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Court of Appeals
Division I
State of Washington

NO. 74422-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MURRAY,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Michael Murray is a brain-damaged stroke victim. In 2008, bleeding inside his skull injured those parts of his brain that manage reasoning, judgment, and inhibitory control. The resulting cognitive deficits – including behavioral dyscontrol – are medically diagnosable as dementia, secondary to cardiovascular accident.

When released from jail in February of 2015, Mr. Murray should have been prescribed anti-seizure medication to temper his disinhibition and placed into an assisted living environment. Instead, he was released without medication or a home.

Struggling, he asked Sound Mental Health providers for help. He was trying to "do the right things," but was worried he would "start doing dumb things."

Charged with three counts of felony indecent exposure, Mr. Murray presented a diminished capacity defense. Dr. Craig Beaver testified that when Mr. Murray exposed himself,

> he was not able to reflect and consciously know what the impact of the behaviors was going to be until after the behaviors had occurred because he doesn't have that inhibitive or reflective control that we would expect most normal people to have... he has lost that ability [due] to his dementia and his cerebral vascular disease.

RP 522 (emphasis added).

Nevertheless, the jury convicted and also found that sexual motivation and rapid recidivism aggravating factors applied to each of the counts. The standard sentencing range was 0 to 365 days in jail, but Mr. Murray was ordered to serve three years in prison.

Sexual motivation cannot be used to impose an exceptional sentence for indecent exposure, a crime that is inherently a sexual offense. The "rapid recidivism" aggravating factor cannot apply to conduct rooted in diagnosable brain injury, rather than any spiteful disregard for the rule of law. Even if the aggravating factors could technically support an exceptional sentence, punishing Mr. Murray with three years of incarceration for behavior caused at least partly by a cognitive deficit was clearly excessive.

The exceptional sentence should be vacated and the matter remanded for resentencing within the standard range.

B. ASSIGNMENTS OF ERROR

1. The sentencing court erred in imposing an exceptional sentence.

2. The sentencing court erred in imposing an exceptional sentence based on the jury's finding of "sexual motivation" because indecent exposure is an inherently sexual offense.

3. The sentencing court erred in imposing an exceptional sentence based on the jury's finding that Mr. Murray committed his crimes "shortly after" release, where Mr. Murray's law violation was not the result of a disdain for authority but arose out of a medical impairment to his ability to conform his behavior to legal norms.

4. In this unique case, where a brain-injured Mr. Murray sought help for his situation precisely so that he would not reoffend, the "rapid recidivism" aggravator is unconstitutionally vague.

5. Even if either the "sexual motivation" or "rapid recidivism" aggravators could technically be applied to Mr. Murray's crimes, the sentence was clearly excessive because the root of the offending was a medically-based volitional impairment.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A sentencing judge may not justify an exceptional sentence on a fact already taken into account in computing the standard range. Instead, exceptional sentences are intended to impose extra punishment where the particular crime at issue caused more damage than that contemplated by the statute defining the offense.

Indecent exposure requires proof of an open and obscene (lewd or lascivious) exposure of one's person. If indecent exposure

is inherently a sexual offense, did the sentencing court err in imposing an exceptional sentence on the basis that the jury found what Mr. Murray did was sexually motivated?

2. The Sentencing Reform Act allows for an exceptional sentence if the State proves, beyond a reasonable doubt, that "[t]he defendant committed the current offense shortly after being released from incarceration." RCW 9.94A.535(3)(t). To prove this "rapid recidivism" aggravating factor, the State must show an "especially short time period between prior incarceration and reoffense" and the "gravamen" of this aggravating factor" is "disdain for the law." State v. Combs, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010).

Rather than flout the law, following his release from jail Mr. Murray reached out for psychiatric assistance precisely so that he would not reoffend. As a matter of law, is this "rapid recidivism"?

3. A statute is void for vagueness if it either (1) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement.

Is the rapid recidivism aggravator, which allows for an exceptional sentence for those who reoffend "shortly after" release but without guidance as to what that term means or how to incorporate other relevant facts, void for vagueness as applied to this brain-injured offender?

4. The sentencing judge accepted that "there is some medical basis for what Mr. Murray's problems are," but sent him to prison anyways. 12/10/15 RP11. Even if the aggravators could be technically applied to Mr. Murray's crimes, was the sentence clearly excessive?

D. STATEMENT OF THE CASE

1. Stroke and enduring brain damage

On July 3, 2008, first responders brought Michael Murray to the emergency room at Swedish Hospital. Ex. 12 at 2[1]; RP 500. He was walking irregularly, slurring his speech, and had left body weakness. A CT scan of his brain "showed a large basal ganglia hemorrhage extending into the caudate area and also extending

[1] Exhibit 12 is Dr. Craig Beaver's "Neuropsychological Examination" report dated January 5, 2015. Dr. Beaver is a licensed psychologist in Idaho, Oregon, Washington and Wyoming. RP 486. Half his work is clinical treatment and the other half is forensic assessment. RP 486. Dr. Beaver has been treating and evaluating individuals who suffer from neurological issues (such as brain injury, strokes, tumors, etc.) for more than thirty years. RP 487-88.

into the right frontal horn." Ex. 12 at 2. In lay terms, Mr. Murray had suffered a serious stroke and had likely suffered one sometime earlier too. Id.; RP 500-01.

