No. 92154-7
Court of Appeals No. 46066-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONNELL WAYNE PRICE,

Petitioner.

PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PETITIONER

Petitioner Donnell W. Price, appellant below, asks this Court to grant review of the decision designated in Section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1), (2), (3) and (4), petitioner seeks review of the unpublished opinion of the court of appeals, Division Two in State v. Price, ___ Wn. App. ___, ___ P.3d __ (2015 WL 4550400), issued on July 28, 2015.[1]

C. ISSUES PRESENTED FOR REVIEW

1. In Personal Restraint of Echeverria, 141 Wn.2d 323, 6 P.3d 573 (2000), this Court held that a defendant's right to allocution is satisfied if the opportunity to speak is given at the sentencing hearing "at some point prior to imposition of sentence."

   Does the decision in this case conflict with Echeverria and should review be granted where the court of appeals held that, even though the right to allocution did not occur prior to imposition of the sentence, there was no reversible error because the sentencing court was willing to listen to the defendant after announcing the sentence and "reconsider" before then reimposing the already announced exceptional sentence?

2. In State v. Crider, 78 Wn. App. 849, 899 P.2d 24 (1995) and State v. Aguilar-Rivera, 83 Wn. App. 199, 290 P.2d 623 (1996), Divisions One and Three of the court of appeals applied a bright line rule of automatic resentencing before a different judge when a sentencing court imposes

[1] A copy of the opinion is attached as Appendix A.

the sentence prior to allowing the defendant to allocute. Several judges from those divisions and judges from Division Two have rejected the bright line rule in favor of a "harmless error" standard.

a. Should this Court grant review under RAP 13.4(b)(2) to address the conflict in Divisions and decide which of the different standards being used by the courts of appeals is the proper standard for our state in light of the purposes of the statutory right?

b. Is the ongoing dispute over the proper standard an issue of substantial public importance which this Court should finally resolve and should review be granted because the lack of clear guidance from the Court has led to differing treatment of similarly situated appellants based solely on the happenstance of judicial assignment?

c. If the Court decides to adopt a "harmless error" standard, should it be the version used in published cases which looks at whether the failure to allow allocution could have had an impact on the sentence, or the version Division Two used here, which found it sufficient that a defendant is allowed to speak at some point and did not consider the potential impact on the sentence?

Is the focus of the right to allocution the opportunity to speak prior to the imposition of sentence or just the opportunity to speak at some point during sentencing?

3. At resentencing, the lower court took evidence and argument about the proper offender score, heard from the victim's family about their desires for the sentence, heard from the prosecutor about his opinion regarding the facts of the case and allowed lengthy recitation of those facts and argument about why an exceptional sentence should be reimposed. At the prosecutor's behest, however, the court

refused to address Mr. Price's point that no exceptional sentence could be validly imposed because the jury had not made the required finding to support the aggravator.

a. Where a resentencing court must decide whether to impose an exceptional sentence, may that court simply ignore the question of whether the aggravating factor it is using to support that sentence is constitutionally infirm?

b. Where a resentencing court is faced anew with the question of whether to impose an exceptional sentence, is that a "ministerial" correction limiting the court to simply correcting the offender score and reimposing the same exceptional sentence or is it instead a full resentencing which requires proper consideration of whether the exceptional sentence is supported by the record and law?

c. In State v. White, 123 Wn. App. 106, 109, 97 P.3d 34 (2004), the court of appeals held that the entire sentence is wiped clean and all arguments and issues regarding the sentence properly before the lower court when there is remand for correction of an offender score applying to the entire outcome.

Does the decision in this case conflict with White and further, does it conflict with the doctrine that corrections to the underlying offender for an exceptional sentence invalidate that sentence and require the court to revisit the whole sentence?

D. STATEMENT OF THE CASE

1. Procedural facts

Petitioner Donnell Price was charged with and convicted after jury trial in Pierce County superior court in 2007 of first-degree murder and second-degree unlawful possession of a firearm, with the

murder alleged to have been committed with a firearm and the crime aggravated by "domestic violence" or intimidation of the victim. CP 1-2; RCW 09.41.010; RCW 9.41.040(2)(a)(I); RCW 9.94A.510; RCW 9.94A.530; RCW 9.94A.535(3)(h); RCW 9A.32.030(1)(a); RCW 10.99.020.[2] He was ordered to serve an exceptional sentence on the murderand a total term of 494 months was ordered. CP 11-22, 32-34. After an initial appeal affirming in 2009 in Division Two, Mr. Price continued to seek relief and, on October 10, 2012, Division Two granted Price's personal restraint petition in part and remanded for resentencing. CP 81-88.

Resentencing was held in multiple proceedings, in front of a different judge than had presided over the original trial. RP 78-80; CP 92-103. The same exceptional sentence was imposed and Price appealed to Division Two of the court of appeals. CP 104-116. On August 4, 2015, the court of appeals substantially affirmed. App. A.

2. Overview of relevant facts[3]

At the original sentencing, the trial court had counted two prior

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[2]An aggravating factor of "deliberate cruelty" was also charged but the jury did not find that factor. See CP 1-2, 11-22.

