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NO. 62887-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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In re Personal Restraint Petition of

NATHANIEL CRAVEN,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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A. AUTHORITY FOR RESTRAINT OF PETITIONER.

Nathaniel Craven is restrained pursuant to judgment and sentence in King County Superior Court No. 07-1-03346-2 SEA. Appendix A and B.<sup>1</sup>

B. ISSUES PRESENTED.

Whether this petition should be granted in part where the court amended the judgment and sentence sua sponte and exercised its discretion in imposing a new sentence within the standard range of 51 to 60 months without a hearing and without the presence of petitioner or his counsel.

C. STATEMENT OF THE CASE.

On September 21, 2007, Nathaniel Craven pled guilty to the crime of unlawful possession of a firearm in the second degree. Appendix C. The parties were in dispute as to whether Craven's correct offender score was 43 to 57 months or lower due to juvenile felony adjudications that the defense believed constituted the same criminal conduct. Appendix C, at 2. The State agreed to

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<sup>1</sup> The appendices referenced herein were attached to the State's Response to Personal Restraint Petition filed March 5, 2009.

recommend a sentence of 43 months, but Craven was advised that if he was convicted of new crimes before sentencing, the sentence range and the prosecuting attorney's recommendation could increase. Appendix C, at 3-4.

Craven committed a new crime, possession of cocaine, on December 20, 2007, and pled guilty to that crime in King County Cause No. 08-1-00775-4 SEA on March 3, 2008. Appendix D. At sentencing for Cause No. 07-1-03346-2 SEA on March 4, 2008, the court determined that Craven's offender score was 51 to 68 months based on an offender score of 9, counting all juvenile adjudications separately, and adding a point for King County Cause No. 08-1-00715-5 SEA. Appendix A. The court imposed a sentence 64 months, although the statutory maximum for the crime was 60 months. Appendix A.

The Department of Corrections advised the court that the 64-month sentence was invalid. Appendix B. Sua sponte, the court entered an order amending the judgment and sentence to impose a sentence of 60 months on March 28, 2008. Appendix B.

D. ARGUMENT.

PETITIONER IS ENTITLED TO RESENTENCING<sup>2</sup>.

Craven argues that his right to due process was violated when the court amended his judgment and sentence, imposing a new term of imprisonment, without holding a hearing. The State agrees.

A defendant need not be present at resentencing when his presence would be useless. State v. Davenport, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007). But where the court is exercising its discretion upon resentencing, and performing more than a ministerial act, the resentencing constitutes a critical stage in the proceedings and the defendant is entitled to be present. Id. Upon being informed by the Department of Corrections that Craven's sentence exceeded the statutory maximum for that crime, the court had discretion to impose a new sentence between 51 and 60 months.

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<sup>2</sup> Craven's claims that his plea was involuntary and that his offender score was miscalculated were addressed by the State in its initial response to the personal restraint petition. Those claims have been dismissed by this Court and will not be addressed herein.

In State v. Kilgore, \_\_\_ Wn.2d \_\_\_, 216 P.3d 393 (September 24, 2009), the state supreme court recently addressed the proper scope of remand where part of a sentence has been invalidated on appeal. The court noted that a trial court has discretion on remand to revisit sentencing issues that were not the subject of an earlier appeal. However, if the court chooses not to exercise its discretion on remand, the case is final as of the date of the prior mandate. Notably, for this case, the crucial question for the court in Kilgore was whether the court exercised its discretion in imposing a new sentence, or merely performed, as Davenport termed it, a ministerial act.

In its order appointing counsel, this Court questioned the application of United States v. Erwin, 277 F.3d 727 (5<sup>th</sup> Cir. 2001), to the present case. In that case, Erwin was convicted of 15 counts arising from drug activity. He was sentenced to life imprisonment without parole on one offense, plus 120 years on the other offenses. Id. at 729. On appeal, the court reversed one count based on an instructional error and affirmed in all other respects. Id. On remand, the court dismissed the count that had been reversed. Subsequently, the court amended the judgment and sentence to reflect that one count had been dismissed and

reflecting that the sentence was life imprisonment without parole, plus 105 years. The amended judgment and sentence was entered without a hearing. Id. at 730. The Fifth Circuit held that no hearing was required in that case, but noted that a defendant is entitled to be present when the court is imposing a new sentence. Id. at 731. In United States v. Stribling, 54 Fed. Appx. 414 (5<sup>th</sup> Cir. 2002), the Fifth Circuit discussed their holding in Erwin and explained that in that case the court had only deleted the reversed count and had not imposed a new sentence. In contrast, in Stribling, the supervision component of the sentence was vacated and remanded for imposition of a new supervised release sentence. Id. The court held that Stribling had a right to be present because a new sentence was being imposed. Id.

In the present case, having been advised that the 64-month sentence was invalid, the court necessarily exercised its discretion in imposing a new sentence within the corrected standard range of 51 to 60 months. Because the court was exercising its discretion and imposing a new standard range sentence, Craven had the right to be present with counsel when the court exercised that discretion. The State agrees with petitioner that the matter should be remanded for a resentencing in Craven's presence.

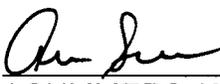
E. CONCLUSION.

This petition should be granted in part because imposition of a new standard range sentence without a hearing and without petitioner's presence violated due process.

DATED this 27<sup>th</sup> day of October, 2009.

Respectfully submitted,

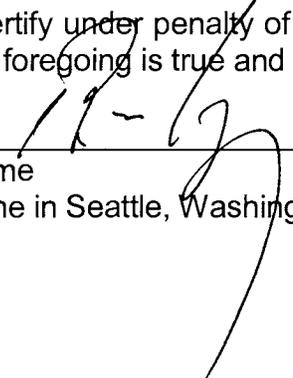
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in In re Personal Restraint of Craven, Cause No. 62887-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Name  
Done in Seattle, Washington

10-27-2009  
Date

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