EXHIBIT

A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 95734-7
Respondent,	)	
	)	
v.	)	En Banc
	)	
RONALD RICHARD BROWN,	)	
	)	
Petitioner.	)	Filed MAY 02 2019

MADSEN, J.—Ronald Brown appeals an unpublished Court of Appeals decision affirming his exceptional sentence for two counts of first degree robbery and one count of first degree burglary. At his first sentencing hearing, the trial court decided not to impose an exceptional sentence on his original convictions. On appeal, four of his seven original convictions were vacated. Upon resentencing, the trial court exercised its discretion and imposed an exceptional sentence above the sentencing range for his remaining convictions. Brown argues that the decision to impose an exceptional sentence on remand was collaterally estopped, that the exceptional sentence is the result of judicial vindictiveness, and that the State's recommendation for an exceptional sentence is the

result of prosecutorial vindictiveness. We affirm the Court of Appeals decision and affirm Brown's sentence.

FACTS

In 2012, Brown was charged with two counts of first degree kidnapping, two counts of first degree robbery, one count of first degree burglary, and two counts of second degree assault, all with a firearm. Brown proceeded to jury trial. At the close of trial, the jury convicted Brown of all seven counts.

At the sentencing hearing, the State recommended the high end of the sentencing range for Brown's convictions. The State noted that an exceptional sentence upward would be warranted based on Brown's high offender score but did not recommend an exceptional sentence at the original sentencing. The trial court also declined to impose an exceptional sentence, citing the victims' statements that their lives would have been in danger if not for Brown being present. The trial court ultimately sentenced Brown to the high end of the sentencing range, 638 months in prison.

On appeal, the Court of Appeals reversed Brown's two kidnapping convictions on instructional error and his two assault convictions on double jeopardy grounds. The court then remanded for resentencing.

On remand, the State elected to dismiss the two kidnapping charges without prejudice because of the time and effort involved in relocating the victims and codefendants, and the resources spent by the prosecution in retrying Brown. At the resentencing hearing, the State initially recommended a sentence of 351 months—reflecting the high end of the standard sentencing range. However, the State later

amended its recommendation to reimpose the original sentence as an exceptional sentence. The court declined to reimpose the original sentence but did impose an exceptional sentence of 399 months. At the resentencing hearing, the judge noted that he did not impose the exceptional sentence at the original sentencing because he felt the 638 months was "legally appropriate and within the law." Verbatim Report of Proceedings, Resentencing & Mot. Hr'g (VRP Mot.) (June 21, 2016) at 34. The judge also noted that imposing the high end of the sentencing range with the remaining charges would give Brown a "free crime[]," justifying the imposition of an exceptional sentence. *Id.* However, the judge stopped short of imposing the original sentencing range.[1] *Id.*

ANALYSIS

Collateral Estoppel

Brown first argues the trial court is collaterally estopped from imposing an exceptional sentence at the resentencing hearing when it chose not to impose one at the original sentencing hearing.

For collateral estoppel to apply, (1) the issue in the prior adjudication must be identical to the issue currently presented for review, (2) the prior adjudication must be a final judgment on the merits, (3) the party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication, and (4) barring the

[1] The trial judge took into account that one of Brown's codefendants, Johnathan Frohs, accepted a plea deal and received his sentence during the interim. Although the trial judge never specified the length of Frohs' sentence, he did articulate that when he looked at "[Brown's] original sentence . . . compared to what Mr. Frohs got . . . I think it's too far out of the lines of being reasonable." VRP Mot. at 34. Presumably, Frohs' guilty plea sentencing resulted in a shorter sentence than Brown's original sentence.

relitigation of the issue will not work an injustice on the opposing party. *State v. Harrison*, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003). Courts should not apply collateral estoppel hypertechnically but, rather, with realism and rationality. *State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003).

Brown argues the issue in the prior adjudication is identical to the issue currently presented for review—whether to impose an exceptional sentence based on Brown's offender score. Suppl. Br. of Pet'r 6-7. Specifically, Brown argues because the judge chose not to impose an exceptional sentence at the initial sentencing despite being justified due to his offender score, collateral estoppel applies. *Id.* at 7.

His argument is similar to the one made in *Tili*. In that case, the defendant was initially sentenced to 417 months. 148 Wn.2d at 357. The trial court did not impose an exceptional sentence because it treated his offenses as separate and distinct conduct. *Id.* However, the court indicated that if his ruling was reversed on appeal and the offenses should have been treated as the same criminal conduct, the court would impose the same sentence as an exceptional sentence. *Id.* The original sentence was reversed, to be treated as same criminal conduct, and the trial court imposed the same 417 month sentence as an exceptional sentence. *Id.*

The defendant in *Tili* argued that the trial court was collaterally estopped from imposing an exceptional sentence on resentencing because it chose not to do so at the original sentencing hearing. *Id.* at 361. This court was not persuaded. We noted that separate and distinct conduct for multiple offenses resulted in a fundamentally different sentence from same criminal conduct—the former resulting in consecutive sentences,

while the latter results in concurrent sentences. *Id.* at 362-63. Thus, the issue at resentencing was fundamentally different.

Despite this, Brown attempts to distinguish *Tili* because, here, the only relevant change was the dismissal of four charges resulting in a lowered offender score. Suppl. Br. of Pet'r at 7. This is a distinction without effect. Under RCW 9.94A.535(2), a trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under certain circumstances, one of them being that "[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). To justify an exceptional sentence upward, a trial court must first calculate or otherwise determine the defendant's offender score, and based on that factor, the trial court has discretion to impose an exceptional sentence if it deems the defendant's sentence will result in "free crimes."

Based on Brown's offender score in addition to the firearm enhancements, Brown's original sentence totaled 638 months. The trial court had a question before it at that time: Based on the defendant's high offender score, should it impose an exceptional sentence based on the current range? The court decided the sentence at the time was fair and opted not to impose an exceptional sentence. On appeal, based on the reversal of two convictions on the basis of double jeopardy and the State's decision not to retry two other convictions, Brown was left with three convictions. The question upon resentencing thus fundamentally changed: Was the newly computed sentencing range sufficient based on Brown's offender score? The trial court had a new offender score and a new sentencing range to consider when it decided to impose the exceptional sentence.

Finality under Collateral Estoppel

Next, Brown argues that the issue of imposing the exceptional sentence was "final" for purposes of collateral estoppel. In support of this position, he cites to *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009), for the proposition that an unchallenged exceptional sentence on appeal is final and has preclusive effect on remand should any other portion of the judgment and sentence be reversed. Suppl. Br. of Pet'r at 9.

In *Kilgore*, the trial court imposed an exceptional sentence of 560 months on seven counts. 167 Wn.2d at 32. On appeal, two counts were reversed and the other five affirmed. *Id.* The trial court did not elect to resentence him and instead signed an order striking the two reversed counts and changing his offender score accordingly. *Id.* at 34. We held that finality occurs when "'the availability of appeal' [has] been exhausted." *Id.* at 43 (emphasis omitted) (quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 327, 823 P.2d 492 (1992)). "[A] case has no remaining appealable issues where an appellate court issues a mandate reversing one or more counts and affirming the remaining count, and where the trial court exercises no discretion on remand as to the remaining final count." *Id.* at 37. We noted that "[a]lthough the trial court had discretion . . . to revisit Kilgore's exceptional sentence on the remaining five convictions, . . . it was not reconsidering the exceptional sentence imposed on each of the remaining counts." *Id.* at 41.

Brown's reliance on *Kilgore* is misplaced. It does not stand for the proposition that all exceptional sentences are final when they are not appealed. Rather, when a trial court does not exercise its discretion on remanded issues, those issues become final for

purposes of reviewability. Here, because the trial court did exercise its discretion on remand to determine whether an exceptional sentence was appropriate, the issue became reviewable and is not "final."

The Effect of *Collicott*

Brown also argues that collateral estoppel applies based on *State v. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992). Brown asserts the lead opinion's discussion on collateral estoppel is applicable as it is factually analogous to the instant case.[2] In *Collicott*, the trial court, in its original sentencing, could have imposed an exceptional sentence but did not. *Id.* at 652. The defendant appealed, and the case was remanded to the trial court for resentencing. At the resentencing, the trial court learned that the defendant had a stayed charge pending until resolution of the case. *Id.* at 653. The trial court imposed an exceptional sentence at rehearing based on deliberate cruelty. *Id.* at 653-54. This court, in its lead opinion, reversed, holding that the defendant's offender score was not properly calculated and the trial court was collaterally estopped from imposing the exceptional sentence. It is the court's discussion that collateral estoppel applies to exceptional sentences that Brown relies on.

But Brown's reliance on this is misguided. First, the collateral estoppel discussion did not command a majority of the court.[3] As subsequent case law has held, the collateral

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[2] Brown also seeks clarification as to the weight that should be placed on the lead opinion in *Collicott*. The lead opinion in *Collicott* stated that the court should be collaterally estopped in imposing an exceptional sentence on resentencing.

[3] Only four justices of this court, Justices Smith, Utter, and Dolliver, and Chief Justice Dore, subscribed to this holding. Five justices, Justices Durham, Andersen, Brachtenbach, and Guy, and Justice Pro Tem Callow, specifically disavowed the collateral estoppel holding as "go[ing]

estoppel analysis is dicta and is not binding on this court. *See Harrison*, 148 Wn.2d 550; *Tili*, 148 Wn.2d 350. Second, the facts in *Collicott* are quite distinct from the instant case.

