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Supreme Court No. _____
(COA No. 64262-6-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ROWLAND,

Petitioner.

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JUN 15 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

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PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER.

Michael Rowland, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Rowland seeks review of the published Court of Appeals decision entered on February 28, 2011, a copy of which is attached hereto as Appendix A. The Court of Appeals denied Rowland's motion to reconsider on May 6, 2011, a copy of which is attached as Appendix B.

C. ISSUES PRESENTED

1. When an appellate court remands a case for resentencing on a single count, and the judge imposes a new sentence, the prior judgment imposed on that count is no longer final or binding, as this Court ruled in Kilgore.¹ Rowland previously received an exceptional sentence based on solely on factual findings by a judge. When the judgment was remanded for resentencing and the judge reconsidered whether the exceptional sentence should stand, altered the length of the sentence imposed,

and decided to maintain a similar exceptional sentence above the standard range, did the judge impose a new sentence as dictated by Kilgore?

2. When a defendant received an exceptional sentence above the standard range that was final before Blakely,² but that sentence is later reversed and remanded for resentencing after Blakely, Blakely applies at the resentencing hearing, as the Court of Appeals held in McNeal³ and Kilgore. Under Blakely, the court must empanel a jury to determine whether the State has proven the aggravating factors necessary for an exceptional sentence.

Division One of the Court of Appeals refused to follow the Division Two decision in McNeal because it disagreed with its logic. Should this Court grant review to resolve this conflict between published decisions in the Court of Appeals?

3. The Court of Appeals ruled that Rowland's offender score remains erroneous but did not order a new resentencing hearing. Is Rowland entitled to a new resentencing hearing and must the trial court exercise its discretion anew based on a correct understanding of his standard range sentence?

¹ State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009)

² Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

³ State v. McNeal, 142 Wn.App. 777, 787-88, 175 P.3d 1139 (2008)

D. STATEMENT OF THE CASE.

In 1991, Michael Rowland was convicted of first degree murder under a theory of accomplice liability, and he received an exceptional sentence above the standard range based on the court's finding that the crime was "deliberately cruel." CP 98, 103.

Several years later, the Court of Appeals granted Rowland's personal restraint petition and ruled that Rowland's offender score had been incorrectly calculated by including an out of state conviction that was not comparable to a Washington burglary. CP 61, 72.⁴ The court remanded Rowland's case "for resentencing." Id. In its decision remanding the case, the court noted that it did not necessarily agree with the State's concession that on remand, Rowland a jury would need to be impaneled if the State sought an exceptional sentence. CP 70-72. Instead, it declined to decide whether Rowland would be entitled to a jury finding for the basis of the exceptional sentence in the event the State sought such a sentence. CP 70-72.

At the 2009 resentencing following remand, the court held a lengthy hearing. It heard from three members of the victim's family, the prosecution, and the defense regarding the sentence it should

impose. 9/16/09RP 2-22. The court acknowledged that Rowland's offender score was now lower and it had the authority to sentence Rowland "up or down," with either more time or less. 9/16/09RP 24. The court stated its belief that Blakely did not restrict its power to impose a sentence greater than the standard range and imposed an exceptional sentence for the same reason as it had initially, based on the court's factual finding that the crime was committed with deliberate cruelty. Id. at 23-25. The court lowered Rowland's overall sentence based on the decreased offender score but imposed an exceptional sentence of an additional 180 months above the high end of the newly calculated standard range, for a total of 527 months. CP 15.⁵

The trial court also refused to consider Rowland's claim that his offender score remained incorrectly calculated because it separately counted two concurrently imposed convictions from before 1986. CP 24-26; 9/16/09RP 18, 22-23. Under former RCW 9.94A.360(6)(c), the statute in effect at the time of Rowland's offense, convictions from before 1986 that were concurrently imposed must be counted as a single point. CP 25-26. Instead of

⁴ See In re Pers. Restraint of Rowland, 149 Wn.App. 496, 204 P.3d 953 (2009).

⁵ Rowland's previous sentence was 541 months. CP 100.

ruling on Rowland's claim, the court found he could not challenge his offender score at this resentencing hearing. 9/16/09RP 22-23.

On appeal following the resentencing hearing, the Court of Appeals agreed that Rowland's offender score had again been incorrectly calculated. Slip op. at 14.⁶ But it concluded that the trial court had discretion to impose an exceptional sentence, and the erroneous offender score was harmless because the court would have imposed the same exceptional sentence, based on the judicial determination of deliberate cruelty. Slip op. at 16-17. It also held that even though the trial court changed the length of Rowland's exceptional sentence after reconsidering whether it was appropriate to impose an exceptional sentence, the court had not resentenced Rowland on the exceptional sentence and therefore, Rowland had no jury trial rights under Blakely. Slip op. at 14.

The facts are further set forth in the Court of Appeals opinion, pages 2-5, Appellant's Opening Brief, pages 3-5, and Appellant's Reply Brief, passim.

⁶ See State v. Rowland, 160 Wn.App. 316, 249 P.3d 635 (2011).

