99256-8
Supreme Court No. (to be set)
Court of Appeals No. 53257-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN THOMAS TYLER,

Appellant.

PETITION FOR REVIEW
BY THE APPELLANT, JOHN THOMAS TYLER

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY
THE HONORABLE DEREK J. VANDERWOOD, JUDGE

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I. IDENTITY OF PETITIONER

John Thomas Tyler, the Appellant, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this motion.

II. COURT OF APPEALS DECISION

Mr. Tyler seeks review of the unpublished decision of the Court of Appeals issued on October 27, 2020. A copy of this decision is attached, see App. at 1-13.

III. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review and reverse Mr. Tyler's sentence when the trial court erroneously concluded that some of his offenses would go "unpunished" absent an exceptional sentence?

2. Should this Court grant review and reverse Mr. Tyler's sentence when the trial court erroneously considered a presentence report after his attorney failed to object?

IV. STATEMENT OF THE CASE

John Tyler was convicted and sentenced for the first time in October 2002. CP 170-91. A jury found him guilty of a total of 15 counts, including rape of a child and child molestation. CP 92-111. Years later, he appealed his convictions and sentence. *State v. Tyler*, No. 46426-8-II, 2016 WL 3965171, *review denied*, 186 Wn.2d 1029 (2016) (Wash. Ct. App. July 19, 2016) (unpublished). In an opinion issued in July 2016, the Court of Appeals upheld his convictions but remanded for resentencing. *Id*.

Mr. Tyler was sentenced for a second time in June 2017. CP 242-63. He again appealed his sentence. *State v. Tyler*, No. 50434-1-II, 2018 WL 6331730 (Wash. Ct. App. Dec. 4, 2018) (unpublished). In December 2018, the Court of Appeals again remanded for resentencing. *Id*.

In February 2019, Mr. Tyler was sentenced for a third time. CP 303-25. At the sentencing hearing, Mr. Tyler's attorney addressed a presentence report from 2002 but did not object to this report. RP at 11-12. The sentencing judge imposed an exceptional upward sentence of 732.5 months confinement. CP 307, 309, 322. The judge reached this number by grouping Mr. Tyler's counts and running each group consecutively.[1] CP 309. Each count was sentenced within the standard sentence range; the exceptional sentence resulted from running some of the counts consecutively. *Id*.

The jury in this case did not make any findings justifying an exceptional sentence. RP at 15. Instead, the judge determined that an exceptional sentence was warranted in this case. RP at 15-17. Specifically, the sentencing judge found: "The defendant has committed multiple current offenses and the defendant's high offender score results in some of the

[1] Specifically, the judgment and sentence reads: "count 15 is to run consecutively to counts 8 and 19 (counts 8 and 19 shall run concurrent to each other only) and to counts 1, 2, 3, 4, 6, 10, 11, 14, 16, 17, 18, 20 (counts 1, 2, 3, 4, 6, 10, 11, 14, 16, 17, 18, 20 shall run concurrent to each other only)." CP 309.

current offenses going unpunished under RCW 9.94A.535(2)(c)." CP 322. Mr. Tyler had an offender score of 46. RP at 14.[2] Mr. Tyler appealed, and the Court of Appeals affirmed his sentence. App. at 1-13. Mr. Tyler seeks review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Tyler respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals. This Court grants review under four circumstances:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, review is appropriate under subsections (1) and (3), for two reasons.

First, the Court of Appeals misinterpreted the statutes governing exceptional sentences and indeterminate sentences for sex offenders. RAP 13.4(b)(3). Mr. Tyler's offenses would not go "unpunished," justifying an exception sentence, because he was subject to an indeterminate sentence

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[2] Four of those points were from prior convictions, and each of his 14 current sex offenses counted for three points, totaling to 46. RP at 14.

that could extend to life. Second, the Court of Appeals decision conflicts with this Court's decision in *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012). RAP 13.4(b)(1). The trial court improperly considered a presentence report from 2002, violating due process. Mr. Tyler's failure to object to this report did not constitute an "acknowledgment."

A. The Sentencing Court Erred by Concluding that, Without an Exceptional Sentence, Some of Mr. Tyler's Crimes Would Go "Unpunished."

The sentencing court in this case determined that an exceptional sentence was justified because otherwise some of Mr. Tyler's offenses would go "unpunished." CP 322. The Court of Appeals upheld the trial court's conclusion. App. at 7-9. However, this conclusion was not supported by the record. *See State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). This Court should grant review and reverse because the Court of Appeals erred in its interpretation of the exceptional sentence statute, RCW 9.94A.535, and its relationship to the indeterminate sentencing of sex offenders under RCW 9.95.420. RAP 13.4(b)(3).

