Supreme Court No. _____
Court of Appeals No. 39422-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CLAYTON JONES,
Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Washington Court of Appeals Cases

United States Supreme Court Cases

United States Constitution

Washington Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW

Clayton Jones, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review. RAP 13.3(a)(2)(b); RAP 13.4(b)(1)-(4). The June 6, 2024, opinion and July 23, 2024, order denying reconsideration are attached.

B. ISSUES PRESENTED FOR REVIEW

1. The Rules of Appellate Procedure (RAP) establish the process governing appeals and the resolution of parties' motions while an appeal is pending. The law of the case also binds a court, so previous rulings on an issue prevail. Here, the Court of Appeals disregarded its own ruling and order denying reconsideration of that ruling, and it ignored the law of the case. This Court should accept review of the opinion because it contradicts the RAP, conflicts with multiple cases, and disregards considerations of estoppel and basic fairness by permitting the government to relitigate issues until it prevails.

2. To increase a person's sentence based on sexual motivation, RCW 9.94A.835[1] requires that either the jury "find a special verdict" or the court "make a finding of fact" of the sexual motivation element. Here, Mr. Jones entered an *Alford*[2] plea acknowledging he could be convicted at a trial, but he did not admit guilt of any fact, and the court did not "make a finding of fact" that sexual motivation was present at the time he committed the crime. Nevertheless, the Court of Appeals remanded for the trial court to enter findings to justify the increased sentence imposed, rather than remand for the trial court to enter a sentence authorized by the court's findings. The Court of Appeals opinion ordering the trial court to impose

[1] The legislature has twice amended the special allegation statute since Mr. Jones was convicted and sentenced in 2004. Laws of 2006, ch. 123, § 2; Laws of 2009, ch. 28, § 15. However, the relevant substantive portions of the statute remain unchanged, and Mr. Jones cites to the current version for convenience.

[2] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

a sentence not authorized by the court's findings is contrary to precedent and contradicts the statute.

3. Similarly, a court may enhance a sentence based on a deadly weapon only when a jury "find[s] a special verdict" or a court "make[s] a finding of fact" that the defendant was armed with a deadly weapon at the time of the commission of the crime.[3] Here, there is no jury verdict, and the court did not find that Mr. Jones was armed with a deadly weapon at the time of the commission of the crime. The court's imposition of a 24-month consecutive sentence for a deadly weapon enhancement is therefore unlawful. This Court should accept review of the opinion that orders the trial court to impose a sentence not authorized by the trial court's findings.

[3] Former RCW 9.94A.602 (1983), *recodified as* RCW 9.94A.825. Laws of 2009, ch. 28, § 41. The relevant provisions of the deadly weapon enhancement statutes remain the same, and Mr. Jones cites to the current version.

C. STATEMENT OF THE CASE

In 2004, Mr. Jones entered an *Alford* plea to assault in the second degree with a sexual motivation special assessment and a deadly weapon enhancement. CP 9-18. Mr. Jones did not admit he was guilty of the alleged facts or agree the court could consider the probable cause statement in considering his plea. CP 15. Instead, Mr. Jones agreed only, "Based on evidence presented in a trial by the prosecutor, I feel that I could be potentially convicted of this and face much greater consequences after a trial." CP 15.

After Mr. Jones's *Alford* plea, the court did not find sexual motivation was present at the time Mr. Jones committed the crime. CP 20. The court carefully considered the issue—the court first checked the box to reflect a sexual motivation finding and then affirmatively scribbled it out, indicating the court was *not* finding sexual motivation. CP 20. The court also did not find Mr. Jones committed the assault while armed with a deadly weapon. CP 20.

[ ] A special verdict/finding for use of **a deadly weapon other than a firearm** was returned on Count(s) ___. RCW 9.94A.602, 9.94A.533.

[X] A special verdict/finding of **sexual motivation** was returned on Count(s) ___. RCW 9.94A.835

CP 20.

Although the court did not find Mr. Jones was armed with a deadly weapon, the court added a 24-month deadly weapon enhancement. CP 21, 25. Although the court did not find Mr. Jones committed the offense with a sexual motivation, it sentenced Mr. Jones under the sex offender sentencing scheme instead of the standard sentence range and imposed a sentence of life in prison with the possibility of release after 48 months. CP 21, 25.

In 2022, Mr. Jones returned to court for resentencing following *Blake*[4] because the court had included two points for drug offenses in Mr. Jones's offender score. CP 21. The 2004 judge had retired, and a new judge presided. The court struck the two void possession convictions from Mr. Jones's score and

[4] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

recalculated Mr. Jones's standard range as 13-17 months. CP 35-36; 12/05/22RP 6.

The 2022 court did not find that the 2004 court found Mr. Jones used a deadly weapon, but the court added a 24 months deadly weapon enhancement. CP 35-36; 12/05/22RP 6. The 2022 court also did not find that the 2004 court found Mr. Jones committed the crime with a sexual motivation. CP 35.

