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75458-1

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Court of Appeals
Division I
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No. 75458-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD RICHARD BROWN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

The State's request for an exceptional sentence at resentencing is a presumptively retaliatory response to Ronald Brown's decision to exercise his right to appeal. On appeal, this Court vacated two of Brown's convictions. The Court also reversed two others based on instructional error, and the State elected not to retry those charges. Nonetheless, at resentencing, the State asked the court to impose an exceptional sentence that was equivalent in length to the sentence Brown had originally received. These circumstances give rise to a reasonable likelihood of vindictiveness on the part of the State, in violation of constitutional due process.

Also, the trial court's decision to impose an exceptional sentence on the same ground it had earlier considered and rejected at Brown's first sentencing, is presumptively vindictive and barred by collateral estoppel.

In addition, the State did not prove all of the facts necessary to establish the offender score, and several conditions of community custody are invalid.

B. ASSIGNMENTS OF ERROR

1. The State's request for an exceptional sentence at resentencing was presumptively vindictive in violation of constitutional due process.

2. The trial court's decision to impose an exceptional sentence was presumptively vindictive and barred by collateral estoppel.

3. The State did not prove the facts necessary to establish Brown's offender score.

4. Several conditions of community custody are invalid.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor is presumed to be vindictive and in violation of due process when the prosecutor unilaterally decides to bring a more serious charge against a defendant who exercises his right to appeal. The prosecutor can rebut the presumption only if the prosecutor shows it was impossible to proceed on the more serious charge at the outset. Here, the prosecutor requested an exceptional sentence after Brown successfully attacked four convictions on appeal. The prosecutor cannot show it was impossible to request an exceptional sentence at the outset. Is the prosecutor's action in violation of due process?

2. A court is presumed to be vindictive if the court imposes an exceptional sentence on a defendant who exercises his right to appeal, if the court originally considered imposing an exceptional sentence on that same ground but decided against it before the sentence was appealed. Collateral estoppel also bars a court from imposing an exceptional sentence at resentencing on the same ground it had earlier rejected. Is the court's decision to impose an exceptional sentence after Brown exercised his right to appeal presumptively vindictive and barred by collateral estoppel, where the court originally considered imposing an exceptional sentence on that ground but decided against it?

3. The State bears the burden to prove a defendant's offender score, including those facts necessary to find any prior felony convictions do not wash out. Did the State fail to prove the offender score where it did not prove the facts alleged to prevent washout?

4. The trial court may not impose conditions of community custody requiring the defendant to engage in drug treatment or other conditions related to drug use unless the facts demonstrate, and the court finds, the defendant's drug use contributed to the offense. Did the trial court err in imposing several drug-related conditions of community custody where it specifically found that Brown's drug use

did *not* contribute to the offense? Is the condition requiring Brown to “stay out of drug areas” unconstitutionally vague and overbroad?

D. STATEMENT OF THE CASE

After this case was remanded to the trial court for resentencing following Brown’s appeal, the State requested an exceptional sentence equivalent in length to the standard-range sentence Brown originally received. RP 21. On appeal, this Court had vacated two convictions on double jeopardy grounds and reversed two convictions based on instructional error. CP 59-88. The State elected not to retry Brown on the latter two charges. 6/21/16RP 2-3. Brown’s offender score was now substantially reduced. Nonetheless, the State requested an exceptional sentence based on Brown’s offender score. 6/21/16RP 25-26. The State requested an exceptional sentence of 638 months—287 months above the top of the standard range. 6/21/16RP 21-22, 25-26.

Judge Weiss, who had originally sentenced Brown, agreed to impose an exceptional sentence, although for less time than the State requested. 6/21/16RP 32-34. The judge acknowledged he had not imposed an exceptional sentence at the original sentencing, based on the facts of the case. 3/12/13RP 21; 6/21/16RP 33. But this time he thought an exceptional sentence was appropriate due to Brown’s

offender score. 6/21/16RP 34-35. This was despite the fact that Brown's offender score had substantially *decreased* from a 19 to an 11. CP 9, 91. The court imposed an exceptional sentence of 399 months. 6/21/16RP 36; CP 11, 21-22.

The court also imposed several conditions of community custody requested by the State that were related to drug use, even though the court had expressly found at the first sentencing that the crime was not drug-related. 6/21/16RP 38-39; CP 39-40. The court made no finding that the crime was drug-related and did not check the box on the judgment and sentence next to the statement: "The defendant has a chemical dependency that has contributed to the offense(s)." CP 8.

The case arose out of an incident that occurred in December 2011. The facts are set forth in this Court's opinion. CP 59-88. Brown was originally convicted of two counts of first degree kidnapping, two counts of first degree robbery, one count of first degree burglary, and two counts of second degree assault, all with firearm enhancements. CP 6, 101-02.

At the first sentencing before Judge Weiss, the State recommended a high-end standard-range sentence. The deputy

prosecutor informed the judge that he had authority to impose an exceptional sentence based on Brown's high offender score which resulted in some of the current offenses going "unpunished."