Subject to constitutional restraints, a court's sentencing authority is purely statutory. *See Blakely v. Washington*, 542 U.S. 296, 305-06, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). Under the Sentencing Reform Act (SRA), a sentencing court generally must impose a sentence within the standard

range established by the legislature. RCW 9.94A.505. A court may impose a sentence outside the standard range if it finds that "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The SRA sets forth a non-exhaustive list of factors that the court can consider in exercising its discretion to impose an exceptional sentence. *Id*.

Appellate courts reverse exceptional sentences under three circumstances: (1) the reasons given by the sentencing judge were not supported by the record under the clearly erroneous standard, (2) the reasons do not justify a departure from the standard range under the de novo review standard, or (3) the sentence is clearly too excessive under the abuse of discretion standard. *Law*, 154 Wn.2d at 93 (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)); RCW 9.94A.585(4). Under the clearly erroneous standard, reversal is required when the sentencing court's findings are not supported by substantial evidence. *State v. Statler*, 160 Wn. App. 622, 640, 248 P.3d 165 (2011) (citing *State v. Branch*, 129 Wn.2d 635, 646, 919 P.2d 1228 (1996)).

Generally, facts supporting an aggravated sentence must be proved to a jury beyond a reasonable doubt. RCW 9.94A.537(3). However, a judge may impose an exceptional sentence without findings by a jury where "[t]he defendant has committed multiple current offenses and the defendant's high

offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). This provision is referred to as the "free crimes" aggravator. *See State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013). Pursuant to that aggravator, a court may impose an exceptional sentence "if the number of current offenses results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses." *France*, 176 Wn. App. at 469.

The offender score is calculated based on prior and current convictions. RCW 9.94A.525(1), .589(1)(a). The maximum offender score is nine. RCW 9.94A.510. Normally, felonies add one point to a person's offender score. RCW 9.94A.525. However, if the present conviction is for a sex offense, other sex offenses are computed using a multiplier. RCW 9.94A.525(17). Thus, each sex offenses counts for three points. *Id*.

Here, the facts supporting an exceptional sentence were found by the judge, not by a jury. RP at 15. The sentencing court imposed an exceptional sentence pursuant to RCW 9.94A.535(2)(c). RP at 15-17; CP 322. The court found that, due to Mr. Tyler's high offender score (46), a sentence in the standard range would result in some of his offenses going unpunished. *Id*.

The sentencing court's findings were not supported by substantial evidence. Although Mr. Tyler's offender score was high, his offenses were in no danger of going unpunished. "Punishment" is defined in Black's Law Dictionary as, "[a]ny fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law." *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008) (quoting Black's Law Dictionary 1110 (5th ed.1979)). For purposes of the SRA, punishment "relates to the sentence imposed" and is "'expressed in terms of total confinement time.'" *Alvarado*, 164 Wn.2d at 562 (quoting RCW 9.94A.530(1)).

In this case, Mr. Tyler faced a lengthy and indeterminate standard sentence range. For count 15, he faced a standard sentence range of 240 to 318 months. RCW 9.94A.510, .515. In addition, counts 10 and 15 were indeterminate sentences subject to review by the Indeterminate Sentence Review Board (ISRB). RCW 9.94A.507(1)(a)(i). For these counts, the sentencing court was required to impose a minimum sentence as well as a maximum sentence consisting of the statutory maximum for the offense. RCW 9.94A.507(3). For counts 10 and 15, the statutory maximum was life in prison. RCW 9A.20.021(1)(a). In other words, even if sentenced within

the standard range, Mr. Tyler faced an indeterminate sentence with a minimum of 240 to 318 months and a maximum of life.

Due to this indeterminate sentence, Mr. Tyler's other offenses would also be punished because they would be taken into account by the ISRB prior to his release. Before release, the ISRB must hold a hearing to determine "whether it is more likely than not that the offender will engage in sex offenses if released." RCW 9.95.420(3)(a). The ISRB must release an offender "under such affirmative and other conditions as the board determines appropriate," unless the ISRB "determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the offender will commit sex offenses if released." *Id*.

