Supreme Court No. _____
COA No. 86843-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

KRISTOPHER KORSAKAS,
Petitioner.

PETITION FOR REVIEW

KATE R. HUBER
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
katehuber@washapp.org
wapofficemail@washapp.org

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Kristopher Korsakas asks this Court to accept review of the Court of Appeals decision terminating review. Opinion (Feb. 18, 2025); Order Denying Reconsideration (Mar. 14, 2025). RAP 13.3(a)(1); RAP 13.4(b)(1)-(4).

B. ISSUES PRESENTED FOR REVIEW

1. Defendants have the right to the assistance of counsel at every critical stage of criminal prosecutions, including motions to withdraw a guilty plea advanced before sentencing. Mr. Korsakas sought to withdraw his guilty plea before sentencing, but defense counsel refused to make the motion and abandoned Mr. Korsakas to argue the motion himself. The Court of Appeals ignored this Sixth Amendment violation because it found Mr. Korsakas did not establish his attorney was ineffective. The opinion conflicts with cases from the United States Supreme Court, this Court, and the Court of Appeals, and presents an important constitutional issue of substantial public interest. RAP 13.4(b)(1)-(4).

2. Absent compelling necessity, the rights to due process and to appear and defend in person prohibit a court from restraining people who appear before it. The court unlawfully restrained Mr. Korsakas at his sentencing hearing without any individualized assessment of the need for restraints or consideration of lesser alternatives and then imposed an exceptional sentence over five years beyond the top of the standard range after viewing Mr. Korsakas in restraints. The Court of Appeals refused to consider Mr. Korsakas's claim because he did not object to the court's failure to follow the mandatory procedures. This Court should accept review to clarify that *State v. Jackson* imposes an affirmative duty on courts to ensure people appear unrestrained, unless compelling necessity dictates otherwise, even absent a specific objection.[1] RAP 13.4(b)(1), (3)-(4).

3. The Sixth and Fourteenth Amendments require any

[1] *State v. Jackson*, 195 Wn.2d 841, 467 P.3d 97 (2020).

fact on which a court relies to increase the permissible range of punishment must be plead and either admitted by the defendant or proven to a unanimous jury beyond a reasonable doubt. Mr. Korsakas's guilty plea stipulated to facts supporting an aggravating factor, but he did not admit that substantial and compelling reasons justified an exceptional sentence.

Washington's sentencing scheme permits the imposition of an exceptional sentence above the standard range when a judge determines "substantial and compelling reasons justify[] an exceptional sentence." In *State v. Hughes* and *State v. Suleiman*, this Court held the determination that substantial and compelling reasons justify an exceptional sentence is a legal judgment that may be made by a judge, not a factual determination that must be made by a jury.[2] The United States Supreme Court decisions in *Hurst v. Florida* and *Erlinger v.*

[2] *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005); *State v. Suleiman*, 158 Wn.2d 280, 143 P.3d 795 (2006).

United States show this is conclusion is incorrect.[3] This Court should grant review to revisit these decisions, follow the dictates of the Sixth and Fourteenth Amendments, and hold a determination that a substantial and compelling reason supports an exceptional sentence is a factual assessment that must be plead and admitted by a defendant or proven to a unanimous jury beyond a reasonable doubt. RAP 13.4(b)(3)-(4).

C. STATEMENT OF THE CASE

On the third day of his jury trial, Mr. Korsakas pleaded guilty to every charge in the information filed against him, encompassing eight counts. CP 109-120; RP 378-91. He also admitted facts supporting the deliberate cruelty domestic violence aggravating factor under RCW 9.94A.535(3)(h). CP 119; RP 385-88.

Mr. Korsakas pleaded guilty toward the end of trial following a request to represent himself. RP 362-91. Shortly

[3] *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016); *Erlinger v. United States*, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024).

before his plea, Mr. Korsakas explained to the judge that his attorney had not spent enough time preparing his defense and that there had been "a breakdown of communication." RP 367. Mr. Korsakas and his attorney had not discussed all of the charges and his attorney did not have sufficient time to understand the case. RP 367-69.

Following a short recess, Mr. Korsakas pleaded guilty to every count charged in the information and aggravating factors for six counts rather than continue with the trial. RP 376-91; CP 98-120. The prosecution advised it would seek an exceptional sentence based on the domestic violence and free crimes aggravating factors. RP 383; CP 113. Mr. Korsakas did not agree to an exceptional sentence and the plea did not bind him to any sentencing recommendation. CP 109-20; RP 378-82.

At the sentencing hearing, the prosecution asked for an exceptional sentence above the standard range. RP 398-409. The prosecution detailed Mr. Korsakas's criminal history and

regurgitated the evidence introduced at trial before Mr. Korsakas pleaded guilty. RP 398-409.

In response to the State's sentencing recommendation, defense counsel informed the court, "Mr. Korsakas is asking to make a motion to the Court at this time to withdraw his guilty plea." RP 409. Although he was aware of Mr. Korsakas's desire to withdraw his plea before the proceeding, defense counsel did not prepare a written motion or alert the court. RP 409-10. Counsel also refused to argue the motion to the court. Instead, he informed the court, "It's [a] collateral attack. I don't normally get involved with that." RP 410.[4] Instead, counsel proposed to "let Mr. Korsakas make his motion." RP 410.

Without an attorney to represent him on the motion to withdraw his plea, Mr. Korsakas tried to explain the basis for his motion orally to the court. RP 410-11. He said a manifest

[4] Counsel was wrong. A motion to withdraw a plea before sentence is not a collateral attack. *Compare* CrR 4.2, *with* CrR 7.8.

injustice required the court permit him to withdraw his plea. RP 410. Mr. Korsakas argued his attorney "was so ineffective in mounting a defense" that his "only alternative" was to plead guilty. RP 410.

