Supreme Court No. 988102
Court of Appeals No. 35297-8-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

CHAD GERRIT BENNETT,
Petitioner

ANSWER TO PETITION FOR REVIEW

GARTH DANO
GRANT COUNTY PROSECUTING ATTORNEY

Katharine W. Mathews, WSBA No. 20805
Deputy Prosecuting Attorney
Attorneys for Respondent

P.O. Box 37
Ephrata, Washington 98823
PH: (509) 794-2011

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B. WHETHER BENNETT CAN ARGUE HIS SENTENCE VIOLATES DUE PROCESS WHEN AGGRAVATING CIRCUMSTANCES UNDER RCW 9.94A.535(3) ARE NOT SUBJECT TO A VOID-FOR-VAGUENESS CHALLENGE, AND *BALDWIN* REMAINS GOOD LAW.

C. WHETHER, ABSENT ANY IDENTIFIED OR ARGUED CONDITIONS GOVERNING ACCEPTANCE OF REVIEW, BENNETT IS ENTITLED TO A DO-OVER IN THIS COURT OF PROSECUTORIAL MISCONDUCT ARGUMENTS CORRECTLY REJECTED BY THE TRIAL COURT AND THE COURT OF APPEALS.

II. STATEMENT OF THE CASE

The State relies on its Statement of the Case in the Brief of Respondent filed in the Court of Appeals, No. 35297-8-III, and on the facts recited in the unpublished opinion of the Court of Appeals, No. 35297-8-III, at 1–16.

III. REASONS TO DENY REVIEW

A. THE ISSUES RAISED IN BENNETT'S PETITION DO NOT WARRANT THIS COURT'S REVIEW BECAUSE THEY FAIL TO SATISFY THE EXCLUSIVE CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW REQUIRED BY RAP 13.4(B).

Nowhere in his Petition does Bennett discuss or argue the considerations governing acceptance of review required by RAP 13.4(b). Although he cites three times to "RAP 13.4(b)(3), (4)," Petition for

Review at 7, 11, 14, he neither quotes nor paraphrases those two conditions, nor does he argue how they apply to the rejection by the Court of Appeals of his asserted sentencing and trial errors.

This Court resolved the constitutional issues surrounding challenges to Washington's aggravating factors in *State v. Baldwin*, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). That this Court has already concluded *Baldwin* remains the law following *Blakely v. Washington,*[1] is demonstrated by its denial of petitions for review in *State v. DeVore*, 2 Wn. App. 2d 651, 413 P.3d 58 (2018) (Division Three), *review denied*, 191 Wn.2d 1005 (2018); *State v. Brush*, 5 Wn. App. 2d 40, 425 P.3d 545 (2018) (Division Two), *review denied*, 192 Wn.2d 1012 (2019); and *State v. Lloyd*, 3 Wn. App. 2d 1060, 2018 WL 8642839 (Division One), (unpublished) http://www.courts.wa.gov/opinions/pdf/751115.pdf., *review denied*, 191 Wn.2d 1016 (2018). In this case, Division Three recognized as settled whether aggravating factors listed in RCW 9.94A.535(3) are subject to a void-for-vagueness challenge and its companion question concerning the continued viability of *Baldwin* following *Blakely.*

Nor does Bennett develop his bald assertion-by-citation that this case involves an issue of substantial public interest, which might bring it

[1] 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)

into this Court's purview under RAP 13.4(b)(4). This Court does not review assigned error absent adequate development of the argument in the proponent's brief. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). It should deny to do so here.

Neither do RAP 13.4(b)(1) or (2) apply. As Bennett recognizes, *DeVore*, *Brush*, and *Lloyd* establish a lack of conflict between Division Three and this Court, RAP 13.4(b)(1), and among the three divisions of the Court of Appeals. RAP 13.4(b)(2). Thus none of the predicate requirements of RAP 13.4(b)(1) through (4) are present, review is unwarranted, and Bennett's Petition must be denied.

B. THE COURT OF APPEALS CORRECTLY CONCLUDED AGGRAVATING CIRCUMSTANCES ARE NOT ELEMENTS OF A GREATER CRIME AND MAY NOT BE CHALLENGED AS UNCONSTITUTIONALLY VAGUE. *BALDWIN* REMAINS GOOD LAW.

Bennett is incorrect–the statement that an aggravating factor does not increase an offender's permissible sentence is not "indisputably wrong." Pet. at 9. Bennett's cited authority for this proposition is *State v. Allen*, 192 Wn.2d 526, 431 P.3d 117 (2018), inapplicable here. *Allen* concerned the 14 aggravating circumstances identified in RCW 10.95.020 under which first-degree murder is elevated to aggravated first-degree murder. The question in *Allen* was whether those aggravating circumstances increased the mandatory minimum penalty for first-degree

murder. *Allen*, 192 Wn.2d at 534. Nothing in that opinion changed *Baldwin's* rule precluding vagueness challenges to the aggravators set out under the Sentencing Reform Act (SRA) in RCW 9.94A.535(3). The SRA does not require that a trial judge sentence a defendant above the standard range if an aggravating factor is present. "[T]he due process considerations that underlie the void-for-vagueness doctrine [still] have no application in the context of sentencing guidelines." *Baldwin*, 150 Wn.2d at 459.

Under the doctrine of stare decisis, courts must adhere to a prior ruling absent a clear showing the ruling is "incorrect and harmful." *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Precedent is not "lightly set aside." *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). Mr. Bennett failed to show below that *Baldwin*'s rule was either incorrect *or* harmful and has failed to establish any authority for that argument here.