The ISRB considers the following factors before determining whether to release an offender:

> [1] The original recommendation of the sentencing Judge and Prosecutor to the ISRB (if available).
> [2] The length of time an inmate has served so far.
> [3] Actuarial Risk Assessment Scores (static, dynamic and protective)
> [4] Responsivity to Programming (level and dosage of program)
> [5] Institutional and Previous Supervision Behavior
> [6] Inmate Change (participation, refusal, progress)
> [7] Release Plan
> [8] Case Specific Information
> [9] Discordant Information
> [10] Victim Input
> [11] Public Safety
> [12] Statutory Direction

Frequently Asked Questions, Washington State Department of Corrections – Indeterminate Sentence Review Board (last visited Nov. 24, 2020), https://www.doc.wa.gov/corrections/isrb/faq.htm#determine-release.

Many of the ISRB factors take into account Mr. Tyler's other convictions, beyond counts 10 and 15. For example, the recommendation of the prosecutor, the recommendation in the presentence report, case specific information, victim input, and public safety all factor in Mr. Tyler's other sex offenses. These factors would steer the ISRB towards a lengthier sentence, possibly up to life imprisonment.

In this case, Mr. Tyler's offenses would not have gone "unpunished" without an exceptional sentence. Instead, his offenses would have been taken into account within the framework of his indeterminate sentence—an outcome consistent with the structure and purpose of the SRA. Under these circumstances, substantial evidence did not support the sentencing court's finding that Mr. Tyler's "high offender score" resulted in "some of [his] current offenses going unpunished." RCW 9.94A.535(2)(c). Thus, this Court should grant review, reverse his exceptional sentence, and remand for resentencing. *See Law*, 154 Wn.2d at 93; *Statler*, 160 Wn. App. at 640.

The Court of Appeals upheld Mr. Tyler's sentence, concluding that he "ignores RCW 9.94A.507(3)(c)" and "misconstrues the purpose of the ISRB." App. at 8. The Court erred for two reasons.

First, RCW 9.94A.507 does not have a direct bearing on this case. The Court of Appeals correctly pointed out that "RCW 9.94A.507(3)(c) allows a trial court to set a minimum term outside the standard range if the offender is eligible for such a sentence." App. at 7. Under this statute, the trial court "shall" impose a minimum term that is "either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater." RCW 9.94A.507(3)(c). Here, the high end of Mr. Tyler's standard range sentence was over 26 years (318 months). *See* RCW 9.94A.510, .515. The trial court instead imposed an exceptional sentence with a minimum term of over 61 years (732.5 months). CP 307, 309, 322. The fact that the trial court could have applied RCW 9.94A.507(3)(c) to set a lower minimum term is not relevant.

Second, the Court of Appeals erred by in its analysis of the purpose of the ISRB. App. at 8. The Court correctly noted that "RCW 9.95.420(3)(a) creates a presumption of release for sex offenders unless 'it is more likely than not that the offender will commit sex offenses if released.'" *Id*. However, the Court then distinguished between "public safety" and "punishment":

> The conditionality of release set forth by the legislature under this section addresses *public safety*, not punishment. The ISRB has no power under the statute to prevent Tyler's release for sake of punishment, and so the mere fact that the ISRB may determine that an offender cannot be released for public safety sake is not a fact of consequence for a trial court when making an RCW 9.94A.535(2)(c) analysis.

Id. The Court of Appeals erred because this is a false dichotomy.

The Sentencing Reform Act repeatedly discusses public safety as a basis for punishment. *See* Laws of 2002, ch. 290, § 1 (amending the SRA such that "sentences for drug offenses accurately reflect the adverse impact of substance abuse and addiction on public safety [and] that the public must have protection from violent offenders"); RCW 9.94A.555(2)(a) (sentencing "three-time, most serious offenders to prison for life without the possibility of parole" in order to "[i]mprove public safety by placing the most dangerous criminals in prison."). Similarly, as explained above, the ISRB takes punishment into account when determining whether inmates should be released. This Court should grant review and reverse Mr. Tyler's sentence because the Court of Appeals decision does not reflect the practices of the ISRB.

B. The "Real Facts" Doctrine was Violated because the Sentencing Court Considered Information Outside of the Record without an Evidentiary Hearing.

In his statement of additional grounds, Mr. Tyler argued that the trial court erred by relying on a presentence report from 2002 when resentencing

him in 2019. The Court of Appeals held that Mr. Tyler could not challenge this report because he "failed to make a timely objection to the trial court's consideration of the presentencing reports." App. at 12. This Court should grant review and reverse because the trial court violated the "real facts" doctrine and violated Mr. Tyler's due process rights.