E. ARGUMENT.

BECAUSE THE PUBLISHED COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S RULING IN KILGORE AS WELL AS WITH THE COURT OF APPEALS DECISIONS IN MCNEAL AND TONEY, THIS COURT SHOULD ACCEPT REVIEW AND RESOLVE THE CONFLICT

Michael Rowland received an exceptional sentence above the standard range based on facts found by the judge after trial, not by the jury by a preponderance of evidence. The judge originally imposed this sentence before Blakely. In 2009, Rowland was resentenced. The judge reconsidered Rowland's sentence and imposed a lower term of imprisonment. But the judge decided Rowland deserved the exceptional sentence based on a judicially determined factual finding of deliberate cruelty. The Court of Appeals ruled that Blakely and its progeny did not apply to the resentencing hearing to bar the judge from increasing Rowland's sentence based on facts that were never charged or proven to the jury. Division Two of the Court of Appeals has reached the opposite decision in an almost identical case.

1. A direct conflict between the published decision and decisions by this Court and Division Two of the Court of Appeals favors review. When a case returns to trial court for resentencing,

the prior sentence is no longer the final judgment in the case.

State v. McNeal, 142 Wn.App. 777, 787-88, 175 P.3d 1139 (2008);

see also State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009).

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. Rowland's resentencing was not purely ministerial – the judge imposed a different term of confinement based on a different offender score for a single offense after reconsidering what sentence to impose.

At a resentencing hearing, where the judge has discretion and exercises its discretion “up or down,” the judge is imposing a new final judgment. Kilgore, 167 Wn.2d at 41. The prior judgment is void. Id.; 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, since ‘reverse’ and ‘vacate’ have the same definition and effect in this context—the finality of the judgment is destroyed. Accordingly, Harrison's prior sentence ceased to be a final judgment on the merits, and collateral estoppel does not apply.”).

In Kilgore, this Court held that when a court exercises any discretion in a resentencing hearing, the finality of the sentence

runs from the entry of the new sentence. 167 Wn.2d at 41. In that case, the defendant had received concurrent exceptional sentences for five separate counts. After the court reversed two of those five counts on appeal, the State elected not to re-prosecute the 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.

The Kilgore Court ruled that when there is an error in a defendant's offender score affecting the applicable standard range "resentencing is required." 167 Wn.2d at 41. At such a resentencing, the court has discretion to revisit issues or consider new issues if properly raised. Id. It is only when the court does not exercise any discretion, and the amended sentence does not give rise to any appealable issues, that the finality of the decision runs from the entry of the original sentence and conclusion of direct appeal. Id. at 42-43.

Thus, while Kilgore is different from Rowland's case because that case involved the ministerial act of striking two

convictions from the judgment while Rowland's case involved a resentencing on a single offense, Kilgore sets forth the applicable legal standard. When the court exercises its discretion at a resentencing hearing, it is imposing a new sentence that must comply with due process. 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).

Division Two applied the reasoning of Kilgore in McNeal and Toney.⁷ In a scenario almost identical to Rowland's, the defendant in McNeal received an exceptional sentence above the standard range in 1997, and his direct appeal was final two years before Blakely was decided. 142 Wn.App. at 781 n.1, 783. In a later a personal restraint petition, the appellate court ruled his sentence for one offense exceeded the statutory maximum and deferred to the trial court to consider other challenges Mr. McNeal made to his sentence. Id. at 784. At the resentencing hearing, the trial court found Blakely did not apply to McNeal because his original direct appeal was final before Blakely was decided. Id. The resentencing court recalculated Mr. McNeal's offender score as one point lower,

which did not alter the standard range because the score remained greater than nine, and imposed an exceptional sentence based on previously entered findings.

But the Court of Appeals in McNeal ruled that the resentencing court erred, because it was bound by the dictates of Blakely at the resentencing hearing. Id. at 786-87. Once the case was remanded for a new sentencing hearing, the earlier judgment was no longer final and “the trial court therefore erred when it found Blakely did not apply to McNeal’s sentence on remand.” Id. The court remanded the case, with the explanation that if the State seeks an exceptional sentence, the court must empanel a jury for a trial on the aggravating factors. Id. at 788; see also State v. Applegate, 147 Wn.App. 166, 172, 194 P.3d 1000 (2008) (adopting reasoning of McNeal and remanding for jury trial on exceptional sentence following Blakely).

Like McNeal, Toney involved a sentence originally entered in 1996, which was later overturned and Toney was resentenced. State v. Toney, 149 Wn.App. 787, 792-93, 205 P.3d 944 (2009), rev. denied, 168 Wn.2d 1027 (2010). The State argued in Toney

⁷ McNeal and Toney both relied on the Court of Appeals ruling in Kilgore, which was affirmed by the Supreme Court. Toney, 149 Wn.App. at 793; McNeal, 142 Wn.App. 787 n.13 (citing State v. Kilgore, 141 Wn.App. 817, 172 P.3d 373

that the resentencing was purely ministerial and Toney could not raise new challenges to his sentence in the appeal that followed his resentencing. Id. at 791. The Toney Court of Appeals relied on McNeal for the principle that when the court has an adversarial resentencing hearing, that subsequently-entered sentence serves as the final judgment from which an appeal may be taken. Id. at 793.

Division One opted to disregard McNeal as the product of flawed reasoning. Slip op. at 9 n.5. It viewed McNeal as unpersuasive because the appellate prosecutor had conceded that Blakely should have applied to the resentencing hearing, and even though the Court of Appeals exercised its independent judgment in resolving the issue, the Court of Appeals did not have the benefit of adversarial briefing due to the State's concession.

There is no logical reason to distinguish McNeal and Rowland. The direct conflict between the two published cases merits review. RAP 13.4(b)(2).

