NO. 94346-0

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MURRAY,

Petitioner/Appellant.

AMICUS CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Nancy L. Talner, WSBA #11196
Jessica Wolfe, WSBA #52068
American Civil Liberties Union of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. IDENTITY AND INTEREST OF *AMICUS*

The identity and interest of *Amicus Curiae* are set forth in the concurrently filed Motion for Leave to File Amicus Curiae Brief, which is hereby incorporated by reference.

II. ISSUES PRESENTED

1. Whether the aggravating factors of Washington's Sentencing Reform Act, RCW 9.94A ("SRA"), are subject to review for vagueness?

2. Whether there are substantial and compelling reasons as a matter of law justifying an exceptional sentence above the range, in light of the strong mitigating factor that Mr. Murray's capacity to conform his conduct to the law was significantly impaired?

3. Whether the exceptional sentence imposed on Mr. Murray violated the SRA's expressed purposes?

III. INTRODUCTION

This case presents this Court with the opportunity to resolve whether the Sentencing Reform Act's (SRA) aggravating factors can be challenged as void for vagueness. This Court is not bound by its previous consideration of this issue in *State v. Baldwin*, 150 Wn.2d 448, 457–461, 78 P.3d 1005 (2003), due to intervening U.S. Supreme Court precedent and significant revisions to the SRA's aggravating factors. Under the U.S.

Supreme Court's reasoning in *Beckles v. United States*, 137 S.Ct. 886, 197 L.Ed.2d 145 (2017), mandatory sentencing schemes like the SRA are subject to vagueness challenges because they implicate the "twin concerns" of the doctrine: providing notice and preventing arbitrary enforcement. Accordingly, this Court should hold that the aggravating factors of the SRA can be challenged as void for vagueness.

Additionally, the sentencing court committed an error of law by failing to recognize that the mitigating factor of significantly impaired capacity to conform conduct to the requirements of the law countervailed the aggravating factor. Imposing an exceptionally long sentence in these circumstances also violated numerous purposes of the SRA, further rendering the sentence legally erroneous and justifying reversal.

IV. STATEMENT OF THE CASE

The following facts are taken from the Court of Appeals' opinion and the parties' briefs. Petitioner/appellant Michael Murray was accused of three counts of indecent exposure for incidents that occurred in March 2015. Two weeks prior, he had been released from jail on an indecent exposure case, and promptly sought treatment upon his release. The anti-seizure medication and assisted living setting that had been recommended by a forensic psychologist to increase his ability to control his indecent

exposure conduct were not provided to him. Trial testimony describes him as an "elderly" man.

At trial, Mr. Murray presented a diminished capacity defense which included expert testimony showing he lacked inhibitive control because of a 2008 stroke that left him with a severe brain injury and dementia. The jury rejected the diminished capacity defense and returned verdicts finding the aggravating factors of rapid recidivism and sexual motivation. Although the standard range for Mr. Murray's offenses was zero to 12 months in jail, the sentencing court imposed an exceptional sentence of 36 months in prison. At sentencing, Mr. Murray had apologized for his conduct and begged the court to send him to "the state hospital or something," where he could get help for his medical condition.

Both the sentencing court and the Court of Appeals acknowledged the evidence showed a medical basis for Mr. Murray's conduct: "Murray's brain injury very well could have played a role in his lack of inhibition." Slip Op. at 13. But both lower courts also justified the three-year prison sentence on the basis that "it's not clear that there is any way to protect the community other than locking him up." Neither court offered an evidentiary basis for believing the particular amount of prison time imposed would do anything to alter Mr. Murray's conduct.

V. ARGUMENT

A. The Aggravating Factors of the SRA are Subject to Vagueness Challenges

The Due Process Clause prohibits "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556, 192 L.Ed.2d 569 (2015). The U.S. Supreme Court has reaffirmed that that there are two kinds of criminal laws that can be found unconstitutional under the "void for vagueness" doctrine: "laws that *define* criminal offenses and laws that *fix the permissible sentences for criminal offenses*." *Beckles, supra,* 137 S. Ct. at 892 (emphasis in the original). Of the latter category, the Supreme Court has held that only mandatory sentencing schemes can be challenged on due process grounds. *Id.* at 894. Discretionary sentencing guidelines, such as the federal Sentencing Guidelines at issue in *Beckles,* are not subject to the void-for-vagueness doctrine. *Id.* at 895.