RCW 9.94A.530 codifies the "real facts" doctrine, which prohibits trial courts from relying on either (1) facts that compose the elements of an additional, unproven crime, or (2) facts that would elevate the degree of the charged crime. *State v. Wakefield*, 130 Wn.2d 464, 475-76, 925 P.2d 183 (1996); *State v. Barnes*, 117 Wn.2d 701, 707, 818 P.2d 1088 (1991); *State v. Morreira*, 107 Wn. App. 450, 458, 27 P.3d 639 (2001). Under RCW 9.94A.530, a sentencing court may rely on no more information than is admitted, acknowledged, or proved in a trial or at the time of sentencing. RCW 9.94A.530(2). Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing. *Id*.

The "real facts" doctrine requires the sentence be based only on the defendant's current conviction, criminal history, and the circumstances surrounding the crime. *Morreira*, 107 Wn. App. at 458. The doctrine was adopted in order to limit sentencing decisions to facts that are acknowledged, proven or pleaded. *State v. Houf*, 120 Wn.2d 327, 332, 841 P.2d 42 (1992). Courts have also interpreted the doctrine as excluding

consideration during sentencing of uncharged crimes or charged crimes that were later dismissed. *Houf*, 120 Wn.2d at 332; *State v. McAlpin*, 108 Wn.2d 458, 466, 740 P.2d 824 (1987).

The purpose of the "real facts" doctrine is "to protect against the possibility that a defendant's due process rights will be infringed upon by the sentencing judge's reliance on false information." *State v. Herzog*, 112 Wn.2d 419, 431-32, 771 P.2d 739 (1989); Wash. Const., art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.") This doctrine also prevents against sua sponte investigation and research by a judge, and sentencing based on speculative facts. *State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183, 1187 (2005). Under the "real facts" doctrine, a trial court must not impose a harsher sentence on a defendant based on presentations that the facts could constitute a more serious crime that the State did not charge or prove. *Wakefield*, 130 Wn.2d at 475-76, *citing* RCW 9.94A.370(2); *Barnes*, 117 Wn.2d at 708.

RCW 9.94A.530 contains an important caveat: the trial court can consider information "acknowledged" by the defendant without further proof. RCW 9.94A.530(2). "Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing." *Id*.

Courts have held that a defendant waives the right to challenge a presentence report by failing to object at the sentencing hearing. *State v. Atkinson*, 113 Wn. App. 661, 669, 54 P.3d 702 (2002); *see also Wakefield*, 130 Wn.2d at 476; *State v. Reynolds*, 80 Wn. App. 851, 860, 912 P.2d 494 (1996). These decisions were wrongly decided, and should be overturned in light of this Court's decision in *State v. Hunley*, 175 Wn.2d 901, 912, 287 P.3d 584 (2012).

In *Hunley*, the defendant was convicted of attempting to elude a police vehicle. 175 Wn.2d at 905. At sentencing, the state presented a report by the prosecuting attorney summarizing his criminal history. *Id*. Hunley did not dispute or object to this report at the sentencing hearing. *Id*. On appeal, this Court vacated his sentence. *Id*.

The *Hunley* Court was not swayed by the fact that Hunley failed to object to the prosecutor's report at the sentencing hearing. *Id*. at 912. The Court rejected that argument because "[a]cknowledgment does not encompass bare assertions by the State unsupported by the evidence." *Id*. (citing *State v. Ford*, 137 Wn.2d 472, 483, 973 P.2d 452 (1999)). A defendant's "mere failure to object to State assertions of criminal history at sentencing does not result in an acknowledgment." *Id*. (citing *Ford*, 137 Wn.2d at 482-83). Instead, due process requires "some *affirmative* acknowledgment of the facts and information alleged at sentencing in order

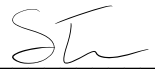
to relieve the State of its evidentiary obligations." *Id*. (citing *Ford*, 137 Wn.2d at 482-83) (emphasis in original). "'To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an *unconstitutional shifting of the burden of proof to the defendant*.'" *Id*. (quoting *Ford*, 137 Wn.2d at 482) (emphasis in *Hunley* decision).

Here, like in *Hunley*, Mr. Tyler failed to object to a report at the sentencing hearing. This was a "presentence report[]" and not merely "criminal history" per RCW 9.94A.530(2). However, the same principles from *Hunley* apply. Mr. Tyler's failure to object was insufficient to amount to an acknowledgment of the presentence report. This Court should reverse because the trial court erred by considering this report.

VI. CONCLUSION

Mr. Tyler respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 25th day of November, 2020.



