

NO. 81020-6

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARK KILGORE, PETITIONER

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan, Judge

No. 96-1-04678-9

SUPPLEMENTAL BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. As defendant's convictions were "final" under well-settled law for determining the finality of a judgment for the purposes of retroactivity analysis, did the trial court and the Court of Appeals properly determine that defendant was not entitled to re-sentencing under *Blakely v. Washington*?
2. Has defendant failed to provide any authority to support his contention that the trial court was required to conduct a re-sentencing hearing?
3. Under the controlling authority of this court's decision in *State v. Barberio*, did the Court of Appeals correctly dismiss defendant's second appeal when the trial court, on remand, did not exercise its independent judgment by reviewing and ruling again on the imposition of exceptional sentences that had not been challenged in the first appeal?

B. STATEMENT OF THE CASE.

The current appeal is the second time petitioner's Mark Kilgore's (defendant) convictions have been before this Court for review.

Following a jury trial, defendant was found guilty of three counts of child rape in the first degree, and four counts of child molestation in the

first degree involving four different victims in Pierce County Cause No. 96-1-04678-9. CP 107-118; *see also*, *State v. Kilgore*, 107 Wn. App. 160, 165-173, 26 P.3d 308 (2001), *aff'd* 147 Wn.2d 288, 53 P.3d 974 (2002). The trial court imposed an exceptional sentence of 560 months on each of the seven counts based upon an offender score of 18. CP 107-118. The court found the following aggravating factors were substantial and compelling reasons which justified an exceptional sentence: (1) defendant violated a position of trust; (2) the victims were particularly vulnerable; (3) the court observed no remorse on the part of defendant despite the jury verdict; (4) multiple victims and multiple incidents per victim; and (5) defendant's conduct manifested deliberate cruelty to the victims by providing them with alcohol to the point of intoxication with no concern for the safety of the children. CP 122-125 (Findings of Fact and Conclusions of Law for Exceptional Sentence), *See* Appendix A.

Defendant appealed from his convictions, but did not assign error to the imposition of his exceptional sentences or to the calculation of his offender score. *See*, *State v. Kilgore*, 107 Wn. App. at 165. The Court of Appeals found the trial court had erred in suppressing evidence that someone else had previously abused one of the defendant's victim's and reversed a count of first degree child molestation and a count of first degree child rape which pertained to that victim (Counts I and II), but affirmed the remaining five convictions and remanded for further proceedings. *Id.* at 178, 190.

Defendant petitioned for review, but the State did not cross petition on the reversed counts. This Court accepted review and affirmed the decision of the Court of Appeals, upholding the five convictions. *State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002) (filed on September 12, 2002). The Supreme Court issued its mandate on October 9, 2002, remanding the case to the superior court. CP 8-21.

On remand, the State did not seek retrial on the two counts that had been reversed on appeal; ultimately, the matter was brought back before the superior court for a hearing to bring the judgment into conformity with the terms of the appellate decisions. RP 3-6. Defendant moved the trial court for a re-sentencing in light of *Blakely v. Washington*, 542 U.S. 296, 125 S. Ct. 2531, 195 L.Ed.2d 4023 (2004), arguing that he should be sentenced to a standard range sentence on each of his five convictions. CP 31-49. The State responded that the defendant's reliance on *Blakely* was misplaced because his case had not been remanded for re-sentencing on the five affirmed convictions. CP 50-84. The State argued that the unchallenged exceptional sentences and corresponding convictions were final at the time that *Blakely* had issued, and that the court only needed to correct the judgment without conducting a full re-sentencing. CP 50-84. The court agreed that a full re-sentencing hearing was not necessary. The trial court stated:

The Defendant's case was final in October or November of 2002. I am not re-sentencing the Defendant based upon the decisions of the higher court. Rather, I am correcting the Judgment and Sentence, and that's what we need to accomplish.

RP 13. On October 27, 2005, the trial court entered two orders. The first order reflected the trial court's determination that defendant was not entitled to a new sentencing hearing. CP 100-101, Appendix B. The second order corrected the judgment and sentence by striking the two counts which had been reversed and adjusting defendant's offender score from an "18" to a "12" on the remaining counts. CP 102-104, Appendix C. Despite the reduction in offender score, defendant's standard sentencing range did not change for any of the remaining counts. CP 102-104.

