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STATE OF WASHINGTON
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NO. 89957-6

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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 ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF THE PARTY</u>	1
B. <u>COURT OF APPEALS OPINION</u>	1
C. <u>STATEMENT OF THE CASE</u>	1
D. <u>ARGUMENT</u>	3
1. THE COURT SHOULD DENY REVIEW	3
E. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Alleyne v. United States, ___ U.S. ___,
133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) 4, 5

Washington State:

State v. Clarke, 156 Wn.2d 880,
134 P.3d 188 (2006)..... 4, 5

State v. Halstien, 122 Wn.2d 109,
857 P.2d 270 (1993)..... 4

State v. Laviollette, 118 Wn.2d 670,
826 P.2d 684 (1992)..... 4

State v. Oliver Weaver, Slip op. 67558-3-I,
2014 WL 231338 (January 21, 2014) 1, 3

State v. Rowland, 174 Wn.2d 150,
272 P.3d 242 (2012)..... 2, 5

Constitutional Provisions

Federal:

U.S. Const. amend. VI 3, 4

Statutes

Washington State:

Former RCW 9.94A.712 1

RCW 9.94A.507 1, 4

A. IDENTITY OF THE PARTY

The State of Washington is the respondent.

B. COURT OF APPEALS OPINION

The Court of Appeals issued a unpublished decision in this case, State v. Oliver Weaver, Slip op. 67558-3-I, 2014 WL 231338 (January 21, 2014).

C. STATEMENT OF THE CASE

The relevant facts of this case are set forth in the Brief of Respondent and the Court of Appeals' opinion. Over ten years ago, in December of 2002, defendant Oliver Weaver violently raped 13 year-old R.T. Slip op. at 2. R.T. became pregnant, aborted the fetus, and DNA testing confirmed that Weaver was the father. Id.

In February of 2005, a jury convicted Weaver of one count of second-degree rape of a child and one count of second-degree rape by forcible compulsion. Id. at 3. The jury also found the exceptional sentence aggravating circumstance that the offense resulted in the pregnancy of a child victim of rape. Id. Weaver was subject to indeterminate sentencing under RCW 9.94A.507 (former RCW 9.94A.712). The trial court imposed the maximum sentence

of life and a minimum term exceptional sentence of 250 months.

Id. The court treated the two convictions as the same criminal conduct. Id.

As the result of his first appeal, this Court remanded for re-sentencing, holding that the State had not sufficiently proven Weaver's offender score. Id. at 3-6. At the resentencing in 2011, the State provided additional documentation relating to Weaver's criminal history, and the trial court included Weaver's two prior felony convictions in his offender score. Id. at 6. The trial court did not impose sentence on the second-degree rape of a child count, holding that Weaver's two current convictions violated double jeopardy. Id. The trial court re-imposed the same original sentence on the second-degree rape conviction: a maximum sentence of life and a minimum term exceptional sentence of 250 months. Id.

Weaver appealed again, raising a variety of new issues challenging his exceptional sentence. The State cross-appealed the trial court's double jeopardy holding. The State objected to Weaver's attempt to raise new challenges to his exceptional sentence in his second appeal, citing State v. Rowland, 174 Wn.2d 150, 272 P.3d 242, 243 (2012) for the proposition that a

resentencing hearing ordered to correct an offender score did not reopen challenges to the basis for an exceptional sentence.

The Court of Appeals rejected all of Weaver's claims on appeal. Slip op. at 10-19. The court declined to consider Weaver's challenge to the trial court's authority to impose an exceptional sentence because at the resentencing the trial court did not exercise its independent judgment to review and reconsider its earlier sentence. Id. at 12. With respect to the State's cross-appeal, the court held that the trial court erred in holding that Weaver's two convictions violated the prohibition against double jeopardy. Id. at 7-10.

D. ARGUMENT

1. THE COURT SHOULD DENY REVIEW.

The State's briefing filed with the Court of Appeals fully addresses the issues previously raised in this appeal. The State provides this answer to address Weaver's attempt to raise a new issue for the first time in his petition for review.

In his petition, Weaver asks this Court to take review in order to decide whether his exceptional sentence minimum term was imposed contrary to his Sixth Amendment right to a jury trial under

Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). Petition for Review at 1-2. Weaver never raised this constitutional claim before the Court of Appeals. See Appellant's Opening Brief at 2-5. Alleyne was decided on June 17, 2013, seven months before the Court of Appeals issued its decision in this case. Weaver never sought to supplement the issues before the Court of Appeals, and in his petition, he does not acknowledge that he is making this argument for the first time.

This Court will not consider an issue not raised or briefed in the Court of Appeals. State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); State v. Laviollette, 118 Wn.2d 670, 679, 826 P.2d 684 (1992). There is no reason for this Court to make an exception to this rule here.

Not only did Weaver not raise this issue below, but his case is a poor vehicle to address the alleged conflict between Alleyne and State v Clarke, 156 Wn.2d 880, 134 P.3d 188 (2006). In Clarke, the Washington Supreme Court held that the Sixth Amendment right to a jury trial does not apply to exceptional minimum sentences imposed under RCW 9.94A.507. 156 Wn.2d at 894. Weaver argues that in light of Alleyne, Clarke is no longer

good law and that a jury finding of the aggravating circumstance is required for an exceptional minimum sentence.

Weaver's case is not an appropriate case to address any conflict between Alleyne and Clarke. In Weaver's case, a jury found, beyond a reasonable doubt, the aggravating circumstance supporting the exceptional sentence. Weaver cannot claim any constitutional violation under Alleyne. Instead, Weaver's complaint is that the jury made the finding of the aggravating circumstance without proper *statutory* authority to do so. See Appellant's Opening Brief at 10-14. The Court of Appeals properly declined to consider this issue because at the resentencing the trial court did not reconsider the basis for the aggravating circumstance and reimposed the same exceptional sentence. Rowland, 174 Wn.2d at 154-56. Because Weaver cannot claim any constitutional error, the alleged conflict between Alleyne and Clarke does not affect the validity of his sentence

E. CONCLUSION

For all the foregoing reasons, the Court should deny the petition for review.

DATED this 18th day of March, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
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By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the State's Answer, in STATE V. OLIVER WEAVER, Cause No. 89957-6, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Kelley A. Ross

Name

Done in Seattle, Washington

3/18/14

Date

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Dear Supreme Court Clerk,

Attached please find the State's Answer to Petition for Review in the above-referenced case.

Please let me know if you should have problems opening the attachment.

Thank you,

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