A pre-discharge hospital assessment of Mr. Murray's speech and language showed he had difficulty with concentration, mild to moderate difficulties with memory, moderate difficulties with initiation, and moderate difficulties with executive functioning. Id. Additional CT brain scans repeated in 2010 showed enduring brain damage. Ex. 12 at 3 (describing "residual encephalopathy in both the right and left anterior portions of the brain."); RP 500.

In January of 2015, forensic psychologist Dr. Beaver interviewed Mr. Murray and also examined his neuropsychological functioning. Ex. 12; RP 496-99. Mr. Murray told Dr. Beaver that since his 2008 stroke, he has had a hard time focusing, difficulty with his speech, memory, and "feels that he has poor inhibitory control." Id. at 4. Mr. Murray added that he "finds himself doing things before he realizes it," without always understanding why things occur. Id. Mr. Murray also let Dr. Beaver know he found his condition distressing and wanted to address it. Id.

Testing of Mr. Murray's neurocognitive functioning showed multiple deficits, including "obvious inhibitory control issues." Id. at

5-7. After reviewing the 2008 hospital records, speaking with Mr. Murray, and conducting the testing,[2] Dr. Beaver diagnosed Mr. Murray with a major vascular neurocognitive disorder, with behavioral disturbance, as defined in the DSM-V. Id. at 7.[3]

Dr. Beaver explained that "anterior cerebrovascular disease, such as demonstrated by Mr. Murray in his head radiological studies, typically results in individuals having decreased inhibitory control." Id. at 7. The frontal cortex of the brain that was injured in Mr. Murray, manages "our reasoning, judgment, [and] inhibitory control." RP 502. Mr. Murray had "terrible trouble" on a particular test which has been demonstrated to be very sensitive for gauging inhibitory and emotional control. RP 510-11. The data reviewed by Dr. Beaver demonstrated that Mr. Murray's inhibitory control problems were caused by the brain damage he suffered: "It's directly related to the dementia that he has involving the frontal cortex." RP 514 (emphasis added).

Referring to then-pending indecent exposure charges, Dr. Beaver concluded that "Mr. Murray's cerebrovascular dementia or

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[2] The testing was valid; Mr. Murray participated to the best of his abilities without trying to fake or exaggerate his difficulties. RP 503-05.

[3] Dr. Beaver also opined that this condition, with attendant depression, would significantly limit Mr. Murray's capacity for employment such that he would likely meet Social Security Disability Insurance eligibility guidelines. Id. at 8.

major neurocognitive disorder does appear to be a significant contributing factor to the behavioral dyscontrol he has exhibited, likely resulting in his current legal circumstance." Id. at 8.[4]

Dr. Beaver suggested that three classes of medication could help with Mr. Murray's behavioral dyscontrol. Id. at 8. Beta blockers are known "to slow impulsive responses, giving the person more time to reflect and inhibit behavior." Id. Similarly, anti-seizure medication can reduce sexual arousal, thus reducing the probability of inappropriate behaviors. Last, antidepressant medication "has also been found effective in decreasing difficulties with dysregulation or dyscontrol." Id.; RP 516-17.

2. Homeless and asking for help

Mr. Murray was in jail when Dr. Beaver interviewed him in January of 2015. Ex. 12 at 2. At trial, the State presented evidence that Mr. Murray left jail on February 17, 2015. RP 476-77.

A week after his release, Mr. Murray went to the Sound Mental Health clinic for help. Ex. 13 at 3. On March 2, 2015, he returned seeking follow-up care. Ex. 14 at 1 ("Sound Mental health

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[4] Dr. Beaver had evaluated Mr. Murray at the request of defense counsel who represented Mr. Murray in an indecent exposure charge arising out of a December 6, 2013, event. Id. at 1. This was an earlier charge than the three convictions now on appeal.

Psych Evaluation"). He provided Dr. Beaver's report to the examiner and asked for assistance: "I need all the help I can get." Id.; RP 518. Despite Dr. Beaver's recommendations, Mr. Murray had no medications prescribed to him upon his February 17, 2015, release from jail. Ex. 14 at 2.