On November 22, 2005, defendant filed a timely notice of appeal from entry of the order correcting the judgment and sentence. The State filed a motion to dismiss the appeal pursuant to *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993). A commissioner of the Court of Appeals denied the State's motion to dismiss appeal without prejudice. After hearing oral argument, the Court of Appeals granted the State's motion to dismiss the appeal in a split decision. Defendant successfully petitioned this court for review.

C. ARGUMENT.

1. UNDER WELL-SETTLED LAW AS TO THE FINALITY OF JUDGMENTS FOR RETROACTIVITY ANALYSIS, DEFENDANT'S CASE WAS FINAL BEFORE THE DECISION IN **BLAKELY** ISSUED; THEREFORE, HE WAS NOT ENTITLED TO RE-SENTENCING.

On June 24, 2004, the United States Supreme Court issued *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), which stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. at 301 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000)). While *Blakely* represented a sea change in sentencing law, it does not apply retroactively to cases that were final when *Blakely* was announced. *State v. Evans*, 154 Wn.2d 438, 448, 114 P.3d 627, cert. denied, 126 S. Ct. 560, 163 L.Ed.2d 472 (2005). "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S. Ct. 948, 127 L.Ed.2d 236 (1994), citing *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6, 93 L.Ed.2d 649, 107 S. Ct. 708 (1987). Washington has adopted this standard. *In re*

Pers. Restraint of St. Pierre, 118 Wn.2d 321, 327, 823 P.2d 492 (1992)
(quoting *Griffith v. Kentucky*, 479 U.S. at 321 n.6).

It is important not to confuse the different standards for determining “finality” for retroactivity analysis with the standard for determining “finality” for the application of the statute of limitations for collateral attacks.¹ Like Washington, the federal case law has various definitions of “finality” depending on the context. See, *Burrell v. United States*, 467 F.3d 160, 163-164 (2nd Cir. 2006); *Derman v. United States*, 298 F.3d 34, 40 (1st Cir. 2002). Under Washington law, there is only one circumstance that will result in a conviction will be “final” for the purposes of retroactivity analysis on the same date that it is “final” for the purposes of filing a timely collateral attack; in most situations, the “finality” dates will be different.

In Washington, the time limit for filing a timely collateral attack has been set by the Legislature:

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

- (a) The date it is filed with the clerk of the trial court;
- (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

¹ Generally these collateral attacks are brought under RCW 10.93.090 in the state system or under 28 U.S.C. §2255 in the federal system.

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RCW 10.73.090(3). In contrast, the finality for retroactivity will occur when the *availability* for direct appeal has been exhausted, which is at the latest of: 1) thirty days after the judgment is filed in the superior court if no notice of appeal is filed (RAP 5.2); or 2) thirty days after the Court of Appeals renders a decision in a direct appeal if no petition for review in the Supreme Court is filed (RAP 13.4); or 3) ninety days after the Washington Supreme Court denies the petition for review, issues its decision on the case, or denies a motion for reconsideration of its decision (USSC Supreme Ct R 13); or 4) when the United States Supreme Court denies a timely filed petition for certiorari. It is only when the finality date for a timely filed collateral attack is established by the denial of a timely filed petition for certiorari that this finality date will be the same as the finality date for retroactivity purposes.

In the petition for review, defendant argues that he was entitled to be resentenced under *Blakely* because his case was not final and cites to cases that are determining “finality” for the purposes of the filing of a collateral attack (pursuant to RCW 10.73.090 and 28 U.S.C. §2255) rather than cases assessing “finality” for the purposes of retroactivity analysis as

if these definitions of “finality” are interchangeable. *See* Petition for Review at pp 9-10, citing *In re Skylstad*, 160 Wn.2d 944, 162 P.3d 413 (2007)(finality for determining the timeliness of a personal restraint petition); *United States v. Colvin*, 204 F.3d 1221 (9th Cir. 2001) (finality for determining the timeliness of a §2255 motion); *United States v. La Fromboise*, 427 F.3d 680 (9th Cir. 2005)(finality for determining the timeliness of a §2255 motion). The dissenting opinion of Judge Armstrong of the Court of Appeals also relies on some of these decisions, improperly looking to cases discussing “finality” for the purpose of determining the timeliness of a collateral attack as authority for “finality” for the purposes of retroactivity analysis. The correct and well-settled, standard for determining “finality” for retroactivity analysis is set forth in *Caspari*, *Griffith*, and *St. Pierre*.