2. The Court of Appeals decision is also contrary to decisions from the United States Supreme Court and courts in other jurisdictions. The Supreme Court of Florida recently

(2007)).

addressed the same issue and decided the matter just as the Court of Appeals did in McNeal. State v. Fleming, __ So.3d __, 2011 WL 320959 (Fla. 2011). In Fleming, the defendant's original sentence imposed in 1997 was increased based on judicially determined aggravating facts. Id. at *1. A later discovered error required a resentencing hearing, which made his sentence no longer final at the time Blakely was decided. Id. at *2. Appellate courts in Florida had issued conflicting decisions about whether a resentencing must comport with the jury findings required by Blakely, when the original sentence was final before Blakely. Id. at *5-6.

The Florida Supreme Court held that "when a sentence is vacated, the defendant is resentenced at a new proceeding subject to the full panoply of due process rights." Id. at *9. It also held that at a de novo sentencing, when the court may exercise its discretion over the term of confinement and has the authority to consider new information, the constitutional procedures set forth in Blakely apply "regardless of when the conviction or original sentence was final." Id.

The Florida decision is consistent with recent decisions from the United States Supreme Court. In Pepper v. United States, __ U.S. __, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011), the Supreme

Court addressed the discretion of a trial court judge on remand for resentencing. It explained that sentences are “a package of sanctions.” Id. at 1251. When a case is remanded for resentencing, the judge revisits that package of sanctions because the judge’s sentencing intent “may be undermined by altering one portion of the calculus.” Id.

Pepper involved the question of whether, on resentencing, the judge is bound by prior federal sentencing guideline decisions at the earlier sentencing hearing. By statute, the resentencing court was required to rely on judicial fact-finding from the prior sentencing decision. Id. at 1243 (citing 18 U.S.C. § 3742(g)(2)).⁸ But the Supreme Court invalidated this statute. It held, and the Government conceded, this section of the statute was invalid because it contravened the Sixth Amendment limitations set forth in Blakely. When judicial factfinding increases a sentence based on facts not expressly established by the jury verdict, it violates the Sixth Amendment. Pepper, 131 S.Ct. at 1244. The Court held in Pepper that to treat prior judicial factfinding as binding at

⁸ This now-invalidated statute provided that when a sentence is remanded following an appeal, the trial court was limited to reconsidering grounds that were “specifically and affirmatively” raised at the initial sentencing, and were held by the court of appeals to be permissible grounds for departing from the guidelines. 18 U.S.C. § 3742(g)(2).

resentencing violates that Sixth Amendment. Id. at 1243.

Similarly, in Magwood v. Patterson, __ U.S. __, 130 S.Ct. 2788, 2801, 177 L.Ed.2d 592 (2010), the Court explained that when a case is remanded for a new sentencing hearing and the court is reconsidering what sentence to impose, the new sentence constitutes a new judgment for purposes of finality. Id. The defendant may raise claims on appeal that were not previously raised, when those same errors occur at the new sentencing hearing. Id. at 2801.

Applying the logic of Magwood and Pepper here, and as explained in McNeal and Fleming, Rowland's case was remanded for resentencing. At this resentencing, the judge could and did consider new information and exercise discretion. It imposed a sentence that far-exceeded the standard range based on judicial fact-finding. This was a *de novo* resentencing for the pertinent count of conviction. By relying on unconstitutional judicial fact-finding when imposing a new sentence, the judge violated the Sixth Amendment.

3. The Court of Appeals decision rests on a false distinction within a single sentence imposed for a single offense. The Court of Appeals parsed Rowland's sentence into discrete parts, treating

the "length" different from the factual determination that Rowland deserved an exceptional sentence. This is a false distinction.

Rowland received an exceptional sentence for a single offense. The Court of Appeals relied on State v. Barberio, 121 Wn.2d 48, 51-52, 846 P.2d 519 (1993), as controlling authority but this comparison is inapt and legally incorrect. Barberio was decided long before Blakely, at a time when judicial discretion was enough to impose an exceptional sentence.

Barberio is also factually inapposite. In Barberio, there was no resentencing hearing. Instead, the court struck count II, and left the count I 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 the sentence imposed for a single offense, as the court did in Rowland's case.

Unlike Barberio or Kilgore where the defendant received multiple exceptional sentences for different offenses, Rowland was resentenced on a single count. When the trial court resentenced Rowland, it reconsidered the facts of the case and reweighed how

long of a sentence it should impose. Upon this exercise of discretion, the court imposed a new exceptional sentence, and the sole aggravating factor was the court's finding of deliberate cruelty.

In State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009), this Court held that when a court resentences a person who previously received an exceptional sentence, the court must comply with the post-Blakely revisions to the Sentencing Reform Act and empanel a jury. Rowland seeks these procedural protections and he is entitled to them upon remand, should the State seek to pursue an exceptional sentence.

4. The error in Rowland's offender score requires resentencing. Before sentencing any offender, the court must correctly determine the offender's standard sentence range, and consider that term before deciding the need to impose an exceptional sentence above the standard range. RCW 9.94A.505(2)(a)(i); State v. Parker, 132 Wn.2d 182, 187, 937 P.2d 575 (1997). "[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." Id.

After the judge ruled that Rowland could not contest the accuracy of his offender score, the State convinced the judge to offer an advisory opinion: if Rowland's offender score was actually lower, it would not alter the length of Rowland's imprisonment and would just impose a longer exceptional sentence. Slip op. at 16-17. The Court of Appeals held that this exchange shows that Rowland is not entitled to resentencing even though the judge miscalculated Rowland's offender score at the 2009 resentencing hearing. Id.

