

FILED
SUPREME COURT
STATE OF WASHINGTON
10/26/2018 3:15 PM
BY SUSAN L. CARLSON
CLERK

No. 98326-7

~~NO. 96051-8~~

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

ANTHONY THOMAS WALLER,

Respondent.

APPELLANT'S OPENING BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Appellant

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
B. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
C. <u>STATEMENT OF THE CASE</u>	1
D. <u>ARGUMENT</u>	6
1. THE TRIAL COURT'S RULING GRANTING RELIEF FROM JUDGMENT IS APPEALABLE AS A MATTER OF RIGHT	6
2. WALLER'S COLLATERAL ATTACK ON HIS JUDGMENT WAS TIME-BARRED AND MUST BE DISMISSED	10
E. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Pers. Restraint of Light-Roth, 200 Wn. App. 149,
401 P.3d 459 (2017)4, 6

In re Pers. Restraint of Light-Roth, 191 Wn.2d 328,
422 P.3d 444 (2018)6, 10

In re Pers. Restraint of Skylstad, 160 Wn.2d 944,
162 P.3d 413 (2007)7, 8

State v. Hardesty, 129 Wn.2d 303,
915 P.2d 1080 (1996)8, 9

State v. Larranaga, 126 Wn. App. 505,
108 P.3d 833 (2005)8, 9

State v. Miller, 185 Wn.2d 111,
371 P.3d 528 (2016)7

State v. O’Dell, 183 Wn.2d 680,
358 P.3d 359 (2015)4, 6, 10

State v. Rowland, 97 Wn. App. 301,
983 P.2d 696 (1999)9

State v. Scott, ___ Wn.2d ___,
416 P.3d 1182 (2018)7

State v. Smith, 159 Wn. App. 694,
247 P.3d 775 (2011)9

State v. Waller, No. 46568-6-I, slip op.
(Wash. Court of Appeals, Division One,
filed August 13, 2001)2

Statutes

Washington State:

RCW 10.73.090..... 10
RCW 10.73.100..... 6, 10

Rules and Regulations

Washington State:

CrR 7.8..... 4, 5, 7, 8, 9, 10
RAP 2.2..... 1, 5, 6, 7, 8, 10
RAP 7.2..... 5

A. ASSIGNMENTS OF ERROR

The trial court erred by entering orders (CP 166-17, 124) granting reconsideration of the court's earlier order transferring Waller's collateral attack to the Court of Appeals and which ruled that Waller was entitled to vacation of his long-final judgment and sentence and to resentencing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether under RAP 2.2 the State may appeal an order granting relief from judgment.

2. Whether Waller is barred from challenging his judgment and sentence where his attack on the judgment was not filed until many years after his case was final on appeal and where there had been no significant change in the law material to his case?

C. STATEMENT OF THE CASE

Anthony Waller chased down and killed Thomas Moore – who was homeless and defenseless – by stabbing him more than 40 times in the eyes, face and head with a flathead screwdriver. CP 2-9. The cause of death was at least seven penetrating injuries

into the brain. Many of the wounds standing alone would have been fatal. Waller had never met his victim—he killed Moore simply because he feared Moore had seen him and his friends breaking into cars. CP 2-9. Waller was 21 years old at the time of this murder. A jury convicted him as charged. CP 64-68 (State v. Waller, No. 46568-6-I, slip op. (Wash. Court of Appeals, Division One, filed August 13, 2001)).

The Honorable Deborah Fleck presided over trial and sentencing. Waller personally proclaimed his innocence in no uncertain terms.

“If [Det. Holt would have done her job correctly] I wouldn’t be standing in the courtroom this day facing charges for something that I didn’t do.” [RP (4/7/00) at 18]

“...I didn’t do the crime [the prosecutor] says I committed.” [RP (4/7/00) at 19]

“...somebody else committed the crime...” [RP (4/7/00) at 19]

“If Det. Holt would have done everything the right way and investigated the case thoroughly, then she would have found the people who actually did the crime...” [RP (4/7/00) at 19]

“...the people who live in Kent ... should know that the real killers, Michael Waller and Adam Okerson, are out there walking and driving on the same streets as they are.” [RP (4/7/00) at 19]

“...the people who really did the crime are still on the loose.” [RP (4/7/00) at 20]

“Your Honor, it’s a tragedy what happened to Mr. Moore. My heart goes out to his family and friends. And I wish once again that Detective Holt would have done a better job in her case, so that the people who committed this crime could have been brought to justice. But she didn’t care who did it, as long as she could have her case closed, even if it means sending an innocent person to jail, as it is right now. I hope that in the future Detective Holt and other detectives will start doing their jobs thoroughly, so that they can arrest the real people who committed crimes instead of making their case fit an innocent person.” [RP (4/7/00) at 20-21]

Appendix A. Given these repeated and clear protestations of innocence, defense counsel had no basis to argue that Waller’s youth influenced his commission of this horrendous crime.

The sentencing judge court rebuked Waller’s claims of innocence and found the following facts relevant to sentencing:

- Waller acted with premeditated intent to cause Moore’s death.
- Waller intentionally and deliberately inflicted more than 40 stab wounds about Moore’s head and face with a flathead screwdriver.
- The attack “took place over a period of time and distance sufficiently long to inflict extreme fear, pain and suffering on the part of Mr. Moore prior to his death.”
- Waller “inflicted the fatal stab wounds to Mr. Moore with multiple blows of a flat head screw driver through the eyes of Mr. Moore and into the vital portions of Mr. Moore’s brain.”
- The wounds were concentrated around Mr. Moore’s head and face and the extent and number of these stab

wounds were gratuitous in nature and represented “overkill” on the part of the defendant.

- Waller remarked after the attack, “This is what happens when somebody fucks with me,” and then stabbed Moore in the head one final time.

CP 56-58.

Waller’s standard sentencing range was 261-347 months (21.75 - 28.9 years). CP 28. Based on the above findings of fact, the sentencing court concluded that Waller had manifested deliberate cruelty toward Moore, and imposed an exceptional aggravated sentence of 432 months (36 years) incarceration. CP 29.

This case has been final for over 15 years now. The Court of Appeals affirmed Waller’s sentence, CP 64, and a mandate was issued on November 18, 2002. CP 63. Waller has served substantially less than ½ of the 36-year sentence imposed by the trial judge, and several years less than even the 21-year sentence at the bottom of the standard range.

Waller filed a CrR 7.8 motion to vacate his judgment under the authority of In re Pers. Restraint of Light-Roth, 200 Wn. App. 149, 401 P.3d 459 (2017) and State v. O’Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), alleging that the sentencing judge erred by failing

to consider his youth. CP 38-46. The State opposed his request and moved to transfer the motion to the Court of Appeals to be treated as a personal restraint petition. CP 48-51. The trial court entered an order of transfer, CP 75-76, but Waller sought reconsideration of that order. CP 77-114. The court considered argument from the parties in open court. RP (6/1/18) 1-20. It then retracted its transfer order and granted Waller's motion to vacate judgment. CP 116-17, 124.