In this case, defendant’s underlying premise is that he had a right to be re-sentenced under *Blakely*. He fails with this argument because the convictions and sentences on which he sought re-sentencing were final for the purposes of retroactivity analysis long before the *Blakely* decision issued. Defendant directly appealed his convictions to the Court of Appeals, and later to the Supreme Court. The decision of the Supreme Court left intact five convictions and their corresponding exceptional sentences, which had never been challenged. The availability of direct review in the state court system of the five affirmed convictions and their corresponding exceptional sentences ended on September 22, 2002,

twenty days after the Washington State Supreme Court issued its decision *State v. Kilgore*, 147 Wn.2d at 288 (filed on September 12, 2002), when defendant did not file a motion for reconsideration. RAP 12.4(b). Any ability for the Washington Supreme Court to change or alter its decision ended when it issued its mandate on October 7, 2002. CP 8-21; RAP 12.5(b); *see also State v. Hunt*, 76 Wn. App. 625, 629, 886 P.2d 1170 (1995)(finding right to appeal exhausted when the appellate court issues its mandate). The case became final for the purposes of retroactivity analysis when the time for a petition for certiorari elapsed on Wednesday, December 11, 2002,² which was 90 days after the Washington Supreme Court issued its opinion. USCS Supreme Ct R 13. This is nearly a year and a half prior to the decision issuing in *Blakely*. Accordingly, defendant cannot assert a *right* to have the holding in *Blakely* apply to the exceptional sentences on defendant's five affirmed convictions.

Defendant has never articulated what right to a direct appeal he had after December 11, 2002, or how he could have proceeded to file another direct appeal in his case at that juncture. It is this availability of a direct appeal that is critical to the determination of finality for

² The only disagreement the State has with the majority decision of the Court of Appeals below is that it held defendant's convictions were "final" for the purposes of retroactivity analysis when the Supreme Court issued its mandate on October 7, 2002. The State contends that the proper finality date is the expiration of the time to file a timely petition for certiorari on December 11, 2002. *See argument, supra.*

retroactivity, and not whether the trial court has entered a corrected judgment to comply with the mandate after remand.

The Court of Appeals did not err in finding that the defendant's case was final for the purposes of retroactive application of the decision in *Blakely*. This court should affirm the decision below.

2. THE TRIAL COURT WAS NOT REQUIRED TO CONDUCT A RE-SENTENCING HEARING; IT PROPERLY ENTERED AN ORDER CORRECTING THE JUDGMENT AND SENTENCE.

After an appeal is taken, the trial court loses its jurisdiction over the subject matter of the appeal, and cannot change its judgment or orders entered before the appeal. *Sewell v. Sewell*, 28 Wn.2d 394, 396, 184 P. (2d) 76 (1947). The judgment of the Supreme Court is final and conclusive upon all the parties properly before it. RCW 2.04.220. The superior court can only enforce such a judgment. It is powerless to change it. *In re Ellern*, 29 Wn.2d 527, 529, 188 P.2d 146 (1947). While, a superior court does have the power and duty to correct an erroneous sentence upon discovery, see *In re Pers. Restraint of Call*, 144 Wn.2d 315, 332, 28 P.3d 709 (2001); *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999), it does not have the unlimited power to modify a correct sentence. *State ex rel. Schock v. Barnett*, 42 Wn.2d 929, 932-933, 259 P.2d 404 (1953).

In the direct appeal of defendant's case, the decisions of the appellate courts affirmed five of his convictions, vacated two convictions, and "remanded for further proceedings." Defendant never challenged the correctness of the exceptional sentences in his direct appeal; consequently no "further proceedings" were necessary or required on the five affirmed convictions and their corresponding exceptional sentences. When the State did not retry the two reversed convictions, the trial court had the power and obligation to remove the vacated convictions from the judgment and sentence.

When the matter came before the trial court to correct the judgment and sentence to conform it to the appellate decision, the court had to assess whether the vacation of two convictions required re-sentencing on the other five affirmed convictions. RP 3-13.