[ ] A special verdict/finding for use of **a firearm** was returned on Count(s) __. RCW 9.94A.602, 9.94A.533.
[ ] A special verdict/finding for use of **a deadly weapon other than a firearm** was returned on Count(s) ___. RCW 9.94A.602, 9.94A.533.

CP 35.

Despite the absence of a special allegation finding, the court sentenced Mr. Jones as if the court had made a sexual motivation finding. CP 35, 39; 12/05/22RP 6-7. The court imposed a term of life in prison with the possibility for release after 37 months. CP 39; 12/05/22RP 6-7.

After Mr. Jones appealed, the State filed a motion to amend the judgment and sentence. CP 52-104. The State acknowledged the court imposed a sentence that is unlawful without these findings and conceded the judgment did not

reflect either finding. CP 55-56. But the State opportunistically argued that both the 2004 and the 2022 judgments and sentences were "unclear" because neither judgment reflected a finding of sexual motivation or deadly weapon. CP 56-57. The State agreed an indeterminate life term "is only permissible if the court makes a finding of sexual moti[vation]" and admitted the sentence imposed was unlawful. CP 57.

Mr. Jones opposed the State's motion to amend the judgment and sentence already under appeal. 01/12/23RP 19. Mr. Jones agreed the judgment was unlawful but argued the judgment plainly demonstrated the 2004 court did not make a sexual motivation finding of fact. Although the parties agreed the 2004 court did not enter the findings, the trial court nonetheless "ma[de] a finding that sexual motivation was found and that should have been part of the original judgment and sentence." 01/27/23RP 20. The court did the same for the deadly weapon finding. *Id.* Thus, in January of 2023, and

contrary to the 2004 court's absence of either finding, the trial court entered sexual motivation and deadly weapons findings for the first time. *Id.* at 20-21.

The State moved the Court of Appeals for permission to enter this new, substantively altered 2023 judgment, including sexual motivation and deadly weapon findings not made by the 2004 court, to retroactively justify the unlawful sentence and moot out Mr. Jones's appeal. State's Mot. to Authorize Spokane Co. Superior Ct. to Enter Am. J&S ("State's 7.2 Mot."). Although the State argued to the trial court that the previous judgment was void under CrR 7.8(b)(4), the State argued to the Court of Appeals that the 2004 trial court's finding that sexual motivation did not exist at the time of the crime's commission and the absence of a deadly weapon finding were "scrivener's errors" that required correction under CrR 7.8(a). CP 57; State's 7.2 Mot. at 3.

Mr. Jones opposed the motion. Answer Opposing State's Mot. To Enter Am. J&S. The Court of Appeals denied the

State's motion to permit entry of that amended judgment and sentence. Ruling Den. RAP 7.2 Mot, Feb. 14, 2023; Order Den. Mot. to Modify, May 11, 2023. Court of Appeals Commissioner Landrus found the 2004 court did not enter the findings and ruled the State did not prove the absence of findings were clerical errors. Ruling Den. RAP 7.2 Mot at 1-2.

The Commissioner noted that Mr. Jones's plea to assault in the second degree with sexual motivation merely reflected "*his* intention, not *the trial court's* intention," and ruled that the plea statement did not prove the court intended to enter a factual finding of sexual motivation. *Id.* at 2 (emphasis added). The Commissioner found the State did not prove the trial court intended to enter findings of sexual motivation or deadly weapon. *Id.* at 1-3. The Commissioner denied the State's motion. *Id.* at 3. The State moved to modify the Commissioner's ruling, and the Court of Appeals denied the motion. State's Mot. to Modify Commissioner's Ruling ("State's Mot. to Modify"); Order Den. Mot. to Modify.

Although it denied the State's motion to modify the ruling, the Court of Appeals reversed course in the opinion. It permitted the State a third opportunity to alter the judgment and sentence. The Court of Appeals disregarded its own ruling and order and held the State is permitted yet another chance to do exactly what it tried to do in the unauthorized resentencing proceeding held while Mr. Jones's judgment was already on appeal. Slip op. at 8-12. It remanded for the trial court to "make the applicable correction" to the judgment and sentence and add sexual motivation and deadly weapon findings. Slip op. at 11-12.

D. ARGUMENT

1. The opinion conflicts with the Court of Appeals' own ruling and order and disregards the Rules of Appellate Procedure, the principle of the law of the case, and precedent.

The State previously moved the Court of Appeals under RAP 7.2(e) to enter the 2023 amended judgment and sentence. State's RAP Motion for Reconsideration 7.2 Mot. Mr. Jones opposed that motion, having already appealed his judgment and

sentence. Answer Opposing State's RAP 7.2 Mot. The Court of Appeal agreed and denied the State's motion. Ruling Deny. RAP 7.2 Mot; Order Den. Mot. to Modify.

In its opinion, the Court of Appeals recognized, "A commissioner of this court denied the State's motion, finding that the State failed to prove the 2004 sentencing court intended to enter findings of sexual motivation or use of a deadly weapon." Slip op. at 7. It further acknowledged, "A panel of this court denied the State's motion to modify the commissioner's ruling." Slip op. at 7. Yet the Court of Appeals held the State is permitted yet another opportunity to do exactly what it tried to do in the unauthorized resentencing proceeding held while Mr. Jones's judgment was already on appeal. The opinion disregards the RAP, the law of the case, precedent, and the Court of Appeals' own ruling and order. This Court should accept review to address this conflict that presents an issue of substantial public interest.