The Court's reasoning in creating this mandatory-discretionary demarcation was twofold. First, the Court found that the vagueness doctrine was concerned with providing notice "to a person who seeks to regulate his conduct so as to avoid particular penalties within the statutory

range," and that a discretionary scheme could not achieve this goal "because even if a person behaves so as to avoid an enhanced sentence . . . the sentencing court retains discretion to impose the enhanced sentence." *Id.* at 894. Second, the Court concluded that discretionary sentencing does not implicate the doctrine's concerns with the arbitrary application of justice. *See id.* ("An unconstitutionally vague law invites arbitrary enforcement in this sense if it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case, or permits them to prescribe the sentences or sentencing range available.") (internal citations and quotations marks omitted).

The Washington State's Sentencing Reform Act (SRA) is a mandatory sentencing scheme. *See* RCW 9.94A.505(1) ("the court *shall* impose punishment as provided in this chapter.") (emphasis added). Unlike the federal Sentencing Guidelines at issue in *Beckles*, which permit judges to exercise discretion in imposing an enhanced sentence beyond the scope of the Guidelines, the SRA requires in most cases that a judge submit the elements of aggravating factors to a jury before handing down a sentence above the standard range. *Compare Pepper v. United States*, 562 U.S. 476, 501 131 S. Ct. 1229, 179 L.Ed.2d 196 (2011) ("a district court may in appropriate cases impose a non-Guidelines sentence based on

a disagreement with the [Sentencing] Commission's views") *with* RCW 9.94A.537(3) ("The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt.") The jury must find the facts supporting the aggravating factor unanimously, and the court must conclude that there are "substantial and compelling reasons" to increase the sentence. RCW 9.94A.537(6). Only then can a court apply an exceptional sentence; however, the court is still bound by the limits imposed by statute. *See id.*

In addition to being a mandatory scheme, Washington's SRA implicates the "twin concerns underlying vagueness doctrine – providing notice and preventing arbitrary enforcement." *Beckles*, 137 S. Ct. at 894. Because the elements of an aggravating factor must be submitted to a jury and proved beyond a reasonable doubt, a person can, in theory, "behave[] so as to avoid an enhanced sentence." *Id.* Further, if the aggravating factors of the SRA are impermissibly vague, jurors are "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Id.* (internal citations and quotation marks omitted). This creates a risk of creating arbitrary outcomes, thus thwarting Due Process' "constitutional safeguard" that "the law must be one that carries an understandable meaning with legal standards that courts must enforce." *Giaccio v. Pennsylvania*, 382 U.S. 399, 404, 86 S. Ct. 518, 15 L.Ed.2d 447

(1966) (allowing jury to decide if criminal defendant should pay costs for "misconduct" despite acquittal violated due process on vagueness grounds).

Contrary to the State's arguments in this case, this Court is not required to reject all vagueness challenges to exceptional sentence guidelines under *State v. Baldwin*, 150 Wn.2d 448, 457–461, 78 P.3d 1005 (2003). *Baldwin* was decided before the SRA was revised to conform with the U.S. Supreme Court's ruling that facts supporting aggravating factors must be submitted to a jury. *See Blakely v. Washington*, 542 U.S. 296, 305, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Stubbs*, 170 Wn.2d 117, 130–31, 240 P.3d 143 (2010) (explaining that the SRA was revised in 2005 to conform to *Blakely*). Accordingly, *Baldwin* did not address whether aggravating factors under the revised SRA can be challenged as vague. This Court should revisit the due process framework as applied to the revised SRA and hold that the aggravating factors can be challenged on vagueness grounds.[1]

B. There Are Not Substantial and Compelling Reasons as a Matter of Law Justifying an Exceptional Sentence Above the

[1] Amicus take no position on whether the rapid recidivism aggravating factor is void for vagueness as applied to Mr. Murray's case. *See Maynard v. Carwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988) ("Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.")

Range in Light of the Strong Mitigating Factors Present and the Expressed Statutory Purposes of the SRA.