The State filed a notice of appeal and/or notice for discretionary review. CP 140-44. The State also asked the sentencing court to stay proceedings. CP 125-33. The trial court denied the motion to stay, ruling that the Court had lost jurisdiction to act in the case pursuant to RAP 7.2. Supp. CP ____ (Sub No. 186, filed 7/17/18) (Appendix B). The court's order provided, in relevant part, that

Mr. Waller sought relief from *judgment* based on a court rule, CrR 7.8, that provides for relief from *judgment*. Thus, under the plain language of the court rules, it appears to this Court that when the State sought review of the Court's rulings (granting relief from judgment), the State appealed as a matter of right under RAP 2.2(b)(3) (Arrest or Vacation of Judgment). ... Because review has been accepted, RAP 7.2 applies. It appears that RAP 7.2 does not provide for a resentencing hearing.

Supp. CP ____ (Sub No. 186, p. 1-2) (*italics in original*).

Since this appeal was initiated, this Court filed its decision in In re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 422 P.3d 444 (2018), reversing the decision of the court of appeals and holding that State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), did not constitute a significant and material change in the law that applies retroactively to a final sentence, and thus that the exception to RCW 10.73.100's time bar does not apply to such cases.

D. ARGUMENT

The trial court granted Waller a new sentencing hearing 15 years after his case was final based on the Court of Appeals decision in Light-Roth. This ruling vacated his judgment and sentence and is appealable as a matter of right under RAP 2.2(b)(3). Moreover, the trial court's ruling was in error. Under this Court's recent decision, Waller's collateral attack on his judgment was untimely, and must be dismissed.

1. THE TRIAL COURT'S RULING GRANTING RELIEF FROM JUDGMENT IS APPEALABLE AS A MATTER OF RIGHT.

RAP 2.2(b)(3) provides that in a criminal case the State may appeal as a matter of right "an order arresting or vacating a

judgment.” The term “judgment” in RAP 2.2(b)(3) includes not just the finding of guilt, but the sentence imposed.

Waller filed, and the trial court granted, a motion for relief from *judgment*. That motion was filed pursuant to CrR 7.8, which governs “relief from judgment.” If a motion for resentencing is not a motion that affects the “judgment,” then such motions are not authorized by CrR 7.8. The trial court here, in the order denying the State’s motion for a stay, plainly viewed its ruling to be the grant of a motion to vacate the judgment. Supp. CP ____ (Sub No. 186) (Appendix B). Thus, the plain language of RAP 2.2(b)(3) allows the State to appeal a ruling that vacates judgment.

Case law is consistent with this plain language reading. This Court has permitted State appeals from trial rulings ordering resentencing of youthful offenders. See State v. Miller, 185 Wn.2d 111, 371 P.3d 528 (2016) (State’s appeal from order granting resentencing in untimely collateral attack); State v. Scott, ____ Wn.2d ____, 416 P.3d 1182 (2018) (State’s appeal of order granting relief from judgment in untimely collateral attack on sentence imposed on youthful offender).

This Court has in the past explained that a final judgment ends the litigation. In re Pers. Restraint of Skylstad, 160 Wn.2d

944, 949, 162 P.3d 413 (2007). In a criminal case, the sentence is part of the judgment. Id. at 950. The judgment is not final until the sentence is pronounced. Id. Thus, both the conviction and the sentence must be affirmed on appeal in order for the judgment to become final. Id.

This Court further held in Skylstad that when the appellate court reverses a sentence it “effectively vacates the judgment,” even though the existing sentence remains in effect until a resentencing hearing can be held. Id. at 954.

Likewise, in State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996), this Court characterized the correcting of an erroneous sentence as an amendment of the “judgment.”

Other appellate decisions are in accord with this reasoning. The term “judgment” in CrR 7.8 has been read to encompass a change to the sentence, not simply to an order that vacates the finding of guilt. State v. Larranaga, 126 Wn. App. 505, 108 P.3d 833 (2005), is instructive. In that case, the defendant pled guilty and received a mid-range sentence. Larranaga moved for resentencing. The trial court denied that motion. The appellate court held that the denial was appealable as a matter of right pursuant to RAP 2.2(a)(9) which allows the defendant to appeal “an

order granting or denying a motion for new trial or amendment of judgment.” Larranaga, 126 Wn. App. at 508. The State argued the denial of Larranaga’s motion for resentencing was not appealable because Larranaga had not moved for “relief from the underlying judgment but only a motion for resentencing.” Id. The Court of Appeals rejected the State’s argument and held that “correcting an erroneous sentence amends a judgment.” Id. The Larranaga court relied on this Court’s decision in Hardesty.

Similarly, in State v. Smith, 159 Wn. App. 694, 247 P.3d 775 (2011), the court held that the trial court had authority under CrR 7.8 to modify a sentence. See also State v. Rowland, 97 Wn. App. 301, 305, 983 P.2d 696 (1999), the court noted that the defendant could have brought his claim of an offender score error to the trial court by means of CrR 7.8(b), explaining that the procedure provides a forum to correct sentencing errors.

The trial court’s order in this case granting resentencing disturbs the finality of the existing sentence and thus vacates the judgment. It is appealable as a matter of right. A trial court’s order granting resentencing is the equivalent of an appellate court decision reversing a sentence. Thus, the order granting Waller

resentencing here vacated the judgment and may be appealed by the State as a matter of right pursuant to RAP 2.2(b)(3).

2. WALLER'S COLLATERAL ATTACK ON HIS JUDGMENT WAS TIME-BARRED AND MUST BE DISMISSED.

Waller filed a CrR 7.8 motion seeking relief from judgment. CP 85-97. A CrR 7.8 motion is a collateral attack on his judgment. RCW 10.73.090 prohibits an attack on a criminal judgment more than a year after the case is final. Waller's sentence was final in 2003. CP 63. An exception to the time bar exists under RCW 10.73.100(6) if there is a significant change in the law material to the defendant's case. Waller argued that State v. O'Dell was such a change. This Court's recent decision rejects that argument. In re Pers. Restraint of Light-Roth, 422 P.3d at 337-38 (2018). Thus, Waller's collateral attack on his judgment was untimely and it must be dismissed.

Moreover, even if this Court were to address Waller's claims, they should fail. He never sought leniency based on youth, because he maintained his innocence at sentencing. RP 16-21.

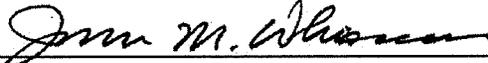
E. CONCLUSION

For the foregoing reasons, this Court should dismiss Waller's collateral attack on his judgment.

DATED this 26th day of October, 2018.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Appellant
Office WSBA #91002

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

vs.

ANTHONY T. WALLER,

Defendant.