3/12/13RP 12. But the deputy prosecutor did not recommend an exceptional sentence. Id.

Judge Weiss expressly declined to impose an exceptional sentence at the first sentencing. He said an exceptional sentence was not warranted based on the facts of the case. The judge explained, "the Munsons were pretty clear in their testimony . . . that they believed that if you were not there that their lives were in jeopardy. So I'm giving you credit from that standpoint such that I'm not imposing an exceptional sentence" 3/12/13RP 21; 6/21/16RP 33. The court imposed a standard-range sentence of 638 months. CP 91.

On appeal, this Court reversed the two first degree kidnapping convictions based on instructional error and vacated the two second degree assault convictions on double jeopardy grounds. CP 59-88. The Court "remand[ed] with instructions that the trial court enter orders vacating these convictions and for resentencing." CP 88.

E. ARGUMENT

1. **The exceptional sentence is presumptively vindictive and barred by collateral estoppel, where the State did not request and the court did not impose an exceptional sentence at the first sentencing.**

The State's decision to request an exceptional sentence nearly 24 years above the top of the standard range after Brown successfully appealed four out of seven of his convictions is presumptively vindictive. In addition, the court's decision to impose an exceptional sentence after having expressly rejected an exceptional sentence at the first sentencing is presumptively vindictive and barred by collateral estoppel, where the only change in circumstances is that four convictions were reversed on appeal, resulting in a much lower offender score.

- a. *The State's decision to seek an exceptional sentence nearly 24 years above the top of the standard range is presumptively vindictive.*

The exceptional sentence requested by the State at the second sentencing was nearly 24 years above the top of the standard range and is equivalent to the sentence Brown originally received. The State's action is presumptively vindictive. The circumstances create a realistic likelihood the State was acting in retaliation for Brown's decision to

exercise his right to appeal. They are sufficient to create a due process violation.

- i. The prosecutor may not request an exceptional sentence at resentencing, where the prosecutor originally requested a standard-range sentence and the prosecutor's action is in retaliation for the defendant's decision to exercise his right to appeal.

Constitutional due process prohibits the prosecutor from retaliating against a defendant for exercising his right to appeal. State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006); Blackledge v. Perry, 417 U.S. 21, 27-29, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); U.S. Const. amend. XIV. To punish a person because he has done what the law plainly allows him to do is a due process violation “of the most basic sort.” Bordenkircher v. Hayes, 434 U.S. 357, 363, 90 S. Ct. 663, 54 L. Ed. 2d 604 (1978). Prosecutorial vindictiveness occurs when “the government acts against a defendant in response to the defendant’s prior exercise of constitutional or statutory rights.” Korum, 157 Wn.2d at 627.

A presumption of vindictiveness arises when “all of the circumstances, when taken together, support a realistic likelihood of vindictiveness” on the part of the prosecutor. Korum, 157 Wn.2d at

627 (internal quotation marks and citation omitted). The due process violation lies “not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.” Bordenkircher, 434 U.S. at 363.

Brown need not show the prosecutor acted with an actual retaliatory motive. Perry, 417 U.S. at 28-29. Instead, the question is whether the situation creates a “potential for vindictiveness.” Id. “[T]he mere *appearance* of vindictiveness is enough to place the burden on the prosecution.” United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976) (emphasis added).

This rule against prosecutorial vindictiveness recognizes that a prosecutor inevitably has a stake in discouraging defendants from appealing their convictions, even if the defendant cannot show such a motive on the part of the prosecutor in a given case. See Perry, 417 U.S. at 27-28. It is a “prophylactic rule” intended to prevent actual vindictiveness from entering into a prosecutorial decision and allay any fear on the part of the defendant that the prosecutor’s decision is in fact the product of vindictiveness. See Wasman v. United States, 468 U.S. 559, 564-65, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984).

A presumption of vindictiveness arises when the prosecutor unilaterally decides to bring more serious charges against a defendant who exercises his right to appeal.¹ Perry, 417 U.S. at 28-29.

Here, the prosecutor's action had a similar effect to bringing more serious charges against Brown after he appealed his convictions. The State requested an exceptional sentence at the second sentencing after it had expressly declined to request an exceptional sentence at the first sentencing. See 3/12/13RP 12; 6/21/16RP 21. The effect is that Brown received an exceptional sentence following his appeal, where he had originally received a standard-range sentence. These circumstances raise a presumption of vindictiveness in violation of constitutional due process.

¹ This situation is to be contrasted with the situation where the prosecutor brings more serious charges against a defendant who successfully withdraws a guilty plea entered pursuant to a plea agreement. See Korum, 157 Wn.2d at 630; Bordenkircher, 434 U.S. 357. The Fourteenth Amendment does not prohibit the prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against a defendant if he does not guilty. Unilaterally imposing a sanction upon a defendant who chooses to exercise a legal right to attack his conviction is “very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.” Bordenkircher, 434 U.S. at 363. “A claim of vindictive prosecution cannot insulate the defendant from the lawful consequences of his tactical choices.” Korum, 157 Wn.2d at 636 (internal quotation marks and citation omitted).

