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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 86117-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ROWLAND,

Petitioner.

---

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

---

PETITIONER'S SUPPLEMENTAL BRIEF

---

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ORIGINAL

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A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED.

Under Blakely v. Washington,<sup>1</sup> it violates the constitutional right to a fair trial by jury for a judge to decide that aggravating circumstances justify imposing an exceptional sentence greater than the standard range. Before Blakely, a judge ordered that Michael Rowland serve an exceptional sentence based on an aggravating factor that was not proven to the jury beyond a reasonable doubt. In 2009, Rowland won a new sentencing hearing because his offender score was wrong. The judge shortened Rowland's overall sentence but insisted that the facts justified an exceptional sentence regardless of the current law. The new sentence rests on a longer exceptional sentence than the judge ordered in 1991.

When a court resentences a person for a crime, and after considering its options, it imposes an exceptional sentence based on an aggravating circumstance that was never found by the jury, has the court impermissibly disregarded the governing sentencing statutes and constitutional right to a fair jury trial as dictated by current law?

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<sup>1</sup> 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

B. STATEMENT OF THE CASE.

Following a jury trial at which conflicting versions of events were presented, Michael Rowland was convicted of first degree murder under a theory of accomplice liability. CP 80-84, 94. In 1991, the court sentenced Rowland to 541 months in prison based on the high end of the standard range for an offender score of "3," plus another 180 months based on the court's determination that the aggravating factor of "deliberate cruelty" justified a sentence greater than the standard range. CP 103.

In 2009, the Court of Appeals remanded Rowland's case "for resentencing" because his offender score was incorrect, an error which the State conceded after Rowland filed a personal restraint petition. In re Pers. Restraint of Rowland, 149 Wn.App. 496, 503, 509, 204 P.3d 953 (2009).

At the resentencing hearing, the victim's sister and two brothers asked the court to give Rowland a longer exceptional sentence of 25 years, in addition to the standard range, in light of the now-reduced offender score. RP 11, 13, 17.<sup>2</sup> The prosecution asked the court to reduce Rowland's sentence based on the lower

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<sup>2</sup> The transcript from the resentencing hearing held on September 16, 2009 is referred to herein as "RP."

offender score but also to impose an exceptional sentence. RP 5. Rowland argued that since the court did not accurately understand the standard range when it sentenced him originally, the court should treat this proceeding as its first opportunity to impose a correct sentence. RP 18. Rowland apologized for the terrible things he had done and assured the court he had been trying to better himself while in prison. RP 21-22.

The trial court acknowledged its discretionary authority. RP 23-26. The judge said, "I very well can sentence you down or up." RP 24. He explained he had thought about the case and considered his options. RP 24. He continued to believe Rowland deserved an exceptional sentence but also thought his sentence should be reduced in accordance with the change in his standard range. RP 24. The judge shortened Rowland's sentence to the high end of the reduced standard range, a difference of 14 months. RP 25.<sup>3</sup> He decided to again impose the exceptional sentence based on the judicially-found aggravating factor on which he relied

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<sup>3</sup> Rowland's standard range was originally calculated as 271-361 months. CP 99. His range decreased to 261-347 months with an offender score of "2." CP 14. His range would be lower still, 250-333 months, if his offender score was "1." CP 21.

in 1991. RP 25. The judge imposed an exceptional sentence of 527 months imprisonment. RP 25.

Also at this resentencing hearing, the parties disputed whether Rowland's criminal history score was "2" or "1." RP 2; CP 24-26. The personal restraint petition that prompted Rowland's resentencing was based on the legal comparability of a prior out-of-state burglary conviction. CP 40. However, at his sentencing hearing he explained there was another error in his offender score: two concurrent convictions entered before 1986 must be treated as a single point under controlling law.<sup>4</sup> CP 24-26.

The court decided to treat Rowland's offender score as "2" but offered the proviso that if the Court of Appeals ruled that the score should be "1," it would still impose the same sentence. RP 22, 29. The court ruled that if Rowland's criminal history was "1," then "in essence the exceptional sentence would increase." RP 29.