Washington's SRA was enacted with the purposes of ensuring proportionate, just, and commensurate punishment, protecting the public, providing an opportunity for rehabilitation and reduction of recidivism, and conserving government resources. *See* RCW 9.94A.010. The SRA assumes that the standard range sentence in most cases appropriately reflects the seriousness of the offense and the offender's criminal history. *See* RCW 9.94A.010. It structures sentencing consistent with this principle, but allows a sentence above or below the range when "substantial and compelling reasons" justify an exceptional sentence. RCW 9.94A.535. Essential to compliance with the "substantial and compelling reasons" rule is proper legal interpretation of the statutory aggravating and mitigating factors. *See id.*

Mr. Murray's three-year prison sentence should be invalidated as it thwarts the purposes of the SRA and promotes an unlawful interpretation of the aggravating factor. Legal error occurred because the strong evidence of a mitigating factor – the failed defense of diminished capacity based on stroke-induced dementia – was given little or no weight in the legal analysis used to justify the exceptionally long sentence. The amount of time between prior release from jail and the current offenses was used

to justify a sentence triple the range, despite the fact that the rationale for the aggravating factor was rendered inapplicable as a matter of law by the mitigating factor.

An exceptional sentence may be reversed when there are not substantial and compelling reasons justifying the departure. RCW 9.94A.585(4)(b). The reviewing court applies a de novo standard in assessing whether a sentence was justified as a matter of law. *See* RCW 9.94A.585; *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). For the reasons discussed below, the exceptional sentence should be reversed.

1. *There Were Not Substantial and Compelling Reasons for an Exceptional Sentence in Light of the Strong Mitigating Factors Present, Namely Mr. Murray's Impaired Ability to Conform His Conduct to the Requirements of the Law.*

Consideration of an individual's circumstances is legally required when an exceptional sentence above the range is considered; the rationale for a particular aggravating factor cannot be divorced from the facts when there is a strong mitigating factor present countervailing the aggravating factor. In *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017), this Court explained that the mitigating factor of youth may be so significant that the sentencing court must consider it despite otherwise

applicable sentence enhancements under the SRA. The presence of a legally recognized mitigating circumstance, like the failed defense of diminished capacity here, diminishes the rationale for an exceptionally long sentence. *See State v Davis*, 182 Wn.2d 222, 229, 340 P.3d 820 (2014) (lead opinion) ("Exceptional sentences are intended to impose additional punishment where the particular offense at issue causes more damage than that contemplated by the statute defining the offense. In that situation, the standard penalty for the offense is insufficient and an exceptional sentence based on a statutory aggravating factor found by the jury remedies that insufficiency.")

Instead of Mr. Murray's case warranting additional punishment because it "caused more damage" than an ordinary case, both the SRA statute and case law interpreting it compel the conclusion that a strong mitigating factor weighing against longer prison time was present. RCW 9.94A.535(1)(e) states that a sentence may be mitigated when"[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." The expert testimony presented in Mr. Murray's case directly linked his stroke-induced dementia to impairment of his capacity to conform his conduct to the requirements of the law. It is generally accepted that indecent exposure can be a product of dementia

resulting from brain injury. In fact, indecent exposure is such a common result of dementia, because of the loss of impulse control, that materials advise law enforcement and first responders about it. *See, e.g.*, Alzheimer's Association, "Safe Return: Alzheimer's disease – Guide for law enforcement" (2006), http://www.alz.org/national/documents/SafeReturn_lawenforcement.pdf; The Arbor Company, "Dementia + Alzheimer's First Responder Tip Guide, https://cdn2.hubspot.net/hubfs/747395/PDF/Engagement_First_Responder_Tip_Guide_-_2016-0524.pdf?t=1471040986286. Unlike in *State v. Rogers*, 112 Wn.2d 180, 770 P.2d 180 (1989), where severe stress failed to support the mitigating factor, in Mr. Murray's case the evidence demonstrated the ways in which his brain injury significantly impaired his ability to control his indecent exposure behavior – exactly the circumstances contemplated as a mitigating factor by RCW 9.94A.535(1)(e).

In addition to the strong evidence supporting the mitigating factor here, the rationale for applying the aggravating factor of rapid recidivism was also absent. *See* RCW 9.94A.535(3)(t). As the Court of Appeals acknowledged, "This factor is premised on the idea that committing a new offense shortly after release from incarceration demonstrates a greater

disdain for the law than would usually be the case." *State v. Murray*, Slip Op. at 9 (citing *State v. Butler*, 75 Wn. App. 47, 876 P.2d 481 (1994) and *State v. Combs*, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010)) (emphasis added). For example, in *State v. Butler*, the Court explained that Butler's "immediate reoffense, within hours of his release, reflects a disdain for the law so flagrant as to render him particularly culpable in the commission of the current offense." *Butler*, 75 Wn. App. at 54; *see also*, *State v. Hughes*, 154 Wn. 2d 118, 141–42, 110 P.3d 192, 204 (2005), *abrogated by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (finding that committing "the exact same offense against the same exact victim" within three months showed disregard and disdain for the law); *see also State v. Saltz*, 137 Wn.App. 576, 585, 154 P.3d 282 (2007) (basing reliance on the rapid recidivism factor on whether the short time period shows a "greater disregard for the law than otherwise would be the case.")