But the judge's incorrect understanding of the standard range Rowland faced only underscores the error. Under the recalculated sentence, Rowland will receive a longer exceptional sentence than previously imposed, without any ability to have a jury decide the essential factual question on which the court's authority to impose an exceptional sentence rests. Rowland should receive a new sentencing hearing at which his offender score is first correctly calculated and the judge imposes an exceptional sentence only after following the mandatory statutory and constitutional procedures under Blakely and RCW 9.94A.535 and RCW 9.94A.537.

F. CONCLUSION.

Based on the foregoing, Petitioner Michael Rowland respectfully requests that review be granted because the decision of the Court of Appeals is inconsistent with prior decisions of this Court, contrary to other decisions of the Court of Appeals, and a violation of his state and federal constitutional rights to a jury trial and due process of law, pursuant to RAP 13.4(b).

DATED this 6th day of June 2011.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

FILED
COURT OF APPEALS
DIVISION ONE
FEB 28 2011

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 64262-6-1
)	
Respondent/Cross Appellant,)	DIVISION ONE
)	
v.)	
)	
MICHAEL J. ROWLAND,)	PUBLISHED OPINION
)	
Appellant/Cross Respondent.)	FILED: February 28, 2011

LAU, J. — This case presents the question of whether Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), applies to require that facts supporting an exceptional sentence be tried to a jury and proved beyond a reasonable doubt on remand for resentencing from a collateral attack on a miscalculated offender score. Because Rowland's collateral attack on his standard range sentence did not affect the finality of his exceptional sentence, we affirm the exceptional sentence imposed at the resentencing hearing. But because Rowland was entitled to dispute a new offender score error at his resentencing hearing, we remand to correct the offender score and standard sentencing range.

FACTS

Rowland was convicted in 1991 of first degree murder and taking a motor vehicle without permission. In re Pers. Restraint of Rowland (Rowland II), 149 Wn. App. 496, 501, 204 P.3d 953 (2009).¹ Based on an offender score of 3, Rowland's standard range was 273-361 months. Rowland II, 149 Wn. App. at 501. The court imposed an exceptional sentence of 180 months—for a total sentence of 541 months—based on a finding of deliberate cruelty.² Rowland II, 149 Wn. App. at 501. Rowland appealed his judgment and sentence and this court affirmed in all respects. State v. Rowland (Rowland I), noted at 76 Wn. App. 1072 (1995); see also Rowland II, 149 Wn. App. at 501. The mandate was issued on June 26, 1995. Rowland II, 149 Wn. App. at 501.

In January 2007, Rowland filed a personal restraint petition (PRP), challenging his offender score on the basis that his prior California conviction for burglary was not comparable to a Washington burglary. Rowland II, 149 Wn. App. at 503-04. We accepted the State's concession of error, holding that the offender score should have been 2 rather than 3. Rowland II, 149 Wn. App. at 507. We "remanded for resentencing," reasoning,

¹ The State notes that "the facts and procedural history . . . prior to remand are adequately set out in this Court's opinion" in Rowland II. Br. of Respondent at 1.

² The court found the following "substantial and compelling reasons" for the exceptional sentence:

The defendants exhibited deliberate cruelty by inflicting sixteen stab wounds following an ax blow to the head; by telling the victim during the course of his murder: "You're dying, Dude"; by stuffing a hat into the victim's mouth as he tried to crawl away from his home to stifle any further cries or pleas while inflicting the last of the stab wounds.

Rowland's sentence is being remanded because, at the time the trial court selected 541 months as the appropriate length of the exceptional sentence, the court did not have in mind the correct standard range. The error in the offender score potentially bears upon the length of the exceptional sentence, but it does not implicate the findings that justified imposition of the exceptional sentence.

Rowland II, 149 Wn. App. at 512.

At the time of Rowland's original sentence, the law allowed a sentencing court to impose an exceptional sentence based on judicial fact-finding. But when we granted Rowland's PRP, Blakely required 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 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Our Supreme Court subsequently held that Blakely was not retroactive. State v. Evans, 154 Wn.2d 438, 448, 114 P.3d 627 (2005). The Rowland II court "[r]emanded for resentencing," but refused to assume that the State would seek an exceptional sentence on remand and declined to decide whether Blakely would apply if it did. Rowland II, 149 Wn. App. at 511-12.

We are not satisfied that the discovery of a mistake in the calculation of Rowland's offender score should be the occasion, in a collateral attack, for wiping out his exceptional sentence altogether—constitutional relief under Blakely to which he would not otherwise be entitled. We leave these matters for briefing and argument before the trial court on remand.

Rowland II, 149 Wn. App. at 512. We remanded the case to the trial court and the mandate was issued on May 15, 2009, for "further proceedings in accordance with the attached true copy of the opinion." Neither party sought review in the Supreme Court.

At the resentencing hearing on September 16, 2009, the court heard from three members of the victim's family,³ Rowland, and counsel for the State and Rowland. Both Rowland and the State submitted sentencing briefs. The court stated that Blakely did not apply on resentencing, and it distinguished between what it was required to reconsider on remand (the standard range sentence) from the exceptional sentence.

Mr. Rowland, I gave a great deal of thought to the sentence that I imposed when I sentenced you 18 years ago. I see no reason to change that sentence now, not up, not down. And I'm not going to, except the fact that the sentencing score has changed. . . . [W]hen I sentenced you, it was the intent to treat you and [your co-accused] equal in that I was sentencing you to the high end of the range along with 15 years as an exceptional sentence to both of you. That was my intent, and there is no reason to depart from that now.