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VII. APPENDIX

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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN THOMAS TYLER, Appellant.	No. 53257-3-II UNPUBLISHED OPINION

WORSWICK, J. — John Tyler appeals his sentence of 732.5 months to life for convictions of 15 counts relating to his sexual abuse of his daughter and two stepdaughters over the course of nearly a decade. In 2002, Tyler was convicted of and sentenced on 15 counts: 11 counts of first degree child rape, 2 counts of first degree child molestation, and 2 counts of second degree child rape. Tyler appealed twice and was resentenced twice, although his convictions were affirmed. At his third sentencing in 2019, the trial court imposed an exceptional sentence upward under RCW 9.94A.535(2)(c),[1] reasoning that some of Tyler's offenses would otherwise go unpunished.

Tyler argues that his sentence should be vacated and this case remanded for a new sentencing, arguing that (1) substantial evidence did not support the finding that some of his crimes would go unpunished given that some were subject to an indeterminate sentence, (2) his high offender score did not justify an exceptional sentence because the legislature already considered this factor when making them subject to indeterminate sentences, and (3) his

[1] The Legislature has amended RCW 9.94A.535 several times since 1992, but because the relevant language has not changed, we cite to the current version of the statute, which became law on July 28, 2019. LAWS OF 2019, ch. 219, § 1.

exceptional sentence of over 60 years of incarceration was clearly too excessive. In a Statement of Additional Grounds (SAG) for Review, Tyler challenges the constitutionality of his sentence. We hold that substantial evidence supports the trial court's findings, a standard range sentence would have resulted in most of Tyler's crimes going unpunished, the sentence was not clearly too excessive, and Tyler's sentence did not violate his constitutional rights. Consequently, we affirm Tyler's sentence.

FACTS

I. CRIME, TRIAL, AND VERDICT

In March 2002, the Clark County Prosecuting Attorney charged Tyler with 19 counts for multiple acts of child rape and child molestation of his daughter and two stepdaughters, then 14, 12, and 9 years old. The information alleged counts 1 through 13, 14 through 17, and 18 through 19 as crimes perpetrated against each child respectively.

In August 2002, a jury found Tyler guilty of 15 counts of child molestation and rape. Tyler was found guilty of 11 counts of first degree child rape, 2 counts of first degree child molestation, and 2 counts of second degree child rape.

II. SENTENCE AND APPEALS

In 2002, Tyler was sentenced to an exceptional sentence upward of 878 months to life. In 2017, after a successful appeal that challenged the State's evidence of his criminal history, the trial court resentenced Tyler to an exceptional sentence for a total of 732.5 months to life.

In 2019, after another successful appeal that challenged the calculation of his offender score and a community custody condition, Tyler was resentenced again. Tyler's offender score was 46.

The trial court sentenced Tyler to 732.5 months to life by grouping his counts and running each group consecutively.[2] The trial court made a finding of fact that "defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished under RCW 9.94A.535(2)(c)." Clerk's Papers at 322. Tyler received the maximum standard range sentence of 280 months for 10 of the 11 counts of first degree child rape and second degree child rape, a median standard range sentence of 173.5 months for the 2 counts of first degree child molestation, and 279 months for count 15 (first degree child rape. Because counts 10 and 15 occurred after September 1, 2001, they are subject to indeterminate sentences and fall under the jurisdiction of the Indeterminate Sentence Review Board (ISRB) and the supervision of the Department of Corrections. RCW 9.94A.507. Thus, those counts could result in additional incarceration with a maximum range of life.

Tyler appeals his sentence.

ANALYSIS

I. LEGAL PRINCIPLES AND STANDARDS OF REVIEW

A. *Exceptional Sentences under the Sentencing Reform Act*

The Sentencing Reform Act (SRA) of 1981, chapter 9.94A, generally requires that a sentencing court impose a sentence within the standard sentencing range. RCW

[2] The trial court imposed an exceptional minimum term for counts 10 and 15, and imposed an exceptional sentence for all the other counts. For sake of brevity, we refer to the sentence as "732.5 months to life." The trial court ruled that "count 15 is to run consecutively to counts 8 and 19 (counts 8 and 19 shall run concurrent to each other only) and to counts 1, 2, 3, 4, 6, 10, 11, 14, 16, 17, 18, 20 (counts 1, 2, 3, 4, 6, 10, 11, 14, 16, 17, 18, 20 shall run concurrent to each other only)." Clerk's Papers at 309.

9.94A505(2)(a)(i). The SRA was designed to provide a system for sentencing that "structures, but does not eliminate, discretionary decisions affecting sentencing," and to "ensure, in part, that the punishment for a criminal offense is proportionate to the seriousness of the offense and offender's criminal history." RCW 9.94A.010.