The State acknowledges that re-sentencing would be required if the elimination of two counts affected the standard range on the remaining five counts, or that it might be required if the reasons for the exceptional sentence were affected by the reversal of two convictions. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003); *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)(Imposition of an exceptional sentence requires a correct determination of the standard range.); *State v. Dunaway*, 109 Wn.2d 207, 219-20, 743 P.2d 1237, 749 P.2d 160 (1987)(When an appellate court invalidates some but not all of the aggravating reasons supporting an exceptional sentence, remand is appropriate to see whether

the trial judge would have imposed the same sentence had he considered only the valid aggravating factors.) Neither situation was present here.

The reversal of Counts I and II did not impact the applicable standard ranges for the remaining five counts. Under the provisions of the Sentencing Reform Act, once the offender score reaches 9, the standard sentencing range remains the same regardless of how many additional prior convictions are added. *State v. Argo*, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996). Defendant is correct that reversal of Counts I and II lowered his offender score, but it lowered it from a score of “18” to “12,” leaving the standard range unaffected. The reduction of the number of convictions might also affect the underlying basis for an exceptional sentence if the court relied upon the multiple offense policy as a reason for an upward departure. When the trial court imposed an exceptional sentence of 560 months on each of the original seven convictions, it did not mention the multiple offense policy as a basis for imposing the exceptional sentence. SRP 1583-1587. The court’s written findings of fact and conclusions of law regarding the imposition of an exceptional sentence make clear that it did not rely on the multiple offense policy as an aggravating factor supporting the exceptional sentences. CP 122-125. As there was no change to the underlying standard ranges, and no alteration or elimination of any of the aggravating factors supporting the exceptional sentences, there was no legal requirement necessitating a re-sentencing on the five affirmed convictions. The only thing that was

required was a deletion of the two reversed convictions from the judgment. This was accomplished by the order correcting the original judgment and sentence. CP 102-104.

Federal circuits are divided as to what authority a trial court has regarding the scope of a resentencing when the remanding court has not provided explicit direction; the question has been phrased as to whether a remand for resentencing should be limited in scope or *de novo*. See *United State v. Quintieri*, 306 F.3d 1217, 1228, n.6 (2002)(noting that the Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits follow a *de novo* sentencing default rule while the D.C., First, Fifth, and Seventh Circuits follow a default rule of limited resentencing where, unless the court of appeals expressly directs otherwise, the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision). The Second Circuit has not taken a clear position. Compare *United State v. Quintieri*, 306 F.3d at 1228, at n. 6, ("Today we conclude that when a resentencing results from a vacatur of a conviction, we in effect adhere to the *de novo* default rule of the Sixth, Eighth, Ninth, and Eleventh Circuit, because multiple convictions are "inextricably linked" in calculating the sentencing range under the guidelines ... But when a resentencing is necessitated by one or more specific sentencing errors, unless correction of those errors would undo the sentencing calculation as a whole or the "spirit of the mandate" otherwise requires *de novo* resentencing, we in effect adhere to the First, Fifth, Seventh, and

D.C. Circuit's default rule of limited resentencing.”) With *Burrell v. United States*, 467 F.3d 160, 165-166 (2006)(despite reversal of one of Burrell’s two convictions on appeal, the trial court was not required to conduct a *de novo* resentencing as reversal of conviction, did not affect the ‘knot of calculations’ under federal sentencing guidelines; the court finds that Burrell’s case was final prior to the issuance of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005))

3. AS THE ORDER CORRECTING THE JUDGMENT WAS NOT APPEALABLE UNDER THE CONTROLLING AUTHORITY OF *STATE v. BARBERIO*; THE COURT OF APPEALS CORRECTLY DISMISSED THE APPEAL.

At some point the appellate process must stop. *State v. Sauve*, 100 Wn.2d 84, 87, 666 P.2d 894 (1983). “This Court from its early days has been committed to the rule that questions determined on appeal or questions which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case. *State v. Sauve*, 33 Wn. App. 181, 185, 652 P.2d 967 (1982), citing *Davis v. Davis*, 16 Wn.2d 607, 609, 134 P.2d 467 (1943); *Sauve*, 100 Wn.2d at 87, 666 P.2d 894 (1983) (“Where, as in this case, the issues could have been raised on the first appeal, we hold they may not be raised in a second appeal”). The Rules of Appellate Procedure also require appellate restraint. RAP 2.5(c)(1) states:

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

This Court made it clear that despite the permissive language of RAP 12.5(c), this rule does not allow for review of every issue or decision which was not raised in an earlier appeal. *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993).