The parties extensively litigated whether the court should expand the appellate record to include the 2023 amended judgment and sentence the State procured after its CrR 7.8 motion while Mr. Jones's 2022 amended judgment was already on appeal. Commissioner Landrus ruled "the State failed to prove the 2004 sentencing court intended to enter findings of sexual motivation or use of a deadly weapon." Slip op. at 7. The State moved to modify this ruling. State's Mot. to Modify. Mr. Jones again opposed. Answer Opposing State's Mot. to Modify. The court denied the State's motion, and the Commissioner's ruling became the Court of Appeal' order on the matter. Order Den. Mot. Modify.

Over a year later, the Court of Appeals changed the rulings on which Mr. Jones relied and permitted the State another chance to add findings to the 2004 judgment. Slip op. at 1, 11-12. The Court of Appeals' disregard of its own ruling and order conflicts with numerous published cases. *E.g.*, *In re Det. of Broer*, 93 Wn. App. 852, 857, 957 P.2d 281 (1998);

Kramer v. J.I. Case Mfg. Co., 62 Wn. App. 544, 548, 815 P.2d 798 (1991); *Gould v. Mutual Life Ins. Co. of New York*, 37 Wn. App. 756, 758, 863 P.2d 207 (1984).

A party who is unsatisfied with a commissioner's ruling must "seek modification of the ruling from the appellate court." *State v. Nolan*, 98 Wn. App. 75, 80, 988 P.2d 473 (1999). If a court denies a motion to modify, that resolves the issue. *See* 3 Wash. Pract., Rules Practice, RAP 17.7 (9th ed. July 2023 update) (court's refusal to modify ruling is not subject to reconsideration). When a party either fails to seek modification of a commissioner's ruling or seeks modification but is unsuccessful, "the ruling becomes a final decision of this court." *Broer*, 93 Wn. App. at 857; *accord Hough v. Ballard*, 108 Wn. App. 272, 277-78, 31 P.3d 6 (2001); *see State v. Rolax*, 104 Wn.2d 129, 135, 702 P.2d 1185 (1985) (failure to move to modify ruling "cuts off further appellate review").

The Court of Appeals' decision to disregard the ruling of its own Commissioner and its own order agreeing with that

ruling, after the parties vigorously litigated the issue and the State received two unfavorable rulings, is inconsistent with the law and fundamentally unfair. Mr. Jones was entitled to rely on the already-litigated issue. The point of a commissioner's ruling and a court's order on a motion to modify is to resolve issues. RAP 17.7 unambiguously provides "[a]n aggrieved party may object to the ruling of a commissioner … only by a motion to modify the ruling." RAP 17.7; *accord Nolan*, 98 Wn. App. at 78. The State did so here, and the court denied that motion. Order Den. Mot. to Modify.

A party does not get to keep objecting and arguing an already-resolved issue until it gets the result it wants. The court's opinion disregarding Commissioner Landrus's ruling and its own order denying the motion to modify and permitting the State to litigate again the already-resolved issue is contrary to caselaw, conflicts with RAP 17.7, and is fundamentally unfair.

The Court of Appeals' order denying the motion to modify also meant Commissioner Landrus's ruling became the law of the case. "[T]he law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). "[T]he doctrine seeks to promote finality and efficiency in the judicial process" by preventing the same parties from relitigating the same issues in the context of the same case. *Id.*; *Cowan v. Cowan*, 29 Wn. App. 2d 355, 540 P.3d 158 (2023), *rev. denied*, 2 Wn.3d 1020 (2024).

Here, the Commissioner already ruled the 2004 court did not enter or intend to enter findings of sexual motivation or use of a deadly weapon. Slip op. at 7; Ruling Den. RAP 7.2 Mot. The Commissioner also decided this was not a "clerical error[]." Ruling Den. RAP 7.2 Mot. at 2. Such appellate court rulings "must be followed in subsequent stages of the same

litigation." *State v. Merrill*, 183 Wn. App. 749, 757, 335 P.3d 444 (2014).

The State moved to modify that ruling, and the Court of Appeals denied that motion. But the court's opinion permits the State to relitigate those issues, disregards the Commissioner's ruling, and holds the opposite. The opinion holding the 2004 court made findings of sexual motivation and deadly weapon but simply failed to memorialize them and holding this "correction" is "purely ministerial" directly contradicts all aspects of the Commissioner's ruling that the court already declined to modify. Slip op. at 12.

Collateral estoppel also prevents the State from relitigating the issues of sexual motivation and deadly weapon findings, which were already finally resolved by the 2004 judgment. "Collateral estoppel, or issue preclusion, bars re-litigation of the same issue in a later proceeding after an earlier opportunity to fully and fairly litigate the issue results in a final decision on the merits." *Cowan*, 29 Wn. App. 2d at 370.

