principle to counter the sentencing structures of the SRA and case law such as *Parker*.

F. CONCLUSION

This Court should accept review for the reasons indicated in Part E and grant Pascuzzi to be resentenced under a correct offender score of "7" and a correct standard range of 108 – 144 months. This Court should also grant any other relief this Court deems appropriate and remand for further proceedings.

DATED this 10th day of April, 2024.

Anthony Pascuzzi #346937
Petitioner, pro se

INMATE

April 10, 2024 - 10:30 AM

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Appellate Court Case Number:	102,780-0
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EXHIBIT A

(Court of Appeals Decision)

Filed
Washington State
Court of Appeals
Division Two

January 17, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY JOSEPH PASCUZZI, Appellant.	No. 57221-4-II PUBLISHED OPINION

GLASGOW, C.J. — A jury found Anthony Pascuzzi guilty of two counts of first degree child molestation. The sentencing court imposed an exceptional sentence because the jury found that Pascuzzi had used his position of trust to facilitate both offenses and the judge found that Pascuzzi's unscored misdemeanors, unscored foreign convictions, and other unscored convictions resulted in a presumptive sentence that was clearly too lenient. In the sentencing court's findings of fact and conclusions of law, it wrote that these grounds, taken together or considered individually, justified the exceptional sentence. And it wrote that it would impose the same sentence regardless of Pascuzzi's offender score.

Pascuzzi later filed a CrR 7.8 motion for relief from judgment because his offender score needed to be reduced by one point after *State v. Blake*.[1] Following a show cause hearing, the trial

[1] 197 Wn.2d 170, 481 P.3d 521 (2021).

court denied the motion, reasoning that Pascuzzi's sentence expressly would be the same regardless of his offender score.

Pascuzzi appeals. He argues that it is unclear whether the sentencing court would have imposed the same exceptional sentence if his offender score were different. We hold that the trial court did not abuse its discretion in denying Pascuzzi's CrR 7.8 motion and affirm.

FACTS

In 2011, a jury found Pascuzzi guilty of two counts of first degree child molestation. For each count, the jury found an aggravating factor, determining that Pascuzzi had used his position of trust to facilitate both offenses.

The sentencing court imposed an indeterminate sentence under RCW 9.94A.507(3), setting a minimum term with a maximum term of life. Because Pascuzzi's offender score was 8 for both counts, a top-end standard range minimum term would have been 171 months and the maximum term was life. But the sentencing court imposed an exceptional sentence of 200 months to life for each count—29 months above the top of the standard range for the minimum term—to be served concurrently. The judgment and sentence indicated that the sentencing court found "substantial and compelling reasons that [justified] an exceptional sentence" in part because the jury found aggravating factors. Clerk's Papers (CP) at 3.

In findings of fact and conclusions of law supporting the exceptional sentence, the sentencing court found that Pascuzzi's unscored misdemeanor and foreign conviction history, as well as the prior convictions omitted from Pascuzzi's offender score calculation, resulted in a presumptive sentence that was "clearly too lenient." CP at 17 (Finding of Fact (FF) I). The court also included the jury finding that Pascuzzi "used his position of trust or confidence to facilitate

the commission of the current" offenses. *Id.* And the sentencing court found that these grounds, "*taken together or considered individually*, [constituted] sufficient cause to impose the exceptional sentence." *Id.* (FF II) (emphasis added). The sentencing court added a handwritten note: "Additionally, this sentence is imposed *regardless of the defendant's offender score*." *Id.* (emphasis added).

In 2021, Pascuzzi filed a CrR 7.8 motion for relief from judgment because his offender score included a Florida drug possession conviction that he argued became void after *Blake*. The trial court determined that the motion was not time barred under RCW 10.73.090 and that Pascuzzi had "made a substantial showing that [he was] entitled to relief." CP at 52. The trial court therefore ordered a show cause hearing as required under the rule.

After the hearing, the trial court denied the CrR 7.8 motion. The trial court explained, "[T]he sentence expressly excluded criminal history calculation, so the effect of *Blake* . . . is, essentially, a non-event." Verbatim Rep. of Proc. at 5.

Pascuzzi appeals the denial of his CrR 7.8 motion.

ANALYSIS

I. CrR 7.8 PROCEDURAL REQUIREMENTS

Under CrR 7.8, a superior court "may relieve a party from a final judgment" when the "judgment is void." Former CrR 7.8(b)(4) (2007). The superior court must transfer a defendant's CrR 7.8 motion "to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion" meets certain procedural requirements. Former CrR 7.8(c)(2).

First, the superior court must determine that the motion "is not barred by RCW 10.73.090." *Id.* RCW 10.73.090(1) prohibits a defendant from collaterally attacking a judgment and sentence that became final more than one year ago "if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." A judgment and sentence may be invalid on its face if the sentencing court calculated the defendant's offender score using a conviction *Blake* voided and the reduction in the offender score affected the standard range. *See In re Pers. Restraint of Richardson*, 200 Wn.2d 845, 847, 525 P.3d 939 (2022).