- ii. A presumption of vindictiveness arises because two of Brown’s convictions were vacated on double jeopardy grounds but the State nonetheless requested an exceptional sentence equal in length to the sentence Brown originally received.

The presumption of vindictiveness arises even though the total sentence requested—638 months—was the same sentence Brown originally received. A realistic likelihood of vindictiveness exists when an appellate court determines multiple convictions violate the Double Jeopardy Clause but the trial court imposes the same sentence on remand for only a single act. In re Craig, 571 N.E.2d 1326 (Ind. Ct. App. 1991). In Craig, the defendant was convicted of three counts of contempt and received three consecutive sentences for a total of 270 days. On appeal, the court held only one crime occurred. On remand, the trial court imposed the same sentence of 270 days for a single act of contempt. These circumstances gave rise to a presumption of vindictiveness because “after reversal of a sentence erroneously entered for multiple acts of criminal contempt, it is a denial of due process to impose a sentence any greater than the original sentence for each single act of contempt.” Id. at 1328. An exception to the rule exists only if “the record indicates facts, unknown at the time of the first sentencing, that would justify an enhanced sentence.” Id.

Similarly, a presumption of vindictiveness arises here because two of Brown's convictions were vacated on double jeopardy grounds. This Court determined Brown's two convictions for second degree assault merged into the convictions for robbery and kidnapping. CP 59-88. In other words, the alleged acts of assault are not separate criminal acts that may be separately punished. Therefore, it would be a denial of due process for Brown to receive the same sentence on remand, unless the record indicates facts unknown at the time of the first sentencing that would justify an enhanced sentence. Craig, 571 N.E.2d at 1328.

- iii. A presumption of vindictiveness arises because the State elected not to retry the two kidnapping charges.

A trial court may not impose a sentence on remand that effectively relieves the State of its burden to re-prove charges that were reversed on appeal. State v. Bradley, 281 Or. Ct. App. 696, 383 P.3d 937 (2016). In Bradley, the defendant was convicted of several counts of sexual abuse against two victims and the court imposed a sentence of 215 months. On appeal, the court reversed the counts against one victim and the State decided not to retry Bradley on those counts. At resentencing, the trial court imposed a lesser total sentence but a longer

sentence on the affirmed counts than it had originally. Under these circumstances, the sentence was vindictive in violation of due process even though the total sentence was less than what Bradley originally received. Id. at 699-701. That is because the sentence was “increased such that the prosecution would be relieved of its burden to prove the reversed counts beyond a reasonable doubt. That is the essence of punishing defendant for his success on appeal.” Id. at 703.

Similarly, here, the State requested an exceptional sentence that would effectively relieve it of its burden to prove the reversed kidnapping counts beyond a reasonable doubt. On appeal, this Court reversed the two first degree kidnapping counts on the basis that the jury was instructed on two alternative means not charged in the information. CP 59-88. The court also noted that, under the mandatory joinder rule, the State could not re-charge those two alternative means. On remand, the State chose not to retry Brown on those counts. 6/21/16RP 2-3. Yet the State requested the same 638-month sentence Brown had originally received. 6/21/16RP 21-22, 25-26. The State requested a sentence that would in effect relieve it of its burden to re-prove the reversed counts beyond a reasonable doubt. The State was, in essence, seeking to punish Brown for his success on appeal.

Bradley, 281 Or. Ct. App. at 703. Under these circumstances, the State's actions are presumptively vindictive. Id.

iv. The State cannot rebut the presumption of vindictiveness.

The presumption of vindictiveness may be rebutted by the government if it demonstrates objective evidence justifying the action.

Korum, 157 Wn.2d at 627-28. The prosecutor's reasons "must affirmatively appear" and "be based upon objective information" not known to the prosecutor at the time of the original charging decision. See North Carolina v. Pearce, 395 U.S. 711, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

More specifically, the prosecutor must show "it was impossible to proceed on the more serious charge at the outset." Perry, 417 U.S. at 29 n.7; United States v. Goodwin, 457 U.S. 368, 376 n.8, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982). For instance, in Diaz v. United States, 223 U.S. 442, 32 S. Ct. 250, 56 L. Ed. 500 (1912), the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and the defendant was then tried and convicted for homicide. No presumption of vindictiveness arose because "[o]bviously, it would not have been possible for the authorities . . . to have originally proceeded against the defendant on

the more serious charge, since the crime of homicide was not complete until after the victim's death." Perry, 417 U.S. at 29 n.7.

By contrast, in In re Bower, 38 Cal.3d 865, 870, 700 P.2d 1269, 215 Cal.Rptr. 267 (1985), Bower was charged with murder and the parties entered a stipulation that his liability would be limited to second degree murder. During trial he moved for and was granted a mistrial based on an evidentiary error. Id. On retrial, the prosecution unilaterally decided to withdraw the stipulation. Id. This created a presumption of vindictiveness. The prosecutor's explanation, that he withdrew the stipulation after reviewing the evidence more thoroughly and concluding Bower and not his codefendant had fired the fatal shot, was not sufficient to rebut the presumption because he "offered no new facts but . . . relied upon facts available at the time of the first trial." Id. at 871, 877.

