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SEP 28 2012

King County Prosecutor
Appellate Unit

NO. 67910-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

CLIFTON BELL,

Appellant.

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

The Honorable Timothy Bradshaw, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The resentencing court erred in imposing a sentence of 114 months on count 1 following this Court's remand. CP 127.

2. The resentencing court erred in imposing a consecutive sentence that totals 168 months in custody. CP 127.

3. The resentencing court erred in entering findings 1-10 and 12, in its findings and conclusions to support the exceptional sentence. Supp. CP __ (sub no. 205, findings and conclusions), attached as appendix A.

4. The resentencing court erred in conclusion 1, which states that this Court vacated counts V, VI, and VII in Bell's first appeal. App. A. This Court actually vacated counts V, VI, VII, and VIII. CP 92, 109.

5. The court erred in entering conclusions 2-11. App. A.

6. If this Court declines to reverse the erroneous sentence imposed after remand from Bell's first appeal, then Bell was denied his right to effective assistance in the first appeal.

Issues Related to Assignments of Error

1. With the exception of finding 11, are the trial court's "findings and conclusions" unsupported, legally erroneous, and/or legally irrelevant?

2. Where the trial court placed substantial weight on the erroneous findings and conclusions, should this Court reverse the exceptional sentence and remand for resentencing?

3. Appellant Clifton Bell was convicted of 11 felonies and appealed. This Court vacated four of the counts and remanded for resentencing. At resentencing, the only “new” facts were: (1) Bell’s offender scores and standard ranges were significantly lower, and (2) the original sentencing judge had retired and been replaced. The new judge imposed a count I sentence 42 months longer than the initial sentence, and a total consecutive sentence 24 months longer than the initial consecutive sentence.

a. Did the harsher sentences violate appellant’s state constitutional right to appeal, and his state and federal constitutional rights to due process?

b. Does application of the rule in State v. Parmelee, 121 Wn. App. 707, 90 P.3d 1092 (2004), deny appellant equal protection?

c. Is the harsher sentence clearly excessive?

4. Should this Court reverse and remand for resentencing by a different judge?

5. If this Court affirms the harsher exceptional sentence, was Bell denied his state and federal constitutional right to effective assistance of appellate counsel in his first appeal?

B. STATEMENT OF THE CASE

1. Procedural Facts

In a second amended information filed July 3, 2008, the state charged appellant Clifton Bell with 14 counts. Five of the counts (IV, V, VI, VII, and VIII) charged witness tampering. CP 6-12.

A jury convicted Bell of the charged counts on July 8, 2008. CP 124. The jury also found the state proved one aggravating factor, that “prior to the commission of [count I] there was an ongoing pattern of psychological, physical or sexual abuse of the victim by the defendant, manifested by multiple incidents over a prolonged period of time.” CP 33.

The initial sentencing was heard by Judge Charles Mertel, the same judge who heard the trial evidence. CP 28; Supp. CP __ (sub no. 95A, clerk’s trial minutes). The state recommended a 180-month exceptional sentence. RP 9-10; Supp. CP __ (sub no. 189, State’s Resentencing Recommendation, at 3, n.2).

Judge Mertel denied the state’s request, and instead imposed a mid-range 72-month sentence on count I, to run consecutive to the sentences on

the other counts. The court also imposed a mid-range 72-month sentence on count XII, for a total sentence length of 144 months. CP 26, 31. The consecutive sentence was based on the jury's special verdict. CP 32-33.

Bell appealed. This Court rejected several of Bell's arguments challenging his convictions and the special verdict. CP 62-109. But the state conceded, and this Court agreed, the state and trial court erred by charging, convicting, and sentencing Bell for multiple counts of witness tampering. CP 88-92. This Court held there was one unit of prosecution, vacated counts V, VI, VII and VIII, and remanded for resentencing. CP 92, 109.

While the appeal was pending, Judge Mertel retired. RP 47. His seat in King County Superior Court Department 1 was later occupied by Judge Timothy Bradshaw. Prior to taking the bench, Judge Bradshaw had made a career as a deputy and senior deputy prosecutor in the King County prosecutor's office.¹

On remand, the state filed a lengthy resentencing recommendation. RP 3-4; Supp. CP __ (sub no. 189). The state conceded that Bell's criminal

¹ See e.g., State v. Pang, 132 Wn.2d 852, 858, 871, 940 P.2d 1293 (1997). Because this fact is not subject to reasonable dispute, this Court may judicially notice it. ER 201(b); see also, Tegland, 5 Wash. Pract. Evidence, § 201.17 (5th Ed.) (collecting cases and discussing the interplay of ER 201 and RAP 9.11). Judge Bradshaw was employed by the King County prosecutor's office during Bell's trial and initial sentencing.

conduct had not changed, and his offender score was now lower. The state nonetheless asked Judge Bradshaw to impose 177 months, 33 more than Judge Mertel had imposed. RP 7-9.²

In contrast, defense counsel recommended a 104-month sentence. This was based on Judge Mertel's sentencing structure. Counsel suggested a mid-range 50-month sentence on count I, to be served consecutively to the remaining counts. With a 54-month sentence on count XIV, the total would be 104 months. CP 111; RP 32-33.

As defense counsel pointed out, Judge Mertel heard all the testimony, considered the evidence, and was familiar with the charged conduct and Bell's behavior during trial. The consecutive sentence took into account the jury's finding of one aggravating factor. Bell had substantial community and family support. His behavior was accounted for by the multiple remaining

² The offender scores, ranges, and imposed sentences at the initial sentencing and at the resentencing are as follows:

| Ct. | Initial score, range & sent. | | | resent'g score, range & sent | | |
|------|------------------------------|-------|----|------------------------------|-------|-----|
| I | 11 | 63-84 | 72 | 7 | 43-57 | 114 |
| II | 10 | 51-60 | 60 | 6 | 22-29 | 29 |
| III | 10 | 51-60 | 60 | 6 | 22-29 | 29 |
| IV | 10 | 51-60 | 60 | 6 | 22-29 | 29 |
| XII | 11 | 63-84 | 72 | 7 | 43-57 | 54 |
| XIII | 10 | 51-60 | 60 | 6 | 22-29 | 29 |
| XIV | 10 | 60 | 60 | 6 | 41-54 | 54 |

RP 5, 37, 47; CP 24-26, 30-31, 124, 127, 130-31.

counts, and as the state conceded, those counts had not changed. Judge Mertel had determined a mid-range sentence was sufficiently harsh. CP 112-15; RP 31-36.

The prosecutor suggested it was “difficult” because Judge Bradshaw had not heard the trial testimony or seen the witnesses on the stand. RP 21. The prosecutor reargued the facts of the charges and played a few selected minutes from jail phone calls the jury and Judge Mertel previously heard. RP 9-20. The prosecutor asserted “[t]hat was a very brief sample of the tampering that the Court of Appeals said is one charge instead of five. The State could have charged 50.”³ RP 20. The prosecutor said the Legislature had since fixed the problem and the state could now charge multiple tampering counts. According to the prosecutor, Bell should not “get a windfall.” RP 20.

The state then asked Judge Bradshaw to consider several infractions that led to lost good time during Bell’s incarceration in the Department of Corrections (DOC). RP 23-24. The state also read an email purportedly sent from the complaining witness the day before the resentencing. RP 26-31. Judge Bradshaw stated the court would not consider the alleged DOC infractions. RP 34-35, 43, 46.

Bell's attorney pointed out that following the rule of law as set forth by this Court and the Supreme Court is not a "windfall." RP 32-36. When asked if the court was bound by Judge Mertel's sentence, defense counsel referred to the presumption of vindictiveness when the state recommends or the court imposes a higher sentence after a defendant does nothing more than successfully exercise the right to appeal. RP 37-38.

In response to the same question, the prosecutor argued that a person who appeals "give[s] a Judge the opportunity to revisit their own discretionary ruling." RP 45. According to the prosecutor, as long as the court "makes findings, uh, that are sustainable, um, and reasonable, there, the, there's no reason, uh, to make an argument of vindictiveness afterwards." RP 45. This is the same prosecutor who, a few minutes earlier, argued "I don't believe [Bell] should get a windfall because we have a new Judge." RP 20.

Judge Bradshaw then imposed sentence. He first stated he was not bound by Judge Mertel's sentence. RP 47. Recognizing he had not heard the testimony or viewed the witnesses, he "started with the Court of Appeals decision" which cites "to the record without hyperbole." RP 48-49.

³ No, the state could not. See this Court's decision at CP 90-92, and State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010).

He noted the parties agreed that numerous counts did not support an exceptional sentence. RP 51. The court imposed a 54-month sentence on count XIV, running consecutively to the sentence on count I. RP 52.

The court then imposed the count I sentence, stating it would double the top of the 57-month range. The court found “this is, uh, a matter of, uh, discretion and nothing, uh, more.” RP 53. The court said the “pattern of an aggravated crime done to, um, a diminutive formable [sic] person is, um, in my view, repugnant.” RP 53.