This scenario proved true on appeal. The Court of Appeals agreed that Rowland's criminal history score should be "1." State v. Rowland, 160 Wn.App. 316, 331, 249 P.3d 645, rev. granted, 172 Wn.2d 1014 (2011). But because the judge indicated he

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<sup>4</sup> This error is explained in more detail in Appellant's Opening Brief, at 17-21. The State conceded this legal error in its Response Brief, at 12.

would impose the same exceptional sentence even if Rowland's standard range decreased, the Court of Appeals declined to order a new sentencing hearing. *Id.* at 332-34. Instead, it directed the trial court to clerically correct the standard range but without any further resentencing proceedings. *Id.* at 333. Therefore, Rowland received a longer exceptional sentence after his 2009 resentencing hearing than he had received in 1991. RP 29.

C. ARGUMENT.

WHEN A CASE IS REMANDED FOR  
RESENTENCING, THE SENTENCING JUDGE IS  
BOUND BY CURRENT LAW AND  
CONSTITUTIONAL PRINCIPLES AND MAY NOT  
IMPOSE AN ILLEGAL SENTENCE

1. *Apprendi* and *Blakely* bar a court from exceeding the standard range based on factual findings that the jury never made. A judge exceeds her constitutional authority if she imposes a sentence based on factual determinations that are made by the judge, not the jury, and are not proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.435 (2000); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 21, 22. In *Apprendi*, the defendant was convicted of unlawful possession of a firearm, which had a statutory penalty range of 5 to 10 years. *Id.* at 470. But the trial court sentenced him to 12 years

of imprisonment, based on its own determination that the defendant “was motivated by racial bias.” Id. at 471. The Supreme Court held that any “penalty-enhancing findings” must be proved to the jury beyond a reasonable doubt. Id. at 472, 490.

The Supreme Court extended the reach of Apprendi in Blakely, where the Court invalidated this state’s exceptional sentencing scheme because it permitted courts to impose sentences greater than the standard range based on facts found by a judge and proven by only a preponderance of the evidence. 542 U.S. at 304-05. In Blakely, the defendant pled guilty to a kidnapping offense with a standard range of 49 to 53 months. Id. at 299. The judge imposed a 90-month sentence after it decided that he acted with “deliberate cruelty,” a statutorily enumerated aggravating factor. Id. at 300. The Court ruled that any fact increasing punishment beyond the standard sentencing range constitutes an element that must be proved to the jury beyond a reasonable doubt. Id. at 306-07.

Like Mr. Blakely, Rowland received an exceptional sentence based on the court’s finding that he acted with “deliberate cruelty,” under the now-invalidated exceptional sentencing scheme. CP 98-103. Because Blakely was decided after Rowland’s original

sentence was imposed, the trial court decided it would be “unfair” apply that decision to his resentencing. RP 23. As explained below, Apprendi and its progeny dictate the constitutional parameters of a court’s authority when resentencing a person whose original sentence was reversed due to the erroneous calculation of his sentencing range.

2. Even at a resentencing hearing, the court may not disregard currently binding law. It is axiomatic that the court’s sentencing authority is derived solely from statute and is further cabined by the requirements of the constitution. See Blakely, 542 U.S. at 305-06; State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007).

Under the governing sentencing scheme, the court must accurately determine an offender’s standard range before it may consider exceeding the standard range by imposing an exceptional sentence. State v. Parker, 132 Wn.2d 182, 187, 937 P.3d 575 (1997); RCW 9.94A.505(2)(a)(i).

[W]hen imposing an exceptional sentence the court must first consider the presumptive punishment as legislatively determined for an ordinary commission of the crime before it may adjust it up or down to account for the compelling nature of the aggravating or mitigating circumstances of the particular case.

Parker, 132 Wn.2d at 187; see also State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) (“A correct offender score must be calculated before a presumptive or exceptional sentence is imposed.”); State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) (resentencing required when court cited “potentially erroneous offender score” as factor in imposing exceptional sentence).