The prosecution asserted that because the court engaged in a thorough colloquy when Mr. Korsakas pleaded guilty, defense counsel was effective. RP 411-12. It requested time to respond to Mr. Korsakas's motion to withdraw his plea. *Id.*

The court recognized ineffective assistance of counsel constituted a manifest injustice and would permit a plea withdrawal under CrR 4.2. RP 412. However, the court summarily denied Mr. Korsakas's motion, declaring it did not find any grounds justifying withdrawal occurred. RP 412. It did not inquire into Mr. Korsakas's allegations of ineffective assistance of counsel. It did not ask defense counsel or Mr. Korsakas to provide a written motion, explaining his position. It did not appoint new counsel to represent Mr. Korsakas on the motion or request his appointed counsel make the motion.

Although the prosecution had warned it would seek an exceptional sentence, counsel did not submit any sentencing memorandum or mitigating information to counter the State's lengthy submission requesting an exceptional term. *Compare* RP 397 (noting "there was no defense sentence memorandum"), *with* CP 138-67 (29-page Corrected State's Sentencing Memorandum) *and* RP 398-409 (12 transcript pages of State's sentencing recommendation). Instead, counsel perfunctorily asked the court to impose a midrange sentence.[5] RP 412-14 (less than two transcript pages of defense sentencing recommendation).

Mr. Korsakas appeared before the court in leg restraints for his sentencing.[6] RP 397. The court did not engage in any

[5] Counsel mistakenly argued the free crimes aggravator should not apply because "so many … points came from this plea." RP 413. The court recognized counsel's error and explained the stipulated offender score excluded the current offenses. RP 413.

[6] Mr. Korsakas was restrained for the entire proceeding, including the motion to withdraw the plea and sentencing. RP 397-430.

analysis or find a compelling necessity required restraints. RP 397.

Mr. Korsakas apologized and asked the court to consider a standard range sentence. RP 397, 417. Mr. Korsakas's sister, Nicole Trujillo, and nephew, Corinthian Wilkins, spoke on his behalf. RP 413-17. Ms. Trujillo explained how Mr. Korsakas achieved sobriety and became a crucial part of their lives over the years. RP 414-15. She talked about his bond with his son, Dominick, and importance to his immediate and extended family. RP 415. Mr. Wilkins added that Mr. Korsakas was "More present than my father." RP 415. He discussed Mr. Korsakas's great importance to Dominick and how Mr. Korsakas is not only Dominick's father but also Mr. Wilkins's father figure. RP 415-17. They asked the court to consider the positive role Mr. Korsakas played in his families' lives and impose a sentence that would return him to them at some point. RP 414-17.

The court calculated the standard ranges on the felony stalking count as 72-96 months, the no contact order violations as 60-60 months, and the criminal impersonation as 0-12 months. CP 174. The court found the guilty plea established the domestic violence aggravating factor and also found facts supporting the free crimes factor. RP 420; CP 174, 195-97. The court concluded "an exceptional sentence above the standard range is appropriate" based on either aggravating factor. CP 196; RP 419-20.

The court imposed sentences above the standard range of 102 months on the stalking conviction and 60 months on the criminal impersonation conviction. CP 174-78, 197. It also imposed standard range 60-month terms on each of the remaining felony counts. CP 174-78.[7] The court ordered the 102 months to run consecutively to the other sentences for a total term of confinement of 162 months. CP 174-78, 197.

[7] It also imposed 364 days on the misdemeanor stalking count. CP 187-91.

D. ARGUMENT

1. The Court of Appeals ignored counsel's unconstitutional abandonment of Mr. Korsakas at a critical stage.

Mr. Korsakas moved to withdraw his guilty plea before sentencing. RP 409-12. Defense counsel erroneously believed a pre-sentencing motion to withdraw a plea was a collateral attack and refused to represent Mr. Korsakas on his motion. RP 410. Counsel was mistaken. Criminal Rule 4.2, not Criminal Rule 7.8, governed Mr. Korsakas's motion; it was not a collateral attack; and Mr. Korsakas was entitled to representation by counsel on the motion. *State v. Harell*, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996).

The Sixth Amendment and article I, section 22 guarantee defendants representation by counsel at every critical stage. *State v. Heddrick*, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009). The failure to provide counsel at a critical stage is structural error mandating reversal. *United States v. Cronic*, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657

(1984); *State v. Heng*, 2 Wn.3d 384, 392, 539 P.3d 13 (2023); *State v. Charlton*, 2 Wn.3d 421, 427, 538 P.3d 1289 (2023).

Mr. Korsakas had "the right to counsel in all critical stages of the proceedings against [him], and … a presentence motion to withdraw a guilty plea pursuant to CrR 4.2 is a critical stage." *State v. Nguyen*, 179 Wn. App. 271, 282, 319 P.3d 53 (2013). Here, the court left Mr. Korsakas unrepresented at a critical stage when his attorney refused to bring a motion that a defendant controls and did not appoint new counsel. RP 409-12.

Where the court hears and considers a motion to withdraw a guilty plea, counsel is required. *State v. Pugh*, 153 Wn. App. 569, 578-79, 222 P.3d 821 (2009); *Harell*, 80 Wn. App. at 804. But when counsel refuses to represent their client on such a motion, or cannot represent their client on such a motion because it is based on alleged inadequate representation, then the defendant is wholly without counsel on the motion, in violation of the right to counsel at a critical stage. That was

what occurred here. RP 409-12. Requiring a person to proceed pro se to litigate a critical stage motion is "[a]n outright denial of the right to counsel." *Harell*, 80 Wn. App. at 805.

The Court of Appeals acknowledged a pre-sentence motion to withdraw a plea is a critical stage. Slip op. at 4-5. It recognized the Sixth Amendment and article I, section 22 entitle people to counsel at critical stages. Slip op. at 4-5. Yet it affirmed the trial court's actions that left Mr. Korsakas unrepresented at this critical stage. Slip op. at 4-7.