The State cannot rebut the presumption of vindictiveness. The State requested an exceptional sentence on the basis that Brown's offender score was so high that some of the current offenses would go unpunished. CP 32-36; see RCW 9.94A.535(2)(c). These circumstances existed and were known to the prosecutor at the time of the original sentencing. The prosecutor could have but did not request

an exceptional sentence on that basis at that time. In fact, the asserted justification for an exceptional sentence had significantly *diminished*. Brown's offender score for the most serious offense actually *decreased* following his appeal—from a 19 to an 11. CP 9, 91.

Because the prosecutor's actions violated due process, the exceptional sentence must be reversed.

b. The trial court's decision to impose an exceptional sentence after expressly rejecting such a sentence at the original sentencing is presumptively vindictive and barred by collateral estoppel.

The trial court's decision to impose an exceptional sentence based on Brown's offender score is presumptively vindictive and barred by collateral estoppel. The trial court expressly considered but rejected an exceptional sentence on that basis at the first sentencing. 3/12/13RP 21. The court determined an exceptional sentence was not appropriate due to Brown's attempts to assist the Munsons during the incident. 3/12/13RP 21. The only relevant circumstance that changed between the first and second sentencing is that Brown's offender score substantially *decreased*. The court was barred by constitutional due process and collateral estoppel from imposing the exceptional sentence at resentencing.

- i. The trial court's sentence is presumptively vindictive.

Constitutional due process precludes a trial court from imposing a heavier sentence upon a reconvicted defendant for the purpose of punishing him for having succeeded in getting his original sentence set aside. Pearce, 395 U.S. at 723-24; U.S. Const. amend. XIV. And while a court has power to impose any sentence that is legally authorized upon a reconvicted defendant, constitutional due process requires that vindictiveness against the defendant for successfully attacking his first conviction “must play no part” in the sentencing decision. Pearce, 395 U.S. at 720, 725.

A presumption of judicial vindictiveness arises “in cases in which a reasonable likelihood of vindictiveness exists.” Goodwin, 457 U.S. at 373. A presumption of vindictiveness arises when a judge imposes a more severe sentence after a defendant appeals, unless the judge’s reasons “affirmatively appear” and are “based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.” Pearce, 395 U.S. at 726. This presumption “reflect[s] a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided,”

which might “subconsciously motivate a vindictive prosecutorial or judicial response to a defendant’s exercise of his right to obtain a retrial of a decided question.” Goodwin, 457 U.S. at 376.

To be constitutional, the court must justify an increased sentence following a successful appeal “by affirmatively identifying relevant conduct or events that occurred subsequent to the original proceeding.” Wasman, 468 U.S. at 572. A “sentencing judge who presides at both trials can be expected to operate in the context of roughly the same sentencing considerations after the second trial as he does after the first.” Alabama v. Smith, 490 U.S. 794, 802, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Therefore, “any unexplained change in the sentence is . . . subject to a presumption of vindictiveness.” Id.

A court is presumed to be vindictive when the court imposes an exceptional sentence upon a defendant following a successful appeal, if the court considered but declined an exceptional sentence at the original sentencing, and the court identifies no facts to justify the increased sentence that it was not aware of at the first sentencing. State v. Ameline, 118 Wn. App. 128, 134, 75 P.3d 589 (2003). In Ameline, the defendant was convicted of second degree murder and the State sought an exceptional sentence on the basis of deliberate cruelty and

victim vulnerability. Id. at 130-31. The trial court refused and imposed a standard range sentence. Id. Ameline’s conviction was reversed on appeal and he was convicted again following another trial. The State again requested an exceptional sentence for the same reasons. Id. This time the trial court agreed and imposed an exceptional sentence, “without identifying or relying on facts that it was not aware of” at the time of the original sentencing. Id. at 133. These circumstances created a presumption of vindictiveness, which was not rebutted. Id.

The circumstances in this case are sufficiently similar to those in Ameline to raise a presumption of vindictiveness. At the original sentencing, the court expressly considered imposing an exceptional sentence on the basis of Brown’s high offender score but decided against it. 3/12/13RP 21. Following Brown’s successful appeal, the court reversed course and imposed an exceptional sentence on the basis of Brown’s offender score. 6/21/16RP 34-36. The court did not identify or rely upon any facts to justify the sentence that it was not aware of at the time of the original sentencing. In fact, the stated reason for the exceptional sentence—Brown’s high offender score—was actually *less* compelling at resentencing. Brown’s offender score had *decreased* from 19 to 11. CP 9, 91.