Collateral estoppel bars parties from relitigating issues "that have actually been litigated and necessarily and finally determined in the earlier proceeding." *Christensen v. Grant County Hosp.*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004).

The 2004 judgment finally resolved the issue of whether the court made a sexual motivation or deadly weapon finding. Even if Commissioner Landrus's ruling was not law of the case, the State would still be estopped from relitigating these issues that the trial court already decided in its 2004 judgment. The 2004 court did not find a sexual motivation or a deadly weapon. Collateral estoppel prevents the State from relitigating the same.

This Court should accept review to address the opinion's unwarranted disregard of the RAP, the law of the case, and precedent.

2. The opinion holding the trial court must enter findings retroactively to justify the sentence, rather than requiring imposition of a sentence authorized by the findings, turns the sentencing process on its head.

To convict and sentence a person of a crime with sexual motivation, RCW 9.94A.835 requires either a jury's special verdict or a court's finding of fact that sexual motivation was present. Here, neither occurred. Similarly, conviction and sentence of a crime with a deadly weapon enhancement requires either a jury or court's finding that the person armed with a deadly weapon during the offense. Again, neither occurred here.

The Court of Appeals acknowledged the 2004 trial court did not make the findings necessary to increase Mr. Jones's sentence based on a deadly weapon enhancement or a sexual motivation finding. Slip op. at 3. The court further recognized the State sought to amend the judgment and sentence because the trial court never made the necessary findings. Slip op. at 6. Yet rather than require the trial court to sentence Mr. Jones in accordance with the findings—or rather, the lack of findings—

the Court of Appeals holds the trial court must enter findings it never made in order to justify the sentence imposed. Slip op. at 11-12.

The court imposed an unlawful sentence that neither the judgment nor the law supports. This Court should accept review to address this backwards analysis that conflicts with the statutes and the sentencing scheme.

The statute governing sexual motivation plainly requires either a jury special verdict or a court finding of fact for a person to be convicted of and sentenced for a crime with a sexual motivation element. RCW 9.94A.835(2). Mr. Jones entered an *Alford* plea, so there is no jury's special verdict. CP 9-18. But the court did not "make a finding of fact," RCW 9.94A.835(2), that Mr. Jones acted with sexual motivation. CP 20. Because there is neither a jury's special verdict nor a court's finding of fact on sexual motivation, a court cannot sentence Mr. Jones for a crime with sexual motivation in accordance with the statute.

Moreover, because such a finding increases the permissible range of punishment, it is an element of the offense. *Alleyne v. United States*, 570 U.S. 90, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). It is not merely a sentencing consideration. Therefore, a sentencing court cannot retroactively add a finding the trial court never made.

The opinion's analysis that "sentencing enhancements … are deemed proven for purposes of the Sixth Amendment" when "a defendant's guilty plea includes an admission" thereto misses the point. Slip op. at 9. First, any fact that increases the permissible range of punishment is an essential element of the offense. *Alleyne*, 570 U.S. at 103; U.S. Const. amends. VI, XIV. The opinion's dated use of "sentencing enhancements" to address the sexual motivation and deadly weapon essential elements reflects a misunderstanding of elements dating from pre-*Apprendi*[5] opinions. Second, the opinion misses a crucial

[5] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

aspect of sentencing: courts may impose a sentence only for the crime of conviction. When imposing enhanced sentences based on additional elements, in the case of a plea, the defendant must not only admit or acknowledge the necessary facts, but the court also must agree to the findings. RCW 9.94A.835; RCW 9.94A.533. Without the required findings, the element was not established, and the court may not sentence a person as if it was.

The opinion's reliance *State v. Dillon*, 142 Wn. App. 269, 174 P.3d 1201 (2007), also misses the mark. Slip op. at 9. In *Dillion*, the defendant agreed to an exceptional sentence as part of a plea. *Dillon*, 142 Wn. App. at 273. However, the parties' agreement to an exceptional sentence alone is insufficient to impose one; the court also must find that substantial and compelling reasons justify imposing an exceptional sentence, given the purposes of the Sentencing Reform Act. RCW 9.94A.535; RCW 9.94A.537; *In re Pers.*

Restraint of Fletcher, __ Wn.3d __, 552 P.3d 302, *8-10 (2024).

Similarly, in accepting a person's *Alford* plea, the court must find an independent factual basis for each element of the crime. *State v. D.T.M.*, 78 Wn. App. 216, 220, 896 P.2d 108 (1995). An *Alford* plea is not a court's finding of fact, nor does it include "an express admission of guilt" because the person "is unwilling or unable to admit his participation in the acts constituting the crime." *Alford*, 400 U.S. at 37; *accord State v. Newton*, 87 Wn.2d 363, 371-72, 552 P.2d 682 (1976) (holding courts may accept pleas where defendant "refuses to admit guilt" and adopting *Alford*). Here, the place for the court to reflect its findings regarding the deadly weapon element and the sexual motivation element was on the judgment and sentence. CP 20. The court did not make those findings. CP 20.