Rather than conclude, as the law requires, that Mr. Korsakas was denied counsel at this critical stage, the opinion sidestepped counsel's abandonment of Mr. Korsakas. The opinion instead focused on Mr. Korsakas's assertions that his attorney performed deficiently and concluded Mr. Korsakas failed to support his claims with sufficient evidence. Slip op. at 6-7. Therefore, it held the court did not abuse its discretion when it did not appoint new counsel. Slip op. at 4-7. The Court of Appeals' analysis is flawed.

Mr. Korsakas was entitled to representation by counsel on his motion to withdraw his plea, whether that be existing counsel or new counsel. U.S. Const. amend. VI; Const. art. I, § 22. But counsel did not represent Mr. Korsakas on his motion to withdraw his plea. Counsel refused to make the motion based on his misunderstanding of the law. RP 410. It is the intersection of current counsel refusing to make the motion and the court denying Mr. Korsakas new counsel that created the unconstitutional deprivation by leaving Mr. Korsakas unrepresented.

The opinion relied on *State v. Stark*, 48 Wn. App. 245, 738 P.2d 684 (1987), to reject Mr. Korsakas's challenge, but that case is inapposite. Slip op. at 5. In *Stark*, the defendant did not move to withdraw his plea. Instead, that case focused solely on Mr. Stark's motion for new counsel, which the reviewing court determined the trial court properly denied. *Stark*, 48 Wn. App. at 248, 252-53. But *Stark* did not approve of leaving Mr. Stark unrepresented at any point. It simply held

the trial court did not abuse its discretion in denying Mr. Stark's motion for new counsel. Mr. Korsakas's case is distinguishable because he moved to withdraw his plea, and no lawyer represented him on that motion.

The opinion also overlooked that the motion at issue was not just any motion. It was a motion about how to plead. Unlike other motions, a motion about pleading guilty or not guilty is solely within the province of the client. *Brookhart v. Janis*, 384 U.S. 1, 7, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966); Am. Bar Ass'n, *Criminal Justice Standards for the Defense Function*, 4-5.2 (4th ed. 2017).

"[W]hether to plead guilty" is one of the "fundamental decisions regarding the case" over which "the accused has the ultimate authority." *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). An attorney cannot forgo a motion regarding how to plead. *See McCoy v. Louisiana*, 584 U.S. 414, 417-18, 138 S. Ct. 1500, 1505, 200 L. Ed. 2d 821 (2018) (attorney cannot admit factual guilt during trial without

defendant's agreement); *State v. Humphries*, 181 Wn.2d 708, 714, 336 P.3d 1121 (2014) (attorney cannot stipulate to element over defendant's objection); *State v. Cross*, 156 Wn.2d 580, 606-07, 611-12, 132 P.3d 80 (2006), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018) (attorney must abide by client's exercise of specific constitutional rights, such as plea to be entered).

Mr. Korsakas had "'the absolute right'" to decide whether to pursue guilt or innocence. *State v. Burlingame*, 3 Wn. App. 2d 600, 610, 416 P.3d 1269 (2018) (quoting *Cross*, 156 Wn.2d at 611). As a decision about guilt or innocence, the decision of whether to maintain or to withdraw the guilty plea "is the defendant's alone." *See id.* Therefore, a person's attorney cannot simply decline to bring this sort of motion.

Even if the trial court did not abuse its discretion in denying Mr. Korsakas new counsel, his attorney's refusal to advance his motion to withdraw his plea still left Mr. Korsakas unrepresented on the motion. But it was a critical stage motion

addressing an issue within Mr. Korsakas's sole prerogative, and Mr. Korsakas was entitled to representation.

This Court should accept review to address this Sixth Amendment violation.

2. The Court of Appeals disregarded *Jackson* and baselessly refused to address Mr. Korsakas's claim that the court unjustifiably restrained him at his sentencing hearing.

Mr. Korsakas appeared before the court for sentencing. RP 397-425. At the beginning of the hearing, the prosecution, apparently referring to Mr. Korsakas's hands, asserted, "The defendant is present in custody, not shackled, represented by counsel." RP 397. Defense counsel immediately clarified that Mr. Korsakas "is in leg restraints." RP 397. Neither the prosecution nor the court disputed counsel's characterization. RP 397. Read contextually, the prosecutor's comments must have referred to Mr. Korsakas's unrestrained hands and arms. Neither the prosecution nor the court would sit silently in response to counsel's assertion that Mr. Korsakas "is in leg restraints" if he were not. RP 397.

Despite the record establishing Mr. Korsakas was "in leg restraints," the Court of Appeals refused to reach Mr. Korsakas's claim that the court unconstitutionally restrained him at the hearing. Slip op. at 8-9. The court ignored the transcript and concluded, "the record lacks any factual basis that would permit a reviewing court to evaluate Korsakas's claim of error." Slip op. at 9. It ruled that because Mr. Korsakas did not object, RAP 2.5(a) left it unable to consider the issue. *Id.*

The record clearly demonstrates Mr. Korsakas was subjected to physical restraints on his legs. RP 397. That Mr. Korsakas did not object to the restraints does not authorize the court to engage in this due process violation.

Restraining a person without justification "undermines the presumption of innocence" and "violate[s] the dignity of the defendant and the judicial proceedings." *State v. Luthi*, 3 Wn.3d 249, 251, 529 P.3d 712 (2024). Due process of law prohibits this "inherently prejudicial courtroom practice[]"

except where an individualized inquiry shows restraints are necessary. *Id.* at 713 (internal quotation omitted).

State v. Jackson recognized that due process prohibits "shackles or restraints" of any kind without an individualized inquiry. 195 Wn.2d 841, 845, 858, 467 P.3d 97 (2020); *id.* at 852 (prohibiting "all bonds or shackles"). *Jackson*'s mandate is definite: "A trial court *must* engage in an individualized inquiry into the use of restraints prior to every court appearance" at which it considers restraints. 195 Wn.2d at 854. *Jackson* requires that "at all stages of the proceedings, the court *shall make* an individualized inquiry into whether shackles or restraints are necessary." *Id.* at 845 (emphasis added).