So I now sentence you to the high end of the range with a score of two, which is 347 months plus 180 months, which is 15 years for the exceptional sentence that I imposed 18 years ago, and I re-impose that.^[4]

³ Article I, section 35 of the Washington State Constitution provides, **"VICTIMS OF CRIMES—RIGHTS.** Effective law enforcement depends on cooperation from victims of crime. To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.

"Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights. This provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding nor a basis for providing a victim or the victim's representative with court appointed counsel."

⁴ The court also imposed the high end of the sentencing range (five months) for the taking a motor vehicle without permission count, to run concurrent with the first degree murder count.

Report of Proceedings (Sept. 16, 2009) (RP) at 24-25. The difference between Rowland's original sentence and his current sentence for first degree murder is summarized below:

	Offender Score	Standard Range	Standard Range Sentence	Exceptional Sentence	Total Sentence
Original Sentence	3	271-361 months	361 months	180 months	541 months
Resentencing	2	261-347 months	347 months	180 months	527 months

In addition, Rowland argued that his offender score was still wrong because it "separately counted two concurrently imposed convictions from before 1986." Br. of Appellant at 5. Rowland maintained that under former RCW 9.94A.360(6)(c) (1991), convictions prior to 1986 that were concurrently imposed were required to be counted as a single point. The State argued that the law of the case doctrine precluded the court from considering Rowland's offender score contention and that Rowland waived the issue by not raising it in his PRP. The court ruled, "[T]he State is correct in that the offender score is a two." RP at 22.

The court entered a new judgment and sentence with the revised sentence. It refiled the original 1991 appendix to the judgment and sentence, detailing "substantial and compelling reasons" for imposition of the exceptional sentence.

ANALYSIS

Application of Blakely on Remand

Rowland first argues that the resentencing court erred in concluding that Blakely did not apply at resentencing and imposing an exceptional sentence based solely on judicial fact-finding. The State counters that because this court considered and affirmed Rowland's exceptional sentence on his direct appeal, the law of the case doctrine bars further review.

Rowland relies primarily on State v. McNeal, 142 Wn. App. 777, 175 P.3d 1139 (2008). There, McNeal's sentence was affirmed on direct appeal. In a subsequent PRP, the court held that the sentence on one of his counts, possession with intent to deliver, exceeded the statutory maximum. The court "'vacated' and remanded McNeal's sentence for his drug conviction [but] . . . left his sentences for the other counts intact." McNeal, 142 Wn. App. at 784. The resentencing court found that Blakely did not apply since McNeal's direct appeal was final before Blakely was decided. McNeal, 142 Wn. App. at 784. The court "adopted the previous court's findings of fact and conclusions of law supporting the exceptional sentences, which it reimposed" McNeal, 142 Wn. App. at 785.

McNeal appealed his resentencing, and the State conceded error on the Blakely issue. The court held,

In In re Personal Restraint of Skystad, our Supreme Court recently explained that a conviction is "final" for PRP time-bar purposes only if both the conviction and the sentence are final. 160 Wn.2d 944, 949-50, 162 P.3d 413 (2007). Once 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 786-87 (footnotes omitted). The court then concluded that the resentencing court had erred by imposing the exceptional consecutive sentences under RCW 9.94A.589(1)(a) because "a jury must find facts supporting an exceptional sentence beyond the standard range." McNeal, 142 Wn. App. at 788.

Our Supreme Court reached the opposite conclusion in State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009). Kilgore was originally convicted of three counts of rape of a child and four counts of child molestation in 1998. The trial court found five

aggravating factors and imposed 560 months' exceptional, concurrent sentences on each of the seven counts. Division Two of this court reversed two counts, but affirmed five and remanded for further lawful proceedings. Our Supreme Court affirmed. The mandate became final for purposes of retroactivity analysis on January 5, 2003, before the Supreme Court's opinion in Blakely.

On remand in October 2005, Kilgore argued that the trial court had to resentence him under Blakely. The trial court declined and signed an order striking the two counts, correcting the judgment and sentence, and correcting his offender score, but "made clear that in correcting the judgment and sentence to reflect the reversed counts, it was not reconsidering the exceptional sentence imposed on each of the remaining counts." Kilgore, 167 Wn.2d at 41. The court also explicitly ruled that "Kilgore was not entitled to a new sentencing hearing." Kilgore, 167 Wn.2d at 34.

The Supreme Court concluded that the trial court did not abuse its discretion by declining to resentence Kilgore. Although the number of his convictions had been reduced, his presumptive sentencing range remained the same. Kilgore, 167 Wn.2d at 42-43. The court held that where a trial court exercises no independent judgment on remand, there is no issue to review on appeal because the original judgment and sentence remains final and intact. Kilgore, 167 Wn.2d at 40. The court reasoned "the finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced' is unaffected by the reversal of one or more counts." Kilgore, 167 Wn.2d at 37 (quoting In re Pers. Restraint of Carle, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980)). " 'Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.' "

Kilgore, 167 Wn.2d at 37 (quoting State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993) (emphasis added)). The decision to simply correct a judgment and sentence is not an appealable act of independent judgment by the trial court. In such a case, "it is the original judgment and sentence entered by the original trial court that controls the defendant's conviction and term of incarceration." Kilgore, 167 Wn.2d at 40-41.