Defense counsel asked if the court was imposing 168 months, “24 months higher than Mr. Bell’s original sentence?” RP 55-56. The court responded, “Uh, Mr. Bell will need to be advised his right [sic] obviously on appeal.” RP 56.

The court later entered written findings and conclusions. App. A. The first ten findings parrot this Court’s discussion of the facts, as set forth in Bell’s first appeal.⁴ Finding 11 was based on the jury’s special verdict. Finding 12 was not discussed in the parties’ resentencing memoranda, at the resentencing hearing, or in the court’s oral ruling. It was prepared and filed

⁴ CP 62-69; cf. App. A.

by the court sua sponte,⁵ as a post-hoc reason for the already-imposed sentence. See argument 1.b., infra.

C. ARGUMENT

1. THE COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE BASED ON FACTS NOT FOUND BY THE JURY.

The state charged and the jury found one aggravating factor relating to count I. CP 33. Judge Mertel imposed an exceptional sentence based on that finding. CP 24, 32.

On resentencing, Judge Bradshaw imposed an exceptional sentence based on an additional two-and-a-half pages of single-spaced “findings” and another two pages of double-spaced “conclusions.”⁶ App. A. Under controlling legal authority, they are almost entirely erroneous. Finding 11 is the only finding based on the jury’s special verdict. CP 33, 93-97.

An exceptional sentence should be reversed where the sentencing court’s reasons (1) are not supported by the record, as reviewed under the “clearly erroneous” standard; (2) do not justify a sentence outside the

⁵ The findings show no indication they were first drafted or proposed by either party. App. A, at 5 (no signature line for either counsel).

⁶ Because many of the so-called “conclusions” more aptly resemble “findings,” Bell has assigned error to them in an abundance of caution. RAP 10.3(g).

standard range, under a de novo standard, or (3) the sentence imposed is clearly excessive, under the abuse of discretion standard. RCW 9.94A.585(4); State v. Alvarado, 164 Wn.2d 556, 560-61, 192 P.3d 345 (2008); State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

a. Under Blakely and Post-Blakely Statutes, the Jury's Finding is the Only Finding That May Support the Exceptional Sentence.

Washington used to allow judges to impose exceptional sentences based on facts found by the sentencing judge. State v. Gore, 143 Wn.2d 288, 315, 21 P.3d 262 (2001). That all changed with Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Blakely invalidated exceptional sentences based on facts not found by a jury beyond a reasonable doubt, or admitted by the defense. Blakely, 542 U.S. at 303.

After Blakely, the Legislature enacted several statutes to allow exceptional sentences to again be imposed. A court may impose an exceptional sentence if it finds “substantial and compelling reasons[.]” “Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.” RCW 9.94A.535.

Under Blakely and section .537, the state must plead and prove the aggravating factor to a jury. RCW 9.94A.537(1) – (5).

If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.537(6).

In light of Blakely and this subsequent legislation, the resentencing court's extensive findings and conclusions are both factually unsupported and legally erroneous. Findings 1-10 repeat this Court's recitation of the record for the first appeal. But under Blakely, an appellate court's recitation of trial testimony is no substitute for a jury's findings of fact, beyond a reasonable doubt.⁷ For these reasons, with the exception of finding 11, the resentencing court's findings 1-10 are erroneous.

⁷ A jury in the trial court has original jurisdiction to find facts. Const. art. 4, § 6 (superior court has original jurisdiction to try facts); WPIC 1.02 ("It is [the jury's] duty to decide the facts in this case based upon the evidence presented to you during this trial"). An appellate court, on the other hand, has reviewing jurisdiction. When writing opinions, appellate courts do not find facts. Const. art. 4, § 30; Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959); Washington Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc., 168 Wn. App. 710, 282 P.3d 1107, 1111 (2012).

- b. Findings 10 and 12 – and Conclusions 5, 7, 8 and 10 are not Supported by the Record, nor are they Legally Adequate to Support an Exceptional Sentence.

Finding 12 states “[t]he defendant has seven prior adult misdemeanor convictions that are not accounted for in the standard range sentences.” App. A, at 3. This finding is erroneous for three reasons.

First, it is unclear where in the record the resentencing court derived the information that might support this finding. Despite a lengthy resentencing memo – and even lengthier appendices – the state provided no list of Bell’s misdemeanor history.⁸

Second, the finding fails for lack of notice. Neither the state, nor the defense, nor the court discussed this history at the resentencing hearing.⁹ RP 3-62. Bell was provided no opportunity at the resentencing to refute it.

⁸ If the state defends this finding in this Court, perhaps the state will designate other parts of the lengthy record in an effort to support it. Given the finding’s other faults, however, the state may not bother, and simply concede this error.

⁹ The court sua sponte mentioned a prior misdemeanor assault and escape conviction, but not until after defense counsel and Bell had spoken. RP 51. Bell was provided no notice that this alleged history might be used to support an exceptional sentence. Cf. RCW 9.94A.537 (requiring the state to provide notice); State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012) (notice need not be included in the information, but must still be provided prior to sentencing “to allow the defendant to mount an adequate defense.”) (internal quotation omitted).

Third, assuming *arguendo* the state could clear the first two hurdles, the finding still will not support an exceptional sentence. Under post-Blakely statutes,¹⁰ a court may use misdemeanor history to impose an exceptional sentence if

The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

RCW 9.94A.535(2)(b). A jury still must find necessary facts to support the “clearly too lenient” finding. State v. Alvarado, 164 Wn.2d 556, 564–69, 192 P.3d 345 (2008); State v. Saltz, 137 Wn. App. 576, 583-84, 154 P.3d 282 (2007).¹¹ Where the jury made no such finding in Bell’s case, it cannot support the exceptional sentence. Saltz, 137 Wn. App. at 580-84.

¹⁰ After Blakely, there are no nonstatutory aggravating factors. *Cf.* RCW 9.94A.535(1) – (3) (list of mitigating circumstances is illustrative, while list of aggravating factors is exclusive).

¹¹ The Alvarado court summarized the elements as follows:

The “clearly too lenient” determination is based upon factual conclusions that must be made by a jury to meet Sixth Amendment muster, such as: (1) the effect of a defendant's multiple offenses, (2) the level of a defendant's culpability resulting from the multiple offenses, or (3) whether the defendant would receive “free crimes” because the standard sentencing range would not change once the defendant reached a certain offender score.

The same two problems plague “conclusions” 5 and 8, which state:

5. The facts found by the jury, and captured in the Appellate opinion, the trial transcripts, and the jail phone calls reveal a pattern of abuse of a diminutive and vulnerable victim that is exceptionally repugnant. This conduct clearly provide [sic] substantial and compelling reasons justifying an exceptional sentence.

8. The defendant showed no genuine remorse throughout his relationship with Jaimi Freitas, or during his trial and, disconcertingly, could not, despite his best efforts, refrain from blaming the victim even during his current (new) allocution at the resentencing hearing.

App. A, at 4. Bell received no notice and the jury made no finding that Bell “demonstrated or displayed an egregious lack of remorse,” that Freitas was “diminutive and vulnerable,” or that the offenses were “exceptionally repugnant.”¹² RCW 9.94A.535(3)(b), (q). To the extent the court’s findings fit within any statutory aggravating factor, these are factors for which notice must be provided and must be found by a jury. RCW 9.94A.535(3) (“Such facts should be determined by procedures specified in RCW 9.94A.537”).

Alvarado, 164 Wn.2d at 564 (citing State v. Hughes, 154 Wn.2d 118, 137–40, 110 P.3d 192 (2005) (abrogated on other grounds regarding harmless error by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006))).

¹² No “exceptionally repugnant” aggravating factor appears in statute or case law. The fact that an offense may be “more onerous than typical” is a statutory aggravating factor for “major” drug offenses, not second degree assault. RCW 9.94A.535(3)(e). Even then, it must be found by a jury. State v. Flores, 164 Wn.2d 1, 22-23, 186 P.3d 1038 (2008).

Nor was the evidence sufficient to justify the findings.¹³ The court's reliance on these factors is clear error.

In Conclusion 7, the resentencing court found:

The defendant's stated attempts to recruit others to assault the victim so she would not testify at trial is the type of behavior that strikes at a central tenet of the criminal justice system.

App. A, at 4. In finding 10, the court similarly found:

Bell repeatedly attempted to contact Jaimi Frietas [sic] as well as friends and family members, to try to convince her to tell the prosecutor nothing happened or not to testify.