Counsel's statement that he had "[n]o objection" to Mr. Korsakas's leg restraint does not relieve the trial court of its obligation to conduct an individualized assessment before permitting any restraint at any proceeding as required by *Jackson*. RP 397. *Jackson* prohibits courts from deferring to the decision to other agencies or parties as to the need for

physical restraints. 195 Wn.2d at 854. Instead, it unconditionally forbids any restraint without an individualized inquiry by the court. *Id.* at 852-55. *Jackson* does not relieve the court from conducting this individualized inquiry in any circumstances. Courts cannot forgo the inquiry at the request of any agency or party. *See id.* at 853-54 (jail's shackling policy did not permit restraint without individualized inquiry).

Jackson prohibits any restraint at any hearing unless the court "engage[s] in an individualized inquiry … prior to every court appearance" and finds a security necessity. *Jackson*, 195 Wn.2d at 854. This supersedes older cases allowing courts to rely on the absence of an objection to justify restraints. *See, e.g., State v. Davis*, 152 Wn.2d 647, 698-700, 101 P.3d 1 (2004); *State v. Rodriguez*, 146 Wn.2d 260, 270, 45 P.3d 541 (2002).

It is precisely because some courts insist on deferring to "jail staff security procedures, without additional case-by-case inquir[ies]," that caselaw recognized the judge must conduct

individualized inquiries in every case before any restraint occurs. *State v. Jaquez*, 105 Wn. App. 699, 708 n.7, 20 P.3d 1035 (2001) (discussing Pierce County Superior Court's "standard practice" of shackling in-custody defendants pursuant to jail policy); *see also State v. Lundstrom*, 6 Wn. App. 2d 388, 394-95, 429 P.3d 1116 (2018) (discussing similar policy in Clallam County).

Here, there was no evidence indicating Mr. Korsakas posed any risk of escape, injury, or inability to behave. The court did not conduct any inquiry and made no findings. Therefore, the court erred in proceeding with the hearing while Mr. Korsakas was "in leg restraints." RP 397.

The court imposed a 162-month sentence, five years above the standard range, after viewing Mr. Korsakas restrained at sentencing. RP 397-409, 412-25. It also denied Mr. Korsakas's motion to withdraw his guilty plea, which it considered while viewing Mr. Korsakas restrained. RP 397, 409-12. Both of these discretionary decisions demonstrate Mr.

Korsakas's impermissible restraints prejudiced him, a claim the State did not rebut.

Unless the State can prove the unjustified shackling "could not have influenced … his sentence in any way," *State v. Jarvis*, 27 Wn. App. 2d 87, 101, 530 P.3d 1058, *review denied*, 2 Wn.3d 1003 (2023), court must presume the "unknown risks of prejudice … impair[ed] decision-making" by the court. *Jackson*, 195 Wn.2d at 856. Here, the court's harsh treatment of Mr. Korsakas demonstrates prejudice.

Shackling has a devastating physical and symbolic effect on both the accused and the public's perception of the fairness of the proceeding. It unfairly increases the perception of a person's dangerousness and also biases the people who view it, including judges.

This Court should accept review and hold only a showing of necessity based on an individualized inquiry may justify restraints. It should underscore that *Jackson*'s dictate is

categorical and that the failure to object does not permit a court to engage in this due process violation.

3. This Court should accept review to revisit *Hughes* and *Suleiman* and hold that whether substantial and compelling reasons justify an exceptional sentence is a factual determination that must be admitted or proven beyond a reasonable doubt.

Courts derive sentencing authority strictly from statutes, subject to constitutional limitations. *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). Due process of law and the right to a jury trial are two such constitutional limitations. U.S. Const. amends. VI, XIV. Those provisions require the State to prove "any fact (other than prior conviction) that increases the maximum penalty for a crime" beyond a reasonable doubt to a jury or require a person pleading guilty to admit the necessary fact. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (internal quotations omitted).

Washington's relevant "maximum penalty" is "the maximum [the judge] may impose *without* any additional findings." *Blakely*, 542 U.S. at 303-04. The State must plead and prove any fact that determines the permissible range of punishment above the standard range beyond a reasonable doubt for an exceptional sentence based on aggravating factors to be constitutional. *Alleyne v. United States*, 570 U.S. 99, 102, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). The Sentencing Reform Act (SRA) requires courts to sentence persons within a presumptive range based on the seriousness level of the crime and the offender score unless the State meets the requirements for an exceptional sentence. RCW 9.94A.530.

When the government seeks an exceptional sentence, it must provide timely notice of specified statutory aggravating circumstances. RCW 9.94A.537(1). It must also prove the facts supporting the aggravating circumstances to a unanimous jury beyond a reasonable doubt, or the defendant must admit them. RCW 9.94A.537(3).

However, an exceptional sentence does not follow automatically from a jury's finding or defendant's admission of aggravating circumstances. Such a finding is a necessary prerequisite, but the court still must engage in additional fact-finding. RCW 9.94A.535-.537.

A court may impose an exceptional sentence only after it assesses the proven aggravating factors, considers the purposes of the SRA, and then finds the aggravating factors provide "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535-.537(6). A fact is "substantial and compelling" if it "distinguish[es] the crime in question from others in the same category." *State v. Grewe*, 117 Wn.2d 211, 216, 813 P.2d 1238 (1991). The court must "set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535.

Before 2005, the SRA permitted courts to impose exceptional sentences based on aggravating circumstances the court found by a preponderance of the evidence. *State v. Davis*,

163 Wn.2d 606, 615-16, 184 P.3d 639 (2008). In an effort to comply with *Blakely*, the Legislature amended the SRA. Laws of 2005, ch. 68, § 4; *In re Pers. Restraint of Beito*, 167 Wn.2d 497, 507, 220 P.3d 489 (2009). The amendments fixed one problem by requiring the jury to find or the defendant to admit the facts supporting aggravating circumstances in almost all cases. But, the amended statute continues to require courts to find the fact ultimately supporting imposition of an exceptional sentence: that it was justified by substantial and compelling reasons. RCW 9.94A.535-.537(6).