[3]This brief overview is not intended to provide all the details of evidence and allegations in this case but only to acquaint the Court with the general circumstances involved. More detailed discussion of relevant facts is contained in the argument. *infra*. More detailed discussion of all of the facts is contained in Appellant's Opening Brief ("AOB") at 2-8.

felony convictions in the offender score, based on the prosecutor's representation that the state had the documents which could prove that those convictions did not "wash out." CP 83. In granting the personal restraint petition in part, Division Two remanded for resentencing, also ordering that the prosecution should have the chance to "provide all relevant documentation to prove" the criminal history and offender score which should be used. CP 85. Division Two also ordered correction of the seriousness levels for each of the current offenses, which were incorrect and should have been XV and III, but were XIV and IV. CP 85.

Because the original trial judge had retired and the new judge for that position had been a prosecutor on Price's original trial, a judge from a different department was appointed. RP 5-6. At one point during one of the continuances, the prosecutor pointed out witnesses in the courtroom, members of the public and victims' families. RP 20-21. Those people were present so that they could tell the court their opinion on the proper sentence. RP 20-21.

Ultimately, the prosecutor presented a number of exhibits regarding the "wash out." RP 39-61. After ruling against Price on that issue, the court then heard from relatives of the victim regarding what sentence should be imposed. RP 61-70. The prosecutor planned to present evidence on that point, too, wanting to play the 9-1-1 tape from the

trial. RP 61-70. When the tape machine did not work, the prosecutor then declared, at length, the facts he said had been proven at trial about the underlying incident and why an exceptional sentence should be reimposed. RP 66-68. The recitation was only halted when counsel finally objected, pointing out that she was not trial counsel and thus could not rebut any of the prosecutor's factual claims. RP 66-68. During that discussion, the prosecutor handed to the court a number of gruesome photos of the crime. RP 68-69.

After the court asked about the aggravating factors submitted to the jury and the prosecutor conceded that the jury had acquitted on the other aggravating factor of "deliberate cruelty," counsel pointed out that the court could not impose an exceptional sentence based upon the remaining aggravating factor because the jury had not found, beyond a reasonable doubt, all the elements of that aggravator as required under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). RP 73-74. The prosecutor argued that the court should not consider the issue as part of the resentencing because it was outside the "scope." RP 74-75.

In reimposing the same exceptional sentence that the trial judge had imposed years before, Judge Culpepper relied on the aggravating factor, declaring, "the jury did find by special verdict that there was an aggravating circumstance, so I think Judge Fleming did have the ability, if

he wished, to impose an exceptional sentence." RP 76. The judge said that he did not know what he would have imposed if he had been the judge but nothing had been presented to him to give him "any reason to vary" from the original exceptional sentence. RP 74-75.

The judge then declared he was going to "sentence Mr. Price to 374 months in prison, the high end, plus the additional 60 months for the deadly weapon enhancement, and I'm also going to sentence him to an additional 60 months exceptional sentence upward." RP 77-78. The judge repeated, twice, that he had not been presented with anything during the resentencing to make him think "there was anything wrong with Judge Fleming's sentence" so he was "adopting it." RP 78.

At that point, counsel pointed out that Mr. Price had "wanted to address the Court" but the court had imposed the sentence "without his ability to allocute." RP 78. After apologizing, the judge then declared that the sentence "isn't final yet," and asked Price if there was anything he wanted to say. RP 78-79. The judge listened to Price and then again imposed the same exceptional sentence, declaring:

> I apologize for not hearing from you earlier, Mr. Price. I should have, of course, granted that and listened. I did listed. **I really didn't hear anything that makes me change my mind. I've reconsidered**. I'm going to impose what I said earlier.

RP 81 (emphasis added). The judge talked about some of the facts the

prosecution claimed had been proven at trial and Mr. Price disputed them, pointing out evidence to the contrary which had also been admitted. RP 82.

After discussion of the right to appeal and all of the paperwork, the prosecutor then declared that the record "should reflect the Court's judgment was not final at the point in time when the Court allowed Mr. Price to allocute." RP 85. The judge then agreed, saying it the sentence was not final because it had not yet been signed. RP 84-85.

E. REASONS WHY REVIEW SHOULD BE GRANTED

1. REVIEW SHOULD BE GRANTED TO ADDRESS THE DIRECT CONFLICTS WITH CRIDER AND AGUILAR-RIVERA AND THE IMPORTANT PUBLIC ISSUE OF THE SCOPE OF THE STATUTORY RIGHT TO ALLOCUTION AND THE RIGHTS OF APPELLANTS TO EQUAL TREATMENT

In Echevarria, supra, this Court held that defendants have a statutory right to allocution. 141 Wn.2d at 336. This right requires that, at the sentencing hearing, the "court shall. . . allow arguments from the prosecutor, the defense counsel, [and] the offender," *before* pronouncing the sentence. RCW 9.94A.500(1).