Division Three correctly rejected Bennett's argument that *Blakely v. Washington,*[2] then *Johnson v. United States*, [3] resurrected the viability of vagueness challenges to the sentencing aggravators of RCW 9.94A.535(3). As the State pointed out, the provision of the Armed Career

[2] 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)
[3] _ U.S. _, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)

Criminal Act, 18 U.S.C. §924(e)(1), struck down in *Johnson,* was subject to a due process vagueness challenge because it required the imposition of a specific aggravated sentence. The aggravating circumstances listed in RCW 9.94A.535 do not require the imposition of an exceptional sentence, much less a sentence of a specified duration. Instead, the statute recites circumstances that "may" justify a sentence outside the standard range. RCW 9.94A.535. The trial court retains absolute discretion to decide whether the jury's finding of an aggravating circumstance is a substantial and compelling reason to impose a higher sentence. RCW 9.94A.537(6).

A more recent United States Supreme Court case rejected a vagueness challenge to a provision of the federal sentencing guidelines because, like Washington's Sentencing Reform Act, the provision did not require an aggravated sentence, but instead "advise[d] sentencing courts how to exercise their discretion within the bounds established by Congress." *Beckles v. United States*, 137 S. Ct. 886, 895, 197 L. Ed. 2d 145 (2017). Although *Beckles* addressed the purely advisory federal sentencing guidelines and is thus distinguishable from Washington's mandatory standard sentencing ranges, the ruling is entirely consistent with *Baldwin*'s holding that " 'laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.' " 150 Wn.2d at 460 (quoting *In re Pers.*

Restraint of Stranquer, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)).

Bennett here repeats his assertion that this Court's recent decision in *State v. Murray*,[4] and the earlier *State v. Duncalf*,[5] are evidence the Court tacitly reversed itself by deciding vagueness challenges on their merits. This conclusion is unwarranted. In *Murray*, this Court recognized in a footnote the "broader question of whether aggravators listed in RCW 9.94A.535 are subject to void for vagueness challenges[,]" stating:

> We need not resolve this question because *even if we assume that Murray can bring a void for vagueness challenge*, the rapid recidivism aggravator was not void as applied to him. As a result, we do not reach the broader question of whether aggravators listed in RCW 9.94A.535 are subject to void for vagueness challenges generally.

Murray, 190 Wn.2d at 732 n.1 (emphasis added). The earlier *Duncalf* decision foreshadowed *Murray*, stating it was unnecessary to address whether *Baldwin* survived *Blakely*: "Even assuming the vagueness doctrine applies in this case, Duncalf's challenge to RCW 9.94A.535(3)(y) is unavailing." "Even if we assume" and "Even assuming" do not convey a reversal of *Baldwin*.

Baldwin is still the law in Washington, and, as noted above, has been recognized as such by all three divisions of the Court of Appeals. This Court should not accept review on a settled issue merely because an

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[4] 190 Wn.2d 727, 416 P.3d 1225 (2018).
[5] 177 Wn.2d 289, 298, 300 P.3d 352 (2013).

appellant asserts otherwise, and especially not when the argument fails to identify circumstances satisfying at least one of the four exclusive grounds for review required by RAP 13.4(b).

C. THE COURT OF APPEALS, LIKE THE TRIAL COURT, CORRECTLY REJECTED BENNETT'S ASSERTIONS OF PREJUDICIAL PROSECUTORIAL MISCONDUCT, AND BENNETT HAS CITED NO CONDITIONS UNDER RAP 13.4(B) THAT WOULD WARRANT THIS COURT'S REVIEW.

Bennett's second argument for review, that various "serious errors" deprived him of a fair trial, Pet. at 15, contains no mention whatsoever of any consideration related to RAP 13.4(b). Instead, he asks this court for a do-over on assertions rejected first by the trial court and then by the Court of Appeals. This section of Bennett's Petition comprises the arguments he would make to this Court on review but says nothing about applicable conditions of RAP 13.4(b), conditions upon which review must be predicated. Bennett criticizes the logic by which Division Three reached a conclusion contrary to his arguments below. Pet. at 17. He again asserts the trial court's misstatement of the law when refusing "other suspect evidence," Pet. at 18, but ignores that Division Three based its conclusion on the correct standard: that Bennett failed to "present a combination of facts or circumstances pointing to a nonspeculative link between the other suspects and Lucille Moore's murder, having established only motive and opportunity. *Bennett*, No. 35297-8-III, slip op.

at 34. Finally, Bennett asks this Court to accept review based on his disagreement with the findings of both the trial court and the Court of Appeals concerning his various allegations of prosecutorial misconduct. Pet. at 19–20.

These issues are all fact-bound and affect no other case or defendant. There is no broad-based issue of substantial public interest. The claim fails to meet the criteria of RAP 13.4(b).

IV. CONCLUSION

This Court should deny Bennett's Petition for Review.

DATED this 24th day of August 2020.

Respectfully submitted,

GARTH DANO
Grant County Prosecuting Attorney

s/Katharine W. Mathews
KATHARINE W. MATHEWS
WSBA No. 20805
Deputy Prosecuting Attorney
Attorneys for Respondent
Grant County Prosecuting Attorney's Office
P.O. Box 37
Ephrata, Washington 98823
PH: (509) 794-2011
Email: kwmathews@grantcountywa.gov

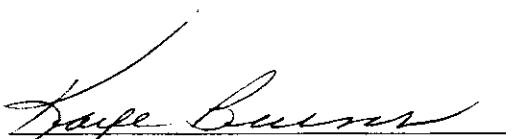
CERTIFICATE OF SERVICE

On this day I served a copy of the Answer to Petition for Review in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Lila J. Silverstein
lilajsilverstein@gmail.com

wapofficemail@washapp.org

Dated: August 24, 2020.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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