The word "disdain" is defined as "a feeling of contempt for someone or something regarded as unworthy or inferior," *see* Merriam-Webster, "Disdain," https://www.merriam-webster.com/dictionary/disdain (last visited Sept. 25, 2017), or "[t]he feeling that someone or something is unworthy of one's consideration or respect." *See* Oxford Dictionaries, "Disdain," https://en.oxforddictionaries.com/definition/disdain (last visited

Sept. 25, 2017). As the expert testimony at trial explained, "disdain" for the law played no part in making Mr. Murray's conduct worse than in a case where the standard range would apply. Far from being a conscious choice to have contempt for the law, Mr. Murray's inhibitory control and capacity to conform his conduct to the law was impaired due to his brain injury and dementia. In stark contrast to *Hughes*, Mr. Murray expressed remorse and begged for treatment. The Court should interpret the rapid recidivism aggravating factor as inapplicable here.

2. *Unless the Rapid Recidivism Factor is Interpreted to Preclude Application Here, the SRA's Purposes will be Violated.*

In addressing the legal validity of Mr. Murray's sentence, the exceptional sentence imposed here should be viewed through the lens of the SRA's purposes: "(2) [to] [p]romote respect for the law by providing punishment which is just; … (4) Protect the public; (5) Offer the offender an opportunity to improve himself or herself; (6) Make frugal use of the state's and local governments' resources; and (7) Reduce the risk of reoffending by offenders in the community." RCW 9.94A.010.

None of these purposes are served by the 3-year prison sentence imposed on Mr. Murray. The sentence does not provide "just" punishment because of the strong evidence of the mitigating factor and Mr. Murray's

conduct being the result of his medical condition, as discussed in Part B(1). Additionally, the exceptional sentence imposed here does nothing to offer the offender an opportunity to improve himself. The prison time imposed on Mr. Murray will do nothing to remedy his brain injury. Given his advanced age and medical condition, the extra-long prison sentence may have particularly harmful effects on him. *See* National Academy of Sciences, "The Growth of Incarceration in the United States: Exploring Causes and Consequences" 200 (2014), https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes ("Persons who enter prison with special vulnerabilities—for example, having suffered extensive preprison trauma or preexisting mental illness—are likely to be especially susceptible to prison stressors and potential harm."). And the SRA's purpose of offering the offender an opportunity to improve himself should have led to consideration of a treatment setting with the medication and supervision that would actually reduce the offender conduct, in accordance with RCW 9.94A.010(5) and (7). *See* Madeleine Liljegren, Georges Naasan, Julia Temlett, "Criminal Behavior in Frontotemporal Dementia and Alzheimer Disease," JAMA Neurology 295–300 (March 2015), http://jamanetwork.com/journals/jamaneurology/fullarticle/2088872?hc_location=ufi (individuals with dementia "should be treated differently … by

the legal system, such as obtaining a neurologic evaluation when suspected and channeling to palliative and medical institutions.") (emphasis added).

The sentence also does not protect the public, as claimed by the lower courts. A National Academy of Sciences study on the growth of incarceration in the United States concluded that "research shows that long sentences have little marginal effect on crime reduction through either deterrence or incapacitation." National Academy of Sciences, "The Growth of Incarceration in the United States: Exploring Causes and Consequences" 345 (2014), https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes. The study's comment is particularly relevant to Mr. Murray's case, since both the lower courts relied on the incapacitation rationale to justify the 3-year prison term. *State v. Murray,* Slip Op. at 13–14. But the SRA explicitly directs that a defendant's impaired ability to conform his conduct to the law, when the product of a medical condition as here, legally weighs in favor of a shorter, not longer, period of incapacitation in prison. The exceptional sentence imposed on Mr. Murray fuels the mass incarceration problem described in the National Academy of Sciences study, rather than achieving any beneficial purpose.