¹³ See WPIC 300.11 ("A victim is 'particularly vulnerable' if he or she is more vulnerable to the commission of the crime than the typical victim of _____. The victim's vulnerability must also be a substantial factor in the commission of the crime."); State v. Suleiman, 158 Wash.2d 280, 291–92, 143 P.3d 795 (2006) (proof of particular vulnerability requires that (1) "the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime"); see also WPIC 300.26 ("An egregious lack of remorse means that the defendant's words or conduct demonstrated extreme indifference to harm resulting from the crime [or were affirmatively intended to aggravate that harm]. In determining whether the defendant displayed an egregious lack of remorse, you may consider whether the defendant's words or conduct (a) increased the suffering of others beyond that caused by the crime itself; (b) were of a belittling nature with respect to the harm suffered by [the victim] [others]; or (c) reflected an ongoing indifference to such harm. A defendant does not demonstrate an egregious lack of remorse by [denying guilt][,] [remaining silent][,] [asserting a defense to the charged crime] [or] [failing to accept responsibility for the crime]."); State v. Garibay, 67 Wn. App. 773, 781, 841 P.2d 49 (1992) ("The mundane lack of remorse found in run-of-the-mill criminals is not sufficient to aggravate an offense"), abrogated on other grounds, State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996).

App. A, at 3. Both are factually erroneous and legally invalid.

First, there is no express jury finding that Bell attempted to recruit anyone to assault Freitas.¹⁴ The evidence supporting count IV was instead based on Bell's initial jail calls to Freitas during the period between September 23 and October 3, 2007, not Bell's later alleged attempts to have third parties contact Freitas. CP 68; App. B. Second, the findings are legally invalid because they are not within the exclusive statutory list of aggravating factors. RCW 9.94A.535(2), (3)(a)-(cc).

In conclusion 10, the resentencing court found "[t]he pattern of abuse was psychological, physical, and sexual." App. A, at 5 (emphasis added). The court's conjunctive "and" exceeds the jury's disjunctive finding. CP 33 (special verdict answered "yes" to the question whether the pattern was "psychological, physical, or sexual") (emphasis added).¹⁵ The court erred in relying on this factor.

¹⁴ The jury was instructed it could convict Bell of witness tampering as charged in count IV if it found he "attempted to induce a person to testify falsely or, without right or privilege to do so, withhold any testimony or absent himself or herself from any official proceeding." Supp. CP __ (sub no. 119, court's instructions, instruction 24, attached as appendix B). This Court vacated all other counts. CP 92.

¹⁵ Under normal linguistic rules, the word "or" does not mean "and." Tesoro Refining and Marketing Co. v. State, Dept. of Revenue, 164 Wn.2d 310, 319, 190 P.3d 28 (2008) ("As a default rule, the word 'or' does not mean 'and'

c. An Exceptional Sentence Cannot be Based on Facts That Inhere in the Offense.

As noted above, findings 1-10 parrot this Court's previous factual summary of the evidence leading to conviction. Those facts, based on evidence offered to support Bell's convictions, inhere in the elements of the offenses. Many of the resentencing court's "conclusions," which resemble "findings," also rely on facts that inhere in the offense. Conclusions 4, 5, 6, and 7 all include and repeat elements of the charged crimes that were accounted for by Bell's multiple convictions.¹⁶

Pre- and post-Blakely decisions make it clear an aggravating factor cannot inhere in the charged offense. In other words, facts already considered in setting the standard range cannot also justify an exceptional sentence. State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143, 146 (2010) (citing, *inter alia*, State v. Nordby, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986)). The

unless legislative intent clearly indicates to the contrary", citing HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs., 148 Wn.2d 451, 473 n. 95, 61 P.3d 1141 (2003)).

¹⁶ Conclusion 4 states the court reviewed the facts "from all sides" and this Court's factual summary. Conclusion 5 references the "facts found by the jury" (otherwise known as the "elements" in the "to convict" instructions), trial transcripts, and jail phone calls. Conclusion 6 states the sentence is based on "the lawful consequence of the defendant's criminal conduct that is both quantitatively and qualitatively remarkable." Conclusion 7 references "attempts to recruit others" to induce Freitas not to testify, which are the elements of witness tampering. Cf. RCW 9A.72.120(1)(b).

findings and conclusions that rely on elements of the charged offenses, and which are accounted for in the standard range, are therefore erroneous.

2. REMAND IS NECESSARY BECAUSE THE RECORD SHOWS THE TRIAL COURT'S ERRORS WERE PREJUDICIAL.

The trial court entered 12 findings and 11 conclusions. As shown in argument 1, the majority suffer clear errors of fact and law.

Where a court relies on invalid factors in imposing an exceptional sentence, the sentence should be vacated and the case remanded unless the state can establish a clear record showing the sentencing court would have imposed the same sentence absent its reliance on invalid factors. State v. Parker, 132 Wn.2d 182, 192-93, 937 P.2d 575 (1997) (“remand for resentencing is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway”). Stated another way, the state has to show the trial court did not place considerable weight on any invalid factor. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993) (remand necessary where sentencing court places considerable weight on invalid factors); State v. Henshaw, 62 Wn. App. 135, 140, 813 P.2d 146 (1991) (same). The state cannot meet its burden here.

First, the court's written conclusions admitted it “considered all of the information noted above,” including facts well beyond the jury's single

aggravator. App. A, at 4 (conclusion 4). Conclusions 4-11 show the court made no effort to limit its consideration to the single valid aggravating factor.¹⁷ There is no question the court placed “considerable weight” on erroneous findings and conclusions. This is not a technical counting error that might be excused on appeal. Cf., State v. Mutch, 171 Wn.2d 646, 660-61, 254 P.3d 803 (2011).

Second, the court did not include the familiar boilerplate that a single valid factor would justify its exceptional sentence. While not dispositive,¹⁸ sentencing courts often include this in an effort to avoid remand.¹⁹ Tellingly, this resentencing judge did not.

The prosecutor also encouraged the court’s error in finding 10 and conclusion 7. Although the only remaining witness tampering count involved Bell’s personal calls to Freitas, the prosecutor at resentencing emphasized recordings of other calls relating to counts that had been vacated. The court relied on those vacated counts. RP 17-20; App. A, at 3-4 (FOF 10, COL 7).

¹⁷ The court’s oral ruling similarly reveals its reliance on erroneous factors in imposing the exceptional sentences. RP 51-54.

¹⁸ State v. Smith, 123 Wn.2d 51, 58 n.8, 864 P.2d 1371 (1993).

¹⁹ See e.g., State v. Clarke, 156 Wn.2d 880, 895, 134 P.3d 188 (2006) (noting trial court’s statement that either of the two aggravating factors, standing alone, would justify the sentence); State v. T.E.C., 122 Wn. App. 9, 20, 92 P.3d 263 (2004) (same).

Given this, the state cannot seriously contend the resentencing court would have imposed the same sentence despite its express written (and oral) reliance on numerous erroneous factors. If the resentencing court had felt a belt would do, it would not have bothered with so many pairs of suspenders. Reversal is required.

The last question is whether the case should be remanded to a different judge for resentencing. As argued both supra and infra, given the breadth of Judge Bradshaw's errors, there is no way it would be fair – or appear fair – to remand this case to the same judge for resentencing.²⁰

²⁰ State v. Sledge, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997) (remanded to different judge "in light of the trial court's already-expressed views on the disposition"); accord, State v. Harrison, 148 Wn.2d 550, 559-60, 61 P.3d 1104 (2003) (resentencing before different judge should be the remedy where state breaches a plea agreement and the defense seeks specific performance); State v. Talley, 134 Wn.2d 176, 182, 188, 949 P.2d 358 (1998) (remanded to different judge where it appeared that initial judge may have "prejudged the matter"); State v. M.L., 134 Wn.2d 657, 661, 952 P.2d 187 (1998) (remand to different judge required where disposition was found clearly excessive); State v. Ameline, 118 Wn. App. 128, 134, 75 P.3d 589 (2003) (remand to different judge following improper exceptional sentence); State v. Cloud, 95 Wn. App. 606, 615-16, 976 P.2d 649 (1999) (remand to different judge required where it would be difficult, if not impossible, for initial judge to set aside improper information), State v. Romano, 34 Wn. App. 567, 570, 662 P.2d 406 (1983) (remanded to different judge where initial sentencing suffered from appearance of unfairness).

3. THE COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE OF 114 MONTHS ON COUNT 1, AND RUNNING IT CONSECUTIVE TO THE COUNT XIV SENTNENCE, BASED ON A SINGLE AGGRAVATING FACTOR.

The jury found one aggravating factor for count I. The resentencing court nonetheless imposed a 54-month sentence on Count XIV and ordered it to run consecutive to the count I sentence. The court then doubled the top of the 57-month count I standard range, and ordered that 114-month sentence to run consecutively to the count XIV sentence.²¹ The court erred.

In Bell's case concurrent sentences are presumed, so the consecutive sentences are exceptional. RCW 9.94A.589(1). They must be supported by a jury's finding of aggravating factors. RCW 9.94A.535, 9.94A.537, and 9.94A.589.

In a series of cases, Division Three has interpreted the Sentencing Reform Act (SRA) to require more than one aggravator for a single count before a trial court may impose multiple types of exceptional sentences. State v. Quigg, 72 Wn. App. 828, 845, 866 P.2d 655 (1994); In re Holmes, 69 Wn. App. 282, 292-93, 848 P.2d 754 (1993), overruled on other grounds, State v. Calle, 125 Wn.2d 769, 778, 888 P.2d 155 (1995); State v. McClure, 64 Wn.