The same analysis applies to the deadly weapon element. RCW 9.94A.533 mandates the imposition of an additional 24-month term of confinement when a person "was armed with a

deadly weapon other than a firearm" during the crime. RCW 9.94A.533(4)(a). Much like the sexual motivation special allegation, when the State pursues a deadly weapon special allegation, either the jury must "find a special verdict" or the court must "make a finding of fact" that the person "was armed with a deadly weapon at the time of the commission of the crime." RCW 9.94A.825.

Here, the court did not "make a finding of fact" that Mr. Jones was armed with a deadly weapon at the time of the commission of the crime. CP 20, 35. The court nonetheless imposed an additional term of 24-months pursuant to the enhancement the court did not find. CP 20-21, 25, 35-36, 39. For the same reasons discussed above, the enhanced sentence is unlawful.

The opinion remands "with instructions to amend Mr. Jones's judgment and sentence so that it conforms with the factual findings necessitated by his 2004 guilty plea." Slip op. at 1. But this is precisely the problem—the court did not make

the factual findings necessary to sentence Mr. Jones as it did. The remedy is not to craft findings the court never made. Instead, the remedy is to sentence Mr. Jones as authorized under the findings the court actually made. Those findings include the absence of a sexual motivation and a deadly weapon. CP 20.

The Court of Appeals has it backward—it is the findings that dictate the allowable sentence. Reviewing courts do not start with a sentence and then work backwards to assess what findings of fact must be made retroactively to prop up the sentence. Courts must look to the findings the court made and then evaluate whether those findings support the sentence imposed. If they do not, the sentence is unauthorized.

The opinion's reasoning that the error was simply "the failure to memorialize the sexual motivation and deadly weapon findings on the judgment and sentence" is circular. Slip op. at 11. The judgment and sentence is where the court reflects the

findings it made. If the court does not enter findings on the judgment and sentence, it did not make the findings.

The Court of Appeals' flawed opinion upholds a sentence imposed without the necessary findings. Allowing courts to backfill findings to retroactively justify sentences turns sentencing on its head. This Court should accept review to address the misinterpretation of the statutes, the sentencing process, and the conflict with precedent.

E. CONCLUSION

For all these reasons, this Court should accept review. RAP 13.4(b).

Counsel certifies this brief complies with RAP 18.17 and the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 3,994 words.

DATED this 21st day of August, 2024.

Respectfully submitted,

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APPENDIX A

June 6, 2024, Opinion

FILED
JUNE 6, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CLAYTON DENNIS JONES, Appellant.	))))))))))	No. 39422-1-III UNPUBLISHED OPINION

PENNELL, J. — Clayton Jones appeals from his judgment and sentence for second degree assault, arguing he is entitled to resentencing without enhancements for sexual motivation and a deadly weapon. We reject this claim for relief. We instead remand with instructions to amend Mr. Jones's judgment and sentence so that it conforms with the factual findings necessitated by his 2004 guilty plea to second degree assault with sexual motivation and a deadly weapon. We further remand with instructions to strike the crime victim penalty assessment (VPA) and community custody supervision fees.

FACTS

2004 guilty plea and sentencing

In 2004, Clayton Jones entered an *Alford* [1] plea to second degree assault with sexual motivation and a deadly weapon. On his "Statement of Defendant on Plea of Guilty to Sex Offense," he wrote "see attached copy of original information" for the elements of the charge he pleaded guilty to. Clerk's Papers (CP) at 9. Count II on the information alleged:

> SECOND DEGREE ASSAULT, committed as follows: That the defendant, CLAYTON DENNIS JONES, in the State of Washington, on or about August 03, 2004, did intentionally assault [M.L.], with a deadly weapon, to-wit: a knife, and the defendant being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and [RCW] 9.94A.510(4), and further the defendant committed said crime with sexual motivation under the provisions of RCW 9.94A.835 and [RCW] 9.94A.030.

Id. at 1.

As part of the plea agreement, the parties agreed to a "24 month standard range sentence along with a 24 month weapon enhancement for a total sentence of 48 months." *Id.* at 12. Mr. Jones stipulated that his offense carried a maximum

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

term of life and acknowledged the offense included a mandatory deadly weapon enhancement.

The 2004 judgment and sentence related to Mr. Jones's plea reflects he was found guilty of "Second Degree Assault with Sexual Motivation-Domestic Violence . . . as charged in the Information." *Id.* at 19.[2] Despite his plea, the court did not mark that it made a special finding that the crime was committed with a deadly weapon, and it is unclear whether it marked off a special finding for sexual motivation:

> [ ] A special verdict/finding for use of **a deadly weapon other than a firearm** was returned on Count(s) ___. RCW 9.94A.602, 9.94A.533.
>
> [illegible] A special verdict/finding of **sexual motivation** was returned on Count(s) ___. RCW 9.94A.835

Id. at 20. The court did, however, clearly mark that the charged crime involved domestic violence:

> [✓] contributed to the offense(s). RCW 9.94A.607.
> The crime charged in Count(s) 2 involve(s) **domestic violence.**

Id.