In *Collicott*, the trial court imposed an exceptional sentence upon resentencing based on deliberate cruelty. 118 Wn.2d at 654. The trial court could have imposed an exceptional sentence based on deliberate cruelty at the initial sentencing but chose not to. *Id.* at 653. The lead opinion stated that collateral estoppel applied where the court could have imposed an exceptional sentence based on the same factor that it relied on at resentencing. *Id.* at 661.

Brown argues that the same situation is presented here; the trial court could have imposed an exceptional sentence based on the "free crime" rule but chose not to, triggering collateral estoppel. But Brown overlooks another part of the lead opinion in *Collicott* in which the court suggested that a trial court may impose an exceptional standard based on the "clearly too lenient" standard (now the "free crime" rule) upon resentencing. *Id.* at 659-60.

Judicial Vindictiveness

Brown next argues that the exceptional sentence imposed by the trial court at the resentencing hearing is presumptively vindictive. Generally, a trial judge may impose a new sentence that is greater or less than the sentence originally imposed based on events subsequent to the first trial that may throw new light on the defendant's life, health,

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beyond what is necessary to resolve this case." *Collicott*, 118 Wn.2d at 670 (Durham, J., concurring).

habits, conduct, and mental and moral propensities. *North Carolina v. Pearce*, 395 U.S. 711, 723, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). But the "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy [is] a violation of due process of law." *Id.* at 724. The Court in *Pearce* held that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for . . . doing so must affirmatively appear." *Id.* at 726. Such reasons must be based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.*

For years, *Pearce* seemed to stand for a sweeping rule that applied a presumption of judicial vindictiveness whenever a new sentence was harsher than the original sentence imposed. However, the scope of the rule set out in *Pearce* has been substantially narrowed over the years. In *Alabama v. Smith*, the defendant originally was sentenced based on a guilty plea. 490 U.S. 794, 795, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). The defendant successfully had his guilty plea vacated, and the case proceeded to trial. *Id.* After the trial the defendant was convicted and resentenced, this time to a life sentence. *Id.* at 796-97. The defendant argued there was a presumption of vindictiveness under *Pearce*. The Supreme Court disagreed, stating that "subsequent cases have made clear that [*Pearce*'s] presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.'" *Id.* at 799 (second alteration in original) (quoting *Texas v. McCullough*, 475 U.S. 134, 138, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986)). Rather, the presumption applies only in "[s]uch circumstances . . . in which there is a 'reasonable likelihood' that the increase in sentence is the product

of actual vindictiveness on the part of the sentencing authority." *Id.* (citation omitted) (quoting *United States v. Goodwin*, 457 U.S. 368, 373, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982)). When there is no reasonable likelihood, the defendant must prove actual vindictiveness. *Id.* at 799-800. The Court later went on to hold that the presumption does not apply where a greater penalty is imposed after trial than was imposed after the guilty plea because "the judge may gather a fuller appreciation of the nature and extent of the crimes charged [at trial]." *Id.* at 801.

The Supreme Court has since declined to apply the *Pearce* presumption in a number of cases. *See, e.g.*, *McCullough*, 475 U.S. 134 (holding the presumption does not apply where retrial that resulted in the harsher sentence was initiated because the trial judge herself concluded a new trial was warranted based on prosecutorial misconduct); *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973) (*Pearce* presumption does not apply when new jury at retrial imposes a harsher penalty than the original jury); *Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972) (presumption does not apply where de novo trial in general criminal jurisdiction courts imposes a harsher sentence than inferior court did at original sentence).

Under *Pearce*, it appears the presumption of vindictiveness does not apply since the subsequent aggregate sentence was substantially lower than the original sentence.[4]

[4] The dissent argues we should apply the *Pearce* presumption because our Sentencing Reform Act of 1981(SRA) requires courts to consider only the "real facts" of the crimes at sentencing, RCW 9.94A.530(2), distinct from the federal sentencing guidelines, which allow courts to consider acquitted conduct. Dissent at 8 (citing 18 U.S.C. § 3661). In essence, the dissent asserts that it was improper for the sentencing court to consider the facts and circumstances of the entire criminal transaction because some of those facts could support elements of the charges that were

However, Brown points to federal circuit cases that consider the sentence imposed on each count, not the aggregate sentence. There are essentially two schools of thought in determining whether the presumption applies—whether we compare the overall length of the new sentence to the original sentence or whether we compare the remaining sentence once the dropped convictions are factored out to the new sentence.[5] The overwhelming majority of federal circuits subscribe to the former analysis. *See, e.g., United States v. Pimienta-Redondo*, 874 F.2d 9 (1st Cir. 1989) (presumption does not apply when one count is dropped and resentencing judge increases the sentence on remaining count so the overall sentence remains the same);[6] *United States v. Nerius*, 824 F.3d 29 (3d Cir. 2016) (*Pearce* does not apply where the revised sentence is lower than that originally imposed); *United States v. Gray*, 852 F.2d 136 (4th Cir. 1988) (no possibility or appearance of vindictiveness when the second sentence is shorter overall than the first sentence);[7]

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reversed on appeal. But the "real facts" doctrine does not require a trial court to wholly disregard facts simply because they may be used to support elements of crimes that were not charged. Rather, "[t]he SRA structures the sentencing decision to consider only the actual crime of which the defendant has been convicted, his or her criminal history, and the *circumstances surrounding the crime*." *State v. Houf*, 120 Wn.2d 327, 333, 841 P.2d 42 (1992) (emphasis added).

In any event, the "real facts" doctrine does not apply here. The trial court, after reviewing the new offender score, found that the standard sentencing range would clearly be too lenient and would result in "some of the current offenses going unpunished." RCW 9.94A.535(2)(c). An offender score above 9 warrants an exceptional sentence. Since Brown's adjusted offender score after the reversed convictions was 11, the trial court determined an exceptional sentence was warranted. The trial court's finding did not require an examination of the facts underlying the reversed convictions.

[5] Brown characterizes the two different approaches as the "total aggregate" approach and the "modified aggregate," or "aggregate remainder," approach, respectively, in his briefing. Suppl. Br. of Pet'r at 18.

[6] This reasoning was later affirmed in *United States v. Dominguez*, 951 F.2d 412 (1st Cir. 1991).

[7] Faced with essentially the same argument presented by Brown, the Fourth Circuit affirmed its adherence to the "total aggregate" approach in *United States v. de Jesus Ventura*, 864 F.3d 301 (4th Cir. 2017).

United States v. Cataldo, 832 F.2d 869 (5th Cir. 1987) (no presumption when the judge sentences a defendant to the same sentence even though there are fewer remaining convictions); *United States v. Rivera*, 327 F.3d 612, 615 (7th Cir. 2003) ("we compare the *total* original punishment to the *total* punishment after resentencing in determining whether the new sentence is more severe"); *United States v. Horob*, 735 F.3d 866, 870 (9th Cir. 2013) ("presumption of vindictiveness does not apply . . . because . . . the [] court considered his overall sentence at the time of his original sentence and again on remand, and because his overall sentence was not increased"); *United States v. Sullivan*, 967 F.2d 370 (10th Cir. 1992).

Brown advocates for the "aggregate remainder" approach taken by the Second and Eleventh Circuits in *United States v. Markus*, 603 F.2d 409 (2d Cir. 1979), and *United States v. Monaco*, 702 F.2d 860 (11th Cir. 1983). In *Markus*, the defendant was sentenced to a total of 15 years on seven counts. 603 F.2d at 411. On appeal, the judge vacated two counts "'reluctantly.'" *Id.* The government filed an additional charge, on which the court sentenced the defendant to 5 years. *Id.* The defendant argued vindictiveness under the due process clause of the Fourteenth Amendment to the United States Constitution. The Court of Appeals held the appropriate analysis is to disregard the sentence originally imposed by the trial judge on the count dropped and then compare the total remaining sentence imposed to the current sentence. *Id.* at 413. Since there was no evidence on the record to justify the increase, the court found there to be vindictiveness. *Id.* at 414.

Similarly, in *Monaco*, the Court of Appeals examined a sentence that remained the same after retrial, even though there were fewer counts. *Monaco*, 702 F.2d at 883. The

court in *Monaco* also subscribed to the approach used in *Markus*. *Id.* at 885. Since the trial court did not state any reasons for the increase, the court applied the *Pearce* presumption. *Id.* However, more recently, the Eleventh Circuit discussed *Monaco* in *United States v. Fowler*, 749 F.3d 1010 (11th Cir. 2014). In *Fowler*, the court effectively repudiated the "aggregate remainder" approach taken in *Monaco*, stating, "*Monaco*'s pre-guidelines approach for gauging the severity of a new sentence relative to an old one—the aggregate remainder approach—is not binding in the post-guidelines era, which presents materially different circumstances than those involved in that case." *Id.* at 1018. That court went on further to say that "[w]hile we are obligated to follow the holdings of an earlier decision, 'the holdings of a prior decision can reach only as far as the facts and circumstances presented to the court in the case which produced that decision.'" *Id.* at 1020 (quoting *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1031 (11th Cir. 2003)). "Because *Monaco* arose and was decided before the sentencing guidelines existed, it could not, and did not purport to, decide what approach should be used to determine when the *Pearce* presumption applies to a new sentence imposed under the guidelines regime." *Id.*

Our court has never considered which approach to adopt in determining a *Pearce* presumption of vindictiveness. However, Division One of the Court of Appeals faced that issue in *State v. Larson*, 56 Wn. App. 323, 783 P.2d 1093 (1989). In that case, the defendant's original sentence was for 363 months as a consecutive sentence. *Id.* at 325. After appeal, and upon resentencing, the trial court imposed a concurrent sentence of 360 months. *Id.* at 326. The defendant raised a presumption of vindictiveness argument, and

the Court of Appeals rejected it, stating the "revised aggregate sentence [was] less severe than his original aggregate sentence." *Id.* at 328.