The court's decision relied partly on the pre-Blakely case Barberio, 121 Wn.2d at 51. Barberio was convicted of second degree rape and third degree rape, and the court imposed an exceptional sentence. Barberio, 121 Wn.2d at 49. We reversed the third degree rape conviction, affirmed the second degree rape conviction, and left the unchallenged exceptional sentence intact. Barberio, 121 Wn.2d at 49. On remand, the resentencing court imposed the same exceptional sentence despite Barberio's argument that his lower sentencing range required the resentencing court to reduce his exceptional sentence. Barberio, 121 Wn.2d at 49-50. Describing the Barberio holding, the Kilgore court stated,

We held there was no issue to review on appeal because the trial court did not exercise its independent judgment on remand. . . . Barberio thus makes clear that when, on remand, a trial court has the choice to review and resentence a defendant under a new judgment and sentence or to simply correct and amend the original judgment and sentence, that choice itself is not an exercise of independent judgment by the trial court. The reason that choice is not an independent judgment is because if the trial court simply corrects the original judgment and sentence, it is the original judgment and sentence entered by the original trial court that controls the defendant's conviction and term of incarceration.

Kilgore, 167 Wn.2d at 40-41 (footnote omitted).

McNeal is distinguishable.⁵ There the court explained that its prior remand order in McNeal's PRP "vacated" the original judgment and sentence. And there was therefore no longer a final judgment and sentence. "Once 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 786-87 (footnotes omitted). In Rowland II, we did not vacate the standard range sentence, but remanded for resentencing. We expressly noted that doing so would not necessarily invalidate the exceptional sentence, which was valid when it was imposed and affirmed on direct appeal. "We are not satisfied that the discovery of a mistake in the calculation of Rowland's offender score should be the occasion, in a collateral attack, for wiping out his exceptional sentence altogether" Rowland II, 149 Wn. App. at 512.

Such an approach is well supported by precedent. Our Supreme Court has consistently held that "[c]orrecting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed." In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). In Carle, the defendant pleaded guilty to first degree robbery while armed with a deadly weapon. He was sentenced to a maximum term of 20 years, but "[d]ue to the enhanced penalty provision of [former] RCW 9.41.025(1),

⁵ We also note alternatively that we would decline to follow McNeal here. The McNeal court relied on Skylstad's holding on finality of a judgment and sentence. But Skylstad dealt with finality in the specific context of the one year PRP time bar under RCW 10.73.090 and "did not address finality for purposes of retroactivity" Kilgore, 167 Wn.2d at 36 n 5; Skylstad, 160 Wn.2d at 947. We also note that the McNeal court, without the benefit of adversarial briefing since the State had conceded error on the Blakely issue, failed to address Barberio.

petitioner was subject to a minimum nondeferable and nonsuspendable 5-year sentence." Carle, 93 Wn.2d at 32. After the Supreme Court held in a different case that former RCW 9.41.025(1) did not apply to first degree robbery, Carle challenged his sentence in a PRP. The court agreed that the sentence was erroneous and that the trial court had "the power and the duty to correct it." Carle, 93 Wn.2d at 33-34. The court reasoned, however, that such a holding did not affect the finality of the entire sentence.

Petitioner's entire sentence is not erroneous, however. Our holding does not affect the finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced. We declare only that the trial court must correct the erroneous portion of petitioner's sentence by properly resentencing him without regard for RCW 9.41.025 and its attendant consequences.

Carle, 93 Wn.2d at 34 (citations omitted).

Relying on Carle, the Supreme Court reached the same conclusion in State v. Eilts, 94 Wn.2d 489, 617 P.2d 993 (1980). There, the sentencing court imposed one year of confinement with nine months suspended on condition that Eilts pay restitution to 87 defrauded investors, despite the fact that the State charged and proved that Eilts had defrauded only 7 named investors. Eilts, 94 Wn.2d at 492. On appeal, the Supreme Court concluded that under the law at the time, the trial court lacked authority to order restitution for the uncharged acts. Eilts, 94 Wn.2d at 494-95. The court remanded for a modification of the restitution order only but left the probation order conditioned on the higher restitution payment intact. The court reasoned,

It is well established that the imposition of an unauthorized sentence does not require vacation of the entire judgment or granting of a new trial. In re Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980). The error is grounds for reversing only the erroneous portion of the sentence imposed. Consequently, although the probation exceeds the authority granted in RCW 9.95.210, the order as a whole is not void.

Probation conditioned on restitution to be made to the seven investors named in the counts of which defendant was convicted is clearly authorized by RCW 9.95.210. The trial record indicates the seven investors were defrauded of a total of approximately \$24,930. Consequently, the cause is remanded for modification of the restitution order consistent with this opinion.

Eilts, 94 Wn.2d at 496.

In In re Postsentence Review of Leach, 161 Wn.2d 180, 163 P.3d 782 (2007), Leach was sentenced to 23.25 months' confinement and between 9 and 18 months' community custody. Leach, 161 Wn.2d at 183. The Supreme Court concluded that the imposition of community custody was not authorized by statute and that portion of the sentence "must be excised from Leach's otherwise valid sentence." Leach, 161 Wn.2d at 188. The court "remand[ed] . . . for resentencing without community custody" only, noting, " 'The error is grounds for reversing only the erroneous portion of the sentence imposed.' " Leach, 161 Wn.2d at 188-89 (quoting In re Pers. Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005)). The court left intact the 23.25 months' confinement.