But this Court has yet to address the proper standard of review an appellate court should apply and what remedy should be granted when a sentencing court violates this important statutory right. Although it

granted review to do so nearly 10 years ago, the Court's decision in that case did not do so, because of the relevant facts. See, e.g., State v. Hatchie, 161 Wn.2d 390, 405-406, 166 P.3d 698 (2007). This case presents the chance for this Court to again grant review on these important issues, this time to address them and settle the ongoing dispute between court of appeals divisions once and for all.

The disagreement in standards is not a question of form over substance. Instead, it reflects a fundamental difference in how the lower appellate courts perceive the statutory right. Brief examination of the dispute proves this point and emphasizes the importance of having this Court take review to finally resolve the issue for all cases in our state.

In an early pre-SRA case, State v. Delange, 31 Wn. App. 800, 801, 644 P.2d 1200 (1982), Division Three held that there was no error when a trial court orally indicated an intent to accept the state's recommendation for a 10-year sentence, then allowed the defendant to speak. 31 Wn. App. at 802. While the right to allocute "should have been afforded before the court revealed its intention with respect to sentence," Division Three found, "its failure to do so was inadvertent." 31 Wn. App. at 802.

After passage of the SRA, however, the law changed. In Crider, Division Three examined the SRA and the evolution of the right to allocution, beginning with the common law right seen as far back as 1689.

78 Wn App. at 856. The defendant in Crider was not offered an opportunity to speak until after the sentence was ordered. When counsel immediately tried to file a notice of appeal based upon the lack of opportunity for allocution, the trial court *then* asked the defendant if he wished to say anything. 78 Wn. App. at 852-53.

In reversing, the Crider majority rejected the claim, made by the dissent, that the right was not violated because the sentence was still subject to modification, as it had been signed but not entered and the parties were still before the court. 78 Wn. App. at 861, 863-64. The majority stated:

> [W]e agree with Mr. Crider that an opportunity to speak extended for the first time after sentence has been imposed is "a totally empty gesture." Even when the court stands ready and willing to alter the sentence when presented with new information (and we assume this to be the case here), from the defendant's perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position.

78 Wn. App. at 861. Acting Chief Judge Sweeney dissented, and would have affirmed after applying a harmless error analysis. 78 Wn. App. at 862. The confusion and division in that court on this issue is longstanding. See State v. Canfield, 120 Wn. App. 729, 86 P.3d 806 (2004), affirmed, 154 Wn.2d 698, 116 P.3d 391 (2005) (Division Three; two judge majority following Crider).

Division One followed the reasoning of Crider in Aguilar-Rivera.

Aguilar-Rivera, 83 Wn. App. at 200-201. In Aguilar-Rivera, at sentencing, the trial court orally announced an exceptional sentence after hearing and rejecting counsel's arguments, saying, "[t]hat is the sentence of the court." 83 Wn. App. at 200-201. When the defendant was directed to come forward for fingerprinting, counsel objected that the right to allocution had not been offered, although saying it might be "a moot point now." 83 Wn. App. at 201. The trial court acknowledged that it had erred, allowed the defendant to speak and then adhered to its initial sentence. 83 Wn. App. at 201.

On review, Division One noted that it was clear the sentencing court had "sincerely tried to listen to allocution with an open mind." Id. But, the court was convinced that the failure to invite allocution prior to the sentence being announced left the defendant "in the difficult position of asking the judge to reconsider an already-imposed sentence." 83 Wn. App. at 203-204. Reversal and remand for resentencing in front of a new judge was required. Id.

In this case, in direct conflict with Crider and Aguilar-Rivera, Division Two held that the fact that the defendant was allowed to speak after the sentence was announced was sufficient, because the trial judge's decision was not "final" and the judge was willing to listen and reconsider. App. A at 7-11.

Division One has also had internal conflicts over which standard to apply. A few years after Aguilar-Rivera, a majority of a panel of Division One judges rejected Aguillar-Rivera and Crider. See State v. Gonzales, 90 Wn. App. 852, 954 P.2d 360, review denied, 136 Wn.2d 1024 (1998) (Grosse, J., and Webster, J.). Instead, that majority held, "the inadvertent failure of the trial court to grant the right [to allocution] is not always reversible error." 90 Wn. App. at 854-55. In Gonzales, the defendant had urged a low-end sentence and the trial court had imposed that very sentence. On appeal, the majority was convinced that "to conclude that the denial of his right to allocution was prejudicial under the facts of this case would place form above substance." 90 Wn. App. at 855. In concurring, the Chief Judge attempted to adhere to the "bright line" rule of Aguilar-Rivera but claimed that the unique facts of the case actually rendered the error "harmless." 90 Wn. App. at 855-56 (Baker, C.J., concurring).