These circumstances create a reasonable likelihood of vindictiveness even though the total sentence Brown received was less than the total sentence he received at the first sentencing. Cf. State v. Larson, 56 Wn. App. 323, 783 P.2d 1093 (1989). In Larson, the defendant was convicted of first degree murder, second degree rape, and first degree arson. At sentencing, the trial court commented the murder was “egregious” and noted its intent to sentence Larson “to life” for the murder and rape. The court imposed consecutive sentences totaling 363 months. Id. at 324-25. On appeal, the Court affirmed the convictions but reversed the sentence, holding consecutive sentences were not authorized. Id. at 325. On remand, the trial court imposed essentially the same sentence of 360 months, which was within the standard range for the murder. Id. at 326. This did not give rise to a presumption of vindictiveness because Larson’s “revised aggregate sentence is less severe than his original aggregate sentence.” Id. at 328. Also, “the ‘increase’ in the murder sentence is fully explained by the trial court’s original sentencing intent.” Id.

Larson is distinguishable and does not undermine the conclusion that the court’s action was presumptively vindictive here. Unlike in Larson, four of Brown’s convictions were reversed on appeal. Two of

those convictions were vacated on double jeopardy grounds. Also, unlike in Larson, the court imposed an exceptional sentence on remand after expressly declining to impose one at the original sentencing. Originally, the court stated an exceptional sentence was not appropriate based on the facts of the case. 3/12/13RP 21. These circumstances had not changed. The court’s decision to impose an exceptional sentence on remand is not consistent with its original sentencing intent.

By declining to impose an exceptional sentence at the original sentencing, the court essentially determined the crime was not more egregious than others in the same category. A court may not impose an exceptional sentence unless it finds “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. The aggravating factor relied upon must be “sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” State v. O’Dell, 183 Wn.2d 680, 690, 358 P.3d 359 (2015).

The court’s decision to reverse course and impose an exceptional sentence on the basis of Brown’s high offender score following his successful appeal—where Brown’s offender score actually *decreased* in the interim—creates a “reasonable likelihood of vindictiveness.” Goodwin, 457 U.S. at 373. The presumption of

vindictiveness is not rebutted by any relevant conduct or events identified by the court that occurred subsequent to the original proceeding. Wasman, 468 U.S. at 572. The exceptional sentence violates due process and must be reversed.

- ii. Collateral estoppel precluded the court from imposing an exceptional sentence on remand after expressly rejecting such a sentence on the same ground at the first sentencing.

The court was barred by collateral estoppel from imposing an exceptional sentence on remand after it already determined the crime was not more egregious than typical and an exceptional sentence was not warranted.

“The doctrine of collateral estoppel applies in criminal cases and bars relitigation of issues already adjudicated.” State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992). “Collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties.” Hadley v. Maxwell, 144 Wn.2d 306, 311, 27 P.3d 600 (2001) (internal quotation marks and citation omitted).

In a criminal case, the application of collateral estoppel is a two-step process. Collicott, 118 Wn.2d at 660-61. The first is to determine what issues were raised and resolved by the former judgment, and the

second is to determine whether the issues raised and resolved in the former prosecution are identical to those sought to be barred in the subsequent action. Id. In general, collateral estoppel precludes the retrial of issues decided in a prior action. Id.

Collateral estoppel precludes a judge from imposing an exceptional sentence on remand following an appeal if the judge already determined at the first sentencing that an exceptional sentence was not warranted on those same grounds. Collicott, 118 Wn.2d at 663-64.² In Collicott, at the first sentencing, the judge specifically declined to impose an exceptional on the basis of deliberate cruelty. Id. at 661. The Supreme Court held, “[a]fter considering these issues at the first sentencing and having determined that no exceptional sentence would be imposed, the trial court is estopped from now imposing an

² Collicott was decided by a four-justice plurality of the Washington Supreme Court. Although the Supreme Court subsequently characterized Collicott’s discussion of collateral estoppel as “dicta,” it has not overruled that decision. See State v. Harrison, 148 Wn.2d 550, 560, 61 P.3d 1104 (2003); State v. Tili, 148 Wn.2d 350, 363-64, 60 P.3d 1192 (2003). Instead, the court carefully distinguished Collicott on its facts. See Harrison, 148 Wn.2d at 560 ([Collicott] is distinguishable because it did not deal with the breach of a plea agreement by the State”); Tili, 148 Wn.2d at 364 (“By this opinion we do not overrule [Collicott] as we find it to be distinguishable on the facts.”). By contrast, Collicott is not distinguishable from this case on its facts.

exceptional sentence based on a repeat assertion by the State of deliberate cruelty to the victim.” Id.

Similarly, here, the court was estopped from imposing an exceptional sentence on remand after having specifically determined at the first sentencing that an exceptional sentence was not warranted on the basis of Brown’s offender score. See 3/12/13RP 21. The court already found that Brown’s offender score was not “sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” O’Dell, 183 Wn.2d at 690. The identical issue raised at the second sentencing was already raised and resolved. Brown’s offender score actually *decreased* between the first and second sentencings. It therefore could not have become a “substantial and compelling” reason to justify imposing an exceptional sentence.