Similarly, Division Two, in *State v. Ameline*, addressed the *Pearce* presumption. 118 Wn. App. 128, 75 P.3d 589 (2003). In that case, the defendant was retried three times. The first conviction resulted in a sentence of 164 months. *Id.* at 130. After appeal, the second sentence resulted in a conviction, and the court reimposed the same 164 month sentence. *Id.* at 131. The defendant appealed a third time, this time on instructional error. The case was remanded for a third trial. After his third conviction, the trial court chose to impose an exceptional sentence of 240 months. *Id.* To justify it, the trial court made written findings of fact that could have been made at the other two trials. *Id.* The Court of Appeals found that because the third sentence was harsher than the previous two overall, the *Pearce* presumption applied. *Id.* at 133. The Court of Appeals also determined the presumption was not rebutted based on the justification the trial court made on record. *Id.* Division Three has not decided a case based on judicial vindictiveness.

Given that the overwhelming majority of the federal circuits subscribe to the "total aggregate" approach and that Divisions One and Two also adopted the same, we hold the *Pearce* presumption does not arise when the total sentence upon resentencing is not greater than the original sentence imposed.

Prosecutorial Vindictiveness

Finally, Brown argues that the State's request for an exceptional sentence on remand is presumptively vindictive. The due process clause is not offended by all

possibilities of increased punishment upon retrial after appeal but only those that pose a realistic likelihood of vindictiveness. *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974). The *Pearce* presumption of vindictiveness was extended to the prosecutorial context in *Blackledge*. In that case, the defendant was charged with a misdemeanor assault in an altercation with another inmate while serving another term. *Id.* at 22. After his conviction, he appealed, which under North Carolina law automatically warranted trial de novo. *Id.* Prior to the trial, the State obtained a felony assault indictment that covered the same conduct as the misdemeanor assault. The defendant pleaded guilty to the felony assault charge. *Id.* at 23. The defendant argued the *Pearce* presumption should apply in his case. *Id.* at 25. The Court agreed and held that it was not constitutionally permissible for the State to respond to the defendant's appeal by bringing a more serious charge against him. *Id.* at 28-29.

The *Pearce* presumption does not apply to all cases where a prosecutor brings more serious charges. In *Bordenkircher v. Hayes*, the Supreme Court determined that the presumption does not apply in the pretrial context during plea negotiations when the prosecution threatens and executes additional charges when plea negotiations do not result in a guilty plea. 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). The Court noted the violation "lay not in the possibility that a defendant might be deterred from the exercise of a legal right, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." *Id.* at 363 (citations omitted). Thus, the presumption was inapplicable where there is a "'give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively

equal bargaining power.'" *Id.* at 362 (quoting *Parker v. North Carolina*, 397 U.S. 790, 809, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970) (Brennan, J., dissenting)).

Similarly, in *Goodwin*, the Supreme Court held that a presumption of vindictiveness was not warranted when a prosecutor brings a more severe charge after a defendant has demanded a jury trial. 457 U.S. 368. The Court noted, "[T]he mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified." *Id.* at 382-83.

This court has decided the issue of prosecutorial vindictiveness in the pretrial context. *See State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006) (plurality opinion). Similar to *Goodwin* and *Bordenkircher*, *Korum* involved guilty pleas. In that case, the prosecution threatened 32 additional charges if he did not plead guilty. *Id.* at 620-21. This court held that adding 15 counts did not constitute prosecutorial vindictiveness, finding the case was similar to *Bordenkircher* and *Goodwin*, where the defendants chose to walk away from plea negotiations. *Id.* at 635-36. Later, in *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010), this court noted that the *Blackledge* presumption was inapplicable where, as a result of case law, the conviction was necessarily vacated, requiring the prosecution to reevaluate what charges to bring against the defendant.

Unlike cases where the prosecution chooses to add charges after a defendant exercises his right of appeal and succeeds, this case involves a sentencing recommendation. Courts should be cautious when expanding the scope of prophylactic rules. While it is possible that the prosecution decided to recommend the original

sentence as an exceptional sentence out of spite, the presumption does not apply simply because there is an opportunity for vindictiveness. There must be a *realistic likelihood of vindictiveness*. Here, the State was faced with a decision—was the length of a standard range sentence sufficient given the facts of the case?

Unlike a charging decision, imposing a sentence does not fall under the core responsibilities of a prosecutor. Ultimately, a trial court determines what sentence is appropriate. The State merely recommends what it believes to be an appropriate sentence based on the crimes. Given this important distinction, we decline to extend the *Blackledge* presumption in this context.

CONCLUSION

We hold that collateral estoppel does not apply when a court imposes an exceptional sentence at resentencing based on the "free crime" aggravator when it chose not to impose an exceptional sentence at the first sentencing. Further, we hold that a presumption of vindictiveness is not triggered when a judge imposes a shorter overall sentence than the original or when a prosecutor recommends an exceptional sentence at resentencing when it did not recommend such a sentence at the original sentencing. We affirm the Court of Appeals.

Madsen, J.

WE CONCUR:

Fairhurst, C.J.

Chambers, J.

Owens, J.

Gonzalez, J.

Stephens, J.

Jr, J

No. 95734-7

GORDON McCLOUD, J. (dissenting)—The majority accurately recites the rules about the presumption of vindictiveness that arises when a postappeal sentence for a crime exceeds the preappeal sentence for that crime. But it applies those rules incorrectly. It errs by failing to recognize that at sentencing hearings in Washington, judges can consider only the facts of the crime of conviction—not the facts of other acquitted conduct, dismissed charges, or reversed convictions. This is "offense specific" sentencing as mandated by the state legislature. Since the legislature has mandated such offense specific sentencing, it necessarily follows that the only offense conduct that can be considered in comparing the length of a preappeal sentence for a crime to the length of the postappeal sentence for the exact same crime is the conduct specific to that crime—not the conduct specific to other dismissed or acquitted crimes.

The majority makes a different comparison; it compares the preappeal sentence for seven crimes to the postappeal sentence for just three of those crimes,

even though convictions for four of the seven crimes were reversed. That flawed comparison leads the majority to approve postappeal sentences on the three remaining convictions that far exceed the sentences originally imposed on those same convictions, despite the absence of any new postappeal evidence to justify them.

I therefore respectfully dissent.

FACTUAL AND PROCEDURAL HISTORY

A jury found Ronald Richard Brown guilty of two counts of first degree kidnapping, two counts of first degree robbery, two counts of second degree assault, and one count of first degree burglary in 2013. Clerk's Papers (CP) at 89 (initial judgment and sentence). The superior court imposed a standard-range sentence on each of those seven counts. *Id.* at 91, 93. It explicitly declined to impose an exceptional sentence above the standard range on any count under RCW 9.94A.535(2)(c) (permitting use of high offender score as aggravating factor in certain circumstances). *See id.* at 116-18 (State's initial sentencing memorandum); Verbatim Report of Proceedings (June 21, 2016) (VRP) at 33-34.

Brown appealed. In 2015, the Court of Appeals reversed four of the seven convictions. *State v. Brown*, No. 70148-7-I, slip op. at 12-17 (Wash. Ct. App. July 27, 2015) (unpublished), https://www.courts.wa.gov/opinions/pdf/701487.pdf.

That court ruled that an error in the jury instructions for the kidnapping charges violated Brown's article I, section 22 and Sixth Amendment rights to notice of the charged crimes. *Id.* at 7-9; WASH. CONST. art. I, § 22; U.S. CONST. amend. VI. It also held that convicting and sentencing Brown for both assault and robbery (of each of the two victims) violated his article I, section 9 and Fifth Amendment rights. *Brown*, slip op. at 12-17; WASH. CONST. art. I, § 9; U.S. CONST. amend. V. In other words, it reversed four of Brown's convictions due to constitutional error.

On remand, the State declined to try Brown again on the kidnapping charges, even though those charges carried the highest seriousness level under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. VRP at 3-4; CP at 91 (initial judgment and sentence). *See generally* RCW 9.94A.515 (ascribing seriousness levels to offenses). Instead, it moved to dismiss those charges without prejudice, and the superior court granted that motion. VRP at 4-5; CP at 26 (motion), 25 (order).

Thus, at Brown's resentencing in 2016, only three convictions remained. The offender scores for each of the three convictions decreased from 19 at the first sentencing hearing to 11 at resentencing.[1] *Compare* CP at 91 (initial judgment and

[1] Offender scores reflect prior criminal history and other current convictions. A score is calculated for each offense, and the score for one offense might differ from the score for another offense. *See* RCW 9.94A.525; WASH.

sentence), *with id.* at 9 (judgment and sentence on remand). And at the resentencing hearing, the State presented no new facts. VRP at 19-27.

Nevertheless, the State argued that the court should impose the same total period of confinement that it had previously imposed because that period of confinement "adequately represented the facts in this case." *Id.* at 21-22; *see also* CP at 32-36 (State's amended sentencing memorandum on remand). But because that total period of confinement was greater than the top of the standard ranges for the three remaining convictions, the State sought exceptional sentences above the range—something it had not done at the first sentencing hearing.