²¹ Judge Mertel initially imposed a 72-month standard range sentence on counts I and XII, and ran those consecutively. CP 26.

App. 528, 534, 827 P.2d 290 (1992). In other words, a single aggravating factor will not support a double-dip above-the-range and consecutive sentence for any one count. Id.

The cited cases rely on State v. Batista, 116 Wn.2d 777, 808 P.2d 1141 (1991). “If a presumptive sentence is clearly too lenient, this problem could be remedied either by lengthening concurrent sentences, or by imposing consecutive sentences.” McClure, 64 Wn. App. at 534, (citing Batista, 116 Wn.2d at 785-86). From this, Division Three held a single aggravating factor can support only one type of exceptional sentence. Id. Judge Bradshaw therefore acted without statutory authority in imposing multiple exceptional sentences.

Judge Bradshaw’s oral ruling also reveals the wisdom behind Division Three’s analysis. He first imposed the count XIV sentence of 54 months. He said he found count XIV “more repugnant” than count XII, and would therefore run count XIV consecutively to count I. RP 52. But no aggravating factor justified the imposition of a consecutive sentence on count XIV. CP 33. After that, he determined he would also double the 57-month count I range. RP 53. These were two conceptually independent sentences, of which the consecutive part lacked a supporting aggravating factor.

In response, the state may argue the Division Three cases are no longer good law, after State v. Smith, 123 Wn.2d 51, 864 P.2d 1371(1993), reversed on other grounds, State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). Citing Batista, the Smith court stated:

Other sections of that opinion make it clear that “[w]here multiple current offenses are concerned, in addition to lengthening of sentences, an exceptional sentence may also consist of imposition of consecutive sentences where concurrent sentencing is otherwise the standard.” (Italics ours.) Batista, at 784, 808 P.2d 1141. Indeed, in State v. Oxborrow, 106 Wn.2d 525, 723 P.2d 1123 (1986), we upheld an exceptional sentence which was both beyond the standard range and consecutive. The SRA itself supports no other result. Thus, we hold that is permissible to impose an exceptional sentence which includes both sentencing components.

Smith, 123 Wn.2d at 57-58.

Reliance on Smith would be misplaced, because the double-dip sentences in Smith and Oxborrow were supported by multiple aggravating factors. Batista’s single-factor situation was not present in, or undermined by, Smith. As such, the Division Three cases remain good law.

Indeed, this Court recognized McClure’s reasoning as sound after Smith. State v. Stewart, 72 Wn. App. 885, 901, 866 P.2d 677 (1994), aff’d, 125 Wn. 2d 893, 890 P.2d 457 (1995), superseded by statute on other grounds. Stewart argued the trial court wrongly imposed double-dip

sentences based on a single aggravating factor. This Court rejected Stewart's argument because the record showed two factors, but noted:

While Stewart is correct that two exceptional sentences were imposed (statutory maximums and consecutive sentences), he ignores the trial court's use of the clearly too lenient factor as well as the future dangerousness factor to impose two exceptional sentences. Where numerous aggravating factors are present, more than one exceptional sentence may be imposed. State v. McClure, 64 Wn. App. 528, 534, 827 P.2d 290 (1992).

Stewart, 72 Wn. App. at 901.

Accordingly, under the Division Three cases and this Court's decision in Stewart, the resentencing court lacked authority to impose consecutive, non-standard range sentences on counts I and XIV. This Court should reverse and remand for resentencing.

4. THE INCREASED SENTENCE IS CLEARLY EXCESSIVE.

An exceptional sentence should be reversed where it is "clearly excessive." RCW 9.94A.585(4)(b). Washington courts have chosen to give this language little meaning. A trial court has wide discretion to determine the length of an exceptional sentence that is otherwise justified by legitimate aggravating factors. State v. Ritchie, 126 Wn.2d 388, 396, 894 P.2d 1308 (1995). Still, reversal is necessary where the length of the sentence "shocks

the conscience.” Ritchie, at 396 (quoting State v. Ross, 71 Wn. App. 556, 571, 861 P.2d 473 (1993), rev. denied, 123 Wn.2d 1019 (1994)).

As argued supra, the resentencing court’s reasons are statutorily and constitutionally erroneous. As argued infra, the court’s imposition of a harsher sentence on remand unconstitutionally punished Bell for exercising his article 1, § 22 right to appeal. If the imposition of an erroneous and constitutionally invalid harsher sentence does not shock our collective conscience, it is difficult to imagine what will.

5. THE RESENTENCING COURT UNCONSTITUTIONALLY PUNISHED BELL FOR EXERCISING HIS STATE CONSTITUTIONAL RIGHT TO APPEAL.

The jury found one aggravating factor relating to count I, and at resentencing Bell did not contest the court’s authority to impose an exceptional sentence. CP 33, 111; RP 32. The problem instead arises from the resentencing court’s increased punishment. For no justifiable reason, the court increased Bell’s count I sentence from 72 months to 114 months, and the overall consecutive sentence from 144 months to 168 months. These actions unconstitutionally punished Bell for exercising his right to appeal.²²

²² Bell objected to the increased sentence. RP 32-38, 44-45, 55-56, 60. Bell’s claim also is properly raised as a manifest error affecting a constitutional right. RAP 2.5(a)(3).

As shown in argument 1, nearly all of the resentencing court's findings and conclusions are clearly erroneous and legally invalid. They nonetheless reveal that Judge Bradshaw's harsher sentence was not based on any fact not already considered by Judge Mertel. All of Judge Bradshaw's "findings" and "conclusions" were based on facts that had been before Judge Mertel. App. A. The facts of Bell's offenses, and any criminal history, existed at the time of the initial sentencing. And Judge Mertel, unlike Judge Bradshaw, had heard and considered all of the evidence, not just the cherry-picked bits and pieces of transcripts and recordings the state chose to emphasize at the resentencing hearing. RP 11-23, 45-46.

The only legally relevant fact that had changed in the interim was Bell's successful²³ appeal. In that appeal, the state conceded it had charged more counts than could be lawfully justified. CP 88. As a result of that appeal, Bell's offender score on remand was four points lower, and the standard ranges were significantly lower. See note 2, supra.

²³ Depending on the outcome of this appeal, the use of the word "successful" in this context may prove unintentionally ironic. Still, there is no question that Bell substantially prevailed on appeal. As shown in the prior ACORDS docket, the state did not file a cost bill. Had one been filed, it would have been denied. State v. Partee, 141 Wn. App. 355, 365, 170 P.3d 60 (2007) (state did not substantially prevail and its cost bill was denied where Partee won reversal and remand for a new sentencing hearing, even though the state prevailed on other arguments).

The Washington Constitution guarantees the right to appeal. Const. art. 1, § 22 (“In criminal prosecutions the accused shall have the right to appeal in all cases. . .”). The right is fundamental and cannot be forfeited or relinquished without a knowing, intelligent, and voluntary waiver. City of Seattle v. Klein, 161 Wn.2d 554, 561, 166 P.3d 1149 (2007) (citing substantial authority). There is no right to appeal under the federal constitution,²⁴ so federal cases provide limited guidance.

The Washington Constitution also reminds us that “[a] frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.” Const. art. 1, § 32. One of our fundamental principles is that we do not punish people for exercising constitutional rights.²⁵ We do not allow the state to “chill” the exercise of

²⁴ Klein, 161 Wn. 2d at 556 n.1; McKane v. Durston, 153 U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867 (1894) (as cited in Evitts v. Lucey, 469 U.S. 387, 392, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)).

²⁵ The cases supporting this rule are broad and legion. United States v. Goodwin, 457 U.S. 368, 372, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982) (“while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right”); State v. Rupe, 101 Wn.2d 664, 704-05, 683 P.2d 571 (1984) (“Our analysis starts with the well-established rule that constitutionally protected behavior cannot be the basis of criminal punishment”); see also, United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967) (the right to petition government for redress of grievances is “among the most precious of the liberties safeguarded by the Bill of Rights”); California Motor Transport Co.

constitutional rights.²⁶ We do not even allow the state to make negative inferences from the exercise of constitutional rights.²⁷ These rules apply, as well, to sentencing.²⁸

Washington criminal cases go even farther to protect the right to appeal. We do not allow the state to “chill” the exercise of the right to

v. Trucking Unlimited, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972) (the right to petition applies with equal force to a person's right to seek redress from all branches of government, including the right to access the courts); Stanley v. Georgia, 394 U.S. 557, 568, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) (state may not punish the private possession of obscene materials protected by the First Amendment); In re Restraint of Addleman, 139 Wn.2d 751, 754, 991 P.2d 1123 (2000) (state cannot punish an inmate for exercising constitutional right to petition for redress of grievances).