State v. Tili, relied upon by the State, CP 32-33, does not compel a different result. In Tili, the defendant was convicted of three counts of first degree rape. 148 Wn.2d at 356. The trial court considered the rapes as separate and distinct conduct and ordered the sentences to run consecutively. Id. at 357. At the same time, the court stated that, “should the multiple rapes be considered the same criminal conduct on appeal, the same sentence would be imposed, as an

exceptional sentence upward, justified by deliberate cruelty and vulnerability of the victim.” Id. As predicted, the Supreme Court held the three rapes actually constituted the same criminal conduct. At resentencing, the court imposed the same sentence as an exceptional sentence, based on deliberate cruelty and vulnerability of the victim. Id. Collateral estoppel did not bar the exceptional sentence because the second sentencing context was different, in that the presumptive sentence had significantly reduced. Id. at 362-63. Further, the trial court had expressly stated it would impose an exceptional sentence if it was later determined the three rapes constituted the same criminal conduct. Id. Thus, “[t]here being no identity of the issues, the trial court was not collaterally estopped from imposing an exceptional sentence at the resentencing.” Id.

Here, by contrast, the issues at Brown’s resentencing were identical for purposes of a collateral estoppel analysis. Brown’s presumptive sentence had significantly decreased, but only because four of the convictions were either reversed or vacated. The court had not miscalculated the offender score or imposed an illegal sentence, as in Tili. Moreover, unlike in Tili, the trial court here expressly found at

the first sentencing that an exceptional sentence was *not* warranted on the same ground urged by the State at the second sentencing.

Because the court was collaterally estopped from imposing an exceptional sentence on the same basis it had already considered and rejected, the exceptional sentence must be reversed.

2. The State did not prove the facts necessary to establish the offender score.

The State did not prove the facts necessary to establish that Brown's prior convictions included in the offender score did not wash out. The judgment and sentence lists Brown's criminal history as including seven prior felonies. CP 8. At least two of the felonies would wash out if the wash-out period were not interrupted. CP 8. The State presented certified copies of judgments and sentences for the seven prior felonies. Sub #155. But the State presented no evidence to prove the facts necessary to establish the felonies did not wash out.

The offender score is determined by the defendant's criminal history, which is a list of his prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525.

"Prior convictions result in offender score 'points' in accordance with rules provided by RCW 9.94A.525." State v. Zamudio, 192 Wn. App. 503, 507, 368 P.3d 222 (2016). In

determining the proper offender score, the court “may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2).

Prior convictions are not counted as points if, through crime-free time spent in the community, they have “washed out” according to criteria provided by statute. Zamudio, 192 Wn. App. at 507. Most class B felonies wash out after the defendant spends 10 consecutive crime-free years in the community. RCW 9.94A.525(2)(b). Most class C felonies wash out after five years. RCW 9.94A.525(2)(c).

The State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). This includes the burden to prove that prior convictions have not washed out for the purpose of calculating a defendant’s offender score. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876-78, 123 P.3d 456 (2005). A defendant who does not plead guilty is not obligated to present evidence of his criminal history. Hunley, 175 Wn.2d at 910.

The State’s burden to prove the facts necessary to establish the offender score is mandated by statute and constitutional due process.

State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); RCW 9.94A.530(2); U.S. Const. amend. XIV.

“Bare assertions, unsupported by evidence, do not satisfy the State’s burden to prove the existence of a prior conviction.” Hunley, 175 Wn.2d at 910. The State fails to meet its burden if it simply provides a list of prior convictions and does not introduce any other evidence. Id. This lack of evidence, if it results in the convictions being counted in the defendant’s offender score, falls “below even the minimum requirements of due process.” Ford, 137 Wn.2d at 481. This is because “a prosecutor’s assertions are neither fact nor evidence, but merely argument.” Hunley, 175 Wn.2d at 912 (quoting Ford, 137 Wn.2d at 483 n.3). “Accordingly, the defendant’s mere failure to object to State assertions of criminal history at sentencing does not result in an acknowledgement. There must be some *affirmative* acknowledgment of the facts and information alleged at sentencing in order to relieve the State of its evidentiary obligations.” Id.

The State did not meet its evidentiary obligations. The State provided a list of alleged misdemeanor convictions that might interrupt the wash-out period. Sub #155 at 17. But the State presented no evidence to support its assertions. Brown never affirmatively

acknowledged this information. Thus, like the written summary in Hunley, the State failed to meet the preponderance standard.

The State failed to prove by a preponderance of the evidence that all of Brown's prior convictions did not wash out. The sentence must be remanded for a resentencing hearing at which the State may have another opportunity to present evidence to prove its assertions regarding Brown's offender score. RCW 9.94A.530(2); State v. Jones, 182 Wn.2d 1, 10-11, 338 P.3d 278 (2014).

