

No. 94346-0

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MURRAY,

Petitioner.

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PETITIONER'S REPLY BRIEF TO "SUPPLEMENTAL BRIEF OF  
RESPONDENT ADDRESSING BLAKELY V. WASHINGTON AND  
APPRENDI V. NEW JERSEY"

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## A. ARGUMENT

### **The void for vagueness doctrine applies to statutory aggravators. *Baldwin* has been superseded by United States Supreme Court precedent and is no longer good law.**

The state and federal constitutions prohibit Washington from depriving any person of his or her *liberty* without due process of law. U.S. Const. amend. XIV; Const. art I, § 3. To protect people from being arbitrarily deprived of their liberty, due process requires that criminal laws be sufficiently definite. Known as the “void for vagueness doctrine,” this doctrine applies to statutes that define “elements” of crimes or fix sentences. Johnson v. United States, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015). It even applies outside of the criminal context, at least where the deprivation of liberty is comparable. See Jordan v. De George, 341 U.S. 223, 231, 71 S. Ct. 703, 95 L. Ed. 886 (1951) (civil statute relating to deportation of unauthorized migrant was subject to “void for vagueness” doctrine because deportation is a grave consequence); accord Dimaya v. Lynch, 803 F.3d 1110, 1113 (9th Cir. 2015), cert. granted, 137 S. Ct. 31, 195 L. Ed. 2d 902 (2016).<sup>1</sup>

The law in Washington changed when the United States Supreme Court decided Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159

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<sup>1</sup> The United States Supreme Court heard reargument in this case on October 2, 2017. [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/15-1498\\_886b.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/15-1498_886b.pdf) (last access October 26, 2017).

L. Ed. 2d 403 (2004). Now, before a Washington judge deprives a person of liberty based on a statutory aggravating factor, this aggravator must be found by the jury unless this procedure is waived. Id. at 305, 311. In other words, “every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.” Id. at 313. Our Legislature acted to conform Washington law to Blakely. Laws of 2005, ch. 68, § 1; State v. Stubbs, 170 Wn.2d 117, 130, 240 P.3d 143 (2010).

The decision in Blakely came about a year after this Court decided State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). There, this Court reasoned that the void for vagueness doctrine did not apply to statutory aggravators. Baldwin reasoned that the “sentencing guideline statutes challenged in this case do not define conduct . . .” Baldwin, 150 Wn.2d at 459. The Court further reasoned that the “sentencing guidelines” do not “very the statutory maximum and minimum penalties assigned to illegal conduct by the legislature.” Id. This Court said, “the guidelines do not set penalties.” Id.

All this reasoning does not make sense post-Blakely. When a fact is used to increase punishment, it must now be found to exist beyond a reasonable doubt by the jury. Whether labeled “elements,” “functional equivalent to elements,” “aggravating factors,” or something else, the

result is the same. In this post-Blakely world, sentencing judges do not retain the broad discretion to impose exceptional sentences which existed at the time of Baldwin.

The State argues that Apprendi<sup>2</sup> and Blakely have nothing to do with the void for vagueness doctrine because they concern the Sixth Amendment right to a jury trial rather than the Fourteenth Amendment's guarantee of due process. Br. of Resp't at 4. As the United States Supreme Court has made plain recently in Beckles, however, Apprendi principles are relevant to determining whether the vagueness doctrine applies to a challenged criminal statute. Beckles v. United States, \_\_\_ U.S. \_\_\_, 137 S. Ct. 886, 892 894-95, 197 L. Ed. 2d 145 (2017). There, the majority twice cited to Alleyne v. United States, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) in explaining the rule. Beckles, 137 S. Ct. at 892, 895. Alleyne is a follow-up to Apprendi. Alleyne, 133 S. Ct. at 2155. The Court in Beckles stated the vagueness doctrine applies to laws that permit juries to "prescribe the sentences or sentencing range available" and cited to Alleyne:

An unconstitutionally vague law invites arbitrary — enforcement in this sense if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," or

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<sup>2</sup> Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

permits them to prescribe the sentences or sentencing range available, cf. *Alleyne*, 570 U.S., at —, 133 S. Ct., at 2160–2161 (“[T]he legally prescribed range *is* the penalty affixed to the crime”).

