No.: 91919-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Milord Gelin,
Petitioner

vs.

The State of Washington,
Respondent

MOTION FOR DISCRETIONARY REVIEW

-PRV-

Milord Gelin, pro se petitioner
Washington Corrections Center
PO Box 900
Shelton, WA 89584

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A. IDENTITY OF THE PETITIONER

Milord Gelin, Petitioner, asks this court to accept review of the decision or part of the decision designated in part B of this motion.

B. DECISION

Petitioner seeks review of the Court of Appeals decision, that stated: Assuming without deciding that the amended Judgment and Sentence is appealable, the issues raised on appeal are, with one exception, beyond the scope of our review...and amount to collateral attacks on Gelin's conviction and sentence. To the extent they are not time barred, such claims must be raised in a PRP.

A copy of this decision is attached herein as Exhibit A.

C. ISSUES PRESENTED FOR REVIEW

(1) The trial court exercised its discretion in resentencing the Petitioner on Count III the Assault in the 1°, it was not just purely ministerial in nature, thereby issuing a new "Final Order" that is appealable by right. RAP 2.2 (a)(1)

(2) Since the new Judgment and Sentence is an appealable order that was a resentencing of Count III, it opens direct appellate review of Petitioner's claims of a) Sufficiency of Evidence, b) Same Criminal Conduct, and c) Double Jeopardy, as these issues wholly or at least in part pertain to Count III the 1° Assault conviction, and are co-joined with other counts by association with cited constitutional violations. RAP 2.2 (a)(1) and 2.5 (c)(1).

D. STATEMENT OF THE CASE

After a jury trial the petitioner was acquitted of Attempted Murder (Count II) and found guilty of 1° burglary (Count I), 1° Assault (Count

III), and Theft of a Motor Vehicle (Count IV). At sentencing the court imposed deadly weapon enhancements that ran concurrently and aggravating factors for an exceptional sentence of 300 months.

Petitioner appealed arguing the jury was incorrectly instructed regarding the unanimity requirement for the statutory aggravating factor. His convictions were affirmed and a mandate was issued, with Direct Review terminated on June 7, 2013.

There were several errors in the Judgment and Sentece and Petitioner was brought back for resentencing on October 2, 2013. The court issued an Amended Judgment and Sentence by dropping the 300 months on the acquittal of Count II, and changed the sentence on Count III using a different base sentence and running the weapon enhancements consecutively on Count I and III. The original months sentenced for counts II and III were flip flopped.

The petitioner filed a notice of appeal from the new Sentence and Judgment, and was appointed counsel.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

ISSUE I. The Court Exercised its Discretion in Sentencing Petitioner

Under RAP 2.2 (a) a Final Judgment is an order of the Superior Court that can be appealed. Under appealable judgments and orders: modification or correction of a judgment and sentence; or record; resentencing.

Remand for resentencing renders the prior judgment and sentence void and results in a new final judgment, which is appealable by right RAP 2.2 (a)(1) Personal Restraint of Goodwin,146 Wash.2d 861,869,50 P.3d 618 (2002)(Quoting Carle, 93 Wash.2d, quoting McNutt, 47 Wash.2d at 565.

At resentencing the court did not just fix scrivinger errors that were purely ministerial in nature, but exercised considerable discretion in

changing the the base sentence on Count III from 276 months to 252 months, and added 24 months to this count by making its deadly weapon enhancement to run consecutively with the enhancement from Count I rather than concurrent as stated in the original Judgment and Sentence (refer to argument and case law in Petitioners Reply Brief).

As the court cited in its decision on page two (2), footnote one (1) cites a lengthy discussion that boils down to, if the resentencing court exercised its discretion in resentencing and not just ministerial corrections, then new issues that had not previously been presented could now be brought forward in a second Direct Appeal.

The resentencing on October 2, 2013 went way beyond ministerial corrections, as the court exercised its discretion in resentencing the Petitioner on Count III, thus creating a <u>new</u> "Final Order" that is appealable by right. RAP 2.2 (a)(1). Thus a new Direct Appeal can be made with new issues brought forward in relation to the amended portions, specifically Count III in the instant case. The clock is reset in regards to Count III allowing a new Direct Appeal and if needed a Personal Restraint Petition on this count.

ISSUE II. Review of all Issues Presented that Relate to Count III

Since we have an appealable new "Final Order", the Sufficiency of the Evidence, Double Jeopardy and Same Criminal Conduct issues presented in the second Direct Appeal, should be reviewed as they all relate to Count III wholly or in part.

F. <u>Conclusion</u>

Petitioner asks this court to rule that the new Amended Judgment and Sentence is in fact a new Final Order and is in fact appealable. That in

the areas that have been changed in this new order the petitioner has the right for a new direct and PRP appeal.