No. 99-1-00467-8 KNT

Verbatim Report of Proceedings
from Electronic (Videotape) Record

SENTENCING HEARING - 4/07/2000
Before The Honorable DEBORAH D. FLECK, Judge

APPEARANCES OF COUNSEL:

For the Plaintiff: ROGER DAVIDHEISER, D.P.A.
King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104

For the Defendant: JOHN TAYLOR HICKS
Attorney at Law
Suite 300 Howard Building
614 First Avenue
Seattle, Washington 98104

OTHERS APPEARING:

For the Defendant: PAMELA JOSEPH

TRANSCRIPTIONIST: Laurie K. Snell

1 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY AT KENT

2 FRIDAY, APRIL 7, 2000; 8:50 A.M.

3 --oOo--

4
5 (Defendant and respective
6 counsel present.)

7 THE COURT: Good morning.

8 MR. DAVIDHEISER: Good morning, Your
9 Honor. This is State of Washington versus Anthony
10 Waller, Cause No. 99-1-00467-8. I am Roger
11 Davidheiser, representing the State of Washington. John
12 Hicks is here representing Mr. Waller. We are here
13 before the Court for sentencing in this matter.

14 Mr. Waller was found guilty by way of jury
15 verdict on the 23rd of December of last year, of one
16 count of murder in the first degree. He has an offender
17 score of 3 and the seriousness level on this offense 15,
18 a standard range of 271 months to 361 months, with a
19 maximum sentence of life in prison and a \$50,000 fine.

20 The State is essentially in agreement with
21 the recommendation made by the Department of Corrections,
22 and we have spelled that out in our presentence report.
23 We are recommending an exceptional sentence in this
24 matter. The State is articulating, as the grounds for
25 that exceptional sentence, the vicious nature of the

1 offense, the gratuitous violence, the extreme cruelty
2 that was demonstrated in the perpetration of this offense
3 against the victim in this matter, who -- I think the
4 Court is well familiar with from the facts that were
5 presented at trial -- a homeless man who was either
6 walking to or walking from what he called his home, not
7 far from where he lost his life at the hands of the
8 Defendant. We are recommending a 500-month sentence in
9 this matter.

10 In addition to the sentence, we are asking
11 that the Defendant pay court costs, the victims penalty
12 assessment, and recoupment of any attorneys' fees; also,
13 restitution would be appropriate for any expenses that
14 the family of the victim incurred as a result of this
15 crime.

16 THE COURT: Thank you. Mr. Hicks.

17 MR. HICKS: Yes, Your Honor. First of
18 all, initially, do you have an Appendix B of the
19 Prosecutor's presentence report with Mr. Waller's history
20 on it? I have shown this to the Prosecutor, by the way.

21 THE COURT: Are you referring to the
22 normal presentation by the Prosecutor that has this --

23 MR. HICKS: It has his record on it.
24 It's entitled "Appendix B to Plea Agreement," and it
25 should be in their presentence package. And if not, I

1 will just have you look at mine for a second.

2 THE COURT: Just a second. Yes; here it
3 is.

4 MR. HICKS: Okay. Your Honor, in the
5 middle, there is a section of juvenile felonies. At the
6 very bottom, it says, "Possession, firearm." The date
7 for that is -- the sentence date is 7/17/95. Do you see
8 that?

9 THE COURT: Yes.

10 MR. HICKS: All right. Your Honor, I
11 visited with Mr. Waller last night; I went to the RJC. I
12 just literally got out of trial yesterday in Judge
13 Mertel's court. It lasted -- frankly, the whole mess
14 lasted longer than we thought.

15 Mr. Waller, going over his record and his
16 past record again, this time noticed something that I did
17 not notice, frankly, the first time. Your Honor, the
18 possession of firearm is apparently a misdemeanor, and
19 you will note it does not say VUFA. My experience has
20 been -- and maybe it's different for a juvenile -- but
21 for a possession of a firearm offense to be a felony, it
22 has to be a VUFA. But in any event, I scored the matter
23 differently. That reduces the number of juvenile
24 offenses from four to three, and it gives a juvenile
25 score of 1 rather than 2, for a total score of 2, which

1 changes his range to 200 -- excuse me; which then changes
2 his range from -- let me make sure I get this right --
3 261 months to 347, instead of how it is currently
4 calculated at 271 months to 361 months. And I have a
5 copy of the scoring sheet I made last night at the
6 library. That is our one dispute.

7 And Your Honor, I would have to say it at
8 least looks like Mr. Waller is correct. Mr. Waller
9 insists that all his past juvenile felonies are all
10 burglaries. Now, again, that does compute with what I
11 have been given by the State on the same appendix. There
12 is a residential burg and then two burg-two's. But
13 anyway, that is Mr. Waller's contention.

14 I have submitted some authority
15 previously, and incidentally, I want to thank the Court
16 for the previous continuance. I have read RCW 94A.360.
17 The other juvenile felonies do indeed count.

18 The Defense memorandum I submitted
19 previously, Your Honor, on the issue of the exceptional
20 sentence up by the State basically takes the position
21 that we should be emphasizing here the difference between
22 a panicked attack and a predatory attack. In all of the
23 cases cited by the State, they are predatory attacks on
24 an individual, with gross aggravating factors in addition
25 to the multiple stabbings. Unlike the proposition of the

1 State, there is in fact no authority that multiple stab
2 wounds alone constitute an aggravating factor. The cases
3 I read were quite qualifying in their language on how
4 they reached their exceptional sentences. In fact, one
5 of the cases cited by Mr. Davidheiser, as I point out in
6 my brief, was actually remanded for re-sentencing because
7 the lower court went too far.

8 In any event, Your Honor, basically all of
9 the cases cited by the State merely represent the
10 proposition that, in a case where there are multiple stab
11 wounds that suggest a predatory crime rather than a
12 panic crime, certainly multiple stab wounds can form
13 part of the basis for the deliberate cruelty prong of the
14 aggravating factors, and there's no question about that,
15 but to get there, there has to be all the auspices of a
16 predatory crime, such as deliberate stalking and/or
17 torture of the victim; such as deliberately leaving the
18 victim in a state of agony to die in agony; such as going
19 around coldly boasting about it, instead of boasting in a
20 suddenly triumphant manner, given fear or other factors.

21 Now, the Court heard the factors in the
22 Waller case. This was tried before Your Honor. If
23 anything, what we have here, Your Honor, is a defendant
24 who does have a criminal crime but, as I point out in my
25 brief, no violent previous offenses, other than, I

1 believe, a misdemeanor assault, so no previous violent
2 felonies; very young.