In that case, Barberio was convicted of one count of second degree rape, and one count of third degree rape. *Id.* at 49. The trial court imposed exceptional sentences on each count. *Id.* Barberio's direct appeal resulted in a reversal of the third degree rape charge. *Id.* On remand the State elected not to retry the third degree rape charge. *Id.* At the hearing on remand, Barberio challenged the aggravating factors found by the trial court in the first sentence, despite failing to challenge the exceptional sentences on appeal, and argued that his reduced offender score mandated a proportionate reduction in the exceptional sentence. *Id.* at 49-50. The trial court did not alter the original sentence. *Id.* On review, the Court of Appeals granted the prosecution's motion to dismiss

appeal of the exceptional sentence. *Id.* at 50. This Court took review of the Court of Appeals's decision. *Id.*

On review, this Court found that RAP 2.5(c) is permissive for both the trial court and the appellate court. *Barberio*, 121 Wn.2d at 51. It is discretionary for the trial court to decide whether to revisit an issue which was not the subject of appeal. *Id.* If the trial court does so, RAP 2.5(c)(1) states that the appellate court *may*, but is not required, to review such issue. The permissive aspect of the rule with respect to the appellate court, however, is dependant on the trial court exercising its discretion to revisit an issue. Only when the trial court exercises its independent judgment, reviews and rules again on an issue does it become an appealable question in the second appeal. If the trial court opts not to revisit an issue on remand, then there is nothing for an appellate court to review, and an appeal based upon such a claim should be dismissed. *Barberio*, 121 Wn.2d at 50-51.

Barberio controls the instant case. The deciding factor is whether the trial court on remand in this case did in fact independently review the exceptional sentences imposed for the five counts that had been affirmed on appeal. The trial court decided not to review or reconsider its earlier sentences in regards to the counts that were affirmed. The trial court issued an order to correct the judgment and sentence by striking the counts which had been reversed and adjusting the defendant's offender score. CP 102-104. The trial court made clear in its oral ruling that it was

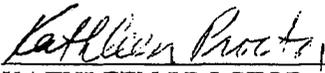
not considering anew its prior exceptional sentences as to the counts that were affirmed, and that it was not resentencing the defendant, despite defendant's urgings that the court should apply *Blakely v. Washington*. RP 13. Because the trial court opted not to reconsider its exceptional sentences that had not been challenged in the first appeal, there was nothing for the Court of Appeals to review with regard to the sentences. Under *Barberio*, it correctly determined that the appeal should be dismissed. That decision should be affirmed by this court.

D. CONCLUSION.

For the forgoing reasons, the State respectfully asks this court to affirm the decision of the Court of Appeals and dismiss the defendant's appeal.

DATED: September 9, 2008.

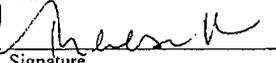
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9-9-08 
Date Signature

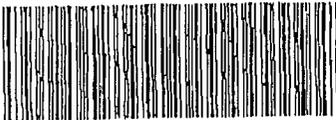
APPENDIX “A”

Findings of Fact/Conclusions of Law

1999-226

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By *[Signature]*
DEPUTY



98-1-04678-9 4844595 FNFL 09-07-08

ERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

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STATE OF WASHINGTON,

Plaintiff,

vs.

MARK PATRICK KILGORE,

Defendant.

CAUSE NO. 96-1-04678-9

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR
EXCEPTIONAL SENTENCE

5 SEP 10 1999

THIS MATTER having come on before the Honorable VICKI HOGAN,
Judge of the above entitled court, for sentencing on three counts
RAPE OF A CHILD IN THE FIRST DEGREE and four counts of CHILD
MOLESTATION IN THE FIRST DEGREE, the defendant, MARK PATRICK KILGORE,
having been present and represented by his attorney, Mike Schwartz,
and the State being represented by Deputy Prosecuting Attorney Kent
Liu, and the court having considered all argument from both parties
and having considered all written reports presented, and deeming
itself fully advised in the premises, does hereby make the following
Findings of Fact and Conclusions of Law by a preponderance of the
evidence.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 1

ORIGINAL

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

96-1-04678-9

FINDINGS OF FACT

I.