The National Academy of Sciences study also shows that the SRA's purpose of making frugal use of governmental resources is not served by Mr. Murray's sentence. Long prison sentences not only fail to reduce crime; they inflict "high financial, social, and human costs" as well. National Academy of Sciences study, *supra*, at 9. More specifically, "The cost for confining an elderly prisoner is significantly higher than the cost for imprisoning a younger inmate. Estimates show the average yearly cost for confining an elderly prisoner is between $60,000-$70,000 – three times the cost for housing a younger individual in prison." Yelena Yukhvid, "Should Elderly Criminals be Punished for Being Prisoners of the Mind? An Analysis of Criminals with Alzheimer's Disease," 50 Gonz. L. Rev. 43, 52 (2014–15). This article confirms the point in the National Academy of Sciences study that "prison is also harsher for older inmates" and "[w]hile prison is difficult for most individuals, it is particularly trying 'for someone who is losing their strength and mental faculties.'" *Id.*

In addition to the higher economic and human cost of imposing a three-year prison term on a person like Mr. Murray, research indicates the longer term will either have no effect on reducing recidivism, or a negative effect on it. "[T]he results of this study suggest that lengthier terms of incarceration, beyond a few months, do not readily appear to reduce recidivism and, indeed, may increase it. … Lengthier prison terms

of three years or more do not appear to appreciably reduce recidivism beyond that associated with shorter prison stays." Daniel P. Mears, Joshua C. Cochran, William D. Bales, Avinash S. Bhati, "Recidivism and Time Served in Prison," 106 J. Crim. L. & Criminology 83, 122 (2016).

As the Court of Appeals recognized in this case, once the jury finding was made, "the trial court must still decide whether the aggravating factor is a substantial and compelling reason to justify an exceptional sentence." For the reasons set forth above, the SRA's purposes are not served by the exceptional sentence imposed in Mr. Murray's case, nor as a matter of law are there substantial and compelling reasons justifying the long prison sentence here. This Court should reverse the sentence for reconsideration in light of the strong mitigating factors present and the express purposes of the SRA.

VI. CONCLUSION

For the reasons set forth herein, this Court should reverse the decision of the Court of Appeals and remand to the trial court for a new sentence.

Respectfully submitted this 29th day of September, 2017.

/s/Nancy Talner
Nancy L. Talner, WSBA #11196
Jessica Wolfe, WSBA # 52068

American Civil Liberties Union of
Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2017, I caused to be served the foregoing *Amicus Curiae Brief of the American Civil Liberties Union of Washington* to the parties below, in the manner noted:

Served Electronically Via Court Portal to:

Kristin Relyea, DPA
paoappellateunitmail@kingcounty.gov
kristin.relyea@kingcounty.gov
KING COUNTY PROSECUTING ATTORNEY
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104
Attorney for the Plaintiffs

Richard W Lechich
richard@washapp.org
WASHINGTON APPELLATE PROJECT
1511 3RD AVE STE 701
SEATTLE, WA 98101-3647
Attorney for the Defendants

Respectfully submitted this 29th day of September, 2017.

By: /s/Nancy Talner
Nancy Talner, WSBA No. 11196
ACLU OF WASHINGTON FOUNDATION
901 5th Avenue, Suite 630
Seattle, Washington 98164
(tel) (206) 624-2184

ACLU-WA FOUNDATION

September 29, 2017 - 4:54 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94346-0
Appellate Court Case Title:	State of Washington v. Michael Murray
Superior Court Case Number:	15-1-02005-2

The following documents have been uploaded:

- 943460_Briefs_20170929164325SC602926_2237.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was 2017 09 29 American Civil Liberties Union of Washington Amicus Curiae.pdf
- 943460_Motion_20170929164325SC602926_2814.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was 2017 09 29 Motion for Leave to File Amicus Brief.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- jwolfe@aclu-wa.org
- kmcruer@aclu-wa.org
- kristin.relyea@kingcounty.gov
- nancy@washapp.org
- paoappellateunitmail@kingcounty.gov
- richard@washapp.org
- talner@aclu-wa.org
- wapofficemail@washapp.org

Comments:

Sender Name: Nancy Talner - Email: talner@aclu-wa.org
Address:
901 5TH AVE STE 630
SEATTLE, WA, 98164-2008
Phone: 206-624-2184

Note: The Filing Id is 20170929164325SC602926