²⁶ Rupe, 101 Wn.2d at 705 (“[t]he State can take no action which will unnecessarily ‘chill’ or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right”); accord United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (government may not chill the exercise of the right to a jury trial); State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006).

²⁷ State v. Martin, 171 Wn.2d 521, 528-34, 538-41, 543-47, 252 P.3d 872 (2011) (state cannot draw adverse inference from accused’s exercise of right to be present at trial); State v. Burke, 163 Wn.2d 204, 211-17, 181 P.3d 1 (2008) 211-17 (state’s substantive use of prearrest silence violates the Fifth Amendment, citing, *inter alia* Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) and State v. Easter, 130 Wn.2d 228, 231-35, 922 P.2d 1285 (1996)); (state’s substantive use of post-Miranda silence violates the Fourteenth Amendment citing, *inter alia*, Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)).

²⁸ See e.g., Mitchell v. United States, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) (the right to remain silent continues through sentencing; courts may not punish its exercise).

appeal. State v. Sims, 171 Wn.2d 436, 447-49, 256 P.3d 285 (2011). Contrary to some jurisdictions, we do not allow the state to impose costs on a person who substantially prevails on appeal.²⁹ We do not allow procedurally convenient shortcuts to erode the full exercise of the right to appeal.³⁰ And we refuse to stigmatize people who exercise the right to appeal. State v. W.W., 76 Wn. App. 754, 760, 887 P.2d 914 (1995) (rejecting as “ludicrous” the state’s contrary position).

The application of these settled rules and fundamental principles should be simple. Bell exercised his constitutional right to appeal. He succeeded, as shown by the state’s concession of error and the vacation of four convictions. But as a result of that appeal, he was punished more harshly. In short, the state and the resentencing court punished him for successfully exercising his right to appeal. Neither lawyers nor judges can

²⁹ State v. Blank, 131 Wn.2d 230, 243 & n.7, 930 P.2d 1213 (1997); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Partee, 141 Wn. App. at 365.

³⁰ State v. Hairston, 133 Wn.2d 534, 946 P.2d 397 (1997) (rejecting Seventh Circuit shortcut that would limit the court’s obligation to review the entire record under Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)); State v. Nichols, 136 Wn.2d 859, 968 P.2d 411 (1998) (rejecting Court of Appeals shortcut that would have avoided appointing new counsel to brief an issue with arguable merit in Anders context); State v. Leeloo, 94 Wn. App. 403, 972 P.2d 122 (1999) (counsel must provide adequate transcripts so the Court may fulfill its independent duty under Anders to review the record).

escape this basic logical syllogism. If this is not punishment for exercising a constitutional right, perhaps the state can tell us what else it might be.

There is no question a contrary rule chills the exercise of the right to appeal. Should the state disagree, it will face difficulty hurdling Sims, which is both instructive and recent. Sims pled guilty and was sentenced to a special sexual offender sentencing alternative (SSOSA). As a SSOSA condition, the trial court banished Sims from Cowlitz County and Castle Rock, the area where he and his wife had a home for over 40 years. Sims, 171 Wn.2d at 440.

On appeal, Sims challenged the banishment condition as not narrowly tailored. The state conceded the error, but argued the trial court should be allowed to punish Sims more harshly on remand by denying the SSOSA altogether. Division Two accepted the concession and held that, on remand, the trial court retained discretion to tailor the condition or deny the SSOSA. Sims, at 440-41.

The Supreme Court granted Sims' petition for review. The court reasoned the state wrongly requested a more extensive reversal than Sims sought on appeal. Because the state had not cross-appealed, Division Two's remedy exceeded the permissible scope of relief. Sims, at 443-44.

Important to the court's analysis was the article 1, § 22 right to appeal. Starting from the premise that "[o]ur state constitution provides a right of direct appeal in criminal cases," the court emphasized the chilling effect that follows when the state seeks harsher punishment on remand. With a SSOSA's high value at stake, the court reasoned few defendants would appeal "even abhorrently unlawful or unconstitutional sentencing conditions for fear of risking the underlying SSOSA[.]" Sims, at 438, 447-48. Although Division Two had noted "Sims' 'chilling appeals' argument is compelling," Division Two still "undervalued how compelling Sims's argument about the chilling effect is, especially in light of the alternative remedy to remand for narrow tailoring of the condition, which does not carry the same chilling risks." Sims, at 448. The Supreme Court rejected Division Two's expansive remedy that would have allowed the resentencing court to impose harsher punishment on remand by rejecting the SSOSA altogether. Sims, at 448-49.

Bell's claim is similarly compelling. On appeal, Bell properly argued for the reversal of several counts.³¹ The state conceded the error, as did the

³¹ Bell's appellate brief argued he could only be convicted of one count of witness tampering, and that his "convictions should be reversed." Brief of Appellant, No. 62552-7-I, at 60, 81. The reply brief argued that four of the five counts "should be reversed and dismissed with prejudice." Reply Brief of Appellant, No. 62552-7-I, at 17, 25.

state in Sims.³² Few errors are more “abhorrently unlawful or unconstitutional” than being charged with and convicted of more offenses than the law allows. Nonetheless, for the first time on remand, as a result of the state’s own charging errors, the state sought to expand the remedy by seeking a harsher sentence, even though no new facts justified it.

The error in Bell’s case is even more egregious than Sims. Unlike the state in Sims’ appeal, the state did not argue it should be allowed to seek a harsher sentence on remand. Bell lacked notice or fair opportunity to seek narrowly tailored relief in his first appeal.

Bell now asks for what the state constitution logically demands: a fair and narrowly tailored remedy. When an appeal results in vacated convictions and resentencing is required, the resentencing court cannot impose a harsher sentence on remand.³³ The rule is both simple and fair.

Numerous jurisdictions have relied on independent state protections to prohibit the imposition of a harsher sentence following remand from a

³² The state’s brief concluded: “[c]ounts 5, 7, 8, and 9 should be considered as a single unit of prosecution of witness tampering. The case should be remanded so that Bell may be resentenced accordingly.” Brief of Respondent, No. 62552-7-I, at 96-97.

³³ Bell’s case does not involve withdrawal of a plea, or remand for a new trial, situations where new evidence might be presented. In Bell’s case, no new facts were considered by the resentencing judge.

successful appeal. Shagloak v. State, 597 P.2d 142 (Alaska, 1979) (Alaska's due process clause prohibits higher sentence; chilling effect of contrary rule precludes effective exercise of the right to appeal); People v. Henderson, 60 Cal.2d 482, 35 Cal.Rptr. 77, 386 P.2d 677, 686 (1963) (California constitution precludes imposition of death penalty on resentencing following successful appeal, where death was not originally imposed); People v. Ali, 66 Cal.2d 277, 57 Cal.Rptr. 348, 424 P.2d 932 (1967) (applying Henderson to all increases in sentences on remand following appeal);³⁴ State v. Mara, 102 Hawai'i 346, 359-62, 76 P.3d 589 (Hawai'i App. 2003) (Hawai'i statute prohibits higher sentence on remand following successful appeal);³⁵ Commonwealth v. Hyatt, 419 Mass. 815, 647 N.E.2d 1168, 1173-74 (1995) (applying state law, "We adopt as a common law principle a requirement that, when a defendant is again convicted of a crime or crimes, the second sentencing judge may impose a harsher sentence or sentences only if the judge's reason or reasons for doing so appear on the record and are based on

³⁴ Accord, People v. Hanson, 23 Cal.4th 355, 1 P.3d 650 (2000).

³⁵ The Mara court also quoted the lengthy and persuasive commentary supporting the adoption of the American Bar Association's Standards Relating to Sentencing Alternatives and Procedures § 3.8 (1968). Mara, 102 Hawai'i at 359-60.

information that was not before the first sentencing judge.”); State v. Violette, 576 A.2d 1359, 1360-61 (Me. 1990) (absent intervening recidivism by the defendant, state due process bars an enhanced sentence on remand from a successful appeal); People v. Mulier, 12 Mich.App. 28, 162 N.W.2d 292, 295 (1968) (citing state constitutional right to appeal, reasoning: “[i]ndividual rights embodied in the State Constitution are no less zealously guarded than Federal constitutional rights. And it cannot be presumed that art. 1, § 20 of the State Constitution bestowed an In terrorem legacy upon the criminally accused. Since the State has granted the universal right of appeal, standards of procedural fairness forbid cutting down the right.”); State v. Burrell, 772 N.W.2d 459, 469-70 (Minn. 2009) (“[a]s a matter of judicial policy in Minnesota, a court cannot impose on a defendant who has secured a new trial a sentence more onerous than the one he initially received,” internal quotations omitted, citing inter alia State v. Holmes, 281 Minn. 294, 161 N.W.2d 650 (1968)); State v. Wolf, 46 N.J. 301, 216 A.2d 586, 590-91 (1966) (rule is based on “procedural policies which are of the essence of the administration of criminal justice;” “the view we now take represents the only procedural standard consistent with the just administration of the criminal law,” rejecting contrary precedent); State v. Sorensen, 639 P.2d 179, 180 (Utah 1981) (Utah constitution provides right to appeal that cannot be

impaired by the threat of a harsher sentence on remand, citing, inter alia, Chess v. Smith, 617 P.2d 341, 343 (Utah 1980)); State v. Eden, 163 W.Va. 370, 256 S.E.2d 868, 876 (1979) (right to appeal is guaranteed under state due process clause; “Protection of the criminal defendant's fundamental right to appeal and avoidance of any possible vindictiveness in resentencing would force us to hold that upon a defendant's conviction at retrial following prosecution of a successful appeal, imposition by the sentencing court of an increased sentence violates due process and the original sentence must act as a ceiling above which no additional penalty is permitted.”)