Carle, Eilts, and Leach establish that where one portion of a sentence is found to be erroneous, it does not undermine that part of the sentence that is otherwise valid. An appellate court may remand for resentencing for an erroneous offender score but leave the otherwise valid exceptional sentence intact. See Kilgore, 167 Wn.2d at 37 (" '[T]he finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced' is unaffected by the reversal of one or more counts." (quoting Carle, 93 Wn.2d at 34)); see also Barberio, 121 Wn.2d at 49-50.

On remand, the resentencing court reconsidered only the erroneous offender score, while declining to exercise its discretion to consider the exceptional sentence. "I

see no reason to change that sentence now, not up, not down. And I'm not going to, except the fact that the sentencing score has changed." RP at 24. Furthermore, it ordered the same exceptional sentence it had originally imposed—the the high end of the range, plus 180 months (15 years). The court explained its original sentence and its intent on resentencing,

[W]hen I sentenced you, it was the intent to treat you and [your co-defendant] equal in that I was sentencing you to the high end of the range along with 15 years as an exceptional sentence to both of you. That was my intent, and there is no reason to depart from that now.

RP (Sept. 16, 2009) at 24. The resentencing court did not exercise independent judgment or discretion when it ordered the exceptional sentence but merely substituted the high end of one standard range for that of another and reimposed the original exceptional sentence. See Barberio, 121 Wn.2d at 49-50 (no issue to review on appeal where resentencing court sentenced defendant to same exceptional sentence despite his reduced offender score). Therefore, while the finality of Rowland's standard range sentence was disturbed by our remand for resentencing following his successful PRP, his exceptional sentence was not. Indeed, in entering the new judgment and sentence, the resentencing court attached the 1991 appendix for the exceptional sentence.

Even if the resentencing court had exercised its discretion by reconsidering either whether to impose the exceptional sentence or its length, that decision does not implicate Blakely. Blakely involves only the procedure to determine the factual basis of an exceptional sentence, not the decision to impose one or its length. As we noted in Rowland II, "The Sentencing Reform Act of 1981, chapter 9.94A RCW, makes it the function of the trial court to decide whether to impose an exceptional sentence, and if so

how long it should be. RCW 9.94A.535. This feature of the statute has survived Blakely.” Rowland II 149 Wn. App. at 511; see also State v. Kolesnik, 146 Wn. App. 790, 802, 192 P.3d 937 (2008) (“Blakely held that a jury, not a judge, must find any aggravating fact that increases the penalty of a crime beyond the prescribed standard range beyond a reasonable doubt. But Blakely did not alter the law governing review of the length of an exceptional sentence based on properly adjudicated factors.”) (citations omitted). Indeed, RCW 9.94A.535 provides that where facts supporting aggravated sentences are “determined pursuant to the provisions of RCW 9.94A.537,” the so-called “Blakely fix,”⁶ “[t]he court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” (Emphasis added.)

Thus, post-Blakely, the imposition of an exceptional sentence involves two steps. First, a jury makes a factual determination beyond a reasonable doubt that facts exist to

⁶ The legislature has twice amended the sentencing act to conform to Blakely. First, the “Legislature enacted former RCW 9.94A.537 (Laws of 2005, ch. 68, § 1) (known as the “Blakely fix”) . . . [which] authorized trial courts to impanel juries to consider aggravating factors supporting exceptional sentences.” State v. Applegate, 147 Wn. App. 166, 171, 194 P.3d 1000 (2008). This statutory amendment has been held inapplicable to any cases decided before its enactment. State v. Pillatos, 159 Wn. 2d 459, 471, 150 P.3d 1130 (2007).

The second and more recent enactment was the 2007 “Pillatos fix” that allows trial courts to impanel juries to decide aggravating factors in cases that had been previously decided. That provision provides,

(2) 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.

RCW 9.94A.537.

support an exceptional sentence. RCW 9.94A.537(3); Blakely, 542 U.S. at 301.

Second, a judge exercises his or her discretion to determine, given the aggravating facts, whether an exceptional sentence is warranted and, if so, its length. RCW 9.94A.535. Our remand authorized the resentencing court to consider only the second step, if it chose to do so, which does not implicate Blakely.

Rowland's sentence is being remanded because, at the time the trial court selected 541 months as the appropriate length of the exceptional sentence, the court did not have in mind the correct standard range. The error in the offender score potentially bears upon the length of the exceptional sentence, but it does not implicate the findings that justified imposition of the exceptional sentence. The justification for the exceptional sentence was affirmed on direct appeal. Rowland's petition does not challenge it, and there is no apparent basis upon which such a challenge could now escape the one-year [PRP] time bar.

Rowland II, 149 Wn. App. at 512 (emphasis added). And even if the resentencing court had reconsidered the length of the exceptional sentence, that decision would not implicate Blakely. We conclude the trial court correctly ruled that Blakely did not apply to Rowland's resentencing.⁷

New Challenge to Offender Score at Resentencing

Rowland next argues that the resentencing court improperly refused to consider his new challenge to his offender score. At the resentencing hearing, Rowland argued for the first time that his offender score should be a 1 and not a 2. Rowland maintained that under former RCW 9.94A.360(6)(c),⁸ his two prior concurrently imposed California

⁷ Having concluded that the trial court did not err, we decline to address the State's law of the case, collateral estoppel, or harmless error arguments. We further note that at oral argument, the State abandoned these contentions.