Mr. Murray reported to the Sound Mental health evaluator that "he is afraid he is going to 'start doing dumb things' which he elaborates to refer to his recent indecent exposure episode one year ago." Id. He said that he was "trying very hard to 'do the right things,'" but has periods of depression and hopelessness lasting days at a time. Id. He said he had no plans to reoffend, but understood from Dr. Beaver's evaluation that his 2008 stroke contributed to his acts of exhibitionism. Id. He admitted having two sexual offenses before the stroke. Id.[5]

Sound Mental Health clinicians noted Dr. Beaver's findings as to neurocognitive deficits, secondary to cardiovascular accident. They diagnosed Mr. Murray with a depressive disorder and handed him a prescription for an anti-depressant. Id. at 3. Mr. Murray

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[5] The trial record references a 1994 lewd behavior case in Utah. RP 531. An exhibit to the defense pretrial "Motion To Exclude Prior Convictions" includes a recitation of facts on defendant's statement of guilt indicating that an "extremely intoxicated" Mr. Murray laid down next to two sleeping boys "with his pants undone." Supp. CP __. The State's request for bail included an assertion that Mr. Murray also has a 2005 indecent exposure conviction from Utah. CP 3.

agreed to call if he were to develop suicidal ideation or untoward side effects and he also agreed to come back to the clinic in one month. Id.

3. March 2015 incidents

On March 4, 2015, S.L., an employee of the Skyline retirement home on Seattle's First Hill, reported seeing a man looking at her and touching his exposed penis. RP 392, 411. This happened on an often-visited 24th floor of the building. RP 371, 378, 382. When S.L. saw the man earlier, he said something to her about it being a nice day and a gorgeous view. RP 385. Not long after this small talk, when the man was confusingly trying to get into the women's bathroom – "he did look confused" – S.L. redirected him to the men's room. RP 386.

S.L. thought this man had left, but then saw him "hiding" behind a wall, with his pants down to mid-thigh and touching himself. RP 390-92. She hid; he left. RP 393-94.

On March 5, 2015, C.Y., an employee at the Dexter Horton building in downtown Seattle, noticed that a man riding in the elevator with her had his penis exposed: "it was just through the zipper." RP 452. He was not touching himself; his hands were pulled up inside his sleeves. RP 453. He said nothing, he did not

look over to C.Y., he seemed to be looking straight ahead, and he had no expression on his face. RP 454, 460, 461. C.Y. reported this to co-workers and security. RP 454-55.

On March 9, 2015, L.S., a hair stylist in downtown Seattle's Central Building, called the police to report an elderly man she saw masturbating in the hallway. RP 332, 342. She had seen the same man earlier that day and noticed he had a cane with him. RP 335. When she first saw him, "he just looked confused to [her]." RP 336. "He had his fly down," and she thought he may have been lost. RP 336. The man had stared at her and was expressionless, "cane in his hand, just like stuck." RP 339-40. (L.S.'s customer had seen the man before too. She thought he was "homeless" and saw him "pacing" and "staring" occasionally. RP 424.)

When her customer saw him touching his penis and screamed, there was "a look of surprise" on the man's face. RP 345, 354, 427. He left the building, but L.S. caught up to him and took his picture. RP 346. When she confronted him, there was "a look of shock on his face." RP 347.

4. Charges and aggravating circumstances allegations

Michael Murray was identified as the suspect in all three incidents. E.g. RP 59-92; 622-27. At first, the State charged him

with one count of felony indecent exposure, for the March 4, 2015, incident involving S.L. only. CP 1. The State claimed that what had occurred was a felony indecent exposure because Mr. Murray had been previously convicted of that crime. CP 1. Citing RCW 9.94A.835, the State further alleged that Mr. Murray committed the offense with sexual motivation. CP 1. Citing RCW 9.94A.535(3)(t), the State further alleged that the crime involved the "rapid recidivism" aggravating factor. CP 1.

In an amended information, the State added two more counts, for the March 5 and March 9 incidents. CP 9-10. In a second amended information, the State claimed that the allegations were felonies not only because of a prior indecent exposure conviction, but also because Mr. Murray was in 2010 convicted of indecent liberties, a sex offense under RCW 9A.88.010. CP 3, 17-18. The State made this amendment after defense challenged the facial validity of the alleged indecent exposure priors. RP 47-52, 58 (State concession the priors facially invalid), 62-63.

5. Earlier incidents admitted under ER 404(b)

At trial, the jury heard from S.C., who in 2009, while riding a bus, saw that a man across the aisle had pulled down the waistband to his sweatpants, was touching himself, and looking at

her. RP 563-66. The man, Mr. Murray, stayed in place even when the police boarded the bus; his penis was still partly out. RP 568-69, 574. He told the police he did not know why the woman was upset and he did not know why "he had did it today." RP 575 (sic).

The jury heard from L.M. who in 2012 reported seeing a man masturbating in a Kent DSHS office. RP 631-40. The man had unzipped his pants and had his hand on his penis. RP 635. He left after two people came in. RP 636. He had stared at L.M. as he walked out, but said nothing. RP 636, 640. The responding officer who spoke with Mr. Murray, testified that Mr. Murray first said that this was in the bathroom, not lobby, then that he "had it out, just had it out," but was not masturbating. RP 469. When asked why he had done this, Mr. Murray said "stupidity." RP 469.