[2] Within this subsection of the judgment, the following statutes are listed: RCW 9A.36.021(1)(c); former RCW 9.94A.602 (1983), *recodified as* RCW 9.94A.825; and former RCW 9.94A.835 (1999). RCW 9A.36.021(1)(c) relates to second degree assault committed with a deadly weapon. RCW 9.94A.825 pertains to deadly weapon special verdicts and, other than recodification, remains unchanged since its adoption in 1983. Former RCW 9.94A.835 provides procedures for sexual motivation special allegations. This statute has had minimal amendments since 2004.

The court calculated Mr. Jones's offender score as five, resulting in an initial standard range sentence of 22 to 29 months with a maximum term of life. The judgment included a 24-month sentence enhancement in the box designated for either a firearm or deadly weapon enhancement, for an adjusted range of 46 to 53 months. Based on the range, the court sentenced Mr. Jones to 48 months confinement with a maximum term of life. Additionally, the court imposed community custody for life with the condition that Mr. Jones register as a sex offender. The court also imposed a $500 VPA, $110 in court costs, and a $100 DNA collection fee.

2022 Blake *resentencing*

In 2022, after nearly 18 years of incarceration, Mr. Jones returned to court for resentencing based on changes to his offender score as a result of our Supreme Court's decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).[3] At the hearing, the court resentenced Mr. Jones based on his new offender score and his conviction for "assault in the second degree with sexual motivation that has a domestic violence tag to it." 1 Rep. of Proc. (RP) (Dec. 5, 2022) at 6. The court added a 24-month enhancement

[3] In *Blake*, a conviction for possession of a controlled substance under former RCW 69.50.4013(1) (2003) was vacated after the Supreme Court held the former statute violated due process and was constitutionally void. 197 Wn.2d at 195. This decision has necessitated resentencing hearings for individuals held in custody under offender scores that were impacted by convictions under the former statute.

per "the domestic violence tag" for a new minimum of 37 months, and reinstated a maximum term of life pursuant to the sexual motivation enhancement. *Id.* at 5-6; *see* CP at 35-36. The court explained that, based on his crime of conviction, it could only adjust Mr. Jones's low end of the sentence range, but that the high end would remain life "because that's what the statute required." 1 RP (Dec. 5, 2022) at 6. The court pronounced Mr. Jones's new sentence of 37 months to life, and required that he register as a sex offender upon release as part of his lifetime community custody, consistent with the original judgment and sentence. After finding Mr. Jones indigent, the court waived the $110 in court costs and $100 DNA collection fee, but reinstated the $500 VPA, stating "[t]he payments stay the same as were originally ordered." *Id.* at 8.

Mr. Jones interjected, stating, "There was no sexual motivation at all. There was no—there was nothing sexual about this crime." *Id*. The court explained, "You pled guilty to the Count II, the second degree assault with sexual motivation, which is why you were being resentenced to a second degree assault with sexual motivation. You've indicated that there was no sexual motivation involved, but that's what you entered a guilty plea to." *Id.* at 9. Other than Mr. Jones's interjection after his sentence was pronounced, there were no objections to the amended sentence. Once again, on the judgment and sentence itself, the resentencing court did not mark that special findings were made for either a

deadly weapon or sexual motivation, but did mark that the crime involved domestic violence.

On December 19, 2023, the Department of Corrections requested clarification from the parties regarding the 24-month enhancement, noting inconsistencies in the findings and sentence imposed. Later that same day, Mr. Jones filed a notice of appeal of his amended judgment and sentence.

Motion for relief from judgment under CR 7.8(b)(4)

While Mr. Jones's appeal was pending before this court, the State moved in the trial court under CrR 7.8(b)(4) to amend the new judgment and sentence after it realized the discrepancies in both of the 2004 and 2022 judgments. The State sought to amend the judgment to add: (1) a special finding of a deadly weapon to support the 24-month enhancement, and (2) a special finding of sexual motivation to support the portions of Mr. Jones's sentence only possible with a finding of sexual motivation.

The superior court held a hearing on January 27, 2023. The State argued the omission of the findings on the original 2004 judgment and the 2022 amended judgment was a scrivener's error, claiming the original sentencing court in 2004 clearly intended to make the findings based on the plea agreement and the sentence given. Mr. Jones's counsel told the court that Mr. Jones's original attorney had informed her that the

24-month enhancement was because of the sexual motivation rather than a deadly weapon. No evidence was presented to corroborate this claim.

Upon review of the original plea, sentencing paperwork, the information, and statement of facts, the resentencing court granted the motion and amended the judgment to reflect findings of sexual motivation and a deadly weapon, stating both "should have been part of the original judgment and sentence." 1 RP (Jan. 27, 2023) at 20-21.

The State then filed a motion with this court to permit entry of the amended judgment and sentence pursuant to RAP 7.2(e). In a subsequent filing, the State asserted it was unable to procure a transcript of Mr. Jones's 2004 sentencing hearing. The original sentencing judge had retired, the original court reporter who covered the hearing had passed away, and current court reporters were unable to decipher the original court reporter's notes in order to produce a legible transcript. Mr. Jones opposed the State's motion to allow entry of the amended judgment and sentence.