That the defendant was found guilty by jury trial of three counts of RAPE OF A CHILD IN THE FIRST DEGREE and four counts of CHILD MOLESTATION IN THE FIRST DEGREE. That the standard range sentence for RAPE OF A CHILD IN THE FIRST DEGREE is 210 to 280 months imprisonment. The standard range sentence for CHILD MOLESTATION IN THE FIRST DEGREE is 149 to 198 months imprisonment.

II.

That the factors set forth by the Prosecuting Attorney in the State's sentencing recommendation are applicable and are aggravating factors in the instant offense for the reasons set forth by the Prosecuting Attorney, to-wit:

A. The defendant violated a position of trust:

1. The defendant placed himself in a position of trust and utilized that position of trust. For the victims, D.O. and T.O., the defendant stood as a father figure. D.O. and T.O. lived with the defendant at his invitation. The defendant's wife was absent from the home and left the

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 2

96-1-04678-9

defendant in a position of caretaking responsibilities for the victims, A.B., D.O. and T.O.

2. As to C.M., the defendant was residing or staying with the Mann household, and in fact, volunteered to babysit C.M. over a course of several months.

3. To A.B., the defendant stood in a step-parent relationship from 1993 to 1995. This is a prolonged period of time to demonstrate a position of trust and to utilize that position of trust.

B. The victims were particularly vulnerable, not due to their age alone, but because of the relationships between the victims and the defendant. The defendant had practically

unchecked access to the children and used his position of trust and confidence to facilitate the offense.

C. The court has observed no remorse on the part of the defendant despite the jury verdict, and no acceptance of responsibility for the acts which were committed.

III

Other aggravating circumstances included:

A. Multiple victims and multiple incidents per victim.

B. The defendant's conduct manifested deliberate cruelty to the victims. He provided them with alcohol to the point of intoxication w/ no concern for the safety of the children.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 3

96-1-04678-9

CONCLUSIONS OF LAW

I.

That there are substantial and compelling reasons justifying an exceptional sentence outside the standard range.

II.

That the defendant MARK PATRICK KILGORE, should be incarcerated in the Department of Corrections for a determinate period of 560 months.

DONE IN OPEN COURT this ~~20th~~ ^{September} day of ~~August~~, 1999.

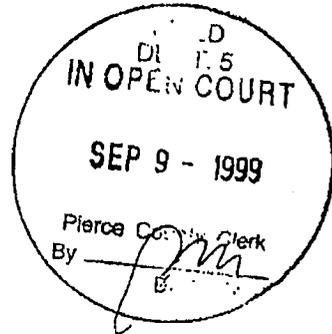
Vicki J. Hooper
J U D G E

Presented by:

[Signature]
Kent Wini
Deputy Prosecuting Attorney

Approved as to Form:

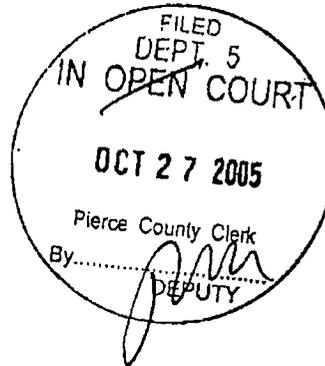
Mike Schwartz 21824
Mike Schwartz
Attorney for Defendant



FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 4

APPENDIX "B"

Order



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 96-1-04678-9

vs.

MARK PATRICK KILGORE,

ORDER

Defendant.

THIS MATTER having come on regularly before the Honorable Vicki Hogan, the defendant having waived his presence and appearing through Counsel, Mr. Jim Dixon, the State being present and represented by Mary E. Robnett, the court having reviewed the file, the memoranda, and other materials submitted by the parties, and the court having heard the arguments of counsel and being duly advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This case was final October 2, 2002;
2. Defendant is entitled to an order correcting Judgment and Sentence, striking Counts I and II and correcting the offender score from 18 to 12 on the remaining five counts;
3. The defendant is not entitled to a new sentencing hearing;

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5) All other terms and conditions of the original Judgment and Sentence shall remain in full force and effect as if set forth in full herein.