For its part, Division Two refused to follow Crider and instead applied a harmless error standard in State v. Roberson, 118 Wn. App. 151, 161, 74 P.3d 1208 (2003), overruled in part and on other grounds by, State v. Hughes, 154 Wn.2d 188, 152-53, 110 P.3d 192 (2005) (overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126

S. Ct. 2546, 165 L. Ed. 2d 466 (2006).[4] Roberson was a juvenile case involving a "manifest injustice" disposition, above the standard range. After hearing arguments of counsel about a community-based disposition, the court allowed the juvenile's father to address the court. He responded by giving the judge a letter to read which did not involve the sentence. 118 Wn. App. at 187. Without asking the juvenile whether he wanted to speak first, the juvenile court then ordered the exceptional disposition. Id.

On review, after first citing Aguilar-Rivera, Division Two chided the juvenile court that allowing comments by the father were "no substitute" for hearing from Roberson himself. The court recognized that some courts applied a harmless error standard and held that, applying that standard, the error in Roberson could not be deemed "harmless" because the defendant received a high manifest injustice disposition rather than the lowest possible sentence. 118 Wn. App. at 187.

Thus, under Roberson, the law in Division Two *should* be that an error in denying the right to allocution is not harmless if the judge imposes an exceptional sentence without hearing from the defendant and thus the defendant's words might have had an impact. The "harmless error" standard of Roberson or Gonzales is that failure to allow allocution before

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[4]Roberson also addressed the issue for the first time on appeal, in contrast to here. 118 Wn. App. at 160-62.

imposing a sentence could be deemed "harmless" where the sentence was the lowest possible which could have been imposed - or the very sentence the defendant says she wants. See Roberson, 118 Wn. App. at 187; Gonzales, 90 Wn. App. at 855. In those cases, the courts made the reasonable conclusion that, where the sentencing court had already imposed the lowest possible sentence or the sentence the defendant was planning to urge, reversing because the defendant did not get to allocute prior to imposition of that sentence would elevate form over substance. See Gonzales, 90 Wn. App. at 855.

But in this case, Division Two went further. After first holding that there was "no reason to reject the application of harmless error" despite Crider, the court then applied a *different* harmless error test. App. A at 7-11. Division Two found the trial court's "inadvertent failure to allow Price to speak before announcing its intended sentence" was harmless, because the trial judge said the decision was not final, was willing to listen and had let Price speak before reimposing the same exceptional sentence as before. App. A at 6.

In reaching its decision, Division Two effectively accepted the lower court's claim that, because a written judgment and sentence had not yet been entered, the sentence the judge announced prior to allocution was somehow not "final." App. A at 5-7.

But that equates two completely different situations. It has long been the law that a party cannot enforce an oral opinion and that a written opinion controls over an oral opinion every time. See State v. Hescock, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999). The issue of whether a party should rely on an oral opinion before that opinion is reduced to writing or can enforce an oral agreement is fundamentally different than the issue of whether a defendant in a criminal case, facing the judge at sentencing, is given a meaningful opportunity to speak on his own behalf before the judge's decision is made.

This Court should grant review. This not the first time it has been presented with these issues, nor is this the first time Division Two has been swayed by this idea that allocution is timely even after announcement of the sentence because only entry of the written judgment and sentence makes the sentence "final." See State v. Hatchie, 133 Wn. App. 100, 135 P.3d 519 (2006), affirmed on other grounds, 161 Wn.2d 390, 166 P.3d 698 (2007). This Court granted review in Hatchie to address, *inter alia*, the crucial question of which standard should apply to a violation, to resolve the dispute among courts of appeals and settle the questions surrounding this crucial statutory right. 161 Wn.2d at 405-406 n. 11. The Court decided not to reach the issue, however, because Hatchie's counsel had not objected below. 161 Wn.2d at 406.

In the nearly 10 years since Hatchie, this Court has not addressed these issues. It should grant review and do so now. The conflict is an issue of significant public importance, even touching on constitutional rights. The statutory right to allocution and its application is at issue in every single criminal case in the state. And as it stands, defendants in different courts are subjected to different standards of review in the different divisions and potentially within the same division, if different judges happen to be appointed. This, in turn, implicates the fundamental state constitutional right to a full and fair appeal under Article 1, section 22, as well as equal protection on appeal. See Griffin v. Illinois, 351 U.S. 12, 17, 76 S. Ct. 585, 100 L. Ed. 2d 891 (1956); Rinaldi v. Yeager, 384 U.S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966) (when a state guarantees the right to appeal, such proceedings must comport with due process and equal protection mandates).

Further, while the statutory right to allocution derives from common law and statute rather than constitution, this Court has recognized its importance as a "significant aspect of the sentencing process." Echevarria, 141 Wn.2d at 335-37. The U.S. Supreme Court has also recognized "the need for the defendant, personally" to address the court prior to sentencing, because "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting

eloquence, speak for himself." Green v. United States, 365 U.S. 301, 303, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961). Indeed, this Court has even found a limited right to allocution in the absence of a statute giving that right. See, Canfield, 154 Wn.2d at 701.

The decision in this case shows the clear need for this Court not only to settle the question of whether to apply a bright line or harmless error standard of review but also to put to rest the novel theory that it is sufficient for a judge to allow the defendant to speak even after the sentence has been ordered, so long as the judge declares a willingness to listen and the written sentencing documents not yet signed.