A commissioner of this court denied the State's motion, finding the State failed to prove the 2004 sentencing court intended to enter findings of sexual motivation or use of a deadly weapon. A panel of this court denied the State's motion to modify the commissioner's ruling.

ANALYSIS

Legality of sentence of incarceration

Second degree assault is generally a class B felony with a statutory maximum of 10 years confinement. RCW 9A.36.021(2)(a); RCW 9A.20.021(1(b). But under the Sentencing Reform Act of 1981, chapter 9.94A RCW, this maximum term can be increased based on sentencing enhancements. For example, if there is a finding of sexual motivation, second degree assault will be elevated to a class A felony with a statutory maximum of life. RCW 9A.36.021(2)(b); former RCW 9.94A.030(38)(c) (2001); former RCW 9.94A.835 (1999).[4] In addition, second degree assault can be accompanied by a 24-month sentencing enhancement if there is a special finding that the crime was committed through use of a deadly weapon. RCW 9.94A.533(4)(a).[5]

A sentencing enhancement that increases a defendant's maximum term of confinement is accorded the jury trial protections under the Sixth Amendment to the United States Constitution. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 494,

[4] At the time of Mr. Jones's original sentencing, the sexual motivation enhancement was found in former RCW 9.94A.712 (2001), *recodified as* RCW 9.94A.507. In addition, the definition for "sex offense" found in former RCW 9.94A.030(38)(c) is now located in RCW 9.94A.030(47)(c). Any subsequent changes to these statutory provisions are not relevant to the issues on review.

[5] The relevant portion of RCW 9.94A.533 was the same at the time of Mr. Jones's original sentencing hearing.

120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). What this means is that unless the defendant consents to a judicial fact-finding, a jury—not a judge—must make all required factual findings beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In the case of a guilty plea, the Sixth Amendment requires that the defendant admit all facts necessary for imposition of any aggravated sentence. *See id.* at 299, 310. If a defendant's guilty plea includes an admission to sentencing enhancements, then the facts necessary for the enhancements are deemed proven for purposes of the Sixth Amendment. *See State v. Dillon*, 142 Wn. App. 269, 275, 174 P.3d 1201 (2007).

The fact that a defendant enters an *Alford* plea as opposed to a traditional plea does not change the Sixth Amendment analysis. *See State v. Poston*, 138 Wn. App. 898, 902-903, 909, 158 P.3d 1286 (2007). An *Alford* plea is a guilty plea in which a defendant does not admit factual guilt but acknowledges that the State's evidence will likely result in a conviction. 400 U.S. 25. A court may accept an *Alford* plea only if it first "finds that it is knowingly, voluntarily, and intelligently made and that there is a satisfactory evidentiary basis to accept the plea." *In re Pers. Restraint of Cross*, 178 Wn.2d 519, 525-26, 309 P.3d 1186 (2013); *see* CrR 4.2(d). Thus, while a defendant technically does not admit guilt through an *Alford* plea, the independent factual basis found by the

court for each element of the crime substitutes for an admission of guilt, and the plea has the same effect as a guilty plea. *State v. D.T.M.*, 78 Wn. App. 216, 220, 896 P.2d 108 (1995).

Here, Mr. Jones entered an *Alford* plea to count II of the information (second degree assault), which included allegations of sexual motivation and use of a deadly weapon. Mr. Jones does not challenge the nature of his plea or attempt to withdraw his plea.[6] Given the court accepted Mr. Jones's plea in 2004, the facts required for the sexual motivation and deadly weapon enhancements were necessarily established beyond a reasonable doubt at the time of the plea as required by the Sixth Amendment.[7]

[6] The record supports that Mr. Jones did, in fact, plead guilty to assault in the second degree with sexual motivation and a deadly weapon. Mr. Jones submitted his plea on a statement on plea of guilty *to a sex offense*. *See* CP at 9. He specifically wrote on the statement that he pleaded guilty to second degree assault "with sexual motivation," and to the elements as charged on the information. *Id.* at 9, 15. The elements of the charge were that Mr. Jones intentionally committed the crime of assault while armed with a deadly weapon and with sexual motivation. *Id.* at 1. Mr. Jones's plea also stipulated that the crime he pleaded guilty to carried a maximum term of life. *See id.* at 10. Additionally, his plea acknowledged the offense he pleaded guilty to includes a mandatory deadly weapon or firearm enhancement. *Id.* at 14. It also shows the parties agreed as part of the plea to a 24-month standard range plus a 24-month "weapon enhancement." *Id.* at 12. Mr. Jones signed and acknowledged that he read and understood both the plea statement and offender registration attachment. *See id.* at 15.

[7] The fact that an *Alford* plea does not have preclusive effect in civil proceedings is irrelevant to our analysis.

Because the 2004 plea established the factual basis for the sexual motivation and deadly weapon enhancements, the 2022 resentencing court properly relied on the plea to impose the two sentencing enhancements. There was no further requirement of any independent fact-finding. Indeed, had there been a requirement of independent judicial fact-finding to justify the sexual motivation or deadly weapon enhancements, the sentence would violate the Sixth Amendment rule set forth in *Apprendi*.