The jury heard from E.D. who in 2013 reported seeing Mr. Murray with his pants unzipped and his penis in his hand at the Union Gospel Mission in Seattle. RP 555-57. She told him to get out. RP 559. He said "I'm sorry, I'm sorry," and walked away. RP 561. The arresting officer said that Mr. Murray was "cooperative and seemed somewhat apologetic about the situation." RP 580. Mr. Murray told the officer something to the effect "I'm sorry and it shouldn't have happened." RP 581.

Over objection, the trial court gave the State permission to use the 2009, 2012, and 2013 incidents under ER 404(b) to show that Mr. Murray acted with knowledge that his 2015 conduct was likely to cause reasonable affront or alarm and also as evidence that one of the purposes of him committing the 2015 crimes was sexual gratification. RP 4-30, 38-46, 84-93, 609; CP 74.

6. Diminished capacity defense

Dr. Beaver saw Mr. Murray again after his re-arrest, in September of 2015. Ex. 13 ("Forensic Mental Health Examination," dated September 28, 2015). He reviewed more records and did more testing. Ex. 13 at 1-2; RP 515-18.

Mr. Murray "[s]till had the inhibitory control issues" and still evidenced a major neurocognitive disorder as before. Id. at 6; RP 518-19. In this follow-up report, Dr. Beaver elaborated on the interplay between Mr. Murray's brain damage and criminal culpability. He testified that since the 2008 stroke, Mr. Murray's "ability to inhibit [exposing] behaviors is significantly diminished." RP 520-21.

Dr. Beaver reported that at the time of the March 2015 events, "Mr. Murray reasonably suffered from a cerebrovascular dementia." Id. This meant, that at the time of the charged offenses,

"He has impaired reasoning and judgment, impaired memory, and of particular note, impaired inhibitory control." Id.

In his report, Dr. Beaver explained:

> As a consequence of Mr. Murray's neurological status at and around the time the events took place, based upon current information, he lacked the capacity of "knowing" his conduct (exposing himself) at that moment in time would likely cause reasonable affront or alarm. His decreased capacity for inhibitory control results in him potentially engaging in a behavior without having a full appreciation, or knowing, of how such conduct would reasonably affront another.

Ex. 13 at 8.

His in-court testimony was largely the same:

> [W]ith his inhibitory control, it's my opinion that at the time that he engaged in those behaviors he was not able to reflect and consciously know what the impact of the behaviors was going to be until after the behaviors had occurred because he doesn't have that inhibitive or reflective control that we would expect most normal people to have, and he has lost that ability related to his dementia and his cerebral vascular disease.

RP 522 (emphasis added).

7. Errors in past proceedings

Irregularities plagued Mr. Murray's prior cases. The 2009 offense should not have been charged as a felony, because an out-of-state indecent exposure conviction cannot elevate a Washington misdemeanor indecent exposure. RCW 9A.88.010(2)(c); RP 58,

62-63. But, Mr. Murray was made to serve 5.5 months in jail on what should have been a 90-day maximum term. Supp. CP __.

The statutory maximum for an unranked felony like indecent exposure is 365 days in jail. But, for the 2012 crime, Mr. Murray was told his standard sentencing range was 13 to 17 months, and he was made to serve 14 months behind bars. Supp. CP __.

The 2013 crime was correctly treated like an unranked felony and Mr. Murray received a credit-for-time-served sentence of 12 months. CP 3; RP 476-77. But this happened after he had been in jail for 14 continuous months. Three times he was made to serve more time than what the law allowed.

8. Sentenced to prison

The jury was asked to determine guilt on the three counts of felony indecent exposure and whether the aggravating circumstances of sexual motivation and/or rapid recidivism applied. CP 77-79, 83-87. The rapid recidivism question was framed as follows: "Whether the defendant's [sic] committed the crime shortly after being released from incarceration." CP 85-87. The jury received this definition of sexual motivation: "Sexual motivation means that one of the purposes for which the defendant committed

the crime was for the purpose of his or her sexual gratification." RP 88.

Notably, the diminished capacity instruction did not reach either of the aggravating circumstances. CP 89 (jury instructed "[e]vidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form knowledge.")

The jury declared Mr. Murray guilty of three counts of felony indecent exposure and found that both the rapid recidivism and sexual motivation aggravating factors applied to each. CP 59-64.

At his sentencing, Mr. Murray apologized for what he had done and begged for help as he had done earlier with the Sound Mental Health providers:

> I need counseling or something, I don't need to just be locked up. Locked up's the worst thing because I don't get help being locked up. You know, put me in the state hospital or something. Give me, you know, help me. Help the system.

12/10/15 RP11

The trial court acknowledged the standard sentencing range for each offense was 0-12 months, accepted that "there is some medical basis for what Mr. Murray's problems are," but sent him to serve three years in prison anyway. 12/10/15 RP11; CP 97-99.

E. ARGUMENT

IN IMPOSING AN EXCEPTIONAL SENTENCE, THE TRIAL COURT ERRED.

The Sentencing Reform Act ("SRA") creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant's offender score. RCW 9.94A.505 et seq.; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525.

For unranked felonies such as felony indecent exposure, there is one standard range irrespective of the offender score: 0 to 365 days in jail. RCW 9.94A.505(2)(b).