This fair rule avoids numerous problems that plague efforts to apply the Pearce³⁶ “presumption of vindictiveness.” While Pearce was guided by valid concerns, the federal due process rule adopted therein fails to protect the state constitutional right to appeal.

A sentencing judge will certainly not admit to a character trait of vindictiveness. Furthermore, a truly vindictive judge will be careful enough to leave no tracks in the sentencing record as to the true basis of his decision. Only in the most flagrant cases can vindictiveness be demonstrated by the cold record. Thus, as a practical matter it becomes almost impossible from the cold sentencing record to isolate and identify vindictiveness as the impelling motive. The record of review consists of only what the sentencing court wants to supply for public consumption and the review of the appellate court.

³⁶ North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

State v. Fitzpatrick, 186 Mont. 187, 606 P.2d 1343, 1373 (Mont. 1980) (Shea, J., dissenting in part). This fair rule also

prevents the sentencing disparities that are inherently likely to occur when two different judges engage in sentencing on the same sentencing facts, and avoids the unseemly appearance that the defendant's ultimate sentence is greater than his first for no better reason than a change in the identity of the sentencing judge. The rule, easy of application, effectively safeguards a successful appellant upon retrial from the possibility, however slight, of retaliatory vindictiveness following reconviction, and protects a convicted defendant's right to an appeal from any chilling effect emanating from the possibility that an enhanced second sentence might result from a retrial on the same facts.

State v. Violette, 576 A.2d 1359, 1360-61 (Me. 1990) (citations omitted).³⁷

See also, ABA Standards for Criminal Justice, Sentencing § 18-7.2, at 237 (3d ed.1994) (sentencing court may modify conditions of sanction to fit present circumstances of offender, but “may not increase the overall severity of an offender's sentence”).

³⁷ Oregon used to follow a similarly clear rule, but recently reconsidered that position. Nonetheless, the new Oregon rule continues to prohibit harsher sentences on remand unless the resentencing court's reasons are “based on identified facts of which the first sentencing judge was unaware[.]” State v. Partain, 349 Or. 10, 239 P.3d 232, 242 (2010) (rejecting previous holding in State v. Turner, 247 Or. 301, 429 P.2d 565 (1967)). Bell's harsher sentence cannot survive even under Partain's more lenient scrutiny.

This rule complements existing Washington law. It has long been held that a court may not increase a lawfully imposed prior sentence. State ex rel. Sharf v. Municipal Court of Seattle, 56 Wn.2d 589, 590-91, 354 P.2d 692 (1960). But when the state shows it is aggrieved by an erroneous sentence, an appellate court may invalidate the sentence and remand for resentencing at which more punitive sentence may be imposed. See e.g., State v. Pringle, 83 Wn.2d 188, 193, 517 P.2d 192 (1973) (trial court lacked discretion to refuse to enter mandatory deadly weapon finding that triggered mandatory minimum term; erroneous sentence vacated and case remanded for resentencing); In re McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848, 850 (1955), cert. denied, 350 U.S. 1002 (1956) (trial court has the power and the duty to correct an erroneous sentence), overruled in part on other grounds by State v. Sampson, 82 Wn.2d 663, 513 P.2d 60 (1973)).

In response, the state may repeat its theory that Bell risked more punishment simply because he appealed. RP 45. If the state had shown Bell was erroneously punished too lightly, perhaps increased punishment on remand could be justified.³⁸ But where the error in Bell's judgment and

³⁸ Cf., State v. Hardesty, 129 Wn.2d 303, 310, 915 P.2d 1080 (1996) ("the double jeopardy clause continues to prohibit increasing a correct sentence," but if the state proves an accused's fraud in securing an erroneously low sentence, resentencing to the higher term may be permitted); with State v. Traicoff, 93 Wn. App. 248, 253, 967 P.2d 1227 (1998), ("the double jeopardy

sentence was one that convicted him of too many offenses and punished him too harshly, the state was not aggrieved. The state therefore had no legitimate interest in seeking or securing an increase in Judge Mertel's sentence.³⁹

In short, there is no legitimate justification for the increased sentence. Punishing Bell for exercising his state right to appeal is constitutional error. This Court should vacate the count I sentence and remand to a different judge⁴⁰ for resentencing to a count I term no higher than Judge Mertel's original sentence.

clause does not bar a court from correcting its sentencing error by increasing the severity of a sentence to conform to the mandatory provisions of a statute"), rev. denied, 138 Wn.2d 1003 (1999).

³⁹ See e.g., Shagloak, 597 P.2d at 145 (the state "has no valid interest in imposing unreasonable conditions" on the legitimate exercise of the right to appeal); Henderson, 386 P.2d at 686 ("[s]ince the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal"); Leonard Sosnov, Criminal Procedure Rights Under the Pennsylvania Constitution: Examining the Present and Exploring the Future, 3 Widener J.Pub.L. 217, 339 (1993) ("It is difficult to see what legitimate, societal interest is served by having the possibility of a higher sentence hang over a defendant's head, even though he has committed no misconduct since the first sentencing").

⁴⁰ See argument 6.b., infra, for a discussion of the potential problems with this request posed by State v. Parmelee, 121 Wn. App. 707, 90 P.3d 1092 (2004).

6. THE RESENTENCING COURT ACTED VINDICTIVELY AND ABUSED ITS DISCRETION IN IMPOSING INCREASED SENTENCES FOLLOWING BELL'S SUCCESSFUL APPEAL.

a. The Higher Sentences Cannot Survive Pearce.

In North Carolina v. Pearce, the Supreme Court held that neither the double jeopardy prohibition nor the Equal Protection Clause absolutely bar a more severe sentence upon reconviction. Pearce, 395 U.S. at 723. “A trial judge is not constitutionally precluded from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant’s ‘life, health, habits, conduct, and mental and moral propensities.’” Pearce, 395 U.S. at 723 (quoting Williams v. New York, 337 U.S. 241, 245, 69 S. Ct. 1079 93 L. Ed. 1337 (1949)). “Such information may come to the judge’s attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant’s prison record, or possibly from other sources.” Pearce, 395 U.S. at 723.

However, “It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an unannounced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside.” Pearce, at 723-24. A

court is “without right to . . . put a price on an appeal. [I]t is unfair to use the great power given the court to determine sentence to place a defendant in the dilemma of making an unfree choice.” Pearce, at 724 (quoting Worcester v. Commission of Internal Revenue, 370 F.2d 713, 718 (C.A. Mass. 1966)).

The Due Process Clause of the Fourteenth Amendment therefore requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant’s exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

Pearce, 395 U.S. at 725.

To ensure the absence of such motivation, the Pearce Court held that “whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his or her doing so must affirmatively appear. Those reasons must be based upon objective information concerning the defendant’s identifiable conduct occurring after the original sentencing proceeding. And the factual basis upon which the increased sentence is based must be made part of the record,” to ensure full and fair appellate review. Pearce, at 726.

The Pearce presumption of vindictiveness has been narrowed somewhat by subsequent cases. See e.g. Texas v. McCullough, 475 U.S. 134,

106 S. Ct. 976, 89 L. Ed. 2d 104 (1986); and Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). In the former case, McCullough was tried before a jury and convicted of murder. He elected to be sentenced by the jury, as was his right under Texas law. After the jury imposed a sentence of 20 years, the trial judge granted his request for a new trial based on prosecutorial misconduct. McCullough, 475 U.S. at 136.

The state retried McCullough with the same trial judge presiding. This time, the state presented testimony from two witnesses who had not testified previously. These witnesses testified it was McCullough, not his accomplices, who slashed the victim's throat. After the jury found McCullough guilty, he elected to be sentenced by the judge. The judge sentenced him to 50 years, explaining the increase was due to the new evidence, as well as the fact that McCullough had been recently released from prison at the time of the crime, which the trial judge had only recently learned. McCullough, 475 U.S. at 136.

For two reasons, the Supreme Court held the presumption of vindictiveness did not apply. First, McCullough's second trial came about because the judge herself ordered it: "[U]nlike the judge who has been reversed, the trial judge here had no motivation to engage in self-vindication." McCullough, at 139 (quotation omitted). "Because there was

no realistic motive for vindictive sentencing, the Pearce presumption was inappropriate.” McCullough, at 139.