And should this Court decide to adopt a "harmless error" standard of review, it must further decide *which* such standard is proper - the Roberson standard which asks whether the defendant could have been prejudiced by the violation of his statutory right by looking at the sentence imposed or the standard used here, asking only if the defendant was ultimately allowed to speak and the judge promising to listen before reducing the sentence to writing.

The decision in this case conflicts with Crider, Aguilar-Rivera, and other caselaw honoring the right of the defendant and interpreting the statutory right so that it has some appearance of meaning. It is inconsistent with this Court's recognition of the importance of the

statutory right in Echeverria. And the decision reflects the ongoing conflict which has plagued the courts of appeals for years. This Court should grant review to address these issues.

2. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER A RESENTENCING COURT MAY IMPOSE AN EXCEPTIONAL SENTENCE BASED ON AN AGGRAVATING FACTOR NOT PROPERLY FOUND BY A JURY AND SIMPLY DECLINE TO DETERMINE WHETHER THAT FACTOR IS CONSTITUTIONALLY VALID

This Court has held that a trial court's discretion on remand for resentencing is limited by the scope of the appellate court's mandate ordering those further proceedings. State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). There is a distinction between a case where remand is for some ministerial correction of a judgment and sentence, as opposed to a full resentencing. See White, 123 Wn. App. at 109. Indeed, in White, the court of appeals held that, where there has been an appeal on an offender score issue but remand for resentencing, that remand applies to the entire outcome, wipes the slate clean, and allows the court to fashion an appropriate sentence how it saw fit. Id.

In this case, this Court should grant review to address whether a court may, on resentencing, impose an exceptional sentence based upon an aggravating factor not properly found by the jury under Blakely. In affirming, Division Two refused to address the issue, holding that,

"[b]ecause the trial court declined to reach the merits of Price's challenge . . .we decline to do so as well." App. A at 7.

But the trial court did *not* decline to consider the issue - it ruled that it could rely on the special verdict in imposing the exceptional sentence because the "jury did find by special verdict that there was an aggravating circumstance[.]" RP 76. And the judge then *relied on* that aggravating factor as supporting the exceptional sentence he chose to impose. RP 76-77.

Here, Division Two simply affirmed the exceptional sentence without addressing whether it was constitutionally supported by the required factual finding. That decision is in conflict with White and with the fundamental principles of resentencing. In White, the court of appeals upheld a resentencing court's decision to refuse to reimpose a DOSA on remand even though neither party had challenged the DOSA on appeal. 123 Wn. App. at 110. Although the only issue raised on appeal was the offender score issue, the court of appeals affirmed the resentencing court's decision, noting that a remand for resentencing when the offender score was incorrect affected the entire outcome so that the remand for resentencing "wiped the slate clean" for the whole proceeding. Id. This is consistent with this Court's recognition that, when an exceptional sentence is imposed based on an improper offender score, remand for resentencing

should occur because there is a "great likelihood" that the incorrect calculation had an impact on the determination of what sentence to impose. See State v. Parker, 132 Wn.2d 182, 937 P.2d 57 (1987).

And even a cursory glance at the proceedings below make it clear it was a full resentencing, not just a "ministerial" correction of technical mistakes, given the testimony from victim's family members, the evidence regarding the crimes introduced by the state (such as the gruesome photos), etc.

The court of appeals' decision to decline to even address the improper reliance on the unconstitutional aggravating factor while upholding an exceptional sentence *based on that aggravating factor* should be reviewed, and, on review, this Court should reverse.

F. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 27th day of August, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel via the upload portal at the Court of Appeals, Division Two, at their official service address, pcpatcecf@co.pierce.wa.us, and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows: Donnell Price, DOC 710997, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 27th day of August, 2015.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONNELL WAYNE PRICE, Appellant.	No. 46066-1-II UNPUBLISHED OPINION

MELNICK, J. — Donnell Wayne Price appeals the reimposition of his exceptional sentence during resentencing. He argues that the trial court erred by imposing an exceptional sentence based on an aggravating factor not properly found by the jury and that it violated his right of allocution by imposing sentence before allowing Price to speak. We disagree. Price did not preserve for review the validity of the special verdict instruction and any violation of Price's right of allocution was harmless. We affirm the exceptional sentence but remand for the ministerial correction of scrivener's errors in the judgment and sentence.

FACTS

In 2006, the State charged Price with murder in the first degree while armed with a firearm and unlawful possession of a firearm in the second degree. The State also alleged that the murder was a crime of domestic violence, during which Price's conduct manifested either deliberate cruelty or intimidation of the victim.

In 2007, a jury found Price guilty as charged and returned special verdicts finding that he committed the murder while armed with a firearm and that his conduct manifested intimidation of the victim.[1] The trial court imposed an exceptional sentence that added 60 months for each of the

[1] The jury did not find that Price acted with deliberate cruelty.

two special verdicts, for a total sentence of 494 months. The trial court entered written findings of fact and conclusions of law to support the exceptional sentence.