Beckles, 137 S. Ct. at 894-95 (emphasis added). Similarly, in her concurrence, Justice Sotomayor cited to Apprendi in explaining, “A statute fixing a sentence imposes no less a deprivation of liberty than does a statute defining a crime, as our Sixth Amendment jurisprudence makes plain.” Beckles, 137 S. Ct. at 899 (Sotomayor, J., concurring) (emphasis added) (citing Apprendi, 530 U.S. at 490).

The State emphasizes that in 2012, this Court rejected the argument that aggravating factors must be charged in the information because they are the functional equivalent to elements. State v. Siers, 174 Wn.2d 269, 274, P.3d 358 (2012). But as explained by this Court subsequently, Siers held that the notice required by due process “need not necessarily be afforded in the charging information.” State v. McEnroe, 181 Wn.2d 375, 385, 333 P.3d 402 (2014). This makes sense because “[n]either the Sixth nor the Fourteenth Amendment—the constitutional provisions at issue in *Apprendi* and *Alleyne*—requires the States to use any particular form of charging instrument.” Id.

Thus, Siers is no impediment to recognizing that the void for vagueness doctrine applies to aggravators. The State’s confusion is

understandable, because as this Court recognized, “[w]e have yet to fully weave Apprendi into the fabric of our case law. . .” Id. at 389 (explaining that distinctions between “elements” and “sentence enhancers” or “aggravation penalty factors” derived from pre-Apprendi case law).

In general, before this Court will overrule its own precedent, it must be both incorrect and harmful. In re Determination of Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). But this test does not apply when a decision from this Court on federal law is at odds with a decision from the United States Supreme Court. State v. Tyler, 195 Wn. App. 385, 398 n.6, 382 P.3d 699 (2016) (overruled on other grounds by State v. Johnson, 188 Wn.2d 742, 399 P.3d 507 (2017)); see State v. Radcliffe, 164 Wn.2d 900, 907, 194 P.3d 250 (2008) (rejecting earlier Washington precedent in light of subsequent United States Supreme Court precedent). Here, Baldwin has been superseded by Supreme Court precedent.

Relatedly, this Court may reconsider its “precedent not only when it has been shown to be incorrect and harmful but also when the legal underpinnings of our precedent have changed or disappeared altogether.” W.G. Clark Const. Co. v. Pac. Nw. Reg’l Council of Carpenters, 180 Wn.2d 54, 65, 322 P.3d 1207 (2014). Further, the “doctrine of stare decisis should not keep this court from fully considering all United States Supreme Court guidance on federal issues, even when the newer cases

have not directly overruled or superseded prior cases.” Id. At the very least, the legal underpinnings of Baldwin have changed. Therefore, it is open to reconsideration.

Regardless, Baldwin is not only incorrect, it is harmful. “A decision may be “harmful” for a variety of reasons . . .” State v. Barber, 170 Wn.2d 854, 865, 248 P.3d 494 (2011). When a jury finds an aggravating circumstance, it permits a judge to impose a longer sentence. Absent the jury finding an aggravator, the judge cannot impose a sentence longer than the standard range authorizes. In other words, these aggravating statutes can deprive defendants of their liberty. But if the aggravator is so vague, defendants may not have had notice that this aggravator applied to their conduct or may have had the aggravator arbitrarily imposed upon them by the trier of fact. Baldwin forecloses defendants from attacking this injustice and permits the loss of liberty without due process of law. It is difficult to imagine something more harmful.

## **B. CONCLUSION**

For the foregoing reasons, the Court should reject the State’s argument and hold that the void for vagueness doctrine applies to statutory aggravating factors.

Respectfully submitted this 26th day of October, 2017.

/s Richard W. Lechich  
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Respondent,	)	
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MICHAEL MURRAY,	)	
	)	
Petitioner.	)	

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