Second, the court found the presumption inapplicable because “different sentencers assessed the varying sentences that McCullough received.” McCullough, at 140. Where different sentencers are involved:

[I]t may often be that the [second sentencer] will impose a punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty.

McCullough, 475 U.S. at 140 (quoting Colten v. Kentucky, 407 U.S. 104, 117, 92 S. Ct. 1953, 32 L. Ed. 584 (1972)).

Finally, the Court held that even if the Pearce presumption did apply, the trial judge successfully rebutted it, based on the stated reasons – new testimony and rapid recidivism. McCullough, at 141. In so holding, the Court clarified that its statement in Pearce that reasons justifying an increase in sentence are not necessarily limited to circumstances or events occurring after the original sentencing proceeding. Id.

For similar reasons, in Smith v. Alabama, the Court held the Pearce presumption did not apply when a defendant received an increased sentence following a jury trial after he successfully challenged his guilty plea on appeal:

We think the same reasoning leads to the conclusion that when a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge. Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial. . . .

. . . in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged.

Smith, 490 U.S. at 802.

Unlike the circumstances of McCullough and Smith, in Bell's case there was no new trial and no new evidence on which the resentencing court relied. The only "new" facts of any relevance were: (1) Bell had appealed and his offender score on all counts was four points lower, and (2) Judge Mertel had been replaced by Judge Bradshaw. The state cannot seriously argue that either fact logically or constitutionally supports the imposition of harsher punishment. Because there was a realistic motive for vindictive sentencing in Bell's case, the Pearce presumption should apply. See e.g., State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718, 721 (2001) (Pearce presumption applied where court had same facts and information, and no objective findings justified the increase); accord Commonwealth v. Serrano,

727 A.2d 1168, 1170 (Pa.Super.1999); Marshall v. State, 265 Ark. 302, 578 S.W.2d 32 (1979).⁴¹

Nor can the state overcome the presumption. There were no “events subsequent to the first trial that may have thrown new light upon the defendant’s ‘life, health, habits, conduct, and mental and moral propensities.’” Pearce, at 723 (citing Williams, 337 U.S. at 245). Judge Bradshaw made no such claim, instead asserting “this is, uh, a matter of, uh, discretion and nothing, uh, more.” RP 53. Stated another way, he imposed the longer sentence because he thought he could.

In short, the circumstances of this case show no legitimate non-vindictive reason for the increase in Bell’s sentence. This is a case where Pearce’s prophylactic rule should apply.

b. The Parmelee Rule Denies Equal Protection.

In response, the state will cite this Court’s decision in State v. Parmelee for the proposition that Pearce does not apply when a different judge imposes a longer sentence after resentencing. State v. Parmelee, 121 Wn. App. 707, 90 P.3d 1092 (2004). Because Parmelee creates an illogical

⁴¹ See also, Chaffin v. Stynchombe, 412 U.S. 17, 27, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973) (recognizing a trial court’s institutional interests in avoiding what it might consider frivolous appeals).

classification that bears no rational relation to a legitimate state interest, it is harmful and wrongly decided. It should be overruled.

The state and federal constitutions guarantee the right to equal protection of the law, which requires that similarly situated people be treated similarly. U.S. Const. amend. 14; Const. art. 1, § 12.⁴² “Equal protection does not mandate that persons be dealt with identically, but it does require that a distinction have some relevance to the purpose for which the classification is made.” In re Bratz, 101 Wn. App. 662, 668, 5 P.3d 759 (2000) (citing In re Young, 122 Wn.2d 1, 45, 857 P.2d 989 (1993)).

Where no suspect or semi-suspect class is involved, the rational basis test applies to challenges implicating physical liberty. Bratz, 101 Wn. App. at 669; State v. W.W., 76 Wn. App. at 759. For a classification to withstand rational basis review: (1) the classification must apply alike to all members of the designated class, (2) there must be some rational basis for reasonably distinguishing between those within the class and those outside the class, and (3) the challenged classification must bear some rational relation to the

⁴² The Fourteenth Amendment provides, "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Const. Art. I, § 12 provides, "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

purpose of the challenged statute or rule. Bratz, 101 Wn. App. at 669 (citing Morris v. Blaker, 118 Wn.2d 133, 149, 821 P.2d 482 (1992)).

Parmelee creates two classes of defendants who are resentenced. The first is resentenced before the initial sentencing judge, the second before a different judge. Under Parmelee, the Pearce presumption applies only to the first class. But as Bell's case shows, the Parmelee rule cannot withstand scrutiny.

Bell's new sentence was more punitive for one of three reasons: (1) the state overcharged him, he properly won his appeal (as the state conceded), and on remand had lower offender scores and standard ranges, (2) Judge Mertel retired, or (3) a career King County prosecutor had been elected to preside in Judge Mertel's department. None of these reasons bears any rational relationship to a legitimate state purpose in allowing harsher punishment. These reasons are wholly irrelevant to the achievement of any legitimate state purpose in limiting the Pearce presumption.

The state conceded as much at the resentencing. It pointed to no new fact that would justify the increased sentence. Instead, the state argued a simple judge-based change in sentence length would be an unjust "windfall." RP 20. Where Bell's offender scores and standard ranges had been substantially reduced, the state's term cannot fairly apply to a less harsh

sentence. But where the state and the resentencing court identified no new fact, the longer sentence is nothing more than a “windfall” for the state – and an “unseemly” one at that⁴³ – affirmable under Parmelee for no reason other than Judge Mertel’s decision to retire. SRA sentences are supposed to be proportional and just, and promote respect for the law⁴⁴ – not be a crapshoot. No legitimate reason justifies Parmelee’s disparate treatment.

Parmelee also makes it impossible for an appellate attorney to provide effective assistance of counsel. Counsel cannot monitor a judge’s health, career plans, travel plans, and retirement plans. Nor could any appellant in Bell’s shoes knowingly and intelligently exercise – or waive – the right to appeal, absent the miraculous ability to predict whether the sentencing judge might get hit by a bus on his way to work. Legitimate sentencing policy and the state constitutional right to appeal do not rest on such whims of chance.

Parmelee also creates unfair and unnecessary analytical problems for this appeal. In a normal situation where an exceptional sentence is vacated and the sentencing judge cannot be presumed fair on remand, an appellant logically would seek resentencing before a different judge.⁴⁵

⁴³ Violette, 576 A.2d at 1360-61.

⁴⁴ RCW 9.94A.010(1)-(3).

⁴⁵ See also arguments 2-5, supra.

But the specter of Parmelee's unfair rule again looms large, because even Judge Bradshaw did not impose the statutory maximum sentence on count I. Where Bell now properly seeks resentencing before an unbiased judge, does he risk an even more punitive sentence on remand? And if so, why? The state will have no persuasive answer to either of these questions.

There is no question that Parmelee burdens the right to appeal, and does so unnecessarily. As this Court has previously recognized, this violates equal protection. W.W., 76 Wn. App. at 758-59 (citing Lindsey v. Normet, 405 U.S. 56, 74-79, 92 S.Ct. 862, 874-77, 31 L.Ed.2d 36 (1972)). Parmelee therefore should be overruled, as it is harmful and wrongly decided. State v. Nunez, 174 Wash.2d 707, __ P.3d __, 2012 WL 2044377, **3-6 (precedent should be overruled where it is incorrect and harmful). For all these reasons the resentencing court's harsher sentences are erroneous.

7. IF THIS COURT AFFIRMS THE HARSHER SENTENCES, BELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN HIS FIRST APPEAL AND THIS COURT SHOULD APPOINT NEW COUNSEL TO ARGUE THIS CLAIM.

Bell's first appeal raised challenges to justify the reversal of Bell's convictions and exceptional sentence. This Court agreed in part and reversed four felony convictions. But Bell received a harsher sentence, not a reduced

sentence. This was not Bell's goal, nor did appellate counsel make a legitimate strategic decision to expose Bell to this outcome.

Where a state guarantees the right to appeal, an appellant has the right to effective assistance of counsel to pursue that appeal. U.S. Const. amend. 6, 14; State v. Chetty, 167 Wn. App. 432, 440-41, 272 P.3d 918 (2012) (citing, *inter alia*, Evitts v. Lucey, 469 U.S. at 397). An appellant is denied the right to effective assistance where counsel's deficient performance results in prejudice. Chetty, at 440 (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Bell's current counsel also was counsel in the first appeal. Because it would be a conflict of interest for counsel to argue his own ineffectiveness, this Court should appoint new appellate counsel to investigate and litigate this claim. RPC 1.7(a)(2); United States v. Del Muro, 87 F.3d 1078, 1080-81 (9th Cir.1996) (counsel should not be forced to argue counsel's own ineffectiveness; In re Frampton, 45 Wn. App. 554, 559-60, 726 P.2d 486 (1986) (where effective assistance of appellate counsel is denied, appropriate remedy is reinstatement of the appeal).