The State did not focus on Brown's individual offenses when it made this argument about "the facts of this case." CP at 32-36. Rather, the State focused on reaching a predetermined total period of confinement for all of the three remaining convictions. *Id.* It offered the court multiple ways to impose a total period of confinement equivalent to the one that Brown had originally received, *id.* at 34, thus indicating that it believed "the facts of this case" included the facts of the seven original crimes.

STATE CASELOAD FORECAST COUNCIL, 2017 WASHINGTON STATE ADULT SENTENCING GUIDELINES MANUAL 63, https://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2017.pdf [https://perma.cc/78SQ-AK9G].

Specifically, when the State did discuss specific facts to be considered at resentencing, it did not limit its discussion to the conduct underlying the remaining robbery and burglary convictions. It also relied on conduct underlying the reversed—and consequently unproven—kidnapping counts. For example, in arguing for the same total period of confinement, the State asserted that Brown was "the one who's responsible in this case for the fact that [the alleged kidnapping victims] had to endure the hours of confinement and the hours of fear and anxiety on the night in question and following." VRP at 25.

Brown argued against exceptional sentences. He explained that "there have been no new facts or identifiable conduct by the defendant, besides succeeding on appeal, that this court or the State could use to justify an exceptional sentence." CP at 29 (Brown's sentencing memorandum on remand).

The superior court declined to impose the same total period of confinement. But it did grant the State's request for exceptional sentences above the standard range. *Id.* at 21-22 (findings of fact and conclusions of law). The court concluded that the sentencing range resulting from Brown's number of convictions together with his criminal history did not adequately reflect his criminality, and, hence, it found "substantial and compelling reasons" to depart from the standard range for each conviction. *Id.*; RCW 9.94A.535(2)(c). As a result, Brown's sentences for

the two robbery convictions increased from 231 months to 279 months, and his sentence for the burglary conviction increased from 176 months to 204 months. *Compare* CP at 93 (initial judgment and sentence), *with id.* at 11 (judgment and sentence after remand).

Brown appealed the sentences. The Court of Appeals affirmed. *State v. Brown*, No. 75458-1-I (Wash. Ct. App. Mar. 12, 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/754581.pdf. This court granted review. *State v. Brown*, 190 Wn.2d 1025 (2018).

DISCUSSION

Judicial Vindictiveness Presumptively Infected Brown's Resentencing—and the State Has Not Rebutted That Presumption

A court violates a defendant's right to due process under the Fourteenth Amendment when it imposes a "penalty upon the defendant for having successfully pursued a statutory right of appeal." *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 798-99, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); U.S. CONST. amend. XIV. Because "[t]he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case," *Pearce*, 395 U.S. at 725 n.20, a presumption of judicial vindictiveness

applies when "there is a 'reasonable likelihood' that [an] increase in [the] sentence is the product of actual vindictiveness on the part of the sentencing authority." *Smith*, 490 U.S. at 799 (quoting *United States v. Goodwin*, 457 U.S. 368, 473, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982)). When the record allows, however, the State may rebut that presumption. *Texas v. McCullough*, 475 U.S. 134, 140, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986).

Here, there is a reasonable likelihood that Brown's increased sentences were a response to—and therefore a penalty for—his success on appeal. Consequently, the presumption of judicial vindictiveness applies. And the State has not rebutted that presumption.

A. Brown Got Longer Sentences on His Convictions after His Successful Appeal

The first step in this analysis is to determine whether the postappeal sentences were really longer than the preappeal sentences. To do that, we look to Washington sentencing law.

Our state legislature requires offense-specific sentencing. *See* ch. 9.94A RCW; WASH. STATE CASELOAD FORECAST COUNCIL, 2017 WASHINGTON STATE ADULT SENTENCING GUIDELINES MANUAL 63, https://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentenci

ng_Manual_2017.pdf [https://perma.cc/78SQ-AK9G] ("For multiple current offenses, separate sentence calculations are necessary for *each* offense because the law requires that each receive a separate sentence."). In furtherance of that policy decision, Washington's SRA requires trial courts to consider only "real facts" of the crimes of conviction at sentencing. RCW 9.94A.530(2); *State v. Houf*, 120 Wn.2d 327, 332-34, 841 P.2d 42 (1992). In this respect, Washington's SRA differs from the federal sentencing guidelines, which permit consideration of other factors, including acquitted conduct. 18 U.S.C. § 3661; *United States v. Watts*, 519 U.S. 148, 151-54, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (per curiam).

"Real facts" are those that the State has proved or that the defendant has affirmatively admitted. RCW 9.94A.530(2); *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012) (holding that a defendant's silence does not relieve the State of its burden of proving sentence-enhancing facts). "The 'real facts' or 'established facts' concept excludes consideration of either uncharged crimes or of crimes that were charged but later dismissed." *State v. McAlpin*, 108 Wn.2d 458, 466, 740 P.2d 824 (1987) (collecting cases). Conduct that has "not resulted in convictions . . . may not be considered at all." *Id.* at 467. Thus, the SRA precludes a sentencing court from considering reversed convictions when it imposes a sentence

because reversed convictions are not convictions. *See Pearce*, 395 U.S. at 721 (observing that overturning a conviction results in "the slate [being] wiped clean").

The four reversed convictions in this case fall outside the definition of "real facts." Those convictions were not just "wiped clean"; they were reversed due to unconstitutionality. Under United States Supreme Court precedent, a sentencing court cannot consider an unconstitutionally obtained conviction for any purpose.[2] In other words, under controlling law, Brown's sentences for his three remaining convictions could be based on only those three convictions. It is indisputable that the superior court imposed longer sentences on each of these three convictions after Brown's successful appeal than it did before.

B. Because Brown's Three Sentences Were Longer after Appeal Than They Were Before, *Pearce*'s Holding—That a Presumption of Judicial Vindictiveness Arises When the Same Sentencing Court Increases a Sentence after Appeal without Any New Factual Basis—Applies in This Case

Pearce makes clear that a presumption of judicial vindictiveness applies when, as here, postappeal sentences exceed preappeal sentences. *Pearce* also

[2] *United States v. Tucker*, 404 U.S. 443, 448-49, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972); *Burgett v. Texas*, 389 U.S. 109, 115, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967); *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986).

makes clear that such vindictiveness violates the defendant's right to due process under the Fourteenth Amendment.

Pearce was convicted of assault with intent to commit rape and sentenced to 12 to 15 years in prison. 395 U.S. at 713. His conviction was later reversed by a state appellate court, and the State decided to retry him. *Id.* Pearce was convicted again, and the court imposed an 8-year prison sentence. *Id.* But "when added to the time Pearce had already spent in prison, the parties agree[d the new sentence] amounted to a longer total sentence than that originally imposed." *Id.*

The United States Supreme Court viewed the second sentence as a "more severe punishment," despite its facial appearance of leniency. *Id.* at 716. Yet the sentencing court's reasons, if any, for imposing the increased sentence were "not so dramatically clear." *Id.* at 726. And "the State [had not] offered any reason or justification for that sentence beyond the naked power to impose it." *Id.* The Court therefore presumed that the sentencing court had imposed the "heavier sentence" in response to the defendant's "having succeeded in getting his original conviction set aside." *Id.* at 723-24.

That presumptively vindictive response violated the defendant's right to due process. "Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the

sentence he receives after a new trial." *Id.* at 725. The Supreme Court therefore affirmed the grant of the writ of habeas corpus, holding that Pearce could not be imprisoned under the unconstitutional sentence. *Id.*

The Court also made clear, however, that an increased sentence will not always violate the defendant's right to due process. It stated, "A trial judge is not constitutionally precluded . . . from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities,'" which are all permissible sentencing factors in the federal system. *Id.* at 723 (quoting *Williams v. New York*, 337 U.S. 241, 245, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949)).[3] The Court noted that "[s]uch information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources." *Id.* Thus, new information could justify a sentence increase, but when no new information exists, a presumption of judicial vindictiveness arises.

[3] As discussed above, the SRA's "real facts" doctrine places additional limits on what can be considered at sentencing under the SRA.

No relevant new information about Brown or his crimes was presented at his resentencing, though it certainly could have been.[4] The presumption of judicial vindictiveness therefore applies in this case.

The majority holds to the contrary because it concludes that Brown's sentences were not really increased. The majority reaches that conclusion by comparing Brown's new total period of confinement to his initial total period of confinement. Majority at 13-14.

But that is not the correct comparison to make in Washington. Instead, as discussed in Part A above, Washington courts must impose a specific sentence for each specific offense of conviction based on "real facts" proved (or admitted) about that specific offense. Thus, as a matter of state law, Brown's punishment did increase because the comparison runs from a given conviction's initial sentence to the same conviction's new sentence. And because the punishment increased under state law, federal law requires that we presume that vindictiveness motivated the

[4] RCW 9.94.530(2) provides that "[o]n remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." RCW 9.94A.525(22) further provides that "[p]rior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence."

harsher punishment, unless the sentencing court relied on new information to justify the harsher punishment.