There can be no departure from the applicable standard range unless a number of conditions are satisfied. The court must find there are "substantial and compelling reasons justifying an exceptional sentence RCW 9.94A.535; RCW 9.94A.537(6). The court must set forth its reasons for departure from the standard range in written findings of fact and conclusions of law. RCW 9.94A.535. The State must give notice of the specific aggravating factor(s) on which it is relying, and is limited to the factors set forth in the statute. RCW 9.94A.535; RCW 9.94A.537. The State must

prove facts supporting an aggravated sentence beyond a reasonable doubt. RCW 9.94A.537(3).

Critically, "[e]xceptional sentences are intended to impose additional punishment where the particular offense at issue causes more damage than that contemplated by the statute defining the offense." State v. Davis, 182 Wn.2d 222, 229, 340 P.3d 820 (2014), citing State v. Stubbs, 170 Wn.2d 117, 124–25, 240 P.3d 143 (2010); RCW 9.94A.535.

On appeal, "the meaning and applicability of a statutory aggravating factor [is reviewed] as a matter of law." Davis at 224-25, citing Stubbs, 170 Wn.2d at 123–24; RCW 9.94A.585(4)(a).

"To reverse an exceptional sentence," the reviewing court "must find either that the trial court record does not support the sentencing court's articulated reasons, that those articulated reasons do not justify a sentence outside the standard range for that offense, or that the length of the exceptional sentence was clearly excessive." State v. Hayes, 177 Wn. App. 801, 807, 312 P.3d 784 (2013), aff'd, 182 Wn.2d 556, 342 P.3d 1144 (2015).

When an appellant argues that reasons stated by the sentencing court do not support an exceptional sentence, this Court reviews the decision under the "matter-of-law standard." State v.

Saltz, 137 Wn. App. 576, 584, 154 P.3d 282 (2007). This standard "requires the reviewing court to independently determine, as a matter of law, if the sentencing judge's reasons justify the imposition of an exceptional sentence." Id. (internal quotations omitted).

1. The trial court improperly exceeded the standard range on the basis that Mr. Murray's crimes of indecent exposure were "sexually motivated," because sexual motivation inheres in the offense.

"[A]n exceptional sentence may not be based on factors inherent to the offense for which a defendant is convicted." State v. Thomas, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999); Saltz, 137 Wn. App. at 583; State v. Butler, 75 Wn. App. 47, 53, 876 P.2d 481 (1994). Here, the sentencing court improperly based its decision to exceed the standard range in part on the jury's finding that Mr. Murray's offenses were "sexually motivated." CP 97. "Sexual motivation" is a statutory aggravating factor that may support an exceptional sentence. RCW 9.94A.390(2)(f). "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification. RCW 9.94A.030(47).

"The purpose of 'sexual motivation' as an aggravating factor is to hold those offenders who commit sexually motivated crimes more culpable than those offenders who commit the same crimes without sexual motivation." State v. Thomas, 138 Wn.2d at 630, citing State v. Halstien, 122 Wn.2d 109, 124, 857 P.2d 270 (1993).

But, the sexual motivation enhancement cannot apply to sex offenses. The "sexual motivation" allegation "shall not be applied to sex offenses as defined in RCW 9.94A.030." Id. at 632–33, quoting to RCW 9.94A.127(2)[6] (emphasis in opinion).

Removing sex offenses from the class of crimes to which the sexual motivation sentencing enhancement can apply makes sense because sex offenses have already been identified as being motivated, at least in part, by sexual desire. Sexual motivation is already factored into the sex offense sentence; if the enhancement applied, a defendant's sentence would be twice impacted by the same sexual intent. This is prohibited: "an exceptional sentence may not be based on factors inherent to the offense for which a defendant is convicted." 138 Wn.2d at 636 (holding that sexual motivation can be the basis for an exceptional sentence for felony

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[6] RCW 9.94A.835 is the current version of the sexual motivation allegation statutory provision.

murder because "there is nothing inherently sexual about felony murder.").

Indecent exposure is not an enumerated "sex offense" under RCW 9.94A.030(47) and thus statutorily excluded from the class of crimes to which "sexual motivation" can attach. RCW 9.94A.835(2). Nevertheless, indecent exposure is an inherently sexual offense, which is why the sexual motivation aggravator cannot apply.

"A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm." RCW 9A.88.010(1) (emphasis added).

While neither the statute nor the WPIC's define the term obscene, under common law, "indecent or obscene exposure of his person" means "a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others." State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1966) (emphasis added) (affirming conviction where appellant "deliberately and lewdly exposed his genitals" to complainant);

Accord State v. Vars, 157 Wn.App. 482, 489-90, 237 P.3d 378 (2010).

The Galbreath court held that when coupled with the phrase "exposure of the person," there is no ambiguity as to what the terms indecent and obscene mean:

> The words 'indecent' and 'obscene' are common words, of common usage, and enjoy a commonly recognized meaning among people of common intelligence.