Price appealed and the resulting decision set forth the facts supporting his convictions:

> On September 3, 2006, Olga Carter called 911 to report a domestic violence incident involving her boyfriend, Donnell Price. Carter told the 911 operator that Price had a gun. Police responded and arrived at Price's home in Tacoma.
>
> When the officers approached the house, they heard a man and woman arguing inside and then heard the man say something about flashing lights outside. They then saw Price come to the door and step outside. An officer shined his flashlight on him and announced "Tacoma Police," but Price went back inside and slammed the door shut.
>
> A few seconds later, the police heard a woman scream. Officers quickly approached the front and back doors and demanded that the occupants come out. When there was no response, they kicked in the front door and then heard a gunshot. The officers then continued to announce their presence and to call on the occupants to come out of the house, but there was no response. Price eventually came out through the front door after repeated police demands.
>
> Police then entered the house and found Carter dead on the floor in the utility room. On a nearby table, police also found a handwritten note that contained Carter's fingerprints, was in her handwriting, and was on paper torn from a notebook in her purse. The note read:
>
> To AuBriana
> From: Olga Mommy
> Mommy Luv
> Mr. Price
> Shot Me
> Dead
> He thought
> I Fooled Around
> A Gun
> to my
> Head.
>
> Carter had a daughter named AuBriana.
>
> An autopsy confirmed that Carter died of a single gunshot wound. The fatal wound was a contact gunshot wound to her neck. Forensic evidence indicated that the gun had been placed against her neck pointed upward and that the bullet travelled through her throat, cervical vertebrae, spinal cord, and brain. Forensic

> evidence also showed that Price had gunpowder burns on his shirt and chest, indicating that he was holding Carter very close to him when the shot was fired.

State v. Price, noted at 153 Wn. App. 1038, 2009 WL 3260914, at *1; *see also* Clerk's Papers (CP) at 37-39.

The *Price* court rejected the two issues raised on appeal: Price's assertions that the trial court violated his right to a public trial and erred by admitting the victim's handwritten note. 2009 WL 3260914, at *3-5; *see also* CP at 43, 47.

In 2011, Price filed a personal restraint petition and challenged the wording of his special verdict instruction, the validity of his offender score, and the seriousness levels listed in his judgment and sentence.[2] Price argued that his prior convictions washed and were not properly part of his offender score. We rejected Price's claim of instructional error but granted the petition in part and remanded for resentencing so that the State could "provide all relevant documentation to prove Price's criminal history and resulting offender score." CP at 84 (Order Granting Petition in Part in Case No. 42646-3-II, filed Oct. 9, 2012). We also remanded for correction of the erroneous seriousness levels listed for each offense in the judgment and sentence. *See* CP at 85 (Order in Case No. 42646-3-II).

A new judge presided over the resentencing hearing because the original judge had retired. The trial court granted defense counsel's motion to withdraw and continued the hearing to allow for the appointment of assigned counsel. When the hearing reconvened, the trial court summarized its understanding of the issues before it:

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[2] Price's instructional challenge was based on *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), which the Washington Supreme Court overruled in *State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012). He has filed two other petitions that we have dismissed. *See* Order Dismissing Petition, *In re Pers. Restraint of Price*, No. 43697-3-II (Wash. Ct. App. Oct. 4, 2012); Order Dismissing Petition, *In re Pers. Restraint of Price*, No. 47380-1-II (Wash. Ct. App. Mar. 4, 2015).

> As I understand it from the Court of Appeals' decision . . . [the case] was . . . remanded to review the offender score and just sentencing if the offender score was wrong, as I understand it, and the issue being whether some prior offenses that Mr. Price had had washed.

Report of Proceedings (RP) at 14.

During the hearing, it became apparent that the prosecutor needed an additional document to establish Price's offender score. Before continuing the hearing, the trial court allowed three members of the victim's family to speak.

When the resentencing hearing resumed, the trial court determined that the State's evidence supported the previously calculated offender score of four. After two other members of the victim's family gave statements, the prosecutor outlined some of the facts of the crime that had been revealed at trial. The prosecutor argued that the trial court should impose the same sentence that Price received in 2007.

The defense responded by directing the trial court's attention to the special verdict form that had supported the "intimidation of the victim" aggravating factor. That verdict form provided:

> We, the jury, having found the defendant guilty of Murder in the First Degree or Murder in the Second Degree, return a special verdict by answering the following question from the court:
> **QUESTION:** During the commission of this offense, did the defendant's conduct manifest intimidation of the victim?

CP at 10. Defense counsel argued that this form showed that the jury had not found that the murder was a crime of domestic violence, which was required to support the aggravating factor in question. As a consequence, counsel maintained that the trial court could not reimpose an exceptional sentence without violating Price's rights under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

The prosecutor argued that the issue regarding the special verdict instruction was beyond the scope of the hearing. The trial court ruled as follows:

> Well, with respect to the issue of the exceptional sentence, the jury did find by special verdict that there was an aggravating circumstance, so I think Judge Fleming did have the ability, if he wished, to impose an exceptional sentence.

RP at 76.

