NO. 94346-0

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MURRAY,

Petitioner/Appellant.

AMENDED AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. IDENTITY AND INTEREST OF *AMICUS*

The identity and interest of *Amicus Curiae* was set forth in the concurrently filed Motion for Leave to File Amicus Curiae Brief, which was granted by this Court on October 9 and is hereby incorporated by reference.

II. ISSUE PRESENTED

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

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.

IV. STATEMENT OF THE CASE

The following facts are taken from the Court of Appeals' opinion, the petition for review, and the parties' briefs. Petitioner/appellant Michael Murray was accused of three counts of indecent exposure for incidents that occurred in March 2015. Approximately two weeks prior to the first incident, 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." *Id.* at 3; *see also id.* at 13. 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*, 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.") (citations and internal 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 at 457–461. *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]

VI. CONCLUSION

For the reasons set forth herein, this Court should reverse the decision of the Court of Appeals and hold that aggravating factors under the SRA are subject to vagueness challenges.

Respectfully submitted this 20th day of October, 2017.

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[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.")

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I caused to be served the foregoing *Amended Amicus Curiae Brief of the American Civil Liberties Union of Washington* to the parties below, in the manner noted:

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Comments:

This is an Amended Amicus Brief filed at the direction of the Court in a letter on October, 12th, 2017.

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