A court does not have inherent authority to impose an exceptional sentence. Pillatos, 159 Wn.2d at 469 (“no such inherent authority exists” for court to create own procedures to impose sentence above standard range). It would “usurp the power of the legislature” for the court to create a procedure to impose an exceptional sentence that is not authorized by statute. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005); overruled in part on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

RCW 9.94A.537(2) expressly addresses the court’s authority to impose an exceptional sentence in a remanded case:

*In any case* where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were

relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(emphasis added.). Although the statute says the court “may” impanel a jury, this procedure is optional only to the extent that the State may not wish to pursue an exceptional sentence in a remanded case. If the State seeks an exceptional sentence, the facts supporting an aggravating circumstance “shall be proved to a jury beyond a reasonable doubt.” RCW 9.94A.535(2), (3); RCW 9.94A.537(3).<sup>5</sup>

These statutory mandates were enacted as a “Blakely fix,” to provide a procedure for imposing an exceptional sentence when resentencing occurs. State v. McNeal, 142 Wn.App. 777, 790-91, 175 P.3d 1139 (2008) (citing Pillatos, 159 Wn.2d at 468 n.5); accord State v. Powell, 167 Wn.2d 672, 678, 223 P.3d 493 (2009). “The resentencing provision” contained in RCW 9.94A.537(2) “applies in cases such as the instant where the defendant’s trial began prior to the 2005 amendment and there has been a remand for a new sentencing hearing.” Powell, 167 Wn.2d at 679. It applies in any case where the defendant is being resentenced but

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<sup>5</sup> Narrow exceptions to the jury trial requirement for exceptional sentences based solely on criminal history or a stipulation by the parties are not pertinent here. RCW 9.94A.535(2).

not retried. Id. RCW 9.94A.537(2) describes the circumstances of Rowland's case: he previously received an exceptional sentence and "a new sentence hearing is required."

3. After the court ruled that Rowland's original sentence was erroneous, that original sentence was no longer the final judgment in his case. When a case returns to the trial court after an appellate remand for resentencing, the prior sentence is no longer the final judgment in the case. See State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009). As the Court of Appeals explained in a case similar to Rowland's, "[o]nce we vacated McNeal's original sentence, there was no longer a final sentence, the case was no longer final, and the trial court, therefore, erred when it found that Blakely did not apply to McNeal's resentencing on remand." McNeal, 142 Wn.App. at 787-88; accord State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (when case is "remanded for resentencing," it means that the "entire sentence was reversed, or vacated . . . [and] the finality of the judgment is destroyed.").

The only exception is when the resentencing court acts in a purely ministerial capacity and does not exercise any discretion. Kilgore, 167 Wn.2d at 37; McNeal, 142 Wn.App. at 786-87. When a court exercises any discretion in a resentencing hearing, the

finality of the sentence runs from the entry of the new sentence.

Kilgore, 167 Wn.2d at 41.

In Kilgore, the defendant originally received five concurrent exceptional sentences, but after two convictions were reversed on appeal, the State elected not to re-prosecute those overturned charges. Id. at 33. Instead of resentencing Mr. Kilgore, the trial court simply excised the overturned counts from the judgment and sentence. Id. at 34. The amended sentence did not alter the amount of incarceration imposed because the original sentence consisted of identical concurrent exceptional sentences imposed for all offenses. Id.

Because Mr. Kilgore was originally sentenced before Blakely but his sentence was amended after Blakely, he argued that he should receive a new sentencing hearing based on the change in the law following Blakely. Id. at 31. This Court agreed that if the court had exercised its discretion and revisited Kilgore's sentence, Kilgore could raise new sentencing issues under current law. Id. at 38-39. But where the court acts as it did in Kilgore and strikes parts of the sentence without exercising any discretion, there has not been a "resentencing" hearing that requires the court to reevaluate any of its prior decisions. Id. at 42-43; see also

Harrison, 148 Wn.2d at 563 (when case remanded for resentencing, manifest injustice to bind trial court to prior decision to impose exceptional sentence).

Rowland's resentencing was not purely ministerial or clerical in nature, unlike Kilgore. Not only did the judge have discretion to impose a different sentence, the judge exercised that discretion. RP 23-25. He imposed a different term of confinement based on a different offender score for a single offense after reconsidering what sentence to impose. Id.