Mr. Jones might be heard to argue that despite the fact the sentencing court was authorized to impose the two sentencing enhancements, it chose not to do so. To the extent Mr. Jones makes this argument, it is unconvincing. For one thing, the enhancements at issue were not optional. *See* former RCW 9.94A.712(1)(a)(ii), (3) (2001) ("[T]he court shall impose a sentence to a maximum term consisting of the statutory maximum for the offense" upon a finding of sexual motivation.); former RCW 9.94A.533(4)(e) (2002) ("[A]ll deadly weapon enhancements under this section are mandatory."). And in addition, the terms of incarceration imposed on Mr. Jones in both 2004 and 2022 reflected the 24-month enhancement required by the deadly weapon finding and the maximum life term required by the finding of sexual motivation.

The only error in this case was the failure to memorialize the sexual motivation and deadly weapons findings on the judgment and sentence form as required by former

RCW 9.94A.127(2) (1999), *recodified as* RCW 9.94A.835(2), and former RCW 9.94A.602 (1983), *recodified as* RCW 9.94A.825.[8] Because the task of correcting the judgment and sentence to conform with the facts necessarily established by Mr. Jones's guilty plea is purely ministerial, we remand with instructions that the trial court make the applicable correction. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011).[9]

VPA

Mr. Jones argues the recently amended VPA statute applies to his case pending on direct appeal, and the VPA imposed on him should be struck accordingly from his judgment and sentence. The State argues the amended VPA statute does not apply to Mr. Jones's appeal from a *Blake* resentencing because the resentencing did not interrupt the finality of his legal financial obligations (LFOs).

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[8] The substance of the recodified statutes, which requires the court to make written findings, has not changed.

[9] Mr. Jones argues that our commissioner's ruling on the State's motion to permit filing of a second amended judgment and sentence is now law of the case and prevents the State from relitigating the issue of whether an amended judgment may issue. We disagree. The commissioner's ruling was limited to an assessment of the intent of the sentencing court in 2004. But because a *Blake* resentencing involves a full resentencing, it is the 2022 sentencing hearing that controls. *See State v. Dunbar*, 27 Wn. App. 2d 238, 243, 532 P.3d 652 (2023). This was not addressed in our commissioner's ruling. Furthermore, this court's denial of a motion to modify can be based on a variety of reasons and should not be interpreted as an adoption of the basis for commissioner's ruling.

Former RCW 7.68.035(1)(a) (2018) required a VPA be imposed on any individual found guilty of a crime in superior court. In 2023, the legislature amended the statute to prohibit imposition of a VPA on indigent defendants. RCW 7.68.035(4), 5((b). The amendment took effect on July 1, 2023, and applies prospectively to cases pending on direct appeal that are not yet final. *State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023).

Mr. Jones's resentencing took place prior to the effective date of the amendment. His direct appeal of the judgment and sentence following a full *Blake* resentencing hearing is pending review. *See State v. Dunbar*, 27 Wn. App. 2d 238, 243, 532 P.3d 652 (2023) (*Blake* resentencings are full resentencing hearings.). Thus, Mr. Jones enjoys the benefit of the amended statute as his case is not yet final for the purposes of sentencing. Because the sentencing court found Mr. Jones to be indigent, we remand with instructions to strike the VPA from the judgment and sentence.

Community custody supervision fees

Mr. Jones argues the resentencing court erred by imposing community custody supervision fees because the 2022 amendments to former RCW 9.94A.703(2)(d) (2008), effective at the time of his resentencing, now prohibit the imposition of such fees. Although Mr. Jones did not preserve an objection in the trial court to community custody

fees, this is not a bar to relief. *See State v. Blazina*, 182 Wn.2d 827, 832-34, 344 P.3d 680 (2015) (exercising discretion to review improper LFO raised for the first time on appeal). We therefore grant Mr. Jones his requested relief and remand with instructions to strike the community custody supervision fees.

CONCLUSION

We remand this matter with instructions to amend Mr. Jones's judgment and sentence to memorialize special findings of sexual motivation and a deadly weapon. We further remand with instructions to strike the VPA and community custody supervision fees.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Cooney, J.

APPENDIX B

July 23, 2024, Order Denying Motion for Reconsideration

FILED
JULY 23, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

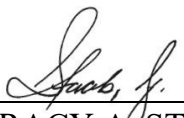
STATE OF WASHINGTON, Respondent, v. CLAYTON DENNIS JONES, Appellant.	)	No. 39422-1-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant Clayton Dennis Jones's motion for reconsideration of this court's June 6, 2024, opinion; and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Pennell, Lawrence-Berrey, and Cooney

FOR THE COURT:



TRACY A. STAAB
Acting Chief Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 39422-1-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: August 21, 2024

WASHINGTON APPELLATE PROJECT

August 21, 2024 - 3:50 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Clayton Dennis Jones, III
Superior Court Case Number:	04-1-02688-2

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