The trial court then stated that it saw no reason to depart from Price's original sentence and sentenced Price to 374 months, plus 60 months for the weapon enhancement and 60 months for the aggravating factor. "I'm simply adopting what Judge Fleming, who heard the trial and knows it a lot better than I did and was there, did." RP at 78. The court added that it would impose the same legal financial obligations.

When defense counsel observed that the trial court had made its ruling without providing Price with his right to allocute, the court apologized and invited Price to speak. The trial court noted that the sentence was not yet final. Price then complained of problems in receiving his legal paperwork and reasserted his allegation of a public trial violation. Price also referred to his status as a minister and a Mason, the pain he had inflicted on his family, and the fact that resentencing was taking place on his wedding anniversary.

The trial court again apologized for not hearing Price earlier, stated that nothing Price said had changed the court's mind, and imposed the sentence it had described earlier. After the prosecutor stated that "the record should reflect the Court's judgment was not final at the point in time when the Court allowed Mr. Price to allocute," the court declared, "It's still not final because I haven't signed it yet. . . . After hearing him, I reconsidered it and reimposed it, and I apologize for not hearing from him before I gave my initial inclination." RP at 85.

Price appeals his resentencing.

ANALYSIS

I. REVIEW OF EXCEPTIONAL SENTENCE

Price argues on appeal that the trial court erred by imposing an exceptional sentence based on an aggravating factor that was not properly found by the jury. *See Blakely*, 542 U.S. at 303 (unless admitted by defendant, facts supporting exceptional sentence must be submitted to jury and proved beyond reasonable doubt). The State responds that this issue has not been preserved for review.

We begin our analysis with RAP 2.5(c)(1), which states:

> 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.

"This rule does not revive every issue or decision which was not raised in an earlier appeal." *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). RAP 2.5(c)(1) allows both trial and appellate courts discretion to revisit an issue on remand that was not the subject of the earlier appeal. *State v. Kilgore*, 167 Wn.2d 28, 38, 216 P.3d 393 (2009). "Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question." *Barberio*, 121 Wn.2d at 50. And, even if it is appealable, the appellate court still retains discretion to review it under RAP 2.5(c)(1). *Barberio*, 121 Wn.2d at 51.

In *Barberio*, the defendant did not challenge his exceptional sentences on appeal. 121 Wn.2d at 49. At resentencing, he challenged for the first time the aggravating factors supporting his exceptional sentence. *Barberio*, 121 Wn.2d at 49. The trial court declined to address the issue and reimposed the same exceptional sentence. *Barberio*, 121 Wn.2d at 50-51. The trial court

emphasized that neither new evidence nor the Court of Appeals opinion merited reexamination of Barberio's sentence. *Barberio*, 121 Wn.2d at 51-52.

Price did not raise the *Blakely* challenge to his special verdict instruction during his trial, in his first direct appeal, or in any of his three subsequent personal restraint petitions. During his resentencing, the trial court allowed the defense to make its record concerning the alleged *Blakely* error but did not rule on its merits. *See State v. Parmelee*, 172 Wn. App. 899, 908, 292 P.3d 799 (where resentencing court allowed defense to make a record and allowed the State to respond but declined to consider the issue, the issue was not properly before the Court of Appeals), *review denied*, 177 Wn.2d 1027 (2013). The trial court instead stated that the jury found an aggravating circumstance and that the prior judge had the ability to impose an exceptional sentence. Because the trial court declined to reach the merits of Price's challenge to the special verdict instruction, we decline to do so as well. *Kilgore*, 167 Wn.2d at 40; *Barberio*, 121 Wn.2d at 50-51.

II. RIGHT OF ALLOCUTION

Price contends that the trial court violated his right of allocution by imposing sentence before giving him a chance to speak. "Allocution is the right of a criminal defendant to make a personal argument or statement to the court before the pronouncement of sentence." *State v. Canfield*, 154 Wn.2d 698, 701, 116 P.3d 391 (2005). This right is guaranteed by RCW 9.94A.500(1), and we review an alleged violation of this statutory right de novo. *State v. Hatchie*, 161 Wn.2d 390, 405, 166 P.3d 698 (2007).

The State contends that Price waived the issue because he did not object by requesting resentencing before a different judge. *See State v. Aguilar-Rivera*, 83 Wn. App. 199, 200, 920 P.2d 623 (1996) (violation of right of allocution entitles defendant to new sentencing hearing

before different judge). There is no authority requiring a defendant to request this remedy in order to preserve this issue for review.

Here, the trial court noted its intention to reimpose Price's original sentence before defense counsel interrupted to state that her client wanted to speak. The trial court then apologized and allowed Price to make a statement. When Price finished, the trial court stated that Price's comments did not alter the court's original inclination. Price's objection sufficiently preserved the allocution issue for review.