Other jurisdictions are in accord. In State v. Fleming, 61 So.3d 399, 401 (Fla. 2011), the Supreme Court of Florida addressed whether Apprendi and Blakely apply at a resentencing hearing when the defendant's convictions were final before Apprendi. The court held that even where a sentence was final, it does not "remain final" when a sentencing error makes resentencing necessary. Id. at 404. If resentencing is required, "the full panoply of due process considerations attach." Id. at 406 (internal citation omitted). Even though Apprendi and Blakely did not retroactively apply to accord Fleming an independent basis to obtain relief, once resentencing is ordered, "Apprendi and Blakely

were current law and applicable to Fleming's resentencing." Id. at 408. Id.

The court reached the same result in State v. Hollingquest, 250 P.3d 366, 369 (Or.App. 2011), where it explained that while Blakely does not apply retroactively to cases on collateral review, "a remand for resentencing is not equivalent to collateral review; it is something that occurs in the course of a *direct review* of a criminal case." (emphasis in original). Put another way, "when a criminal case is before a court for resentencing . . . , the court must impose a sentence that is constitutional at the time of the resentencing." Id.; see also Kline v. State, 875 N.E.2d 435, 438 (Ind. Ct.App. 2007) (observing, in case where "pre-Blakely conviction" was remanded for resentencing in "post-Blakely world," that trial court must comply with the "current state of constitutional law" and any facts used to enhance the defendant's sentence must be found pursuant to Blakely ).

Likewise, the United States Supreme Court invalidated a statute that bound a resentencing court to rely on judicially-found facts from a prior sentencing hearing, because it was contrary to the Sixth Amendment restrictions on judicial fact-finding. Pepper v. United States, \_\_ U.S. \_\_, 131 S.Ct. 1229, 1244-45, 179 L.Ed.2d 196

(2011). The Court further ruled that a sentence is “a package of sanctions.” *Id.* at 1251. When there was an error in the original sentence, on resentencing the judge revisits that package of sanctions because the judge’s intent “may be undermined by altering one portion of the calculus.” *Id.*

Similarly, a person may raise claims based on current law after the prior judgment is found to be erroneous. When there has been a new sentencing hearing, “where the state court conducted a full resentencing and reviewed the aggravating evidence afresh,” the new sentence constitutes a new judgment for purposes of finality. *Magwood v. Patterson*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2788, 2801, 177 L.Ed.2d 592 (2010). Errors that underlie the new sentence may be raised on appeal, even if those same errors could have been raised in an earlier appeal, because “[a]n error made a second time is still a new error.” *Id.*

4. Rowland received a new sentencing hearing when the Court of Appeals remanded his case after finding he had been sentenced under an erroneous offender score. At the 2009 resentencing hearing, the trial court exercised its discretion in three ways: (1) it acknowledged its discretion to sentence Rowland “down or up,” meaning to more or less time; (2) using this discretion, it

reduced Rowland's sentence; and (3) further exercising its discretion, the court explained that if it erred by scoring Rowland's criminal history at two points rather than one point, there would be no need for any further resentencing hearing because it would impose the same term of confinement, so that "in essence the exceptional sentence would increase." RP 24, 29.

The Court of Appeals looked to State v. Barberio, 121 Wn.2d 48, 51-52, 846 P.2d 519 (1993), as authority explaining the court's discretion to reimpose the same exceptional sentence after a remand, but this comparison is inapt. 160 Wn.App. at 325. First, Barberio was issued long before Blakely, at a time when judicially determined facts sufficed as the basis for an exceptional sentence. Second, in Barberio, the court did not hold a resentencing hearing, but instead it struck one conviction that was overturned on appeal and left a second conviction intact. 121 Wn.2d at 51. The resentencing judge said, "I really don't know why it would be necessary for me to revisit the issue of the sentence that the Court imposed on Count I since the Court imposed the sentence on each count separately and makes a determination separately as to each count." Id. The court did not alter Barberio's sentence imposed for a single offense, as the court did in Rowland's case.