In the aftermath of the 2005 amendments, this Court found the determination that substantial and compelling reasons justify an exceptional sentence was "a legal judgment," not a "factual determination[]," and that the SRA scheme requiring the court to make that assessment did not run afoul of *Blakely*. *State v. Hughes*, 154 Wn.2d 118, 137, 110 P.3d 192 (2005); *State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006). However, this conclusion cannot withstand scrutiny

after the United States Supreme Court's decisions in *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) and *Erlinger v. United States*, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024). Those cases reaffirm that the ability of a court to find a fact is limited to the bare fact of a prior conviction. Therefore, the finding that substantial and compelling reasons justify an exceptional sentence requires a unanimous jury finding or a defendant's admission.

In *Hurst*, the Supreme Court reviewed Florida's death penalty sentencing scheme to determine whether it complied with *Apprendi*. The scheme permitted a sentence of death only where a jury found a factual basis justified death and recommended that sentence *and* after the court "weigh[ed] the aggravating and mitigating circumstances" and determined death was appropriate. *Hurst*, 577 U.S. at 96. This two-part finding rendered the jury's finding merely "advisory" because the jury's finding alone could not result in imposing the death penalty. *Id.* at 100. Without the additional "judge-made

findings," the statute did not permit courts to impose a death sentence. *Id.* at 99. The Supreme Court held the scheme violated the Sixth Amendment. *Id.* at 102-03.

The SRA's scheme is similar to the one the United States Supreme Court declared unconstitutional in *Hurst*. The SRA permits an exceptional sentence only if the court makes the additional finding that aggravating circumstances present a substantial and compelling reason justifying an exceptional sentence. For a court to find substantial and compelling reasons justifying an exceptional sentence, it reviews the purposes of the SRA, determines whether an exceptional sentence is consistent with its purposes, assesses the strength of the State's case to decide whether an exceptional sentence is in the interest of justice, and makes a finding that substantial and compelling reasons support an exceptional sentence. *See State v. Hyder*, 159 Wn. App. 234, 263, 244 P.3d 454 (2011).

Indeed, that is the fact-finding the court engaged in here. CP 196; RP 420. The court decided its own perception of the

aggravating factors provided sufficient justification to increase Mr. Korsakas's punishment.

That a finding of substantial and compelling reasons is a factual finding, not a legal conclusion, is also supported by *Erlinger*. In *Erlinger*, the Court considered a statute requiring mandatory prison terms when a sentencing court finds a defendant has three prior convictions for certain felonies on separate occasions. 602 U.S. at 825. Erlinger argued the Fourteenth and Sixth Amendments required a jury, not a court, to make the factual findings regarding these prior convictions. *Id.* at 827.

The Supreme Court agreed. It held the due process and jury trial rights mandate that "a unanimous jury" must "find every fact essential to an offender's punishment." *Id.* at 832. The Court ruled this necessarily included findings about whether prior convictions occurred on separate occasions. *Id.* at 835.

The Court reiterated the *only* possible facts courts may find is the bare fact of a prior conviction. *Id.* at 838. All other determinations require jury findings based on proof beyond a reasonable doubt or an admission. *Id.* at 845-46.

Here, the court imposed an exceptional sentence based on its finding the aggravating factors constituted substantial and compelling reasons justifying an exceptional sentence, given the SRA's purposes. But to impose an exceptional sentence based on Mr. Korsakas's plea, he would have had to admit not only the facts supporting the aggravating factors but also that the factors presented a substantial and compelling reason justifying an exceptional sentence. He did not do so. Instead, the court imposed an exceptional sentence based on unconstitutional judicial fact-finding.

The statutory requirement that the court make a "substantial and compelling" finding before imposing an exceptional sentence above the standard range requires a fact-based determination beyond the mere fact of prior conviction

and beyond the facts found by the jury or admitted by a defendant. This unauthorized judicial fact-finding is impermissible under *Erlinger* and the cases preceding it. The Sixth and Fourteenth Amendments require a defendant to admit or a jury to make that finding. Here, that did not occur.

This Court is bound by *Hurst* and *Erlinger*. "When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's ruling." *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008). This Court should grant review to revisit *Hughes* and *Suleiman* and bring Washington's sentencing law in compliance with the Sixth and Fourteenth Amendments.

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 4,998 words.

DATED this 14th day of April, 2025.

Respectfully submitted,

KATE R. HUBER (WSBA 47540)
Washington Appellate Project (91052)
Attorney for Petitioner
katehuber@washapp.org
wapofficemail@washapp.org

APPENDIX A

February 18, 2025, Opinion

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KRISTOPHER MARTIN KORSAKAS, Appellant.	No. 86843-8-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Kristopher Korsakas appeals his convictions, arguing the trial court erred by (1) depriving Korsakas of his right to counsel at a critical stage in the proceedings, (2) forcing Korsakas to appear for sentencing in shackles without an individualized assessment, (3) imposing an exceptional upward sentence based on judicial fact finding, or alternatively, without complying with the statutory mandate that it find substantial and compelling reasons, and (4) imposing the victim penalty assessment (VPA). We affirm Korsakas's convictions, and remand to allow the trial court to strike the VPA as a ministerial matter.

I

The State filed a third amended information accusing Korsakas of one count of gross misdemeanor stalking, one count of felony stalking S.M., five counts of domestic violence court order violation, and first degree criminal impersonation. Amid trial, Korsakas made a motion to proceed pro se. When asked why he wanted to proceed without defense counsel's assistance, Korsakas stated, "[W]e

haven't had enough time to go over things, and it's been just a breakdown of communication, lack of communication between the two of us." The trial court called a recess, and allowed Korsakas to discuss how to proceed with defense counsel.