The majority follows federal circuit courts of appeals that compare the "total aggregate" of prison time imposed at the two sentencing hearings. Majority at 11. But those decisions are inapt because they are based on a fundamentally different sentencing scheme—one in which the sentencing court may consider uncharged conduct, e.g., UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL 2018 § 1B1.3(a), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf [https://perma.cc/V43L-MQP6] as well as acquittals and reversed convictions. *See Watts*, 519 U.S. at 151-54. Under that sentencing scheme, federal courts consider sentences a package penalty for the crimes of conviction. *See United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1989); *United States v. Gray*, 852 F.2d 136, 138 (4th Cir. 1988); *United States v. Shue*, 825 F.2d 1111, 1114-15 (7th Cir. 1987); *United States v. Bay*, 820 F.2d 1511, 1513-14 (9th Cir. 1987). Contrary to the federal model, where the "factors underlying the original sentence in a multiple count case are not necessarily altered when a defendant successfully appeals his conviction on one count," *Pimienta-Redondo*, 874 F.2d at 14, the facts *are* necessarily altered in Washington when a conviction is overturned. RCW 9.94A.530(2); *McAlpin*, 108 Wn.2d at 465-67.

C. Subsequent Decisions Narrowed *Pearce*—But It Still Applies with Full Force to This Exact Type of Case

It is true that subsequent United States Supreme Court decisions have limited *Pearce*. But those decisions reinforce, not undermine, the conclusion that the presumption of judicial vindictiveness applies here.

The earliest post-*Pearce* Supreme Court decisions held that a presumption of judicial vindictiveness does not arise when the second sentencer, whether it be judge or jury, differs from the first sentencer. *See Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973); *Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972). The Court noted that there is less risk of vindictiveness when the second sentencer "is not the court that is asked to do over what it thought it had already done correctly." *Colten*, 407 U.S. at 116-17; *see also Chaffin*, 412 U.S. at 27. In some instances, the second sentencer may not even have knowledge of the initial sentence. *Chaffin*, 412 U.S. at 26-27. Accordingly, no reasonable likelihood—and therefore no presumption—of vindictiveness exists in those situations.

Two later decisions, *McCullough* and *Smith*, underscored *Pearce*'s cautionary statement that no presumption of judicial vindictiveness arises when the sentencing court relies on new, previously unavailable information to impose a harsher sentence at resentencing.

In *McCullough*, a defendant received a 20-year prison sentence after his first trial for murder, but a 50-year prison sentence after his second trial. 475 U.S. at 135-36. But the Court upheld the longer sentence against the defendant's *Pearce* challenge. Reviewing the record, the Court noted that the trial judge explained that she had imposed a 50-year sentence partly because of "the testimony of two new witnesses" at the second trial that had cast the defendant's conduct in a worse light. *Id.* at 143. The Court held that that testimony and other new information about the defendant's criminal history permissibly supported the increased sentence.[5] *Id.* at 144. Thus, *McCullough* clarified that the *Pearce* presumption does not apply when there is "new, probative evidence" to support the imposition of a harsher sentence at the second proceeding. *Id.* at 143.

Smith bolstered that conclusion. In that case, a defendant pleaded guilty to burglary and rape and received two concurrent 30-year prison sentences for the two convictions. 490 U.S. at 795-96. The defendant later argued that his plea was not knowing and voluntary, and an appellate court permitted him to withdraw the plea. *Id.* at 796.

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[5] Additionally, as in *Colten* and *Chaffin*, *Pearce*'s "presumption [was] inapplicable because different sentencers assessed the varying sentences that [the defendant] received." *McCullough*, 475 U.S. at 140. A jury initially determined the defendant's sentence, but on retrial, the judge determined the sentence. *Id.* at 136.

The State then prosecuted the defendant for burglary, rape, and sodomy. *Id.* At the trial, a cacophony of terrible facts emerged:

> [T]he victim testified that respondent had broken into her home in the middle of the night, clad only in his underwear and a ski mask and wielding a kitchen knife. Holding the knife to her chest, he had raped and sodomized her repeatedly and forced her to engage in oral sex with him. The attack, which lasted for more than an hour, occurred in the victim's bedroom, just across the hall from the room in which her three young children lay sleeping.

Id. On those facts, "[t]he jury returned a verdict of guilty on all three counts." *Id.*

At sentencing, "the trial judge imposed a term of life imprisonment for the burglary conviction, plus a concurrent term of life imprisonment on the sodomy conviction and a consecutive term of 150 years' imprisonment on the rape conviction." *Id.* Thus, the sentences for the burglary and rape convictions increased as compared to the initial sentences imposed for those crimes under the plea bargain. And the life sentence for the new sodomy conviction far outstripped the 30-year prison terms that the defendant had initially received for the other two convictions.

But the Supreme Court upheld the longer sentences against a *Pearce* challenge, even though the same judge had imposed both sets of sentences. The Court pointed out that "[t]he trial court [had] explained that it was imposing a harsher sentence than it had imposed following [the defendant's] guilty plea

because the evidence presented at trial, of which it had been unaware at the time it imposed sentence on the guilty plea, convinced it that the original sentence had been too lenient." *Id.* at 796-97. And just as the new information made a difference to the trial court, it made a difference to the Supreme Court's *Pearce* analysis. "As this case demonstrates, in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged," it observed. *Id.* at 801 (citation omitted). The Court therefore held that when new information about the defendant's conduct comes into the record, the *Pearce* presumption does not apply. *Id.* at 802.

Colten, *Chaffin*, *McCullough*, and *Smith* confirm that the *Pearce* presumption applies in this case. The same superior court judge sentenced Brown both times. VRP at 33-34. The State presented no new facts at the resentencing to support the harsher exceptional sentences. In fact, Washington's "real facts" doctrine provided that there were fewer inculpatory facts than existed at the initial sentencing.

Although the superior court complied with *Pearce*'s mandate to affirmatively identify its reason for imposing harsher sentences on remand, 395 U.S. at 726, its explanation of its decision did not—and could not—generate any new facts about the crime. The court stated only a general basis for imposing

sentences above the standard range, and it was a basis that was even more justified at the first sentencing when the offender scores were far higher: "I don't think it's appropriate for you to have free crimes in relation to what happened here."[6] VRP at 34. So that's not a new fact, either.

Neither Brown's mitigating conduct—ensuring that one of the victims received medication during the criminal episode, *id.* at 24, 33—nor the existence of "free crimes" changed from one proceeding to the next. If anything, the "number" of Brown's "free crimes" decreased when his offender score dropped from 19 to 11

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[6] RCW 9.94A.535(2)(c) permits an exceptional sentence above the standard range when "[t]he defendant has committed multiple current offenses and the defendant's offender score results in some of the current offenses going unpunished"—or, in more common parlance, when the defendant gets "free crimes." *See State v. Alvarado*, 164 Wn.2d 556, 567, 192 P.3d 345 (2008).

The Court of Appeals explained how RCW 9.94A.535(2)(c) operates in *State v. Newlun*:

> 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.

142 Wn. App. 730, 743, 176 P.3d 529 (2008); *see also* RCW 9.94A.510 (providing sentencing grid).

for the robbery and burglary convictions. In the absence of any new additional inculpatory information, *Pearce*'s presumption of judicial vindictiveness applies.[7]

The State has made no effort to rebut that presumption. *See* Suppl. Br. of Resp't at 8-11 (arguing only that the presumption does not apply). Accordingly, we must presume that Brown's right to due process has been violated, and I would reverse the decision of the Court of Appeals and remand the case for resentencing on that basis.

CONCLUSION

The Court of Appeals reversed four of Brown's seven convictions due to constitutional error. The judge then imposed a higher sentence on each of his three remaining convictions. There were no new facts to justify the new, higher sentences. We must therefore apply the *Pearce* presumption of judicial vindictiveness. The State offers only the facts of reversed convictions to rebut that presumption, and that does not suffice.

I respectfully dissent.

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[7] Division Two has reached the same conclusion. *See State v. Ameline*, 118 Wn. App. 128, 133, 75 P.3d 589 (2003). "If the only new fact is that [the defendant] has again succeeded on appeal, the new sentence may not be more harsh than the first and second ones." *Id.* at 134.

EXHIBIT

B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHNGTON,	)	No. 75458-1-I
Respondent,	)	DIVISION ONE
v.	)	
RONALD RICHARD BROWN,	)	UNPUBLISHED
Appellant.	)	FILED: March 12, 2018

Cox, J. — Ronald Brown appeals the exceptional sentence imposed upon remand following his successful appeal of his first judgment and sentence. He contends that the sentence is presumptively vindictive. For the first time in this second appeal, he also contends that the State failed in its burden to prove the facts necessary to establish his offender score. Finally, he challenges certain conditions of community custody that the trial court imposed.

We conclude that Brown fails in his burden to show that the new sentence imposed is presumptively vindictive. And he does not argue that it is actually vindictive. He failed to preserve below on remand his challenge to whether the State proved his offender score and he does not establish that the claim falls within the narrow exception of RAP 2.5(a). But he correctly argues that certain

conditions of community custody are improper. We affirm in part, reverse in part, and remand with directions.

In 2011, Brown, along with several accomplices, entered the home of two victims, restrained them, threatened them with guns, and robbed them.[1] A jury convicted Brown of two counts of first degree kidnapping, two counts of first degree robbery, one count of first degree burglary, and two counts of second degree assault. The jury also found that he was armed with a firearm while committing these crimes, requiring imposition of mandatory firearm enhancements by the court.

The trial court calculated the relevant offender scores and standard ranges at sentencing. Brown's offender score was 17. While the trial court concluded that an exceptional sentence was legally justified, the court chose not to impose one. It did so on the basis that the appropriate length of the aggregate sentence was 638 months.