D. CONCLUSION

This Court should vacate the exceptional sentence and remand for a resentencing before a different judge who cannot punish Bell for exercising his right to appeal. If this Court denies that relief, new counsel should be appointed to assist Bell in litigating an ineffective assistance claim.

DATED this 28th day of September, 2012.

Respectfully Submitted,

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APPENDIX A

No. 67910-4-I

1 Appeals opinion, including the following:

- 2 1. During one early incident, the defendant grabbed Jaimi Freitas' neck. The defendant's
3 violence proceeded to escalate.
- 4 2. On February 17, 2006, another conflict occurred. Bell grabbed the victim's arm and
5 threw her, dislocating her shoulder.
- 6 3. On July 26, 2006, Jaimi Freitas stood outside the front door of the apartment and
7 asked him to toss her the key. Bell told her to come and get the key. When she reached
8 for the key, Bell pulled her into the apartment and began punching Jaimi Freitas. When
9 she ran for the front door, he closed and bolted it so she could not escape. Hoping to
10 signal someone, she ran towards the balcony. She grabbed the balcony rail to prevent
11 Bell from pulling her by the waist back into the apartment. Bell let go, and Jaimi
12 Freitas flipped over the rail and onto her back, hitting the ground fifteen feet below, a
13 fracturing her hip pelvis and causing internal bleeding.
- 14 4. Around September 30, 2006, Jaimi Freitas and Bell were dating on and off and not
15 getting along very well. While visiting a friend's house, Jaimi Freitas and Bell were
16 eating together when Jaimi Freitas placed her hand on Bell's leg. Bell angrily accused
17 Jaimi Freitas of wiping ketchup on his pants. When she denied it, Bell stood up and
18 threw a glass plate, hitting her in the forehead. Blood immediately flowed from the
19 triangle gash in Jaimi Freitas's head. Bell apologized and assisted Jaimi Freitas in
20 stopping the flow of blood.
- 21 5. That same evening, Jaimi Freitas and Bell went to his mother's house to get her
22 assistance in tending to the wound. That night they slept in his sister's bed at his
23 mother's house. After apologizing, Bell wanted to have sex. Jaimi Freitas, nursing this
24 recent suffered injury, told Bell, "No. I don't want to do this." "Bell forcibly removed
her pants and underwear despite her protests. He pinned her down and began having
sexual intercourse, telling Jaimi Freitas, "It will be okay" "while she continued to say
no.
6. Jaimi Freitas testified that during yet another incident, she and Bell were having sex
when he suggested anal intercourse. When she refused, Bell penetrated her anus while
she cried.
7. On September 23, 2007, Jaimi Freitas lived in a small studio apartment in Lake City,
located in King County. Bell lived with her on and off, but they did not live
together full-time due to the conflict in their relationship. That day, Jaimi let Bell in
when he knocked on the door at about 3:00 a.m. At first things were fine, but then
Jaimi Freitas became angry that Bell was mistreating her dog. When she told Bell to
stop, they began to argue. Jaimi Freitas testified that she could tell Bell had been
drinking. Jaimi Freitas walked out the front door of the apartment and tried to call the
dog to come outside. Bell restrained the dog so it could not leave. He then threw Jaimi
Freitas's cell phone, breaking it. He coaxed Jaimi Freitas back inside and shut the door
behind her. Bell then punched Jaimi Freitas in the eye, and Jaimi Freitas began to cry.
He then grabbed her and pulled her to the ground. He laid her on her back and sat on

1 her chest with his legs on each side of her, pinning her arms. Jaimi Freitas testified that
2 Bell swore at her and asked her, "Do you want to see stars?" "He placed his hands
3 around her neck and squeezed so that she could not breathe for between two and 30
4 seconds.

5 8. Jaimi Freitas testified that after this strangling, Bell stood and "got nice" and that
6 he put his arm around Jaimi Freitas and asked her, "[W]hy do you have to act like
7 that?" "She said he unlocked the front door, saying "I'll even keep the door
8 unlocked." "She testified that he calmed down but then "he went right back into what
9 he was before." She explained that by this she meant that "his demeanor" told her that
10 "he wanted to hurt me."

11 9. Jaimi Freitas testified that Bell grabbed her hair and pulled her towards the floor,
12 tearing the hair out of her scalp. He then locked the front door and removed the key to
13 the deadbolt. Because the deadbolt could not be opened from the inside without
14 having a key, Jaimi was trapped. Jaimi Freitas testified that every time she tried to
15 walk towards the door of the (very small) apartment, he would get between her
16 and the door and tell her that she was not going anywhere. She testified that when she
17 tried to go to the bathroom to see her face he kept "flinch[ing]" at her to scare her.
18 Bell then located some ice for her swelling eye. He also poured her a shot of rum and
19 forced her to drink it, despite her protests, threatening to hit her with the bottle if
20 she did not.

21 10. From jail, Bell repeatedly attempted to contact Jaimi Freitas as well as friends
22 and family members, to try to convince her to tell the prosecutor nothing happened or
23 not to testify.

24 11. In count I, the first Assault 2, Domestic Violence charge, the jury found that the
defendant's crime of domestic violence was part of an ongoing pattern of
psychological, physical or sexual abuse of the victim manifested by multiple
incidents over a prolonged period of time, supporting an exceptional sentence under
RCW 9.94A.535(h)(i). This was upheld by the Court of Appeals.

12. The defendant has seven prior adult misdemeanor convictions that are not accounted
for in the standard range sentences.

20 B. CONCLUSIONS OF LAW -- SUBSTANTIAL AND COMPELLING REASONS FOR
21 IMPOSING EXCEPTIONAL SENTENCE

22 1. The Court of Appeals affirmed the underlying convictions on all counts, including the
23 aggravated factor found by the jury in Count 1 but vacated Counts V, VI and VII under a
24 Unit of Prosecution analysis.

1 2. This Court succeeded the original sentencing judge, the Hon. Charles Mertel (ret.),
2 and has exercised independent discretion in this sentencing matter.

3 3. The Court has considered independently the appropriate sentence given all of the
4 information presented and specific objective facts identified above.

5 4. The Court reviewed the facts from all sides and considered all of the information
6 noted above. It also relied on the Court of Appeals citing to the record at trial.

7 5. The facts found by the jury, and captured in the Appellate opinion, the trial transcripts,
8 and the jail phone calls reveal a pattern of abuse of a diminutive and vulnerable victim
9 that is exceptionally repugnant. This conduct clearly provide substantial and compelling
10 reasons justifying an exceptional sentence.

11 6. The court has based its sentence on the data legitimately before the court and not on
12 the fact of or because of the original appeal which is of course a matter of right. The
13 court's sentence represents the lawful consequence of the defendant's criminal conduct
14 that is both quantitatively and qualitatively remarkable.

15 7. The defendant's stated attempts to recruit others to assault the victim so she would
16 not testify at trial is the type of behavior that strikes at a central tenet of the criminal
17 justice system.

18 8. The defendant showed no genuine remorse throughout his relationship with Jaimi
19 Freitas, or during his trial and, disconcertingly, could not, despite his best efforts, refrain
20 from blaming the victim even during his current (new) allocution at the resentencing
21 hearing.

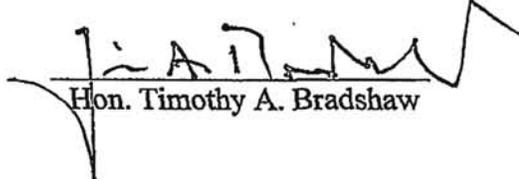
22 9. The defendant's pattern of abuse against Jaimi Freitas, found beyond a reasonable
23 doubt by the jury, warrants an exceptional sentence upward, and the Court, in its
24

1 discretion, finds that doubling the high end of the standard range and running it
2 consecutively to Count XIV, one of the most heinous of the defendant's crimes against
3 Jaimi Freitas, is an appropriate sanction in this case. The jury's special verdict provides a
4 substantial and compelling reason to grant this exceptional sentence on Count I
5 consecutive to Count XIV.

6 10. The pattern of abuse was psychological, physical, and sexual.

7 11. This sentence ensures punishment that is proportionate to the egregiousness of the
8 offenses.

9
10 Done this 31st of January, 2012

11 
12 Hon. Timothy A. Bradshaw

APPENDIX B

No. 67910-4-I

To convict the defendant of the crime of Tampering with a Witness as charged in count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

✓(1) That during the period of time intervening between September 24, 2007 through October 3, 2007, the defendant attempted to induce a person to testify falsely or, without right or privilege to do so, withhold any testimony or absent himself or herself from any official proceeding; and

✓(2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings; and

✓(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 67910-4-1 |
| |) | |
| CLIFFTON BELL, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF SEPTEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CLIFFTON BELL
DOC NO. 893908
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF SEPTEMBER, 2012.

x Patrick Mayovsky

2012 SEP 28 PM 11:34
CLIFFTON BELL
STATE OF WASHINGTON