3 And most importantly -- as the Jury
4 obviously did not accept my argument, to be sure, but
5 represented as a failed defense, Your Honor -- all of the
6 factors just suggested so strongly a sudden surprise
7 witness, a panicked attempt first to scare him off, a
8 chase, then a frantic struggle with a weapon that
9 certainly wasn't designed to kill, a blunt-end
10 screwdriver that was used in a panicked, furious manner,
11 when frankly, assuming the State's theory is correct,
12 Mr. Waller started taking the worst end of the fight.
13 And at that point, then, the fury is released; everybody
14 flees. The victim in this case is certainly deceased,
15 and he is not left at that point -- or, what is left is a
16 hideous mess that no doubt had some impact on the Jury,
17 and that is the multiple stab wounds to the head, as
18 anybody would be repulsed by such a sight and the crime
19 photos and so forth.

20 But Your Honor, it's that very evidence
21 that really suggests the lack of typical premeditation
22 and a predatory crime for which an exceptional sentence
23 is normally sought. In this case, what you have, again
24 if the State's theory is correct, a young and supposed
25 tough guy who panicked because, basically, he faced a

1 struggling individual he was trying to scare off.

2 Whether or not Mr. Waller intentionally
3 killed this individual or not, or basically panicked and
4 just started swinging with that screwdriver in his hand,
5 the evidence was there was initially a fist fight that
6 escalated, and there was evidence of that based upon the
7 testimony. I'm not suggesting there were any credible
8 witnesses, but at least in that respect, the witnesses
9 all at least saw at one point a fist fight commencing
10 without the use of the screwdriver, which meant the
11 screwdriver could have only been pulled out when the
12 scene changed and the chase wound up near the trail.
13 That at least suggests that weapon was not used initially
14 and at first there was a fist fight, followed by the
15 killing near the trail. For all those reasons, Your
16 Honor, we do contest the exceptional sentence.

17 It is somewhat frustrating when the DOC
18 takes these positions. I at least hope they talk to me
19 before they do such a thing. That was not done in this
20 case. I do feel the analysis of the DOC person -- and I
21 don't mean this with any disrespect, because they have
22 got an independent -- a job to do -- it was done somewhat
23 -- sort of lightly. For one thing, there was a just
24 blatantly wrong legal conclusion met by this particular
25 DOC officer. He concluded that a transient qualifies as

1 a vulnerable individual as supported by case law, and
2 that's just not the case, and it was not joined in by the
3 State.

4 So, I would ask the Court to consider
5 that, too, and the fact that the State was not suggesting
6 an exceptional sentence until the DOC stated its
7 position. Thank you, Your Honor.

8 THE COURT: Thank you. Mr. Davidheiser,
9 do you wish any time to respond on the legal issue?

10 MR. DAVIDHEISER: Well, I take issue with
11 Mr. Hicks' interpretation of the facts as proven by the
12 State beyond a reasonable doubt and the conclusion that
13 the jury made relative to those facts. Mr. Hicks
14 essentially made an abbreviated form of his closing
15 argument just now to Your Honor, and the Jury clearly
16 rejected that.

17 This was not a panic attack. This was --
18 I don't believe that it is out of context to characterize
19 this as a vicious predatory attack, to the extent that
20 Mr. Waller was angry that this man saw what he was doing.
21 And it wasn't enough that he just, you know, shouted at
22 him to get away or confronted him in the parking lot. He
23 chased him down up onto the Interurban Trail. And it
24 wasn't enough that he just stab him one or two times in
25 the chest or torso, which would have been a very big

1 target. He purposefully targeted Mr. Moore's head and
2 specifically the eyes, and I think that the evidence
3 demonstrated very clearly why he did that. He did that
4 purposefully because he wanted to teach Mr. Moore a
5 lesson. And, as he said to his buddies out there that
6 night, "This is what happens when someone screws with
7 me."

8 And I think that the number of stab wounds
9 concentrated about the head and specifically through the
10 -- the fatal blows through the orbits of the eyes -- to
11 suggest that somehow that doesn't represent the kind of
12 extreme cruelty that is above and beyond what we normally
13 see in a murder case is, I think, ignoring -- ignoring
14 the reality of murder in our society. Most murders don't
15 have these kinds of facts. This was -- and to suggest
16 that Mr. Moore didn't suffer a terribly painful,
17 excruciating death that wasn't instantaneous, is just
18 well beyond what the evidence presented suggests. And
19 so, I would respectfully ask the Court to reject
20 Mr. Hicks' arguments, as the Jury did. This was a
21 particularly brutal attack that warrants this sentence.

22 If you look at Mr. Waller's criminal
23 history, he has several assault convictions, misdemeanor
24 assault convictions, including one domestic violence
25 conviction. He has multiple weapons violations. This is

1 a young man who has demonstrated, through his criminal
2 conduct, his willingness to resort to violence; his
3 willingness to be prepared to resort to violence in the
4 commission of these felonies and these crimes that he
5 has perpetrated over a period of years. It is, I don't
6 believe, surprising that, on this occasion, he escalated
7 his behavior and demonstrated to his buddies, as he did,
8 exactly what he was willing to do to someone who stepped
9 upon his toes as he was engaged in the kind of conduct
10 that he thought was just what he was allowed to do on a
11 Saturday night.

12 And I think that an exceptional sentence
13 is appropriate under those circumstances, given the
14 nature of this attack on Mr. Moore. That addresses, I
15 think, the legal issues. I think the case law supports
16 that that I have cited, and I will stand on that.

17 With respect to Mr. Waller's criminal
18 history: Unfortunately, Mr. Hicks just informed me this
19 morning that he was disputing the juvenile conviction
20 that we have listed as a felony. All I can say to Your
21 Honor is that we have the criminal history report on
22 Mr. Waller -- I do not have a certified copy of the
23 judgment and sentence on that conviction, nor do I have
24 the file at my fingertips this morning. Both of -- it's
25 a King County case, and that would be very easy to get,

1 but unfortunately -- and we know that this case has been
2 bumped along several times -- I don't have that.

3 All I can say is that we do have the
4 criminal history report that we typically obtain through
5 the Department of Corrections and that the juvenile
6 firearm possession is denoted as a felony on that report,
7 separate and distinct from some of the other weapons
8 offenses that he was convicted of as a juvenile which are
9 denoted as misdemeanors. But beyond that, I
10 unfortunately cannot provide any additional information
11 at this point, and it's unfortunate that I just learned
12 of the dispute this morning from Mr. Hicks.

13 MR. HICKS: Brief response, Your Honor.

14 THE COURT: Yes. And let me mention that
15 the reason requested for the continuance last time, and
16 the reason in fact it was granted, was because you
17 indicated, given your incredibly busy schedule, of which
18 I am aware, having had you in my court and knowing that
19 you had been down the hall and downtown and so on, you
20 needed some additional time to look into any facts about
21 Mr. Waller himself, since you had been able to address
22 the legal issues. And I want to invite you to mention
23 any of that --

24 MR. HICKS: Yes; I know. Your Honor,
25 well, the way I'm going to do that is to have

1 Mr. Waller's mother address the Court.

2 THE COURT: Mm-hmm.

3 MR. HICKS: My brief response is limited
4 to part of the legal argument. Your Honor, as you may --
5 May I remain seated, only to --

6 THE COURT: Yes, that's fine.

7 MR. HICKS: -- fumble with some papers?

8 Thank you.

9 As the Court may recall, my argument to
10 the Jury indeed, as well as today, was that at the worst,
11 in looking at the facts in the very worst light,
12 Mr. Waller's conduct in relation to a homicide would be
13 murder in the second degree, at the worst. It's a matter
14 of record the State agrees. They charged in the
15 alternative murder second degree. I would like to
16 briefly just read that charging language. It's actually
17 less serious than the type of murder-two I suggest.