⁸ That section provides, "In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense"

drug convictions from before 1986 must be counted as a single point. The State counters that because the grounds for challenging the offender score existed at the time of Rowland's PRP and he failed to raise them then, he was barred from raising them before the resentencing court. The State concedes, however, that if Rowland is allowed to raise the issue, his offender score is incorrect. See Br. of Respondent, at 11 n.4.

The State's argument is unpersuasive. Unlike the exceptional sentence (which we authorized the resentencing court to leave intact in Rowland II), Rowland's standard range sentence was not final. In Rowland II, we required the resentencing court to correct the offender score and the standard range. The resentencing court thus necessarily exercised its independent discretion by reconsidering the standard range. Rowland was therefore entitled to raise new challenges to his offender score on remand. See Toney, 149 Wn. App at 792 (defendant was entitled to raise new sentencing issues on a second appeal "if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding . . ."); Carle, 93 Wn.2d at 33 ("When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered.") (emphasis omitted) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), overruled in part on other grounds by State v. Sampson, 82 Wn.2d 663, 513 P.2d 60 (1973)); see also Goodwin 146 Wn.2d at 874 ("[I]n general a defendant cannot waive a challenge to a miscalculated offender score.").

Remand

When a sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand for resentencing is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway. State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). We conclude that the record here demonstrates a clear basis for concluding that if Rowland's offender score had been correctly calculated and the standard range correctly determined, the resentencing court would have imposed the same exceptional sentence of 527 months. Therefore, remand solely to correct the offender score and standard range is the proper remedy, not remand for resentencing.

At resentencing, the prosecutor specifically requested the court to find it would impose the same exceptional sentence in the future.

[THE STATE]: And it seems like there was one other question. I don't know if Your Honor is willing to comment on this. It is very likely that this will go back up now on the issue of whether the exceptional sentence could be re-imposed. And given [defense counsel's] argument, there may be some argument that the offender score should be a one. I'm wondering if you are willing to make a finding that you would impose the same sentence at this point even if it's returned on an offender score of one.

THE COURT: What is the range on a one?

[DEFENSE COUNSEL]: 250 to 333 months.

THE COURT: So if it goes up to the Court of Appeals, and/or if it's brought to the Court of Appeals' attention, and if they rule that – if they decide that the scoring should be a one, would the matter come back in front of me again?

[DEFENSE COUNSEL]: Defense position is that [it] would have to, because he would have to receive the appropriate sentence.

THE COURT: Which means that the family would have to go through this again?

[THE STATE]: And that's the reason I'm asking, Your Honor. I have seen more than you about how painful this is to them, and I hate to think of them having to come back yet again for another sentencing hearing.

THE COURT: And if I stated that if the scoring range changes, if I stated that that should apply, it would still come back to me. If I state that it doesn't apply and I would impose the same sentence, it doesn't come back, does not come back to me?

[THE STATE]: That's what I'm hoping. Because the [Rowland II] court said that they couldn't tell whether you would have imposed the same sentence this last time. And I was thinking if it was made clear that you would impose the same sentence even if they changed the score, but if they upheld the exceptional, possibly the family wouldn't have to do this again.

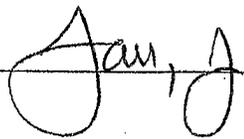
[DEFENSE COUNSEL]: With all respect to [the victim's] family, I do understand their situation; but I think it would have to come back. And I think the court's made it clear their intention was to sentence Mr. Rowland and [his co-defendant] with the same sentence, which would mean a reduced sentence should he be scored of [sic] a one. And I think that would appropriately be back in front of His Honor.

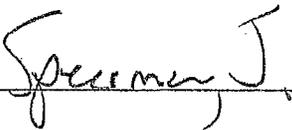
THE COURT: There's come a point where you just say enough is enough. And I'm at that point. If the scoring range is determined to be a one rather than a two, which I'm concluding that it is now, the sentence that I imposed today would be the same sentence that I would impose if it came back in front of me. So in essence the exceptional sentence would increase.^[9]

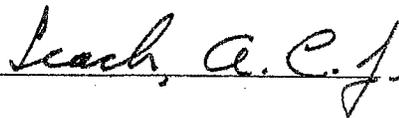
RP at 27-29 (emphasis added).

We affirm the exceptional sentence and remand to correct the offender score and standard range consistent with this opinion.

WE CONCUR:







⁹ With the correct standard range of 250 to 333 months based on an offender score of one in mind, the court recognized the exceptional sentence would necessarily increase from 180 months to 194 months in order to achieve the same sentence of 527 months which it had previously imposed in Rowland II.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

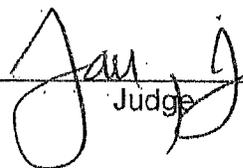
STATE OF WASHINGTON,)	NO. 64262-6-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
MICHAEL J. ROWLAND,)	ORDER DENYING MOTION
)	FOR RECONSIDERATION
Appellant.)	

Appellant Michael Rowland has filed a motion to reconsider the opinion filed February 28, 2011, and the court has determined that the motion should be denied; therefore, it is

ORDERED that appellant's motion to reconsider is denied

DATED this 10th day of May 2011.

FILED
COURT OF APPEALS
DIVISION ONE
MAY 18 2011



Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 64262-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Seth Fine, DPA; Thomas Curtis, DPA
Snohomish County Prosecutor's Office
- petitioner
- Attorney for other party

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STATE OF WASHINGTON
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MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: June 6, 2011