Trial courts consider seven policy goals when imposing a sentence:

> (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.

RCW 9.94A.010.

A trial court may only depart from the standard sentence range "if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. A departure from the standards governing whether sentences for multiple counts run concurrently or consecutively under RCW 9.94A.589 is considered an exceptional sentence and must meet the same standards. RCW 9.94A.535. If a trial court determines that an exceptional sentence is appropriate, a reviewing court may reverse the exceptional sentence only if it finds:

> (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or
> (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

A defendant's standard range sentence reaches its maximum limit at an offender score of nine. RCW 9.94A.510. "Punishment" as contemplated by the exceptional sentence statutes is "expressed in terms of total confinement time," and not the mere fact of a conviction itself. RCW 9.94A.530(1); *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008).

A trial court may impose an aggravated exceptional sentence without a finding of fact by a jury when it determines that the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c).[3] "In other words, if the number of current offenses results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses, then the court may impose an exceptional sentence." *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

B. *Indeterminate Sentence Review Board*

RCW 9.94A.507, titled "Sentencing of [S]ex [O]ffenders," controls when sentencing offenders who commit first and second degree rape of a child. If the offender is subject to sentencing under section (3)(a) of this statute, the trial court is required to impose both a minimum and maximum sentence. RCW 9.94A.507(3)(a). The maximum sentence is the statutory maximum sentence for the offense under the cognizant criminal statute, and the minimum sentence may be either within a standard range sentence for the offense or outside the standard range as an exceptional sentence under RCW 9.94A.535. RCW 9.94A.507(3). RCW

[3] Our Supreme Court in *Alvarado* expressly held that RCW 9.94A.535(2)(c) does not violate the Sixth Amendment and that a trial court can, without a jury finding, impose an exceptional sentence based on the "free crimes" doctrine. 164 Wn.2d at 568-69.

9.94A.507(3)(c) explicitly provides that the minimum term may be "outside the standard range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence."

The Department of Corrections, prior to the conclusion of the offender's minimum sentence, conducts an end of sentence review and evaluation of the offender based on "methodologies . . . recognized by experts in the prediction of sexual dangerousness." RCW 9.95.420(1)(a). At the expiration of the minimum term, the ISRB conducts a hearing to determine whether the offender poses a risk of engaging in sex offenses if released to community custody. RCW 9.95.420(3)(a). The offender shall be released, subject to the ISRB's conditions, "unless the [ISRB] determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the offender will commit sex offenses if released." RCW 9.95.420(3)(a). The ISRB "makes an informed prediction about whether it believes the offender is likely to commit more sex offenses if released before the expiration of his or her maximum sentence." *In re Pers. Restraint of McCarthy*, 161 Wn.2d 234, 244, 164 P.3d 1283 (2007). "If the [ISRB] does not order the offender released, [the ISRB] must establish a new minimum term for the offender as provided in RCW 9.95.011." RCW 9.95.420(3)(a).

C. *Review of Exceptional Sentences*

RCW 9.94A.585(4) requires us to ask three questions, each with a different standard of review.

> 1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
>
> 2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
>
> 3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717(2005) (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997), *overruled in part on other grounds by State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015)).

II. ARGUMENTS

A. *Finding That Tyler's Current Offenses Would Go Unpunished Not Clearly Erroneous*

Tyler argues that the record does not support the finding that his crimes would go unpunished without imposition of an exceptional sentence. Specifically, Tyler argues that because he "faced a lengthy and indeterminate standard sentence range," and because the ISRB would take into account his other offenses in determining the ultimate sentence imposed, substantial evidence does not support the sentencing court's finding. Br. of Appellant at 7. We disagree.

We review whether the reasons given by the trial court are supported by evidence in the record under a clear error standard. *Law*, 154 Wn.2d at 93.

Regarding an indeterminate sentence, RCW 9.94A.507(3)(c) allows a trial court to set a minimum term outside the standard range if the offender is eligible for such a sentence. And under the "free crimes" doctrine, a trial court may impose a sentence outside the standard range where a defendant's current crimes would go unpunished through the imposition of a standard range sentence. *State v. Brundage*, 126 Wn. App. 55, 67, 107 P.3d 742 (2005). This condition is "automatically satisfied whenever 'the defendant's high offender score is combined with multiple current offenses so that a standard sentence would result in 'free crimes'—crimes for which there is no additional penalty.'" *Brundage*, 126 Wn. App. at 66-67 (quoting *State v. Smith*, 123 Wn.2d 51, 56, 864 P.2d 1371 (1993)). The determination that some offenses would

go unpunished without an exceptional sentence "rests solely on criminal history and calculation of the offender score . . ." and RCW 9.94A.535(2)(c) "flow[s] *automatically* from the existence of free crimes." *Alvarado*, 164 Wn.2d at 568-69.