Brown appealed, and this court reversed the kidnapping counts based on an instructional error.[2] This court also vacated the assault counts, concluding that they merged with the robberies.[3] It remanded the case for retrial on the reversed counts as well as for resentencing on the remaining convictions.[4]

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[1] State v. Brown, No. 70148-7-I, slip op. at *1 (Wash. Ct. App. Jul. 27, 2015) (unpublished), http://www.courts.wa.gov/opinions/pdf/701487.pdf.

[2] Id. at *4.

[3] Id. at *8.

[4] Id. at *14.

At the resentencing hearing, the State sought dismissal without prejudice of the two kidnapping counts. The original sentencing judge granted this motion.

The State recommended that the trial court impose the same 638 month term as originally imposed, this time as an exceptional upward sentence. Brown sought a sentence at the low end of the standard range.

The judge rejected both recommendations and sentenced Brown for the remaining three convictions: two of first degree robbery and one of first degree burglary, each with the mandatory firearm enhancements. The aggregate sentence is for a term of 399 months. The court also imposed certain community custody conditions as part of the resentencing.

Brown appeals.

JUDICIAL VINDICTIVENESS

Presumptive Vindictiveness

Brown argues that the trial court abused its discretion by imposing presumptively vindictive sentences upon remand. We disagree.

Constitutional due process under the Fourteenth Amendment requires that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives" upon remand.[5] The United States Supreme Court established, in North Carolina v. Pearce, a

[5] North Carolina v. Pearce, 395 U.S. 711, 725, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

presumption of vindictiveness that may arise in certain circumstances.[6] Actual vindictiveness may be grounds for reversal if proven by the defendant.[7]

The threshold question in each case is whether the sentence on remand is "more severe."[8] In State v. Larson, this court adopted the view of federal courts on this question.[9] Those courts "uniformly hold that the Pearce presumption never arises when the ***aggregate*** period of incarceration remains the same or is reduced on remand."[10] Notably, the Ninth Circuit Court of Appeals has held to this approach, explaining that the purpose of the Pearce presumption is protected "[i]f there is a possibility of a sentence reduction and no risk of a sentence increase."[11]

Here, Brown fails in his burden to show that the Pearce presumption arises. The trial court initially imposed an aggregate sentence of 638 months.

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[6] Id.

[7] State v. Larson, 56 Wn. App. 323, 328, 783 P.2d 1093 (1989).

[8] State v. Ameline, 118 Wn. App. 128, 133, 75 P.3d 589 (2003); Larson, 56 Wn. App. at 326.

[9] 56 Wn. App. 323, 328, 783 P.2d 1093 (1989).

[10] Larson, 56 Wn. App. at 326; see United States v. Nerius, 824 F.3d 29 (3d Cir. 2016); United States v. Fowler, 749 F.3d 1010 (11th Cir. 2014); United States v. Bentley, 850 F.2d 327 (7th Cir. 1988), cert. denied, 488 U.S. 970, 109 S. Ct. 501, 102 L. Ed. 2d 537, rehearing denied, 488 U.S. 1051, 109 S. Ct. 885, 102 L. Ed. 2d 1008 (1989); United States v. Diaz, 834 F.2d 287 (2nd Cir. 1987), cert. denied, 488 U.S. 818, 109 S. Ct. 57, 102 L. Ed. 2d 35 (1988); United States v. Cataldo, 832 F.2d 869 (5th Cir. 1987), cert. denied, 485 U.S. 1022, 108 S. Ct. 1577, 99 L. Ed. 2d 892 (1988); United States v. Shue, 825 F.2d 1111, 1115 (7th Cir. 1987), cert. denied, 484 U.S. 956, 108 S. Ct. 351, 98 L. Ed. 2d 376 (1987).

[11] United States v. Horob, 735 F.3d 866, 871 (9th Cir. 2013).

Upon resentencing, it imposed an aggregate sentence of 399 months. Under State v. Larson and related federal authorities, the shorter aggregate length of the second sentence precludes application of the presumption.

Notably, a fair reading of the sentencing court's reasoning fails to show otherwise. It appears that the court imposed an exceptional sentence on remand under the "free crime" rule because Brown's offender score was still eleven, above the score of nine, implicating this rule. And the length of the sentence imposed included consideration of the sentence imposed on a Brown accomplice after Brown's original sentencing. In short, nothing in the record before us suggests either presumptive or actual vindictiveness.

Notwithstanding that his current aggregate sentence is substantially lower than his original aggregate sentence, Brown relies on State v. Ameline[12] to support his argument. That reliance is misplaced.

In that case, William Ameline was tried and sentenced three times for second degree murder.[13] After the first trial, the trial court imposed a 164-month standard range sentence.[14] Ameline appealed, securing a reversal and remand. He was convicted again and sentenced to the same term.[15] He appealed, secured another reversal and remand, and faced trial again.[16] He was convicted

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[12] 118 Wn. App. 128, 75 P.3d 589 (2003).

[13] Id. at 130.

[14] Id.

[15] Id. at 131.

[16] Id.

a third time, but this time the trial court imposed an exceptional sentence of 240 months.[17]

Division Two of this court applied the Pearce presumption and set aside the third sentence because it exceeded, in the aggregate, the original sentence.[18] Thus, Ameline does not alter the principles we just discussed.

Brown further contends that two opinions from other jurisdictions, State of Oregon v. Bradley[19] and In re Matter of Craig,[20] support his position. Because there is precedent in this state that supports the result we follow, we have no reason to look to other jurisdictions to decide this question. In any event, his reliance on those cases is misplaced.

Bradley does not support Brown's position. In that case, the Oregon Court of Appeals considered a sentence imposed upon Ronald Bradley following reversal of several convictions for sexual abuse of a child.[21] On remand, the trial court imposed a sentence that still took into account the reversed convictions

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[17] Id.

[18] Id. at 133.

[19] 281 Or. App. 696, 383 P.3d 937 (2016), review denied, 361 Or. 645 (2017).

[20] 571 N.E.2d 1326 (Ind. Ct. App. 1991).

[21] 281 Or. App. at 698.

based upon the "strong possibility" that the State might not retry them.[22] But the aggregate sentence was shorter than that originally imposed.[23]

Following the Pearce presumption discussed above, the court of appeals concluded that no presumption of vindictiveness had arisen.[24]

The court then turned to the related question: whether actual vindictiveness was supported by the record.[25] The court concluded that the sentence "should not have been increased such that the prosecution would be relieved of its burden to prove the reversed counts beyond a reasonable doubt. That is the essence of punishing defendant for his success on appeal."[26] The trial court's reliance on the reversed convictions presented an unconstitutionally vindictive and "impermissible consideration in increasing the sentence imposed" upon the remaining counts.[27]

Bradley does not stand for the proposition that the presumption of vindictiveness arises under the circumstances of this case. Rather, it holds that actual vindictiveness may be found where the resentencing court increases the sentence on remaining counts ***on the basis*** of reversed counts. There is nothing in this record to show that was done here.

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[22] Id. at 699 (internal quotation marks omitted).

[23] Id. at 700.

[24] Id. at 701.

[25] Id.

[26] Id. at 703.

[27] Id. at 704.

Brown further relies upon the Indiana Court of Appeals decision in Craig. That court also recognized that the presumption of vindictiveness does not arise "where an aggregate sentence is reduced, but some of the interdependent sentences in a 'sentencing package' are increased following a successful appeal of some of the individual counts."[28]

In the case below, the trial court had found Pierre Craig guilty of three counts of criminal contempt for refusal to testify.[29] Those counts were reversed on the basis that they constituted only a single act of contempt.[30] But the resentencing court imposed the identical sentence originally imposed for the three counts.[31]

The court of appeals reversed this sentence, holding "that after reversal of a sentence erroneously entered for multiple acts of criminal contempt, it is a denial of due process to impose a sentence any greater than the original sentence for each single act of contempt."[32] It explained that the presumption of vindictiveness arose because the resentencing court imposed a sentence in excess of that attendant to a single count of contempt and more proper to the three-count conviction already reversed.[33]

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[28] 571 N.E.2d at 1327-28.

[29] Id. at 1327.

[30] Id.

[31] Id.

[32] Id. at 1328.

[33] Id.

The Indiana Court of Appeals subsequently clarified in Sanjari v. State that it "join[s] with that vast majority of courts who have addressed the question and have concluded that it is the aggregate sentence that is the key in such cases."[34] The defendant in that case initially had been convicted of two class C felonies, each carrying a five-year sentence, to be served consecutively.[35] On appeal, one of the convictions was reduced to a Class D felony.[36] The resentencing court then imposed an eight-year sentence on the remaining Class C felony, and two years on the reduced class D felony, resulting in a sentence equivalent to that originally imposed.[37] Because the resentencing court could permissibly view the individual sentences as part of an overall plan, and flexibly impose an accordant sentence, its action was not presumptively vindictive.[38]

In his reply brief, Brown argues that Washington should adopt the "modified aggregate" approach to the Pearce presumption propounded by the Eleventh and Second Circuit Courts of Appeals. Because this argument was first raised in the reply brief, we choose not to address it.[39]

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[34] 981 N.E.2d 578, 582 (Ind. Ct. App. 2013).

[35] Id. at 580.

[36] Id.

[37] Id.

[38] Id. at 582.

[39] Deutsche Bank Nat. Trust. Co. v. Slotke, 192 Wn. App. 166, 177, 367 P.3d 600, review denied, 185 Wn.2d 1037 (2016).