Second, the superior court must determine either that "the defendant has made a substantial showing that [they are] entitled to relief" or that "resolution of the motion will require a factual hearing." Former CrR 7.8(c)(2).

If the superior court "does not transfer the motion to the Court of Appeals," it must order a hearing and direct "the adverse party to appear and show cause why the relief asked for should not be granted." Former CrR 7.8(c)(3).

Here, the trial court concluded that the motion was timely and that Pascuzzi "made a substantial showing that [he was] entitled to relief." CP at 52.

II. DENIAL OF A CrR 7.8 MOTION

Pascuzzi argues that the trial court erred and we must remand for the trial court to resentence him because his exceptional sentence was based on an erroneously calculated sentencing range. He contends that while the sentencing court clearly intended to impose an exceptional sentence, it is unclear whether the sentencing court would have imposed an "exceptional sentence of the same length" if the top of the standard range had been different. Br. of Appellant at 15. We disagree.

Our review of a trial court's denial of a CrR 7.8 motion is "limited to determining whether the trial court abused its discretion in denying [the] motion." *State v. Larranaga*, 126 Wn. App. 505, 509, 108 P.3d 833 (2005). "A trial court abuses its discretion if its decision rests on untenable factual grounds or was made for untenable legal reasons." *State v. Frohs*, 22 Wn. App. 2d 88, 92, 511 P.3d 1288 (2022).

A CrR 7.8 motion for resentencing is a collateral attack. *State v. Molnar*, 198 Wn.2d 500, 509, 497 P.3d 858 (2021). To obtain relief by collateral attack, a defendant must either show that a constitutional error actually prejudiced them or that a nonconstitutional error amounted to "a fundamental defect resulting in a complete miscarriage of justice." *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007). A miscalculated offender score is a nonconstitutional error. *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 867, 50 P.3d 618 (2002).

In *Goodwin*, a case where the defendant received a standard range sentence, the Washington Supreme Court held that "a sentence based upon a miscalculated offender score is a fundamental defect that results in a complete miscarriage of justice." *Id.* at 876. The court reasoned that Goodwin's miscalculated offender score led to a sentence that was, as a matter of law, "in excess of what [was] statutorily permitted for his crimes." *Id.* at 875-76.

But where a defendant receives an exceptional sentence, an incorrect offender score does not always result in a complete miscarriage of justice. *State v. Parker*, though decided on direct appeal, is instructive. 132 Wn.2d 182, 937 P.2d 575 (1997). In that case, the Washington Supreme Court held that when a "sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." *Id.* at 189.

In *Parker,* the sentencing judge said, "'I am going to make those sentences run consecutively. I think that adds up to something on the order of, if not exactly, 18 years.'" *Id.* at 192. On appeal, the Supreme Court concluded that this mention of a total sentence of 18 years was not significant because it simply acknowledged the total amount of confinement imposed. *Id.* Thus, this remark was not a clear indication that the sentencing court would have imposed the same exceptional sentence regardless of the standard range.

Here, in contrast, the record shows that the sentencing court would have imposed the same sentence even if Pascuzzi's offender score had been different. The sentencing court specifically wrote that it imposed the 200-month exceptional sentence "*regardless* of the defendant's offender score." CP at 17 (FF II) (emphasis added). The trial court therefore reasonably concluded that Pascuzzi's sentence would not have changed even if the standard ranges for the first degree child molestation convictions had changed.

Pascuzzi has the burden to prove a miscarriage of justice, but he offers no evidence that the sentencing court meant to convey that it would have imposed a sentence 29 months above the top of *any* applicable standard range. Under these particular circumstances, including that the offender score would be reduced by only one point, the trial court's reading of the sentencing judge's language was reasonable and not an abuse of discretion. The miscalculation therefore did not result in a complete miscarriage of justice.

Moreover, unlike in *Goodwin*, there was statutory authority for Pascuzzi's sentence in this case. Former RCW 9.94A.535(2)(b), (2)(d), (3)(n) (2008). The sentencing court imposed an exceptional sentence based on several findings of fact. The sentencing court found that Pascuzzi's unscored misdemeanors, unscored foreign convictions, and other unscored convictions resulted in

a presumptive sentence that was clearly too lenient, and the jury found that Pascuzzi used his position of trust or confidence to facilitate the commission of his offenses. The sentencing court also found that its grounds for the exceptional sentence, "taken together or considered individually, [constituted] sufficient cause to impose the exceptional sentence." CP at 17 (FF II).

The trial court did not abuse its discretion in concluding that the miscalculation of Pascuzzi's offender score was not a fundamental defect resulting in a complete miscarriage of justice.

CONCLUSION

We affirm.

Glasgow, CJ
Glasgow, C.J.

We concur:

Che, J
Che, J.

Hull, JPT
Hull, J.P.T.*

* Judge Hull is serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

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