After the recess, Korsakas withdrew his motion to proceed pro se and resolved to enter pleas of guilty. As part of the plea, Korsakas stipulated that he committed the charged counts, and committed the five counts of domestic violence court order violation "with deliberate cruelty or intimidation." The trial court conducted a plea colloquy and found the pleas to be knowingly, voluntarily, and intelligently given, and a factual basis existed for all eight counts and the aggravating circumstance of deliberate cruelty. Without inclusion of the eight current offenses, Korsakas's offender score was 12.[1]

At sentencing, while the State indicated that Korsakas was "present, in custody, not shackled," defense counsel indicated that Korsakas was "in leg restraints . . . . No objection to that for sentencing purposes." No further record was made concerning shackling. The State recommended the high end of 96 months in custody for the felony stalking count.[2] It requested an exceptional sentence under the "free crimes aggravator," consisting of 60 months each on the remaining domestic violence court order violation counts, all running consecutively, for a total of 33 years in custody. The State further argued the trial

[1] Korsakas stipulated to an offender score of 14, but the State asked for an offender score of 12 because "two of the felonies are out of state and [we] did not do a comparability analysis."

[2] The standard range sentence was 72 to 96 months.

court should find the deliberate cruelty aggravator because Korsakas stipulated to it in his plea. S.M. described how Korsakas's stalking affected her and expressed continued fear.

After the State presented its sentencing recommendation, defense counsel informed the trial court that Korsakas was asking to make a motion to withdraw his guilty plea. Defense counsel requested that Korsakas make the motion himself because "[i]t's collateral attack" and defense counsel did not "normally get involved with that." Korsakas stated a manifest injustice occurred and his defense counsel "was so ineffective in mounting a defense that the only alternative that the defendant [had] was to take a guilty plea." The trial court considered Korsakas's motion under CrR 4.2(f), found that none of the four instances of manifest injustice existed, and denied the motion.

In its written findings, the trial court stated the five counts of court order violation "were domestic violence related and deliberate cruelty was present in the defendant's conduct per RCW 9.94A.535(h)(iii)." The trial court further stated, "Prior to pleading guilty to multiple current offenses, the defendant's offender score was 12. Some of the defendant's current offenses would go unpunished based on his offender score, justifying an exceptional sentence under RCW 9.94A.535(2)(c)." The trial court entered a conclusion of law that "an exceptional sentence above the standard range is appropriate based on the defendant's stipulation to, and the court's finding of, deliberate cruelty," and "based on the defendant's high offender score."

The trial court sentenced Korsakas to an above-range sentence of 102 months on count two and 60 months each for counts three through eight, to run consecutively with count two and concurrently with one another, for a total of 13 years, 6 months.[3] The trial court imposed the VPA and waived all other nonmandatory fees. Korsakas appeals.

II

Korsakas argues the trial court deprived him of his right to counsel at a critical stage of the proceedings when it did not appoint new counsel to represent Korsakas during his motion to withdraw his guilty plea. We disagree.

Under the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution, a criminal defendant is entitled to the assistance of counsel. State v. Heng, 2 Wn.3d 384, 388-89, 539 P.3d 13 (2023). The right to counsel attaches at a defendant's " 'first appearance before a judicial officer' where 'a defendant is told of the formal accusation against him and restrictions are imposed on his liberty.' " Id. at 389 (quoting Rothgery v. Gillespie County, 554 U.S. 191, 194, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008)). The right to counsel requires defendants to have the ability to meaningfully and privately confer with their attorneys at all critical stages of the proceedings. State v. Anderson, 19 Wn. App. 2d 556, 562, 497 P.3d 880 (2021). "[A] critical stage is one where a defendant's rights were lost, defenses were waived, privileges were claimed or waived, or the outcome of the case was otherwise substantially

[3] The trial court entered a sentence of 364 days on the gross misdemeanor conviction on count one.

affected.' " Heng, 2 Wn.3d at 394. "[A] plea withdrawal hearing is a critical stage giving rise to the right to assistance of counsel." State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996).

CrR 4.2(f) governs a trial court's ruling on a motion to withdraw a guilty plea if made before the trial court enters its final judgment and sentence. The rule provides, "The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." Id. A defendant's claim that they were denied effective assistance of counsel during the plea bargain process may support a finding of manifest injustice warranting the withdrawal of a guilty plea. State v. Taylor, 83 Wn.2d 594, 597, 512 P.2d 699 (1974). However, a defendant's allegation that counsel rendered ineffective assistance of counsel alone does not create a conflict of interest requiring the substitution of counsel. State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684 (1987). Rather, "[t]he determination of whether an indigent's dissatisfaction with his court-appointed counsel warrants appointment of substitution of counsel rests within the sound discretion of the trial court." Id. at 252-53 (footnote omitted). Stark recognized that "if a defendant could force the appointment of substitute counsel simply by expressing a desire to raise a claim of ineffective assistance of counsel, then the defendant could do so whenever he wished, for whatever reason." Id. at 253. Thus, where a defendant presents a CrR 4.2(f) motion to withdraw their guilty plea based on the allegation that defense counsel rendered ineffective assistance during the plea bargain process, the trial

court need not hold a hearing at which substitute counsel must be appointed if the trial court acted within its discretion in finding that the defendant's allegation lacked merit.

Korsakas argues that Harell shows that the trial court deprived him of his right to counsel on his motion to withdraw his guilty pleas. In Harell, the defendant sought to withdraw his guilty pleas based on an allegation that his counsel had rendered ineffective assistance during the plea stage. 80 Wn. App. at 803. The trial court was persuaded that the defendant alleged sufficient facts to warrant a hearing on the motion to withdraw the plea. Id. at 804. At the hearing, defense counsel declined to assist Harell and instead testified as a witness for the State, leaving Harell unrepresented. Id. at 803. The trial court denied Harell's motion to withdraw his guilty pleas. Id. Because the State did not assign error to the trial court's decision to have a hearing, we did not determine "the degree of specificity required to be shown by a defendant who seeks to withdraw his plea based upon alleged ineffectiveness of counsel, before the right to counsel attaches and a hearing is required." Id. at 804-05. The court noted, "Implicit in the trial court's decision to hold a hearing is a finding that sufficient facts were alleged to warrant a hearing." Id. at 804. The court found Harell was denied his right to counsel and, because an outright denial of the right to counsel is presumed prejudicial, reversed Harell's conviction without a harmless error analysis. Id. at 805.