Actual Vindictiveness

Brown does not argue that this record supports the related question of actual vindictiveness by the trial court in imposing the sentences now before us. In any event, we see nothing in this record to support such a claim.

Collateral Estoppel

Brown next argues that the trial court was barred by collateral estoppel from imposing an exceptional sentence after expressly declining to do so at the time of the initial sentencing. We hold that collateral estoppel is not a bar to this resentencing.

Collateral estoppel arises from the constitutional guaranties against double jeopardy.[40] Under this doctrine, "'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'"[41] The supreme court has applied collateral estoppel in the criminal context.[42] Courts do not apply it hypertechnically "but with realism and rationality."[43]

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[40] State v. Tili, 148 Wn.2d 350, 360, 60 P.3d 1192 (2003).

[41] Id. (quoting Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)).

[42] Id.

[43] Id. at 361.

The Ameline court held that collateral estoppel only operates after a judgment becomes final, and a judgment reversed on appeal and remanded for resentencing is not final for these purposes.[44]

Here, as in Ameline, the original sentence never became final because Brown timely appealed that sentence. The sentence was reversed and the case remanded for resentencing. Thus, a necessary element of collateral estoppel is absent: there is no final judgment. On this basis alone, we reject the collateral estoppel argument.

But this argument fails for other reasons as well. Analysis of collateral estoppel also requires the court to identify the issue subject to the previous valid and final judgment.[45] Then the court must determine if that issue is identical to the issue litigated in a subsequent proceeding.[46] Even if the original sentence constituted a final judgment, which it does not, Brown's argument still fails.

Two distinct issues come into play when a trial court considers whether to impose an exceptional sentence.[47] First, the fact finder must determine beyond a reasonable doubt the presence of relevant circumstances to justify an exceptional sentence.[48] Second, the trial court must make a discretionary determination, whether an exceptional sentence is appropriate in light of those

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[44] Ameline, 118 Wn. App. at 134.

[45] Id.

[46] Id.

[47] State v. Rowland, 160 Wn. App. 316, 330, 249 P.3d 635 (2011).

[48] Id.

circumstances.[49] When a sentence is reversed and remanded for resentencing, the second step may occur under new circumstances.[50]

State v. Tili[51] is instructive. In that case, Fonotaga Tili sexually assaulted L.M., penetrating her numerous times.[52] Along with other charges, the State charged separate counts for each penetration, and Tili was convicted of all counts.[53]

The original sentencing court declined to impose an exceptional upward sentence, opining that the appellate court would likely reverse such a sentence "if the rapes were considered separate and distinct conduct."[54] But the court also explained that if they were reversed on that basis, it would impose the same sentence of 417 months as an exceptional upward sentence, based on deliberate cruelty and vulnerability of the victim.[55]

As predicted, the supreme court reversed the separate rape convictions, concluding that they constituted the same criminal conduct for sentencing

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[49] Id.

[50] Tili, 148 Wn.2d at 365.

[51] 148 Wn.2d 350, 60 P.3d 1192 (2003).

[52] Id. at 355-56.

[53] Id. at 356.

[54] Id. at 357.

[55] Id.

purposes.[56] And, as the trial court stated, it imposed the same sentence on remand as an exceptional upward sentence.[57]

Tili appealed and made the same argument Brown makes here.[58] He contended the trial court was "collaterally estopped from imposing the exceptional sentence at the resentencing because he believe[d] that issue was already considered and rejected with finality at the first sentencing."[59]

The supreme court rejected this argument.[60] It explained that "the issue at the resentencing was fundamentally different" from that present at the original sentencing.[61] Specifically, the sentencing court faced different standard ranges before and following remand.[62] Thus, the context controlling whether an exceptional upward sentence was appropriate had changed.[63] And with that context changed, the trial court could "'choose again to consider whether the presumptive sentence is clearly too lenient' after recalculating the offender score."[64]

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[56] Id.

[57] Id.

[58] Id. at 360.

[59] Id. at 361.

[60] Id. at 363.

[61] Id.

[62] Id.

[63] Id.

[64] Id. at 365 (quoting State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992)).

Here, the original sentencing court found that circumstances existed that could legally justify an exceptional upwards sentence. But it had to determine whether such an upward departure was appropriate when the top end of the standard range was 638 months. Under those circumstances, the court chose not to impose an exceptional sentence because the length of the sentence was appropriate under the circumstances.

Upon remand, the sentencing judge had to determine whether a top end standard sentence was appropriate. It concluded it was not because of the free crime rule. It, accordingly, exercised its discretion to impose an exceptional upward sentence. The issues were not the same.

The trial court discussed at length this change in circumstances. At the original sentencing, the trial court held that it had the power to impose an exceptional sentence based on Brown's offender score but concluded that that imposition was unnecessary in light of the applicable standard range. On resentencing, it concluded that an exceptional upward sentence was appropriate in light of the "free crime rule" and the new relevant standard range.

Based on this reasoning, the trial court extrapolated out what the standard range would dictate based on Brown's higher offender score. The court found that score to be 11, a fact undisputed on appeal. It imposed an exceptional upward sentence based upon that extrapolation.

The trial court also explained that it would not follow the State's recommendation to impose the original term of 638 months because of the sentence imposed on an accomplice since Brown's initial sentencing. The court

explained that "in relation to what [Brown's] original sentence was compared to what [the accomplice] got, if I follow the original sentence I think it's too far out of the lines of being reasonable."[65]

Brown primarily relies on the supreme court's four justice plurality in the lead opinion in State v. Collicott.[66] But the majority opinion in that case, signed by five justices, teaches that this reliance is misplaced.

Eric Collicott had been convicted for burglary, rape, and kidnapping.[67] At initial sentencing, the trial court had declined to impose an exceptional upward sentence.[68] In doing so, it apparently rejected the State's argument that the crime had been deliberately cruel.[69] The trial court concluded that Collicott's crimes constituted the same criminal conduct and sentenced Collicott within the standard range.[70] Collicott appealed.

The supreme court agreed that the crimes constituted the same criminal conduct, but concluded that the sentencing court had erred in calculating the offender score.[71] It remanded for the narrow task of recalculating that score.[72]

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[65] Report of Proceedings (June 21, 2016) at 34.

[66] 118 Wn.2d 649, 827 P.2d 263 (1992).

[67] Id. at 650 (plurality opinion).

[68] Id. at 661 (plurality opinion).

[69] Id. (plurality opinion).

[70] Id. at 651 (plurality opinion).

[71] Id. at 652-53 (plurality opinion).

[72] Id. (plurality opinion).

Upon resentencing, the trial court imposed an exceptional upward sentence based upon Collicott's deliberate cruelty and the "clearly too lenient" nature of the standard range.[73]

On the second appeal, a plurality of justices concluded in the lead opinion that, given the narrow scope of remand, "the trial court could not at resentencing impose an exceptional sentence based on aggravating factors which were considered in the prior sentencing and rejected as a basis for an exceptional sentence."[74] But a majority of the court in an opinion authored by a concurring justice held that they would not have reached the issue of collateral estoppel, or this conclusion.[75]

In Tili, the supreme court subsequently held that Collicott's conclusion is "not mandatory authority regarding the use of collateral estoppel in exceptional sentencing and may be considered dicta."[76] The Tili court also distinguished the holding in Collicott's lead opinion.[77] It explained that the supreme court in Collicott had not altered the sentencing context by its earlier reversal.[78] It had not reversed convictions or findings justifying an exceptional sentence. Rather, it

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[73] Id. at 654 (plurality opinion).

[74] Id. at 663-64 (plurality opinion).

[75] Id. at 669-70 (Durham, J., concurring).

[76] Tili, 148 Wn.2d at 364.

[77] Id.

[78] Id.

remanded solely for recalculation of the offender score.[79] Thus, the resentencing court there had faced an unchanged context, and made a decision at odds with the one previously rejected.

Here, the context at resentencing was like Tili, not Collicott. This court's earlier reversal of several of Brown's convictions changed the context for resentencing. The trial court had to consider a different standard range and determine whether an exceptional upward sentence was appropriate in light of the reversals. Thus, the issue at each sentencing proceeding differed and collateral estoppel did not preclude the sentence imposed on remand.

In sum, there is neither a presumption of vindictiveness nor actual vindictiveness shown by this record. Accordingly, we reject Brown's claim of error.

PROSECUTORIAL VINDICTIVENESS

Brown also argues that the State acted with presumptive vindictiveness. He bases this argument on the State's recommendation at resentencing of an exceptional sentence of 638 months, the same sentence imposed prior to reversal and remand. Because Brown fails to show prejudice from this recommendation, which the trial court rejected, we conclude that he fails in his burden of proof.

The United States Supreme Court has extended the Pearce presumption to review of prosecutorial conduct directed against a defendant who has

[79] Id.

exercised his right to challenge his conviction.[80] It has concluded that such a defendant "convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."[81]

The supreme court has further explained that a prosecutorial action is vindictive "'only if ***designed*** to penalize a defendant for invoking legally protected rights.'"[82] A defendant can demonstrate that the prosecutor's conduct was presumptively vindictive when "'all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.'"[83]

A defendant alleging that a prosecutor has committed some kind of misconduct "must show a substantial likelihood that the misconduct affected" the result.[84]

Here, Brown argues that the State's sentencing recommendation on remand was presumptively vindictive. There is no argument that it is actually vindictive.

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[80] Blackledge v. Perry, 417 U.S. 21, 27, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974).

[81] Id. at 28.