3. Several conditions of community custody conditions related to drug use are invalid because they are barred by collateral estoppel, and because they are not crime-related and/or are unconstitutionally vague or overbroad.

a. The conditions of community custody related to drug use are barred by collateral estoppel.

Five conditions of community custody related to drug use are invalid because the court already found, at the first sentencing, that Brown's drug use did not contribute to the crime. CP 23-24; 3/12/13RP 23. The court may not revisit that decision at the second sentencing.

The five conditions of community custody at issue are: (1) "Do not possess drug paraphernalia"; (2) "You must stay out of drug areas

as defined in writing by your supervising Community Corrections Officer”; (3) “Participate in offense related counseling programs, to include substance abuse/chemical dependency treatment and Department of Corrections sponsored offender groups, as directed by the supervising Community Corrections Officer”; (4) “Participate in substance abuse treatment as directed by the supervising Community Corrections Officer”; and (5) “Participate in urinalysis, breathalyzer, and compliance polygraph examinations as directed by the supervising Community Corrections Officer.” CP 23-24.

A trial court’s authority to impose sentencing conditions is derived wholly from statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

The Sentencing Reform Act generally authorizes a trial court to impose prohibitions or affirmative conditions of community custody only if they are “crime-related.” RCW 9.94A.505(9); State v. Brooks, 142 Wn. App. 842, 850, 176 P.3d 549 (2008). A “crime-related” condition is one that “directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).

Specifically, a condition of community custody requiring the offender to participate in drug counseling must be “crime-related.”

RCW 9.94A.703(3); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003); State v. Parramore, 53 Wn. App. 527, 529, 768 P.2d 530 (1989). To justify such a condition, the evidence must show and the court must find drugs contributed to the crime. Jones, 118 Wn. App. at 203, 208. Drug counseling “‘reasonably relates’ to the offender’s risk of reoffending, and to the safety of the community, only if the evidence shows that [drugs] contributed to the offense.” Id. at 208.

Likewise, conditions prohibiting a person from possessing drug paraphernalia or from going to “high drug use areas” must be crime-related. State v. Munoz-Rivera, 190 Wn. App. 870, 892-93, 361 P.3d 182 (2015). It is not illegal to possess drug paraphernalia or associate with known drug users. A person may not be prohibited from doing these things while on community custody unless the prohibition is crime-related. Id.

The philosophy underlying the “crime-related” provision is that offenders may be punished for their crimes and may be prohibited from doing things that are directly related to their crimes, but they may not be coerced into doing things that are believed to rehabilitate them. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993); David Boerner, Sentencing in Washington, §4.5, at 4-7 (1985).

Here, at the first sentencing, the State requested several conditions of community custody related to drug use that are identical to the ones imposed by the court at the second sentencing. Sub #155 at 14. At the first sentencing, the court specifically declined to impose those conditions because they were not crime-related. The court explained, “[a]lthough there was testimony in relation to you using methamphetamine during the time of this event, I frankly don’t find that these crimes were committed as a result of your chemical dependency issue.” 3/12/13RP 23.

Collateral estoppel bars the court from reconsidering that decision. Collateral estoppel precludes the same parties from relitigating issues actually raised and resolved by a former judgment. Harrison, 148 Wn.2d at 561. The policy is to prevent relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case. Id.

In a criminal case, collateral estoppel is to be applied “with realism and rationality.” Id. In general, before collateral estoppel will preclude the relitigation of an issue, the following requirements must be met: (1) the issue in the prior adjudication must be identical to the issue currently presented for review; (2) the prior adjudication must be a final

judgment on the merits; (3) the party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) barring the relitigation of the issue will not work an injustice on the party against whom the doctrine is applied. Id.

Here, the issue at the first sentencing is identical to the issue presented at the second sentencing. At the first sentencing, the State requested several conditions of community custody related to drug use. Sub #155 at 14. The court specifically declined to impose those conditions, finding drug use did not contribute to the crime. 3/12/13RP 23. At the second sentencing, the State ignored the court's prior ruling and proposed the same conditions. CP 39. This time the court accepted the conditions, without acknowledging its prior decision. CP 23-24. Nothing had changed in the interim. The issues are the same.

Moreover, the court's prior decision was a final decision on the merits. The State did not appeal the court's decision not to impose the community custody conditions. Although the Court of Appeals remanded the case for resentencing, that was because two convictions were reversed due to instructional error and two convictions vacated due to a double jeopardy violation. The Court's opinion does not address community custody conditions. CP 59-88.

The trial court's decision to impose new community custody conditions was not within the scope of this Court's mandate. The Court remanded the kidnapping convictions for retrial and the assault convictions "with instructions that the trial court enter orders vacating these convictions and for resentencing." CP 87-88. The mandate states, "[t]his case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion." CP 58. The mandate does not provide authority for the court to reassess whether community custody conditions related to drug use should be imposed.

When one or more convictions are reversed on appeal, "the finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced' is unaffected." State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) (quoting Carle, 93 Wn.2d at 34). "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.'" State v. Rowland, 160 Wn. App. 316, 326, 249 P.3d 635 (2011), aff'd, 174 Wn.2d 150, 272 Wn.2d

242 (2012) (quoting In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 877, 618 (2002)).