Tyler's argument ignores RCW 9.94A.507(3)(c). The legislature clearly recognized the ISRB's role when it provided that the trial court could set the minimum term outside the standard range.

Moreover, Tyler's argument misconstrues the purpose of the ISRB. RCW 9.95.420(3)(a) creates a presumption of release for sex offenders unless "it is more likely than not that the offender will commit sex offenses if released." The conditionality of release set forth by the legislature under this section addresses *public safety*, not punishment. The ISRB has no power under the statute to prevent Tyler's release for sake of punishment, and so the mere fact that the ISRB may determine that an offender cannot be released for public safety sake is not a fact of consequence for a trial court when making an RCW 9.94A.535(2)(c) analysis.

Moreover, only 2 of the 15 counts implicate the ISRB, so even if we agreed with Tyler on this point, other crimes would go unpunished. The free crimes aggravator is triggered when *some* of the current offenses would go unpunished, and because RCW 9.94A.535(2)(c) makes no distinction between punished and unpunished crimes, all current offenses are subject to an exceptional sentence. *France*, 176 Wn. App. at 470.

Tyler's offender score of 46 substantially exceeded the statutory maximum of 9. RCW 9.94A.510. Starting with 4 points from his prior criminal history, and adding 3 points for each current sex offense, had Tyler committed only 3 total offenses of the 15 for which he was convicted, he would have been at 10 points and would have exceeded the maximum number of

points for the sentencing range grid. Thus, 12 crimes would have gone unpunished and would have failed to punish Tyler for any of the crimes perpetrated against 2 of his 3 victims. We hold that substantial evidence supports the trial court's finding that some of Tyler's crimes would go unpunished and that it was therefore not clearly erroneous.

B. *"Free Crimes" Doctrine Justifies Departure*

Tyler argues that his high offender score does not justify an exceptional sentence because "the legislature already determined that his offenses required an indeterminate sentence," and that a trial court therefore cannot consider his high offender score as a factor. Br. of Appellant at 10. We disagree.

We review whether the reasons considered by the trial court justify an exceptional sentence de novo. *Law*, 154 Wn.2d at 93. We employ a two-part test to determine whether a factor legally supports departure from the standard sentence range. *Ha'mim*, 132 Wn.2d at 840. First, a trial court may not base an exceptional sentence on factors necessarily considered by the legislature in establishing the standard sentence range. Second, the asserted aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. *Ha'mim*, 132 Wn.2d at 840.

Here, the trial court justified its exceptional sentence based on the "free crimes" doctrine through RCW 9.94A.535(2)(c), which is a circumstance the legislature did not intend to be included in the concept of an indeterminate sentencing. This is evidenced by the fact that an offender may receive an indeterminate sentence for only one crime and by the fact that the indeterminate sentencing statute specifically provides that the trial court can set a minimum term outside the standard range. RCW 9.94A.507(3)(c). Moreover, Tyler's argument leads to an

absurd result that would preclude a trial court from ever imposing an exceptional sentence in any case where the ISRB had jurisdiction over even one conviction.

Without the exceptional sentence, Tyler's convictions for 8 counts of first degree child rape, 2 counts of second degree child rape, and 2 counts of first degree child molestation, would receive no punishment. All of Tyler's crimes committed from 1995 to 2002 would have gone unpunished. Most of the abuse one victim suffered would have gone unanswered. Plus, all his crimes against two other victims would have gone unpunished. The exceptional sentence is consistent with the legislature's stated purpose to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history." RCW 9.94A.010(1). Accordingly, we hold that the trial court's imposition of an exceptional sentence was justified under the "free crimes" doctrine.

C. *Tyler's Sentence Not Clearly Too Excessive*

Tyler briefly argues that the trial court abused its discretion by imposing the exceptional sentence because he would be more than 90 years old at the expiration of his minimum term, and it is unreasonable to deprive the ISRB of its decision as to whether Tyler should serve out the maximum life sentence. This argument fails.

We review whether or not a sentence is clearly too excessive for an abuse of discretion. *Law*, 154 Wn.2d at 93.

Again, Tyler misunderstands the purpose of the ISRB. The ISRB decides if an offender cannot be released based on public safety, not on punishment. Punishment is the trial court's prerogative at sentencing. RCW 9.94A.010. This exceptional sentence reflects the full extent of

Tyler's crimes. We hold that this sentence was not clearly too excessive based on Tyler's age, and therefore not an abuse of discretion.