[82] State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006) (quoting United States v. Meyer, 810 F.2d 1242, 1245 (D.C. Cir. 1987)).

[83] Id. (quoting Meyer, 810 F.2d at 1246).

[84] State v. Houston-Sconiers, 188 Wn.2d 1, 31, 391 P.3d 409 (2017).

More importantly, Brown fails to explain how the sentencing recommendation, which the court rejected, resulted in prejudice to him. In view of the rejection of the recommendation and imposition of a substantially lower sentence, we fail to see any prejudice.

At oral argument of this case, Brown speculated that prejudice exists because the sentencing judge imposed an exceptional sentence after not doing so at the first sentencing. We have already discussed why the sentencing judge properly imposed an exceptional sentence the second time. Thus, the record simply does not support Brown's speculative argument of prejudice.

PROOF OF OFFENDER SCORE

For the first time on appeal, Brown argues that the trial court abused its discretion by including two convictions which the State allegedly failed to prove had not washed out. Because Brown cannot make this argument for the first time on his second appeal, having failed to make it in the first appeal or on remand, we decline to reach this issue.

A defendant who has appealed his conviction, had it remanded, and appealed again, generally cannot raise issues from the original proceeding for the first time on his second appeal.[85] But a defendant "may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding."[86] This is compatible with the recognition that the context on resentencing has changed.

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[85] State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983).

[86] State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009).

RAP 2.5(a) requires Brown to have raised this issue at the resentencing to preserve the issue on appeal. He failed to do so. And he makes no argument on appeal why RAP 2.5(a) applies. Thus, we decline to reach the issue.

COMMUNITY CUSTODY CONDITIONS

Brown argues that the trial court improperly imposed certain conditions of community custody relevant to drug treatment. He does not contest other conditions imposed.

We first consider the majority of the challenged conditions, and then separately consider the imposition of a condition precluding Brown from "drug areas."

General Drug-Related Conditions

Brown challenges conditions requiring that he not possess drug paraphernalia, and that he participate in certain substance counseling, treatment, and offender programs, and submit to urinalysis, Breathalyzer, and polygraph tests. These conditions are listed in an appendix to the judgment and sentence as conditions 5, 7, 8, and 9. We agree with his challenges to the conditions concerning drug paraphernalia and substance counseling, treatment, and offender programs. The State concedes error on these. But we disagree with Brown's challenge to the urinalysis, Breathalyzer, and polygraph conditions.

The trial court's sentencing authority depends on statute.[87] Generally, this court reviews for abuse of discretion the imposition of sentencing requirements.[88]

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[87] In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

[88] State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

But we review de novo that imposition when the trial court's statutory sentencing authority is challenged.[89]

The Sentencing Reform Act authorizes the trial court to impose certain prohibitions or affirmative conditions of community custody so long as they are "crime-related."[90] A prohibition is "crime-related" when it "directly relates to the circumstances of the crime for which the offender has been convicted."[91]

Thus, a trial court may only impose certain drug-related conditions when the evidence shows that drugs contributed to the crime, rendering such conditions crime-related. Specifically, Division Two of this court has reversed conditions requiring substance counseling and treatment when the evidence did not show substance use contributed to the crime.[92] Division Three of this court has held that conditions barring the defendant from possessing drug paraphernalia, otherwise not a crime, are improper when the crime was not drug-related.[93]

But a sentencing court may require that an offender submit to tests to monitor compliance with other valid conditions of community custody.[94]

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[89] Id.

[90] RCW 9.94A.505(9).

[91] RCW 9.94A.030(10).

[92] State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

[93] State v. Munoz-Rivera, 190 Wn. App. 870, 892, 361 P.3d 182 (2015).

[94] State v. Riles, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998).

Specifically, the supreme court has recognized the investigative utility of polygraph tests in monitoring general compliance with sentencing conditions.[95]

Here, conditions 5, 7, 8, and 9 require that Brown not possess drug paraphernalia, participate in certain substance counseling, treatment, and offender programs, and participate in urinalysis, Breathalyzer, and polygraph tests.

The trial court at his original sentencing expressly found that Brown's crimes were not drug-related and declined to impose the drug-related conditions. It made no contrary finding on resentencing. Thus, it abused its discretion in imposing conditions that required Brown not to possess drug paraphernalia and to participate in counseling, treatment, and offender programs. These conditions must be stricken.

The sentencing court also imposed a monitoring condition, requiring that Brown submit to urinalysis, Breathalyzer, and polygraph tests. Additionally, the trial court imposed conditions that Brown neither possess nor consume drugs or alcohol. Brown does not challenge these latter conditions. Thus, the trial court did not abuse its discretion in imposing urinalysis and Breathalyzer conditions to monitor compliance with these conditions. Nor did it abuse its discretion in imposing the polygraph condition, necessary to monitor compliance with a wider host of unchallenged conditions.

Brown additionally argues that collateral estoppel barred the trial court from reconsidering its decision that the crimes were not drug-related. We agree.

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[95] Id.

As we discussed, the issue of the standard sentencing range changed from initial sentencing to resentencing. But the issue of whether the crimes were sufficiently drug-related to justify imposition of these same conditions was identical at both proceedings. The State recommended the conditions at both. Thus, the issue is unchanged, and collateral estoppel barred the trial court's reconsideration.

Brown argues that the trial court could not impose community custody conditions as these exceeded the mandate on remand. Not so.

This court remanded Brown's case "with instructions that the trial court enter orders vacating these convictions and for resentencing."[96] The mandate stated that the case was remanded "for further proceedings in accordance with the attached true copy of the opinion." Imposition of community custody sentencing is a necessary part of sentencing, and thus was within the resentencing court's authority.

Drug Areas

Brown argues that condition number 6 requiring that he avoid "drug areas" as determined by his Community Corrections Officer (CCO) is unconstitutionally vague and overbroad. We agree.

Due process precludes the enforcement of vague laws, including sentencing conditions.[97] To avoid a vagueness challenge, the law "must (1) provide ordinary people fair warning of proscribed conduct, and (2) have

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[96] Brown, No. 70148-7-I, slip op. at *14.

[97] State v. Irwin, 191 Wn. App. 644, 652, 364 P.3d 830 (2015).

standards that are definite enough to 'protect against arbitrary enforcement.'"[98] Failure to satisfy either prong renders the condition unconstitutional.[99] But a condition imposed upon community custody is not vague "'merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'"[100] This court does not presume sentencing conditions to be constitutionally sound.[101]

This court recently held, in State v. Irwin, that a community custody condition requiring further definition from a CCO was unconstitutionally vague.[102] That case concerned a community custody condition barring Samuel Irwin from places where "children are known to congregate," as defined by his CCO.[103] This court concluded that "[w]ithout some clarifying language or an illustrative list of prohibited locations . . . the condition does not give ordinary people sufficient notice to understand what conduct is proscribed."[104] The authority given to the

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[98] Id. at 652-53 (quoting State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008)).

[99] Id. at 653.

[100] Id. (quoting State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010)).

[101] Id. at 652.

[102] 191 Wn. App. 644, 652, 364 P.3d 830 (2015).

[103] Id. at 649.

[104] Id. at 655 (internal quotation marks omitted).

CCO to interpret the condition also allowed for unconstitutionally arbitrary enforcement.[105]

Here, the State concedes that this condition is unconstitutionally vague. The State's concession is proper. Leaving the definition of "drug areas" open to the CCO's discretion deprives Brown of fair warning and allows for arbitrary enforcement under Irwin. Further, the trial court held that a recommended condition that Brown "not associate with known drug users" was impermissibly vague. It is difficult to see how that condition is distinct from that challenged with regards to vagueness.

Brown also argues that this condition unconstitutionally infringes upon his fundamental right of travel. We need not reach this argument because the vagueness issue is dispositive.

Brown argues that the condition should be stricken. He contends that even if its vagueness were cured, it would not be crime-related. He cites precedent that this is the "'simple remedy.'"[106] The State contends that both striking and clarification are appropriate remedies.

We conclude that striking the condition is the proper remedy.

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[105] Id.

[106] Riles, 135 Wn.2d at 350.

We affirm the sentence, except for the community custody conditions that we have discussed. We reverse those conditions and remand to the trial court with directions to address them in a manner not inconsistent with this opinion.

COX, J.

WE CONCUR:

EXHIBIT

D

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RONALD RICHARD BROWN, Petitioner.	)	**ORDER DENYING MOTION FOR RECONSIDERATION** No. 95734-7 Court of Appeals No. 75458-1-I Snohomish County No. 12-1-00148-5

The Court considered the Petitioner's "MOTION TO RECONSIDER";

Now, therefore, it is hereby

ORDERED:

That the motion for reconsideration is denied.

DATED at Olympia, Washington this 19th day of June, 2019.

For the Court

Fairhurst. CJ.

CHIEF JUSTICE

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD RICHARD BROWN,

Petitioner.

MANDATE

No. 95734-7

Court of Appeals No. 75458-1-I

Snohomish County No. 12-1-00148-5

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Snohomish County

The opinion of the Supreme Court of the State of Washington was filed on May 2, 2019. The opinion became final on June 19, 2019, upon entry of the Order Denying Motion for Reconsideration. This case is mandated to the superior court for further proceedings in accordance with the attached true copy of the opinion.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court at Olympia, Washington, this 20th day of June, 2019.

SUSAN L. CARLSON
Clerk of the Supreme Court
State of Washington

Additional material from this filing is available in the Clerk's Office.