18 "That the Defendant, Anthony Thomas
19 Waller, in King County, Washington, on or about
20 January 18, '99, while committing and attempting to
21 commit the crime of assault second degree, and in the
22 course of," et cetera, "immediate flight," et cetera,
23 "did cause the death." Well, Your Honor, the charging
24 deputy that signed that is Mr. Davidheiser.

25 I understand the State's position. They

1 won. Did they ever. An hour and sixteen minutes is
2 about as bad a judgment as I ever got; we have got to
3 live with it. But at the same time, you simply cannot
4 ignore -- or, the Court certainly cannot ignore the fact
5 that these facts came out in evidence, but also that the
6 genesis of the case, the State's own theory in the
7 alternative, suggested what I am arguing to the Court in
8 terms of these lesser factors, and factors that outweigh
9 the aggravating factors cited by the State of the
10 multiple stab wounds.

11 The other thing I wish to mention to the
12 Court, Your Honor -- oh, yes. I want to apologize to
13 Mr. Davidheiser. Again, I have gone over these things
14 with Mr. Waller. He in fact spotted this last night, and
15 I can understand how the error happened. He does in fact
16 have a displaying a weapon and unlawful display of weapon
17 in '94 and '98, respectively, and I guess that's how it
18 happened, and I'm sorry about this. I should have caught
19 it before, and I simply didn't.

20 But in any event, Your Honor, to correct
21 Mr. Davidheiser as saying -- he used the word "several" a
22 couple of times, and in fact there are two, just in case
23 there's any dispute -- two misdemeanors, displaying a
24 weapon, did involve weapons, '94 displaying a weapon, '98
25 displaying a weapon. Assaults, yes; two misdemeanor

1 assaults, in '96 an assault, and that's all it says, in
2 '98 an assault, domestic violence. So, that is in fact
3 his record of violence. Thank you, Your Honor.

4 THE COURT: Thank you. And Mr. Hicks, is
5 there anyone else you wish to have me listen to?

6 MR. HICKS: Yes, Your Honor, I do. First
7 of all, the DOC guy did cover somewhat the family
8 situation of Mr. Waller. I would like to ask Pam if she
9 would like to say anything on behalf of her son.

10 THE COURT: If you do, would you step
11 forward, on the other side of Mr. Hicks, please.

12 MR. HICKS: And I believe her legal name
13 is now Balossi (phonetic).

14 THE COURT: Would you identify yourself,
15 please, for the record, by stating your name, and then
16 tell me whatever you would like me to consider.

17 MS. JOSEPH: My name is Pamela Joseph,
18 and Anthony is my only son. He has been a very big part
19 of my life. Excuse me.

20 THE COURT: That's all right.

21 MS. JOSEPH: And thus, it's been very hard
22 for me. He's always been very loving. He has been there
23 for me when I needed him. I lost my mom a year ago.
24 Tony is one of her twenty-two grandchildren. Out of
25 those twenty-two grandchildren, my son was the one who

1 took care of my mother. Her blood -- every day, she had
2 to -- He's been a very big part of my life. And a lot
3 of people don't know, but he is a very good person. He's
4 got a big heart.

5 THE COURT: Thank you, Ms. Joseph.

6 Mr. Waller, is there anything you would
7 like to tell me?

8 THE DEFENDANT: Yes, there is, Your Honor.

9 Your Honor, you were present during the
10 whole duration of this trial here and seen everything
11 that went on during the course of this trial. And I want
12 to ask you honestly, as being the fair judge you are: I
13 am going to ask you, do you really think that it's fair
14 for DOC to recommend an exceptional sentence, when they
15 weren't even present during the trial or didn't hear
16 nothing about the case during the trial whatsoever, so
17 they have no knowledge of what went on. All that they
18 looked at, or I should say browsed at, were a few police
19 reports which I don't believe gives them the full
20 knowledge of the case. So, I submit to you, as being a
21 fair judge, that you would find DOC's recommendation not
22 fair, but prejudiced towards me.

23 Also, Your Honor, I know that everybody in
24 this courtroom today has heard the same, that all people
25 are innocent until proven guilty, but with me that was

1 not the case. In this case, Your Honor, ladies and
2 gentlemen in the courtroom, I was guilty until proven
3 innocent. What I mean by this -- an example is Detective
4 Kathy Holt. I'm sure that all people present during my
5 trial remembers Detective Holt on the stand saying that
6 she knew I was the suspect after talking to just one
7 witness. That witness was no other than Michael Waller,
8 the same Michael Waller who was caught lying a few times
9 on the stand, and the same Michael Waller who did not
10 deny writing the note proving my innocence.

11 Then Detective Holt talked to the other
12 people after Michael gave his first statement. Detective
13 Holt also said on the stand that she went back because
14 she believed that he was lying or hiding something.
15 Well, if she felt that way, then why didn't she tell him
16 that after the first statement? Cause Detective -- I'll
17 tell you why. It was because Detective Holt thought that
18 his first statement wouldn't stand up well enough in
19 court, so she went back to get another statement, only
20 this time she had him say what she wanted him to say, and
21 that's why they were talking a while off record, like
22 Detective Holt admitted.

23 The truth is that Detective Holt wanted
24 every single little detail to point right at me. All
25 Detective Holt wanted to do was make everything fit her

1 way, so she could close the case in a big hurry, so she
2 could get a pat on the back by her boss and so he could
3 tell her what a good job she did. She didn't want to do
4 her job thoroughly or take her time and look at
5 everything closely, like any veteran detective would
6 have. If she would have, then -- if she would have, then
7 I wouldn't be standing in the courtroom this day facing
8 charges for something that I didn't do.

9 Also, Your Honor, I don't know if anybody
10 else noticed this but me, but it seemed like the
11 Prosecutor does a whole lot more acting than he does law
12 in the courtroom. I mean, what if the Jury would have
13 known the truth about Mr. Davidheiser and how he
14 embarrassed my family or made discriminating motions and
15 stuff by sending a subpoena for my grandmother at my
16 grandma's house four months after she's already been
17 deceased. He deliberately did that purposely to try and
18 make [them] lose focus on my case and to disturb my
19 family more than they already are. And of course, he's
20 going to deny it and say he didn't know, but if you are
21 going to subpoena somebody and you haven't called the
22 court, aren't you going to know what that person is up
23 to?