DATED this 27 day October, 2005. NUNC PRO TUNC to November 1, 2002.

Vicki L Hogan

JUDGE

Presented by:

Mary E. Robnett

MARY E. ROBNETT
Deputy Prosecuting Attorney
WSB# 21129

Approved as to form and Notice
Of Presentation Waived:

James Robert Dixon

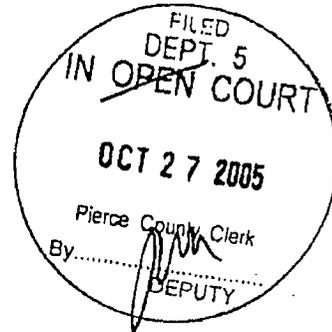
JAMES ROBERT DIXON
Attorney for Defendant
WSB# 18014

FILED
DEPT. 5
IN OPEN COURT
OCT 27 2005
Pierce County Clerk
By *JM*
DEPUTY

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APPENDIX “C”

Motion and Order Correcting Judgment and Sentence



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 96-1-04678-9

vs.

MARK PATRICK KILGORE,

MOTION AND ORDER CORRECTING
JUDGMENT AND SENTENCE

Defendant.

THIS MATTER coming on regularly for hearing before the above-entitled court on the Motion of the Deputy Prosecuting Attorney for Pierce County, Washington, for an order correcting Judgment and Sentence heretofore imposed on the above-named defendant on December 1, 1998, pursuant to the jury verdict of guilty on the charges of Child Molestation in the First Degree and Rape of a Child in the First Degree, as follows:

1) That Page #1 of the Judgment and Sentence, Section 2.1 reflects Counts I and II, which should be stricken from the Judgment and Sentence; the verdicts on Counts III, VI, V, VI, and VII remain;

2) That Page #3 of the Judgment and Sentence, Section 2.3 and Section 2.4 reflect Counts I and II, which should be stricken from the Judgment and Sentence; Counts III, VI, V, VI, and VII remain;

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3) That Page #3 of the Judgment and Sentence, Section 2.3 reflects an offender score of 18 on Counts III, VI, V, VI, and VII and should note an offender score of 12 on Counts III, VI, V, VI and VII.;

4) That Page #6 of the Judgment and Sentence, Section 4.2 reflect Counts I and II, which should be stricken from the Judgment and Sentence; Counts III, VI, V, VI, and VII remain;

5) That all other terms and conditions of the Judgment and Sentence are to remain in full force and effect as if set forth in full herein; and the court being in all things duly advised, Now, Therefore, It is hereby

ORDERED, ADJUDGED and DECREED that the Judgment and Sentence granted the defendant on December 1, 1998, be and the same is hereby corrected as follows:

1) Page #1 of the Judgment and Sentence, Section 2.1 is corrected as follows:

a) Counts I and II are stricken;

2) Page #3 of the Judgment and Sentence, Section 2.3 is corrected as follows:

a) Counts I and II are stricken;

b) an offender score of 18 on Counts III, VI, V, VI, and VII is deleted, and

b) an offender score of 12 on Counts III, VI, V, VI and VII. is inserted instead.

3) Page #3 of the Judgment and Sentence Section 2.4 is corrected as follows:

a) Counts I and II are stricken and it reads as follows: "Substantial and compelling reasons exist which justify an exceptional sentence abovd the standard range for Counts III through VII."

4) Page #6 of the Judgment and Sentence, Section 4.2 is corrected as follows:

a) Counts I and II are stricken from the Judgment and Sentence;

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4. The defendant's request to reduce the appellate costs previously imposed is denied.

DATED this 27 day of October, 2005.

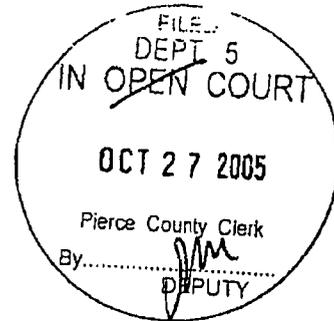
Nick L Hogar
JUDGE

Presented by:

Mary E Robnett
MARY E. ROBNETT
Deputy Prosecuting Attorney
WSB # 21129

Jim Dixon
JIM DIXON
Attorney for the Defendant
WSB # 18014

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