This case is distinguishable. Here, the trial court implicitly and correctly concluded that Korsakas had not alleged facts sufficient to warrant an evidentiary

hearing on his motion to withdraw. Korsakas failed to explain how defense counsel was deficient in mounting a defense.

To prevail on an ineffective assistance of counsel claim, the defendant must demonstrate that (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different but for the challenged conduct. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). In the context of a defendant's claim that their defense counsel rendered ineffective assistance during plea bargaining, the defendant must show that "but for counsel's failure to adequately advise [the defendant], [the defendant] would not have pleaded guilty." State v. McCollum, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997). Korsakas's statement that defense counsel "was so ineffective in mounting a defense that the only alternative that the defendant [had] was to take a guilty plea" was inadequate to meet this standard.

The trial court acted within its discretion in ruling that Korsakas's allegation of ineffective assistance of counsel lacked merit, and so properly declined to hold an evidentiary hearing on his motion to withdraw his guilty plea. Thus, unlike the defendant in Harell, Korsakas was not denied counsel at a critical stage.

III

Korsakas argues for the first time on appeal that the trial court erred by allowing him to appear for sentencing in shackles without conducting an individualized assessment. Korsakas fails to establish a manifest error as required by RAP 2.5(a)(3).

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution protect a criminal defendant's right to a fair trial. State v. Jackson, 195 Wn.2d 841, 852, 467 P.3d 97 (2020). "It is well settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances." State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967 (1999) (plurality opinion). This right extends to nonjury proceedings such as sentencing. State v. Jarvis, 27 Wn. App. 2d 87, 98, 101, 530 P.3d 1058, review denied, 2 Wn.3d 1003, 537 P.3d 1027 (2023). Trial judges are vested with discretion to determine measures that implicate courtroom security, such as whether to restrain a defendant. State v. Hartzog, 96 Wn.2d 383, 396, 400, 635 P.2d 694 (1981). "[A] trial court *must* engage in an individualized inquiry into the use of restraints prior to every court appearance" and determine whether the restraints are necessary. Jackson, 195 Wn.2d at 854. We review a trial court's decision on whether to allow a defendant to appear in restraints for an abuse of discretion. Id. at 850.

Korsakas did not object to the alleged shackling in the trial court, but asserts error for the first time in this court. A claim of error may be raised for the first time

on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). "Manifest" requires a showing of actual prejudice. Id. at 935. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." McFarland, 127 Wn.2d at 333. Jackson indicates that it is Korsakas's initial burden to establish that he was unconstitutionally restrained, and he cannot do so on this record. See 195 Wn.2d at 855-56 (examining whether error was harmless after first determining that the appellant established unconstitutional shackling). But, additionally, the record lacks any factual basis that would permit a reviewing court to evaluate Korsakas's claim of error. There are conflicting statements in the record about whether Korsakas was shackled at sentencing. The State said Korsakas was "not shackled," while defense counsel said Korsakas was "in leg restraints." The minutes from the sentencing hearing do not mention whether Korsakas was shackled or not. No other record allows any factual conclusion to be drawn about whether Korsakas was shackled at all, let alone, if he was, analyze the consequences in the manner Jackson directs. Korsakas's failure to object in the trial court leaves no record of the underlying facts that can be reviewed. Therefore, under RAP 2.5(a), we do not reach this issue.

If Korsakas has evidence from outside the record regarding whether he was restrained at sentencing, he can raise these issues in a personal restraint petition. McFarland, 127 Wn.2d at 335.

IV

A

Korsakas argues the imposition of an exceptional upward sentence under the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, violates the Sixth Amendment because it requires courts to make a factual determination that substantial and compelling reasons justify an exceptional sentence.[4] We disagree.

The United States Supreme Court has held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" in order to comply with the Sixth Amendment right to a jury trial. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). It further explained to increase the statutory maximum, Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), or the mandatory minimum, Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), additional fact finding must be conducted by a jury. In interpreting Apprendi and Blakely, the Washington Supreme Court clarified that the exception to the jury requirement under Apprendi applies "*only* for prior convictions" and that where an enhancement requires findings of "new factual determinations and conclusions" beyond "mere criminal history," those findings are

[4] The State argues Korsakas waived this issue by signing his stipulation on prior record and offender score, in which Korsakas agreed to waive "any such right to a jury determination of [factors that affect the determination of criminal history and offender score]." However, Korsakas stipulated to the existence of aggravating factors, but did not stipulate that the SRA scheme was constitutional.

required to be made by a jury. State v. Hughes, 154 Wn.2d 118, 141-42, 110 P.3d 192 (2005), abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Korsakas argues the SRA scheme is unconstitutional because it "permits an exceptional sentence only if the court makes the additional finding that the found or admitted aggravating circumstance is a substantial and compelling reason justifying an exceptional sentence" in violation of Hurst v. Florida, 577 U.S. 92, 97, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016). The imposition of an exceptional sentence under the SRA is a two-step process prescribed by statute. First, the defendant must stipulate to the aggravating facts, or the jury must find "unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence" exist. RCW 9.94A.537(3), (6). Second, the trial court may impose an exceptional sentence "if it finds, considering the purposes of this chapter, that the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence." Id. at .537(6). We have previously addressed the constitutionality of the SRA's exceptional sentencing scheme in the context of the Sixth and Fourteenth Amendments and concluded that it met due process requirements. State v. Johnson, 29 Wn. App. 2d 401, 425-26, 540 P.3d 831, review denied, 2 Wn.3d 1035, 547 P.3d 899 (2024); State v. Sage, 1 Wn. App. 2d 685, 707-10, 407 P.3d 359 (2017). Despite the statute's imprecise word choice,

> "[t]he only permissible 'finding of fact' by a sentencing judge on an exceptional sentence is to confirm that the jury has entered by

> special verdict its finding that an aggravating circumstance has been prove[d] beyond a reasonable doubt. Then it is up to the judge to make *the legal, not factual, determination* whether those aggravating circumstances are sufficiently substantial and compelling to warrant an exceptional sentence."