24 I mean, I sat here during this whole trial
25 and listened to Mr. Davidheiser degrade me and point his

1 finger at me and make me sound like some brutal person,
2 which I'm not. He told the Jury that I got lucky
3 because there was no physical evidence against me.
4 That's because I didn't do the crime he says I committed.
5 That there would have been, there should have been at
6 least a little piece of physical evidence resembling
7 (sic) me to the crime.

8 You heard the expert testimony. You heard
9 Margaret Barber on the stand saying that there were --
10 there was certain evidence on the victim's clothing that
11 wasn't mine or wasn't the victim. That tells you right
12 there that somebody else committed the crime. And to
13 back that up, Bill Marshall's testimony when he said that
14 there was so much fragments on his coveralls that it had
15 to be more than one -- one person.

16 If Detective Holt would have done
17 everything the right way and investigated the case
18 thoroughly, then she would have found the people who
19 actually did the crime, and the Prosecutor would not have
20 been trying to use them as witnesses. But they didn't --
21 since they didn't, the people who live in Kent and around
22 the Kent area should know that the real killers, Michael
23 Waller and Adam Okerson, are out there walking and
24 driving on the same streets as they are. I know
25 Detective Holt is going to say that this case is closed,

1 when in all reality the case is still open, because the
2 people who really did the crime are still on the loose.

3 And Your Honor, if you wonder why there
4 was no witnesses called on my behalf, it's because my
5 lawyer didn't ask me my side of the story or anything at
6 all about my case. If he would have, then the Jury might
7 have thought differently of the situation, the whole
8 case. But then again, maybe not, being that it was
9 almost Christmas, and they had been in a courtroom all
10 month, so they were missing all their Christmas shopping
11 and the time with their family around the holidays. I
12 know I wouldn't want to be stuck in a courtroom all day
13 [around] the holidays when I could be spending it with
14 my family and my loved ones.

15 Your Honor, it's a tragedy what happened
16 to Mr. Moore. My heart goes out to his family and
17 friends. And I wish once again that Detective Holt would
18 have done a better job in her case, so that the people
19 who committed this crime could have been brought to
20 justice. But she didn't care who did it, as long as she
21 could have her case closed, even if it means sending an
22 innocent person to jail, as it is right now. I hope that
23 in the future Detective Holt and other detectives will
24 start doing their jobs thoroughly, so that they can
25 arrest the real people who committed crimes instead of

1 making their case fit an innocent person. Thank you,
2 Your Honor.

3 THE COURT: I have reviewed the materials
4 that have been presented to me, and I did, of course,
5 preside over this trial. Mr. Moore was an unusual
6 homeless person. He was careful and well kept, and his
7 own small home was organized with shelves, and he was
8 able to take care of himself in perhaps not the typical
9 way, but he was able to be employed, to utilize modern
10 technology to some extent, so that people did not even
11 know that he was homeless. There was no evidence that
12 was ever presented, in these materials or otherwise
13 during the trial, that Mr. Moore was ever a threat to
14 anyone.

15 Mr. Waller, I did preside over this trial,
16 and what I am faced with at this time is imposing
17 sentence for the crime of murder in the first degree;
18 that was what the Jury found you guilty of. For purposes
19 of this sentencing today, I will utilize the offender
20 score of 2 and find that the standard range is 261
21 to 347.

22 The evidence produced at trial gives a
23 picture of an extremely violent and vicious offense in
24 the killing of Mr. Moore. There was gratuitous violence
25 involved. There were variously thirty-four or over forty

1 stab wounds with a screwdriver. The fatal wounds were
2 plunged through Mr. Moore's eyes and deep into his brain.
3 He was almost unrecognizable. His face was a bloody
4 pulp. And at the conclusion of the vicious murder of
5 Mr. Moore, the evidence indicated that you stated this is
6 what you do to people who mess with you.

7 I do find that the multiple wounds in this
8 case, some dozens of them, focused on the head, do
9 constitute deliberate cruelty, together with the
10 statement shortly thereafter that this is what you do do.
11 I don't find this to be a panic attack. I do find it to
12 be an intentional act.

13 Your mother has spoken well of you,
14 Mr. Waller, as being supportive of her and of your
15 grandmother before she passed away, and that does speak
16 well for you.

17 Your criminal record also speaks to your
18 behavior and who you are. And this was, by the DOC,
19 characterized as your sixth felony. By renumbering or
20 recalculating the offender score, I would therefore
21 calculate it as your fifth felony. There are a number of
22 other misdemeanor cases involving weapons and involving
23 assaults against individuals that are consistent with
24 someone who is capable of doing this vicious act.

25 Based on the evidence I heard, I think

1 that Mr. Moore suffered a painful and frightening death.
2 It was vicious. It was well beyond what we normally see
3 in murder trials. It's violence of a kind, with the
4 multiple stab wounds and the wounds, not only into one
5 eye, but into both eyes, that demonstrates deliberate
6 cruelty. And I therefore do find a basis to enter an
7 exceptional sentence. I find the appropriate factor of
8 deliberate cruelty.

9 And I will at this time, Mr. Waller,
10 impose 432 months, 24 months of community placement, \$500
11 victim penalty assessment. Court costs are extensive in
12 this case, over \$2,500, and given the length of
13 incarceration, I will waive court costs and recoupment of
14 attorneys' fees. And with respect to conditions of
15 community placement, the CCO has made recommendations,
16 and they appear appropriate.

17 Mr. Hicks, have you had an opportunity to
18 review those conditions with Mr. Waller?

19 MR. HICKS: Yes, Your Honor. I'm sorry.
20 I wasn't on them, though -- a moment. Oh, I'm sorry.
21 Review them with Mr. Waller?

22 THE COURT: Yes.

23 MR. HICKS: I'm sorry; I didn't.

24 THE COURT: All right. I will impose the
25 following conditions: That you report to and be

1 available for contact with your assigned corrections
2 officer as directed by that officer when you are
3 released; that you be involved in some form of employment
4 or education or community service as approved by the
5 corrections officer; that you pay community placement
6 fees as determined by the Department of Corrections;
7 that you receive prior approval for your living
8 arrangements and residence location.

9 I will also impose the following
10 additional conditions: that you not purchase, possess or
11 use alcohol, either beverage or medicinal, or controlled
12 substances without a lawful prescription, and that you
13 submit to reasonable searches of your person, residence,
14 property and vehicle by the corrections officer to
15 monitor compliance upon a reasonable belief that you are
16 violating. In addition, you are to submit to urinalysis
17 testing as directed. You are not to enter any business
18 where alcohol is the primary commodity for sale. If
19 directed by your community corrections officer, you are
20 to obtain a written substance-abuse evaluation from a
21 qualified provider, and if evaluated as needing
22 treatment, then you are to enter at the next available
23 opening and complete that treatment.