69 Wn.2d at 668.

The commonly recognized meaning of obscenity is that it references sexuality, or offensive sexuality to be precise. Obscene material are "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973); accord RCW 7.48A.010(2).

And, this Court previously found that instructing a jury deciding an indecent exposure charge that: "'Obscene exposure' means the exposure of the sexual or intimate parts of one's body for a sexual purpose" was "a neutral and accurate statement of the law." State v. Steen, 155 Wn. App. 243, 247, 228 P.3d 1285 (2010)

(emphasis added). Here the government also took the position that each of Mr. Murray's prior and current acts of indecent exposure evidenced a sexual purpose. RP 86.

"[S]exual motivation logically applies only to offenses that are not inherently sexual in nature." Thomas, 138 Wn.2d at 636 (emphasis in the original). Because indecent exposure criminalizes a sexual act, this Court should hold that as a matter of law indecent exposure is a sex offense which cannot be aggravated by a finding of sexual motivation.

2. Mr. Murray, who sought out help to keep himself from reoffending, did not commit the crime "shortly after" release, which is why the exceptional sentence based on the "rapid recidivism" aggravating factor should be reversed.

The SRA allows for an exceptional sentence if the State proves, beyond a reasonable doubt, that "[t]he defendant committed the current offense shortly after being released from incarceration." RCW 9.94A.535(3)(t). To prove this "rapid recidivism" aggravating factor, the State must show an "especially short time period between prior incarceration and reoffense." Butler, 75 Wn. App. at 54 (emphasis added). Short means short: "Cham's commission of a crime within one hour of release from jail satisfies the statutory definition" of rapid recidivism. State v. Cham,

165 Wn. App. 438, 450, 267 P.3d 528 (2011), review granted, cause remanded on other grounds, 175 Wn.2d 1022, 289 P.3d 627 (2012).

In Butler, the defendant committed two crimes – one robbery and one attempted rape – within 12 hours of release from incarceration on another robbery conviction. Butler, 75 Wn. App. at 48-50. The sentencing court found the State had proven rapid recidivism, and this Court affirmed, stating:

> Here, Butler's immediate reoffense, within hours of his release, reflects a disdain for the law so flagrant as to render him particularly culpable in the commission of the current offense.
>
> Thus, we hold that the commission of a crime shortly after release from incarceration on another offense may properly be used to distinguish that crime from others in the same category. Hence, under circumstances such as those in the present case, rapid recidivism constitutes a sufficiently substantial and compelling reason to justify the imposition of an exceptional sentence.

Id. at 54 (emphasis added).

Indeed, "[t]he gravamen of the [rapid recidivism] offense is disdain for the law." State v. Combs, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010) (holding that "six months is not a short period of time").

Mr. Murray anticipates that the State will rely on State v. Saltz, where that defendant reoffended a month after release, to argue the aggravated sentence imposed below should stand. However, there is more to Saltz than just the one month window and there is more to this analysis than looking at a calendar. See Combs, 156 Wn. App. at 506 (noting that the relevant timeframe "will vary with the circumstances of the crime involved").

First, Saltz stipulated that his reoffense occurred "shortly after being released from incarceration" and thus expressly authorized the sentencing court to impose an aggravated sentence. Saltz, 137 Wn. App. at 584. Second, his reoffense involved not just the same type of crime but the targeting of the same victim. Id. at 585. It is no surprise that this Court held that Saltz "show[ed] the disregard for the law referenced in Butler." Id.

Unlike Saltz, Mr. Murray did not stipulate that the aggravator applied nor did he target the same victim. Most importantly, upon his release from incarceration, Mr. Murray attempted to get professional help to keep himself from reoffending. Ex. 13 at 3; Ex. 14 at 1.

The Court's post-Saltz approach in Combs is instructive here. The Combs opinion noted that there is no "outer time limit on

what constitutes a short period of time" and suggested "[t]hat period will vary with the circumstances of the crime involved." Combs at 506.

If the specific facts of an offense can lengthen the window that renders recidivism "rapid," then specific facts can shorten that period too. In ruling in Combs' favor, this Court noted that his crime of attempting to elude was "an impulse crime brought about by circumstances" and not borne out of planning or premeditation. Id. Mr. Murray's situation is similar and even more persuasive still, despite a recidivism timeframe shorter than Combs and Saltz.

Mr. Murray's decision to go to Sound Mental Health and ask for help with controlling his behavior is consistent with someone making an attempt to respect and obey the law. Ex. 13 at 3; Ex. 14 at 1; Supp. CP ___; RP 515-16. This is the opposite of "disdain for the law," especially where Mr. Murray's problematic disinhibition is the result of a medical injury. Combs, 156 Wn. App. at 506; Butler, 75 Wn. App. at 54.

Recidivism is already accounted for in calculating the standard range. RCW 9.94A.505; RCW 9.94A.510; RCW 9.94A.525. Mr. Murray's crimes (normally simple misdemeanors) were elevated to the level of unranked felonies precisely because

of his criminal history. The State failed to prove rapid recidivism, and the exceptional sentence should be vacated.