It is evident that the trial court did not precisely adhere to statutory procedure in sentencing Price. RCW 9.94A.500(1); *see In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 336, 6 P.3d 573 (2000) (trial court should "scrupulously follow" the statutory requirements by directly addressing defendants during sentencing, asking whether they wish to say anything in mitigation of sentence, and allowing them to make arguments as to the proper sentence before imposition of sentence).[3] Price argues that the trial court's actions constitute error that require resentencing before a different judge, while the State maintains that any error was harmless. We agree with the State.

Washington decisions differ on whether a violation of the right of allocution can constitute harmless error. In *State v. Delange*, 31 Wn. App. 800, 801, 644 P.2d 1200 (1982), the trial court noted its intention to accept the State's recommendation and sentenced the defendant to 10 years before defense counsel objected that the court had denied the defendant her right of allocution. When the defendant stated that she should have been heard before she was sentenced, the court

[3] *Echeverria* referred to former RCW 9.94A.110, which was recodified as RCW 9.94A.500 in 2001. 141 Wn.2d at 336; LAWS OF 2001, ch. 10, § 6.

stated that she hadn't yet been sentenced and invited her to speak. *Delange*, 31 Wn. App. at 801. The trial court then imposed a 10-year sentence. *Delange*, 31 Wn. App. at 802.

In *Delange*, the trial court had not entered its formal sentence before allowing the defendant to allocute, thus she exercised her right of allocution before sentencing. 31 Wn. App. at 802. "Although that right should have been afforded before the court revealed its intention with respect to sentence, its failure to do so was inadvertent. When defense counsel brought this to the court's attention, defendant was immediately given the opportunity to speak." *Delange*, 31 Wn. App. at 802-03. The *Delange* court determined that there was no need to reverse and remand for resentencing. 31 Wn. App. at 803.

A subsequent decision rejected the State's claim of harmless error. *State v. Crider*, 78 Wn. App. 849, 860-61, 899 P.2d 24 (1995). In *Crider*, the defendant filed a notice of appeal based on a violation of his right of allocution immediately after the trial court entered judgment. 78 Wn. App. at 853. At the trial court's invitation, the defendant then made a statement, but the court was not swayed. *Crider*, 78 Wn. App. at 853. The *Crider* court concluded that "[a]pplying harmless error in the face of a total failure of allocution prior to the imposition of sentence would severely erode a right which the State concedes to be fundamental." 78 Wn. App. at 861. The *Crider* court vacated the sentence and remanded for resentencing. 78 Wn. App. at 861.

In *Aguilar-Rivera*, the trial court imposed an exceptional sentence, legal financial obligations, 12 months of community supervision with conditions, and then stated, "That is the sentence of the court." 83 Wn. App. at 200-01. When the trial court directed the defendant to come forward for fingerprinting, defense counsel pointed out that the court had not permitted his client to allocute. *Aguilar-Rivera*, 83 Wn. App. at 201. The trial court acknowledged that it had just "skipped over" the allocution and listened to the defendant's statement. *Aguilar-Rivera*, 83

Wn. App. at 201. The trial court then adhered to its initial sentence. *Aguilar-Rivera*, 83 Wn. App. at 201. On appeal, the *Aguilar-Rivera* court rejected *Delange* and held that "when the right of allocution is inadvertently omitted until after the court has orally announced the sentence it intends to impose, the remedy is to send the defendant before a different judge for a new sentencing hearing." 83 Wn. App. at 203.

In *State v. Gonzales*, 90 Wn. App. 852, 853-54, 954 P.2d 360 (1998), the court employed a harmless error test where the defendant urged the trial court to proceed with sentencing and asked for the recommended low-end sentence, which the trial court then imposed. The *Gonzales* court noted that although the trial court had erred by failing to allow the defendant to speak on his own behalf, "to conclude that the denial of his right to allocution was prejudicial under the facts of this case would place form above substance." 90 Wn. App. at 855.

The facts here are closer to those in *Delange* than those of the other cases cited, and we see no reason to reject the application of harmless error. The trial court's inadvertent failure to allow Price to speak before announcing its intended sentence constitutes harmless error. The trial court had not yet pronounced the final sentence, and after Price spoke, the court observed that the sentence was not yet final. The trial court listened to Price and afterwards exercised its discretion in sentencing him. We decline to find prejudicial error on the facts presented and affirm the exceptional sentence imposed during the defendant's resentencing.

III. Scrivener's Errors

The State points out that the defendant's judgment and sentence contains inconsistent references to his offender score and sentencing ranges. Paragraph 2.3 misstates his offender score as one and provides corresponding sentence ranges for each conviction. The trial court determined that Price's offender score was properly calculated as four and that his sentencing ranges were

those reflected in paragraph 4.12; *i.e*, 341 to 434 months for count I (including the 60-month enhancement), and 12+ to 16 months for count II. We remand for a ministerial correction of the scrivener's errors in paragraph 2.3 of Price's judgment and sentence. *State v. Moten*, 95 Wn. App. 927, 934-35, 976 P.2d 1286 (1999).

We affirm the exceptional sentence but remand for the ministerial correction of the scrivener's errors identified in this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Johanson, C.J.

Bjorgen, J.

RUSSELL SELK LAW OFFICES

August 27, 2015 - 12:54 PM

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