24 I will impose a no-contact order with any
25 member of Mr. Moore's family, and I will notify you on

1 the record that you are ineligible to possess a firearm
2 unless your right to do so is restored by a court of
3 record. This, for example, is a court of record. You
4 can't touch or shoot or possess a firearm, and if you are
5 in a car or a house or a building where a firearm is
6 present, you may be in violation. Do you have any
7 questions about that?

8 THE DEFENDANT: No, I don't.

9 MR. DAVIDHEISER: Your Honor, I do not
10 have a copy of the Appendix H proposed by Department of
11 Corrections. Perhaps -- I don't know whether the Court
12 has a copy that I could use.

13 MR. HICKS: I have one.

14 MR. DAVIDHEISER: Am I correct in
15 understanding that the conditions that Your Honor just
16 read through were from that proposed Appendix H?

17 THE COURT: They are not completely from
18 it. I will take my copy and make the changes to it.

19 Mr. Waller, I will advise you that, unless
20 a written notice of appeal is filed within 30 days after
21 entry of this judgment, which is today, the right of
22 appeal is given up forever. The original and one copy of
23 the notice of appeal must be filed with and the filing
24 fee paid to the Clerk of the Superior Court within
25 30 days after entry of this judgment. If you are

1 authorized to proceed at public expense, that order must
2 be filed with the notice of appeal instead of the filing
3 fee.

4 Mr. Hicks, will you waive my further
5 formal reading of the notice of rights on appeal and on
6 collateral attack, or would you like me to read them all
7 on the record now?

8 MR. HICKS: So waived.

9 MR. DAVIDHEISER: Your Honor, may we set a
10 restitution hearing date?

11 THE COURT: Is there restitution in this
12 case?

13 MR. DAVIDHEISER: Well, I suspect that
14 there are burial expenses that are typically --

15 THE COURT: Yes. I will ask Ms. Allen to
16 find a date.

17 MR. DAVIDHEISER: I would also ask if
18 there is a date within the next two weeks for
19 presentation of written findings and conclusions on 3.5
20 and 3.6 issues. Mr. Hicks and I have been in a murder
21 trial in Judge Mertel's court --

22 THE COURT: Yes.

23 MR. DAVIDHEISER: -- together. We haven't
24 had a chance to finalize those, but that has concluded,
25 and I think if we can have a date to present those to

1 Your Honor within the next two weeks, that would be --

2 THE COURT: Two weeks is virtually
3 impossible.

4 MR. DAVIDHEISER: Well, it may be that we
5 can do it on an agreed basis.

6 THE COURT: All right.

7 MR. DAVIDHEISER: When I say "present,"
8 I'm not suggesting that we are going to need time to
9 argue.

10 THE COURT: All right.

11 MR. DAVIDHEISER: Or if we can't do it in
12 two weeks, we can -- I don't know, can we do it within a
13 month?

14 MS. [BAILIFF]: We can do it the [day
15 before] conference or we could do it May 2.

16 MR. HICKS: Defendant has also signed this
17 copy of notice of rights on appeal and certificate of
18 compliance.

19 MR. DAVIDHEISER: Could we do May 2?

20 MS. [BAILIFF]: [Unintelligible]. One was
21 May 2.

22 MR. DAVIDHEISER: Let's do May 2.

23 MS. [BAILIFF]: And then if it's agreed,
24 you will --

25 MR. DAVIDHEISER: Yeah. We can strike --

1 and we will strike that. We can strike that. Okay.

2 MR. HICKS: I'm sorry; May 2?

3 MR. DAVIDHEISER: May 2, at 8:30?

4 MS. [BAILIFF]: Mm-hmm.

5 MR. DAVIDHEISER: And restitution --
6 restitution date?

7 THE COURT: And does that work also as a
8 restitution date?

9 MR. DAVIDHEISER: I'm not sure if our
10 victim's assistance unit can get everything together by
11 then. I will give it a try.

12 THE COURT: Why don't we plan on trying to
13 do it then and --

14 MR. HICKS: Okay.

15 THE COURT: -- and see if that --

16 MR. DAVIDHEISER: Does the Defendant waive
17 his presence at the restitution hearing?

18 MR. HICKS: I'm sorry.

19 MS. [BAILIFF]: I'm worried about the
20 3.5/3.6; does he have to be present? So, I have to
21 [request] [unintelligible].

22 MR. DAVIDHEISER: No.

23 MR. HICKS: Your Honor, Mr. Waller wants
24 to be present for any restitution hearings.

25 MS. [BAILIFF]: Does want to?

1 MR. HICKS: Yeah.

2 MS. [BAILIFF]: Okay. Then is he going to
3 waive to go to DOC, or do I have to get him back from
4 DOC?

5 MR. HICKS: Mr. Waller wishes to stay here
6 the entire [month's period; he is willing] to waive
7 his --

8 MS. [BAILIFF]: He is [willing to] waive
9 to his 30 days. Okay. Great.

10 MR. DAVIDHEISER: I know that I have had
11 in another case where an individual was shipped off to
12 DOC prior to --

13 MS. [BAILIFF]: Well --

14 MR. DAVIDHEISER: -- so you might want to
15 check just maybe a week before.

16 MS. [BAILIFF]: Well, yeah. I will make
17 sure. I'll [put it] [unintelligible], but we aren't
18 going to issue -- we aren't going to sign off on those
19 waiver [unintelligible]. I know that this happened
20 recently.

21 MR. DAVIDHEISER: Do you have any credit
22 for time served?

23 MS. [BAILIFF]: 371 days.

24 MR. DAVIDHEISER: 379?

25 MR. HICKS: Mr. Waller has provided his

1 fingerprints.

2 MR. DAVIDHEISER: Carole, do you have an
3 Appendix -- Appendix G for blood testing and DNA?

4 THE BAILIFF: [Unintelligible] that's in
5 the packet.

6 MR. DAVIDHEISER: And does Your Honor have
7 the Appendix H?

8 THE COURT: I do. It's here.

9 MR. HICKS: Your Honor, notice of intent
10 to appeal the judgment and sentence as well as the
11 exceptional sentence is given, simply because I have the
12 feeling that -- later, as opposed to the time that we
13 usually do it at sentencing.

14 Handing the judgment and sentence to the
15 Court: It has been reviewed by both counsel.

16 THE COURT: Mr. Davidheiser, Mr. Hicks has
17 indicated that he intends to file a notice of appeal.
18 There is the dispute over the offender score, and I would
19 like to ask counsel if you see that as a significant
20 issue for purposes of this sentencing. Regardless of
21 what the offender score is and the standard range between
22 the two that were offered and, without prior notice of --
23 contest over the offender score, we had variably a 2 and
24 a 3, with the stated differences. Regardless of which
25 one it would have been or it is, it would not change my

1 decision to impose an exceptional sentence.