3. The "rapid recidivism" aggravating factor is unconstitutionally vague.

The Due Process Clause of the Fourteenth Amendment requires that statutes give citizens fair warning of prohibited conduct and protect them from "arbitrary, ad hoc, or discriminatory law enforcement." State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993); U.S. Const. amend. XIV. A statute is void for vagueness if it either (1) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A statute that "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," is unconstitutional. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

The vagueness doctrine is aimed at preventing the delegation of "basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant

dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The vagueness doctrine applies to sentencing enhancements. Johnson v. United States, __ U.S. __, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015) (striking down a sentencing provision of the Armed Career Criminal Act on vagueness grounds because "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges" in violation of due process).

If, contrary to the argument in subsection (2) above, the rapid recidivism aggravator can be applied to the circumstances of this case, then the aggravator is unconstitutionally vague. The law does not give sufficient notice that a brain-injured man suffering from a medically-caused behavioral disinhibition commits "rapid recidivism" when he first asks for help but then reoffends.

Furthermore, the rapid recidivism aggravator lacks ascertainable standards of guilt to protect against arbitrary enforcement. The statute itself provides no guidance apart from the words "shortly after." "Offenses that do not have a mens rea element are generally disfavored," but the aggravator reads just as

a disfavored strict liability crime would. State v. Bradshaw, 152 Wn. 2d 528, 536, 98 P.3d 1190 (2004).

The problem with this structure is highlighted by the fact that while Mr. Murray was able to raise a diminished capacity defense with respect to the underlying charge, he could not do so with respect to the aggravator. See CP 89 (jury instructed "[e]vidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form knowledge.") The plain language of the instructions forbade the jurors from considering how his brain injury and effort to get help relate to the question of whether he offended "shortly after" release.

This cannot be. Not only because strict liability offenses are disfavored in general, but also because impairments to a "defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law" are recognized by law to constitute a basis for a mitigated sentence. RCW 9.94A.535(1)(e).

The residual clause struck down by Johnson v. United States, was deemed to be unconstitutionally vague because it left "grave uncertainty about how to estimate the risk posed by a crime," before a prior offense would be labeled a violent felony

triggering serious sentencing repercussions. 135 S. Ct. at 2557. The application of the aggravator to Mr. Murray's case, with the uncertainty in deciding whether he offended "shortly after" release was similarly arbitrary. Accordingly, RCW 9.94A.535(3)(t) is unconstitutionally vague as applied to Mr. Murray.

4. Even if either of the aggravating circumstances could technically apply, sending the brain-injured Mr. Murray to prison for 36 months was clearly excessive.

The law explicitly recognizes that the failed diminished capacity defense Mr. Murray presented was grounds for a mitigated sentence. RCW 9.94A.535(1)(e). Additionally, under RCW 9.94A.535(1)(b) an offender may receive a mitigated sentence if he or she "[b]efore detection... compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained." Although this factor does not apply directly to what happened, the underlying rationale certainly does. Aware of and troubled by the difficulty he had controlling his behavior since his brain injury, Mr. Murray attempted to lessen the risk of reoffense he posed upon release by contacting mental health professionals. This was obviously not successful which is why he found himself in jail again, but Mr. Murray's effort certainly distinguishes him from the rapid recidivists like Butler, Saltz, or

Cham. And, while what he did may have been criminal and a nuisance, there was nothing exceptional about his indecent exposures. To the contrary, the fact that his dementia provides a medical explanation for his disinhibition, Mr. Murray is less, not more, blameworthy.[7]

Science has "reveal[ed] fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." State v. O'Dell, 183 Wn.2d 680, 692, 358 P.3d 359 (2015) (footnotes omitted). Precisely because juveniles and young adults suffer from deficient – as compared to mature adults – brains, they are deemed less culpable for their conduct. In fact, youthfulness alone may be grounds for a mitigated sentence. Id. As the United States Supreme Court put it, because "the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." Miller v. Alabama, 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407 (2012) (internal quotations omitted).

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[7] It is worth recalling that unrelated witnesses described Mr. Murray looking "confused" during the March episodes. RP 336; 386. These unrelated witnesses also described him as expressionless, "like stuck." RP 460-61; 339-40. This testimony was consistent with Dr. Beaver's analysis of the dementia.

Mr. Murray's injured brain similarly makes him less blameworthy than a healthy and fully-functioning adult. RCW 9.94A.535(1)(e). And, like the science about juvenile brain development underlying Miller, O'Dell, etc., Dr. Beaver's opinion about Mr. Murray's brain injury, dementia, and ensuing disinhibition is similarly supported by well-established scientific findings.