Not only did the court alter Rowland's sentence after considering the length of the term to impose upon resentencing, the court ultimately increased Rowland's exceptional sentence. The court insisted that Rowland should receive a sentence of 527 months imprisonment no matter whether the high end of the standard range was 347 months under an offender score of "2," or 333 months under an offender score of "1." RP 29. On appeal, the prosecution conceded that the offender score should be "1" based on the correct legal calculation of Rowland's prior convictions, and the Court of Appeals agreed.<sup>6</sup> Yet the Court of Appeals refused to grant Rowland a new sentencing hearing because the trial judge indicated he thought Rowland deserved a longer exceptional sentence if his offender score was lower than "2." 160 Wn.App. at 322, 324.

This final salvo unequivocally demonstrates the discretionary nature of the resentencing proceeding. Rowland has received a more onerous, punitive, and longer exceptional sentence that far

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<sup>6</sup> The prosecution conceded the legal error in the calculation of Rowland's offender score but claimed Rowland was procedurally barred from obtaining relief. Resp. Br. at 11. The Court of Appeals properly rejected this argument, since it has long been the case that "the trial court has the power and duty to correct the erroneous sentence, when the error is discovered." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); Rowland, 160

exceeds the court's authority based on the jury's verdict alone. He is entitled to be resentenced within the term authorized by the jury's verdict.

5. The lack of jury finding entitling the court to increase Rowland's sentence cannot be deemed harmless. The failure to charge, or ask the jury to determine, an element essential to punishment is not an error that can be cured by an appellate court's assessment of the case. State v. Williams-Walker, 167 Wn.2d 889, 897-98, 225 P.3d 913 (2010) (holding that article I, section 21 bars a trial judge from imposing a firearm enhancement when the jury has been asked only to find that the accused possessed a deadly weapon); State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (“[w]ithout a jury determination that he was armed with a ‘firearm,’ the trial court lacked authority to sentence Recuenco for the two additional years that corresponded to the greater enhancement.”).

If “guilty verdicts alone” are insufficient to impose a firearm enhancement even when there is no substantive dispute that the accused used a firearm, a guilty verdict alone is insufficient to

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Wn.App. at 321.

sentence Rowland for first degree murder while acting with “deliberate cruelty.” Williams-Walker, 167 Wn.2d at 899. As the Court of Appeals decision from Rowland’s original direct appeal demonstrates, the trial consisted of substantial “conflicting versions” about who did what in the course of the incident. CP 80-84. Even when imposing the exceptional sentence, the court could not determine which of the participants in the incident took the most egregious actions that the court relied on for its determination that the aggravating circumstance applied. CP 94. It was “impossible to know” who acted with “deliberate cruelty,” but under then-existing law, the judge’s assessment of the evidence permitted an exceptional sentence. CP 94-95.

In State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010), this Court recognized the “heavy toll” extracted by a second trial on the isolated issue of whether an aggravating circumstance applies in a case. Second trials are expensive, difficult to mount, and clog a court docket in which many other pending cases compete to be litigated. Id. Where “a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.” Id. at 146-47. The

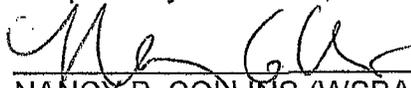
standard sentencing range Rowland faces is substantial. Based on the high costs of relitigating the exceptional length of the penalty the State seeks -- costs which will have increased due to the State's refusal to provide a jury trial at the resentencing hearing in 2009 -- Rowland should be resentenced to a standard range term based on the verdict that the prosecution sought and the jury returned.

D. CONCLUSION.

For the foregoing reasons, Michael Rowland respectfully requests this Court hold that he was denied his right to fair trial by jury when the court imposed an exceptional sentence above the standard range.

DATED this 17<sup>th</sup> day of November 2011.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Respondent,

MICHAEL ROWLAND,  
Petitioner.

NO. 86117-0

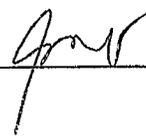
**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF NOVEMBER, 2011, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2011.

X \_\_\_\_\_ 

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