D. *SAG*

1. *Imposition of Exceptional Sentence Not Unconstitutional Without Jury Finding of Fact*

In his SAG, Tyler argues that the resentencing court violated his Sixth Amendment jury trial rights by imposing an exceptional sentence absent a jury finding that aggravating circumstances justified such an exceptional sentence. We disagree.

This issue was similarly raised by Tyler in a prior appeal, and it was considered and rejected. *State v. Tyler*, No. 50434-1-II, slip op. at 1 (Wash. Ct. App. Dec. 4, 2018) (unpublished), http://www.courts.wa.gov./opinions/pdf./504341.pdf. For the reasons discussed in that case, the sentencing court did not engage in impermissible fact finding when it imposed an exceptional sentence, and Tyler's Sixth Amendment claim fails.

2. *Due Process Not Offended by Notice Requirement Violation*

In his SAG, Tyler argues that the State failed to give him adequate notice before trial that they were going to seek an aggravated sentence "in violation of [RCW 9.94A.537(1) . . . and due process." SAG 2. We disagree.

The SRA requires the State to provide notice that it will seek an exceptional sentence based on aggravating circumstances, but it does not dictate how that notice is to be given. *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012). The state and federal constitutions provide that a defendant receive adequate notice of the nature and cause of the accusation to allow him to prepare an adequate defense. *Siers*, 174 Wn.2d at 277. However, pretrial notice of the State's

intent to seek exceptional consecutive sentences on remand for resentencing is not required. *State v. McNeal*, 156 Wn. App. 340, 357, 231 P.3d 1266 (2010).

Here, the State filed memoranda in support of its request for an exceptional sentence in 2002 at the first sentencing and in 2017 at the first resentencing. We hold that because Tyler received adequate notice of the facts that could form the basis of his sentence and the State's intent to seek an exceptional sentence, Tyler was allowed adequate time to prepare his defense, and the State fulfilled its constitutional duty.

3. *Challenge to Trial Court's Findings of Fact at Sentencing Not Timely*

In his SAG, Tyler argues that the trial court erred in relying on a presentencing report investigation without his or his representative's participation. We disagree.

"In determining the appropriate sentence, the trial court can consider the presentencing reports unless the defendant objects." *State v. Wakefield*, 130 Wn.2d 464, 476, 925 P.2d 183 (1996). "When the defendant fails to object to information presented at sentencing, that information is deemed acknowledged." *State v. Reynolds*, 80 Wn. App. 851, 860, 912 P.2d 494 (1996). "In order to dispute information in the [presentencing] report, the defendant must make a timely and specific challenge." *State v. Atkinson*, 113 Wn. App. 661, 669, 54 P.3d 702 (2002).

A review of the record shows that Tyler failed to make a timely objection to the trial court's consideration of the presentencing reports. At the resentencing hearing in 2019, Tyler requested confirmation on the record that a presentencing investigation report was conducted prior to the original sentencing in 2002. The trial court confirmed that it had, and Tyler did not object to the report. Tyler raises the presentence report issue for the first time in his SAG. We

hold that Tyler may not challenge for the first time on appeal the trial court's consideration of the presentencing reports.

CONCLUSION

We hold that (1) the finding that Tyler's current offenses would go unpunished was supported by substantial evidence, thus, was not clearly erroneous; (2) that the trial court's departure from the standard range was justified given that some of Tyler's current offenses would go unpunished; (3) Tyler's sentence was not too excessive, thus, was not an abuse of discretion; and (4) Tyler's SAG raises no reversible error. Consequently, the trial court did not err when it imposed an exceptional sentence and minimum term. Thus, we affirm Tyler's sentence.

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.

Worswick, P.J.

Melnick, J.

Glasgow, J.

Supreme Court No. (to be set)
Court of Appeals No. 53257-3-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On November 25, 2020, I electronically filed a true and correct copy of the **Petition for Review of Appellant, John Thomas Tyler**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document, including the appendix, as indicated below:

Rachael Rogers Clark County Prosecuting Attorney's Office	(X) via U.S. mail (X) via email to: rachael.rogers@clark.wa.gov, CntyPA.GeneralDelivery@clark.wa.gov
John Thomas Tyler DOC # 901014 Airway Heights Corrections Center PO Box 2049 Airway Heights, WA 99001-2049	(X) via U.S. mail

SIGNED in Tacoma, Washington, this 25th day of November, 2020.

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NEWBRY LAW OFFICE

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