In light of the facts presented herein, Petitioner asks this Court to adjudicate the remaining issues or remand them back to the Court of Appeals or Superior Court for proper consideration.

Dated this 15th day of September, 2015.

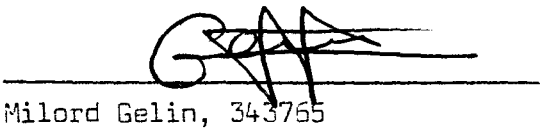

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EXHIBIT A

Court of Appeals Decision

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MILORD GELIN, Appellant.	No. 71204-7-I DIVISION ONE UNPUBLISHED OPINION FILED: June 15, 2015

PER CURIAM — We previously affirmed Milord Gelin's convictions for burglary and assault with a deadly weapon and theft of a motor vehicle. After the mandate issued in that appeal, the superior court, at the State's request, entered an amended judgment and sentence correcting errors in the original judgment and sentence. Gelin now appeals the amended judgment and sentence, arguing for the first time that the jury's deadly weapon findings were not supported by sufficient evidence. In a pro se statement of additional grounds for review, Gelin argues for the first time that his offenses encompass the same criminal conduct, that his burglary and assault convictions violate double jeopardy, and that his exceptional sentence is not supported by sufficient findings

Assuming without deciding that the amended judgment and sentence is appealable, the issues raised on appeal are, with one exception, beyond the scope of our review. The proceedings below occurred after Gelin's direct appeal

was final and mandated. The State initiated the proceedings to correct errors on the face of the judgment and sentence. An appeal from such proceedings is limited to review of the actions taken by the court and does not afford Gelin an opportunity to raise other challenges to his conviction and sentence.[1] Because the superior court simply corrected errors on the face of the judgment and sentence, our review is limited to those corrective actions. In his statement of additional grounds, Gelin questions the court's sentence corrections but fails to adequately inform this court of the nature of the alleged error as required by RAP 10.10(c).

The remaining claims on appeal are beyond the scope of review and amount to collateral attacks on Gelin's conviction and sentence.[2] To the extent

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[1] In general, a defendant may not raise issues, including constitutional, double jeopardy, and sentencing issues, in a second appeal that were or could have been raised in an initial appeal unless the superior court exercised discretion on those issues in the proceedings from which the second appeal is taken. See State v. Wheeler, __ Wn.2d __ , __ P.3d __ (2015)(in appeal following remand of personal restraint petition, court rejected attempts to raise new issues under RAP 2.5(c) and RAP 12.2, holding that appellant could raise issues not raised in earlier direct appeal only if the court on remand exercised its independent judgment on such issues); State v. Kilgore, 167 Wn.2d 28, 37-41, 216 P.3d 393 (2009) (noting that new issues may be raised in a second appeal if they were addressed on remand following the initial appeal or in postjudgment motions, but holding that Kilgore could not challenge his sentence in his appeal following remand because the court on remand merely made corrective changes to his sentence and exercised no discretion); State v. Mandanas, 163 Wn. App. 712, 717, 262 P.3d 522 (2011) (holding that double jeopardy claim could not be raised for the first time in second appeal, that "even an issue of constitutional import cannot be raised in a second appeal," and that Mandanas still had an avenue of relief via personal restraint petition); State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993) (refusing to review new challenge to an affirmed exceptional sentence not reconsidered at resentencing); State v. Toney, 149 Wn. App. 787, 791, 205 P.3d 944 (2009) (defendant could not raise double jeopardy and sentence issues in second appeal following remand because remand was for ministerial corrections). We note that same criminal conduct issues involve factual determinations and are therefore waived if not raised at sentencing, State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009), and Gelin's claim that the court entered no findings supporting its exceptional sentence appears to be contradicted by the record in his prior appeal.

[2] Gelin admits as much in his statement of additional grounds, stating that his other claims "collaterally attack[] his sentences pursuant to RAP 16.3, and RAP 16.4."

they are not time-barred, such claims must be raised in a personal restraint petition. RAP 16.4; State v. Wheeler, __ Wn.2d __ , __ P.3d __ (2015).

Affirmed.

FOR THE COURT:

Cox, J.

Schindler, J.

Leach, J.

EXHIBIT B

Petitioner's Reply Brief

No. 71204-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MILORD GELIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

This Court should reach the merits of Mr. Gelin's arguments

The State contends Mr. Gelin's appeal should be dismissed because the amended judgment and sentence is not an "appealable order." SRB at 10-11. This Court should reject that argument because the trial court's amendment of the judgment and sentence amounts to a resentencing and the issuance of a new final order.

In the original judgment and sentence, the trial court imposed an exceptional sentence of 276 months for the first degree assault charge. CP 22. In the amended judgment and sentence, the court imposed an exceptional sentence of 252 months for the first degree assault charge. CP 42. In other words, the court *resentenced* Mr. Gelin to a term of 252 months rather than 276 months. This was more than merely correction of a scrivener's error.