When this Court reversed Brown's convictions and remanded for resentencing, that portion of the judgment and sentence that was correct and valid when imposed was not affected. The State did not appeal the trial court's decision not to impose conditions of community custody related to drug use. That portion of the judgment and sentence was valid and final at the time of resentencing. The trial court was barred by collateral estoppel from revisiting its earlier decision and imposing new conditions of community custody related to drug use.

- b. *The conditions are invalid because they are not crime related and/or are unconstitutionally vague or overbroad.*
- i. For the same reason found by the trial court at the first sentencing, the conditions are invalid because they are not crime-related.

The court did not have statutory authority to impose conditions of community custody related to drug use because they are not crime-related. This Court reviews de novo whether the trial court had statutory authority to impose a challenged condition of community custody. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

As stated, the conditions prohibiting Brown from using drug paraphernalia or being in “drug areas,” and requiring him to engage in drug-related treatment or counseling, must be crime-related. RCW 9.94A.703(3); Jones, 118 Wn. App. at 207-08; Parramore, 53 Wn. App. at 529; Munoz-Rivera, 190 Wn. App. at 892-93. To justify such a condition, the evidence must show and the court must find drugs contributed to the crime. Jones, 118 Wn. App. at 203, 208.

Here, the trial court did not find that drugs contributed to the crime. The court made no such finding at the resentencing hearing or on the judgment and sentence. To the contrary, the court specifically found at the first sentencing that Brown’s drug use did *not* contribute to the crime. 3/12/13RP 23. The record does not support a contrary finding.

Moreover, the court may require an offender to submit to urinalysis or breathalyzer only in order to monitor compliance with the conditions of community custody. State v. Riles, 135 Wn.2d 326, 341-42, 957 P.2d 655 (1998). Therefore, to the extent the monitoring conditions are intended to monitor compliance with conditions related to drug use, they are invalid because they are not crime-related.

- ii. The condition requiring Brown to “stay out of drug areas as defined in writing by your supervising Community Corrections Officer” is unconstitutionally vague and overbroad.

The due process vagueness doctrine of the Fourteenth Amendment and article I, section 3 of the state constitution require that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008); U.S. Const. amend. XIV; Const. art. I, § 3. A statute is unconstitutionally vague if it (1) does not define the offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

Sentencing conditions that interfere with fundamental constitutional rights, such as the fundamental right to travel and move about freely, must be “sensitively imposed” so that they are “reasonably necessary to accomplish the essential needs of the State and public order.” In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). A sentencing condition that encroaches on the constitutional right to travel “must be narrowly tailored to serve a

compelling governmental interest.” State v. Schimelpfenig, 128 Wn. App. 224, 226, 115 P.3d 338 (2005).

Unlike statutes, sentencing conditions are not presumed constitutional. State v. Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010).

The sentencing condition requiring Brown to “stay out of drug areas as defined in writing by your supervising Community Corrections Officer” is unconstitutionally vague and overbroad. It is equivalent to the condition this Court invalidated in State v. Irwin, 191 Wn. App. 644, 364 P.3d 830 (2015). That condition provided: “Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO.” Id. at 652.

The Court held the condition at issue in Irwin was unconstitutionally vague because it did not give ordinary people sufficient notice to understand what conduct is proscribed. Id. at 652-53. It did not give fair warning of where children “are known to congregate.” Id.

Similarly, here, the condition requiring Brown to “stay out of drug areas” does not give ordinary people sufficient notice to

understand what conduct is proscribed. It does not give fair warning of *where* a “drug area” might be.

The condition’s clause allowing for further definition from the supervising Community Corrections Officer does not save the condition from a vagueness challenge. *Id.* at 654. Although it may be true that, once the CCO defines a “drug area,” Brown will have sufficient notice of what conduct is proscribed, that would leave the condition vulnerable to arbitrary enforcement. *Id.* at 655. The potential for arbitrary enforcement would render the condition unconstitutional under the second prong of the vagueness analysis set forth in *Bahl*. *Id.*

Because the condition does not make clear to an ordinary person what a “drug area” is, it is unconstitutionally vague and overbroad.

c. The conditions must be stricken.

The conditions related to drug use are either barred by collateral estoppel or are otherwise invalid and must be stricken. *Jones*, 118 Wn. App. at 203, 208. When a term included in a sentencing order is found to be improper, “[t]he simple remedy is to delete the questionable provision from the order.” *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 65 (1998).

F. CONCLUSION

The exceptional sentence is presumptively vindictive on the part of the State and the court. It is also barred by collateral estoppel. Brown must be resentenced within the standard range. In addition, the State did not prove the offender score and five conditions of community custody related to drug use are invalid and must be stricken.

Respectfully submitted this 10th day of February, 2017.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 75458-1-I
)	
RONALD BROWN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF FEBRUARY, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** 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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