Medical literature is replete with documentation of the causal link between brain injury and sexual disinhibition: "Frontal lobe syndromes can lead to public masturbation, exhibitionism, pedophilia, and frotteurism as part of the impulsive, disinhibited change in behavior." Cummings, J. and Mega, M., "Neuropsychiatry and Behavioral Science," (2003) Oxford University Press, ch. 23 "Disturbances of Sleep, Appetite, and Sexual Behavior," at 357. See also Hooshmand, H. and Brawley,B.W., "Temporal lobe seizures and exhibitionism," Neurology November (1969) 19(11) (discussing how a form of automatic behavior seen in temporal lobe seizures can be mistaken for exhibitionism); Miller, B. et al., "Hypersexuality or altered sexual preference following brain injury," Journal of Neurology, Neurosurgery, and Psychiatry (1986) vol. 49:867-873 (discussing cases of disinhibition of sexual activity such as hypersexuality and exhibitionism which followed frontal lobe

damage); Libman, R. and Wirkowski, E., "Hypersexuality and Stroke: A Role for the Basal Ganglia?," Cerebrovasc Dis (1996) vol. 6:111-113; Eghwrudjakpor, P.O. and Essien, A.A., "Hypersexual Behavior Following Craniocerebral Trauma: An Experience with Five Cases," Libyan J Med. (2008), 3(4): 192–194 (discussing how "[d]amage to the orbital parts of the frontal lobes is believed to cause deviant sexual behaviour as a result of removal of moral-ethical restraints.").

Generally, an exceptional sentence is appropriate "only when the circumstances of the crime distinguish it from other crimes of the same statutory category." State v. Pennington, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989). The purpose of the SRA is "to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences[.]" RCW 9.94A.010. Additionally, the SRA's purpose is to: (1) ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; (2) promote respect for the law by providing punishment which is just; (3) be commensurate with the punishment imposed on others committing similar offenses; (4)

protect the public; (5) offer the offender an opportunity to improve himself or herself; (6) make frugal use of the state's and local governments' resources; and (7) reduce the risk of reoffending by offenders in the community. Id.

Whether an exceptional sentence is clearly excessive is reviewed for an abuse of discretion. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). The sentencing court may exercise its discretion to determine the precise length of the exceptional sentence appropriate on a determination of substantial and compelling reasons supported by the aggravating factor. State v. Oxborrow, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986). Action is excessive if it goes beyond the usual, reasonable, or lawful limit. Id. at 531. "Thus, for action to be clearly excessive, it must be shown to be clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken." Id.

Mr. Murray is not asking this Court to overrule the jury's declaration that his behavior was criminal. Mr. Murray is not asking this Court to overrule the principle that sentencing judges may use discretion in crafting an appropriate punishment. But here, in this one case, where the lower court accepted that at least a part of the

reason for Mr. Murray's behavior was medical, the sentence imposed was manifestly unreasonable and excessive.

The presumptive punishment for the three unranked felonies was 0 to 365 days in jail, to be run concurrent. The three year prison term is the equivalent of giving Mr. Murray the maximum sentence on each count and stacking the counts. Under the unique circumstances of the case, the sentence shocks the conscience.

Exceptional circumstances must truly distinguish the crime from others of the same category, but Mr. Murray's crimes were not distinguishable from others. State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003). The only thing the State can point to here as reason to impose this much punishment against Mr. Murray is that he has repeated the same behavior after detection and punishment. But the reason for that repetition is not that Mr. Murray is an incorrigible recidivist, but that "he doesn't have that inhibitive or reflective control that we would expect most normal people to have, and he has lost that ability related to his dementia and his cerebral vascular disease." RP 522.

In the past, this man had received illegally long sentences. This criminal conduct occurred, at least in part, because of his brain injury. For these offenses, Mr. Murray was eligible to receive a

mitigated sentence. Relegating him to three years' of prison warehousing shocks the conscience and was clearly excessive.

5. This Court should reverse and remand for resentencing within the standard range for the unranked felony offense.

Where an exceptional sentence is based on a combination of valid and invalid factors, remand is not necessary if the sentencing court would have imposed the same sentence upon consideration of only valid factors. Saltz, 137 Wn. App. at 586.

But here, both factors the sentencing court relied on – sexual motivation and rapid recidivism – were invalid and unwarranted. Accordingly, this Court should vacate the exceptional sentence and remand for resentencing within the standard range.

E. CONCLUSION

For the reasons set forth above, Mr. Murray respectfully requests that this Court vacate the exceptional sentence and remand for sentencing within the standard range.

Should this Court reject Mr. Murray's argument on appeal, he asks that this Court issue a ruling refusing to allow the State to seek any reimbursement for costs on appeal due to his continued indigency.[8] State v. Sinclair, 192 Wn.App. 380, 367 P.3d 612 (2016).

DATED this 15th day of September 2016

Respectfully submitted,

/s/ Mick Woynarowski

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Washington Appellate Project
Attorneys for Appellant

[8] The record below indicates that Mr. Murray was homeless when arrested and is unemployable due to his disability.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO.74422-4-I
v.	)	
	)	
MICHAEL MURRAY,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **OPENING 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:

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[X] MICHAEL MURRAY 347950 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF SEPTEMBER, 2016.

X_____

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