An amended judgment and sentence entered after resentencing is a new "final order" that is appealable as a matter of right. State v. Amos, 147 Wn. App. 217, 195 P.3d 564 (2008). Although "[r]emand to correct a scrivener's error does not result in a new final judgment and sentence, . . . remand for resentencing renders the prior judgment and sentence void and results in a new final judgment, which is

appealable as a matter of right." Id.; RAP 2.2(a)(1). Here, the amended judgment and sentence entered after Mr. Gelin's resentencing is a new final judgment that is appealable as a matter of right.

The State also argues that Mr. Gelin may not challenge the sufficiency of the evidence because he did not raise this challenge in his first appeal, or before the trial court at his resentencing. SRB at 12. But this Court has discretion to reach the issue even though it was not raised in the first appeal. Moreover, it is well-established that a challenge to the sufficiency of the evidence need not be raised before the trial court and may be raised for the first time on appeal.

The Court of Appeals has discretion to review Mr. Gelin's claims raised in this second appeal. RAP 2.5(c)(1) provides:

> 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.

(emphasis added).

By using the term "may," RAP 2.5(c)(1) is written in discretionary, rather than mandatory terms. Cf. Roberson v. Perez, 156 Wn.2d 33, 42, 123 P.3d 844 (2005) (use of term "may" in RAP 2.5(c)(2) indicates appellate court has discretion to review the propriety

of an earlier decision of the appellate court in the same case). The plain language of the rule affords appellate courts discretion in its application. Id. In the interests of justice, this Court should exercise its discretion and reach Mr. Gelin's claims.

Moreover, in regard to the challenge to the sufficiency of the evidence, it is well-established that such a claim may be raised for the first time on appeal and need not be ruled upon first by the trial court. A challenge to the sufficiency of the evidence may be raised for the first time on appeal because it alleges a manifest error affecting a constitutional right. State v. Cheatham, 80 Wn. App. 269, 271 n.1, 908 P.2d 381 (1996); RAP 2.5(a)(3).

Moreover, a challenge to the sufficiency of the evidence in a criminal case is rarely raised first in the trial court because "[a]ppeal is the first time sufficiency of evidence may realistically be raised." State v. Hickman, 135 Wn.2d 97, 103 n.3., 954 P.2d 900 (1998).

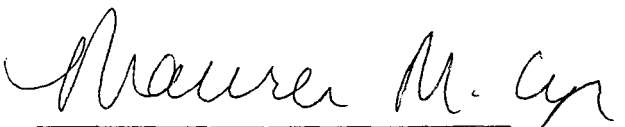
Finally, in the statutes imposing a time limit for filing a collateral attack in a criminal case, the Legislature indicated its intent that an appellate court should reach the merits of a challenge to the sufficiency of the evidence *whenever* such a challenge is raised. Generally, a collateral attack on a judgment and sentence must be filed

within one year after the judgment and sentence becomes final if the judgment and sentence is valid on its face. RCW 10.73.090(1). But that time limit does not apply to a petition or motion that challenges the sufficiency of the evidence. RCW 10.73.100(4). In other words, such a challenge may be raised at any time. Thus, this Court should reach the merits of Mr. Gelin's challenge to the sufficiency of the evidence.

B. CONCLUSION

The trial court resentenced Mr. Gelin when it changed his exceptional sentence for the first degree assault charge from 276 months to 252 months. Thus, the amended judgment and sentence is a final judgment that may be appealed as a matter of right. In the interests of justice, this Court should exercise its discretion and reach the merits of the issues raised in the appeal.

Respectfully submitted this 30th day of March, 2015.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71204-7-I
v.	)	
	)	
MILORD GELIN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DEBORAH DWYER, DPA [paoappellateunitmail@kingcounty.gov] [deborah.dwyer@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X] MILORD GELIN 343765 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF MARCH, 2015.

X_____

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THE SUPREME COURT
FOR THE
STATE OF WASHINGTON

MILORD GELIN, Petitioner, v. STATE OF WASHINGTON, Respondent,	No: 91919-4 DECLARATION OF SERVICE BY MAIL

I, Milord Gelin, the Petitioner in the above entitled case, do hereby declare that I have served the following documents:

MOTION FOR DISCRETIONARY REVEIW

PARTIES SERVED:

The Supreme Court Temple of Justice PO Box 40929 Olympia, WA 98504	Court of Appeals One Union Square 600 University Street Seattle, WA 98101	Deborah A. Dwyer King Co Pros Ofc/Appel Unit 516 3rd Ave, Ste W554 Seattle, WA 98104

I deposited the aforementioned documents with the booth officer as LEGAL MAIL at my present institution, the Washington Corrections Center, by way of the "MAIL BOX RULE",

On the 15th day of September, 2015

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Milord Gelin