Johnson, 29 Wn. App. 2d at 425 (alterations in original) (quoting Sage, 1 Wn. App. 2d at 709). Korsakas's argument that the SRA is like the unconstitutional Florida sentencing scheme in Hurst is also rejected in Sage,

> But the Florida statute at issue expressly state[d] that the jury findings were "advisory." [Former] FLA. STAT. § 921.141 (2004). By contrast, under Washington procedure here, the jury exclusively resolves the factual question whether the aggravating circumstances have been prove[d] beyond a reasonable doubt.

1 Wn. App. 2d at 710 n.86.

Korsakas also relies on the more recent United States Supreme Court decision in Erlinger v. United States, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024). Erlinger pleaded guilty to possession of a firearm in violation of 18 U.S.C. § 922(g) and faced a sentence up to 10 years in prison. Id. at 825-26. However, the government charged Erlinger under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), which increased his prison term to a minimum of 15 years and to a maximum of life if he had three prior convictions for " 'violent felon[ies]' " or " 'serious drug offense[s]' " that were " 'committed on occasions different from one another.' " Id. (alterations in original) (quoting § 924(e)(1) (2012)). At a resentencing hearing, the government based its request for a 15year sentence on decades-old burglaries that spanned multiple days. Id. at 826. Erlinger argued the burglaries had not occurred on separate occasions but during a single criminal episode. Id. at 827.

The United States Supreme Court held that whether Erlinger's past offenses occurred on different occasions was a fact-laden task to be determined by a jury. Id. at 834. The Court reasoned that the ACCA's occasions inquiry required an examination of a range of facts, including whether past offenses were committed close in time and near to or far from one another, and whether the offenses were similar or intertwined in purpose and character. Id. at 828.

In Washington, a trial court may impose an exceptional sentence without a finding of fact by a jury if "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). A defendant's standard range sentence reaches its maximum limit at an offender score of nine. RCW 9.94A.510. We held in State v. Newlun, 142 Wn. App. 730, 742-43, 176 P.3d 529 (2008), that RCW 9.94A.535(2)(c) does not violate the Sixth Amendment because the determination of whether an offense goes unpunished requires simply objective mathematical application of RCW 9.94A.510's sentencing grid to the current offense. The court described the objective application of the statute: "If the number of current offenses, when applied to the sentencing grid, results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses, then an exceptional sentence may be imposed." Id. at 743. "[I]n order to impose an exceptional sentence under RCW 9.94A.535(2)(c), the sentencing court does not need to look beyond 'facts reflected in the jury verdict or admitted by the

defendant.' " State v. Alvarado, 164 Wn.2d 556, 566, 192 P.3d 345 (2008) (internal quotation marks omitted) (quoting Newlun, 142 Wn. App. at 743). Thus, the imposition of an exceptional sentence under RCW 9.94A.535(2)(c) is unlike the fact-intensive inquiry in Erlinger.

Korsakas was also given an exceptional sentence under the deliberate cruelty aggravating factor. Though ordinarily a jury must determine whether a defendant's conduct manifested deliberate cruelty, RCW 9.94A.535(3)(h)(iii), a defendant's stipulation to facts supporting an exceptional sentence is a constitutional method for imposing such a sentence, Blakely, 542 U.S. at 311. Because Korsakas stipulated that for the five counts of domestic violence court order violation that he "did so with deliberate cruelty or intimidation," there was no fact finding conducted. As explained in Johnson and Sage, the sentencing judge's fixing an exceptional sentence in accord with the purposes of the SRA within the bounds permitted by factfinding establishing an aggravator is constitutional under Apprendi and Blakely. Erlinger's determination that the occasions inquiry under the ACCA amounted to fact finding does not undermine the reasoning of Johnson and Sage. The trial court did not engage in impermissible fact finding by determining Korsakas's criminal history and admission to deliberate cruelty supported an exceptional sentence.

B

Korsakas further argues the trial court improperly imposed an exceptional sentence above the standard range without finding "substantial and compelling reasons" to justify the sentence. We disagree.

A trial court "may impose" an exceptional sentence only if it finds "substantial and compelling reasons" to do so. RCW 9.94A.535. When an exceptional sentence is imposed, the trial court must "set forth the reasons for its decision in written findings of fact and conclusions of law." Id. However, "[n]othing in the plain language of the statute requires a sentencing court to use the precise phrase 'substantial and compelling.' " State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). The legislature specifically stated that both a high offender score that results in current offenses going unpunished, RCW 9.94A.535(2)(c), and a defendant's deliberate cruelty during the commission of a domestic violence related offense, RCW 9.94A.535(3)(h)(iii), were reasons justifying an exceptional sentence. Here, the trial court made written findings that Korsakas's high offender score would result in current offenses going unpunished, and the charges were domestic violence related and deliberate cruelty was present in Korsakas's conduct. These were written findings of substantial and compelling factors, justifying an exceptional sentence in satisfaction of RCW 9.94A.535. The trial court's imposition of an exceptional upward sentence did not violate the SRA.

V

Korsakas argues the trial court erroneously imposed the VPA. The State does not object to remand to strike imposition of the fee. We accept the State's concession and remand accordingly.

Affirmed, and remanded to allow the trial court to strike the VPA as a ministerial matter.

Birk, J.

WE CONCUR:

Chung, J.

Dwyer, J.

APPENDIX B

March 14, 2025, Order Denying Motion for Reconsideration

FILED
3/14/2025
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. KRISTOPHER MARTIN KORSAKAS, Appellant.	No. 86843-8-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Kristopher Korsakas, filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Birk, J.

Judge

WASHINGTON APPELLATE PROJECT

April 14, 2025 - 4:00 PM

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Superior Court Case Number:	21-1-00818-4

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