2 MR. DAVIDHEISER: That -- of 432 months?

3 THE COURT: Yes.

4 MR. DAVIDHEISER: Yes.

5 THE COURT: And so, I have -- because the
6 State was not notified and therefore wasn't prepared,
7 nevertheless did not produce the copy of the judgment and
8 sentence on the disputed juvenile offense, I have taken
9 Mr. Hicks' position, as is clear from the record, and
10 determined that the offender score was 2, with 261 to
11 347, ten months different on the low end and slightly
12 lower on the high end. It's not a significant difference
13 in this case. But I do want to know whether counsel wish
14 to address that issue further in terms of verifying the
15 correct offender score.

16 MR. DAVIDHEISER: Well, I mean, the
17 significance of verifying the correct offender score
18 relates to the record that is created for future
19 purposes. I think that --

20 THE COURT: I think it's also significant
21 for me to have in mind what the correct offender score is
22 in imposing -- and therefore the correct standard range
23 -- in imposing a sentence. And therefore, I mention,
24 because this is a serious offense, which is the type that
25 is routinely appealed, and this one in fact we are on

1 notice is going to be appealed, I am simply wondering if
2 there is some issue on the sentencing that may arise in
3 addition to the trial itself that we should be addressing
4 now.

5 MR. DAVIDHEISER: Well, the issue will be
6 the exceptional -- I mean, the issue on appeal will be
7 whether or not the exceptional sentence has a foundation
8 -- a proper foundation in fact and law. It is not more
9 than twice, I think, what is the -- more than twice the
10 top of the standard sentence range, irrespective of how
11 you calculate that.

12 I do want the record to reflect that the
13 State takes exception to the determination that
14 Mr. Waller's offender score is 2, as opposed to 3. The
15 State believes that that prior weapons violation is
16 indeed a felony and, if given the opportunity, we would
17 endeavor to produce the documentation to demonstrate
18 that. As I said that, as is routine in all cases,
19 including a case like this, unless there is -- I mean,
20 we, along with the Department of Corrections, identified
21 that prior conviction as a felony, and unless and/or
22 until put on notice by the Defense that they intend to
23 contest that, we don't -- I think, as Your Honor knows,
24 pull certified copies of judgments and sentences from the
25 files. It's particularly true with respect to juvenile

1 convictions because they are handled a little
2 differently. Because we were not placed on notice that
3 that was the case until this morning, when Mr. Hicks and
4 I met here in court, we did not do that. Certainly,
5 if --

6 MR. HICKS: Your Honor, I will provide a
7 stipulation right now. If the State proves to my
8 satisfaction that I'm wrong on the offender score, I will
9 simply stipulate to an amendment judgment and sentence,
10 detailing the correct offender score.

11 THE COURT: And that's -- it's just a
12 technical difficulty that I wanted to address. I know
13 that no one wanted this continued again and through no
14 fault of Mister --

15 MR. DAVIDHEISER: [And maybe that's
16 something] we could address that May 2.

17 THE COURT: It is. But while I'm thinking
18 of it, I want to be clear that my understanding of my
19 role in imposing an exceptional sentence, when I elect to
20 do so, is that I first need to have the proper offender
21 score and the proper range in mind. And so, it isn't
22 simply, in my opinion, whether the facts support an
23 exceptional sentence. I have to go through the proper
24 procedure.

25 The fact that I have elected the most

1 beneficial offender score for Mr. Waller, from his
2 perspective, perhaps obviates a problem. I don't know.
3 Because the State wasn't prepared under the newest cases
4 to prove up all of the prior convictions, or at least the
5 disputed convictions, and understandably so, since you
6 had no notice until this morning that there was even a
7 question about it, I have elected to use the more
8 conservative approach and pick the 2.

9 And even with that lower standard range, I
10 nevertheless believe that the exceptional sentence I have
11 imposed is the appropriate sentence. And if either of
12 you wish to pursue it further, since this case is going
13 to be appealed, then May 2 would be a good day to either
14 prove it up or not and let the matter rest after that, at
15 least at the trial-court level. All right.

16 MR. HICKS: Thank you, Your Honor.

17 THE COURT: All right. We will be at
18 recess.

19 (Hearing ended, adjourning 9:42 a.m.)
20
21
22
23
24
25

APPENDIX B

FILED
18 JUL 17 PM 4:28
KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

v.

ANTHONY WALLER,

Defendant.

No. 99-1-00467-8 KNT

ORDER UNDER RAP 7.2

On March 8, 2018, Defendant Anthony Waller filed a Motion for Relief from Judgment,¹ which the Court ultimately granted.²

On June 26, 2018, the State filed a Motion for Stay of Proceedings.³ On June 29, 2018, the State filed a Notice of Appeal and/or of Discretionary Review.⁴

The Court has considered the Motion for Stay and the parties' supplemental briefing on the Motion.⁵

On March 8, Mr. Waller sought relief from *judgment* based on a court rule, CrR 7.8, that provides for relief from *judgment*. Thus, under the plain language of

¹ Sub #163.
² Sub ##173, 178.
³ Sub #179.
⁴ Sub #181.
⁵ Sub ##183-84.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

the court rules, it appears to this Court that when the State sought review of the Court's rulings (granting relief from judgment), the State appealed as a matter of right under RAP 2.2(b)(3) (Arrest or Vacation of Judgment).

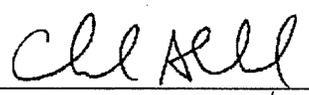
By function of RAP 6.1, review was accepted upon the filing of the appeal. This is true whether the review turns out to be direct review by the Supreme Court or regular review by the Court of Appeals.⁶

Because review has been accepted, RAP 7.2 applies.⁷ It appears that RAP 7.2 does not provide for a resentencing hearing.

Therefore, it is ORDERED that:

1. Pursuant to RAP 6.1 and 7.2, no resentencing hearing is scheduled at this time.
2. The State's Motion for Stay is denied as moot.

July 17, 2018



Judge Chad Allred

⁶ See RAP 4.2(e)(1).
⁷ RAP 7.2(a).

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

October 26, 2018 - 3:15 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96051-8
Appellate Court Case Title: State of Washington v. Anthony Thomas Waller
Superior Court Case Number: 99-1-00467-8

The following documents have been uploaded:

- 960518_Briefs_20181026151419SC959853_6122.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 96051-8 - Appellants Opening Brief.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- nancy@washapp.org
- paoappellateunitmail@kingcounty.gov
- wapofficemail@washapp.org

Comments:

Sender Name: Wynne Brame - Email: wynne.brame@kingcounty.gov

Filing on Behalf of: James Morrissey Whisman - Email: Jim.Whisman@kingcounty.gov (Alternate Email:)

Address:
King County Prosecutor's Office - Appellate Unit
W554 King County Courthouse, 516 Third Avenue
Seattle, WA, 98104
Phone: (206) 477-9497

Note: The Filing Id is 20181026151419SC959853