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No. ~~62749-0-1~~

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

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STATE OF WASHINGTON,  
Respondent,  
v.  
TALIFERRO WILLIAMS,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S OPENING BRIEF

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VANESSA M. LEE  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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The Honorable David Needy

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VANESSA M. LEE  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

C. STATEMENT OF FACTS ..... 5

D. ARGUMENT ..... 8

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT MR. WILLIAMS’ CONVICTION FOR ASSAULT IN THE THIRD DEGREE..... 8

    a. Sufficient evidence must be presented to support each element of the crime charged. .... 8

    b. Insufficient evidence was presented to convict Mr. Williams of assault in the third degree. .... 9

    c. Reversal and dismissal is the appropriate remedy ..... 11

2. MR. WILLIAMS WAS DENIED HIS RIGHT TO TRIAL BY JURY AND TO DUE PROCESS WHEN THE JURY WAS PROVIDED A “TO CONVICT” INSTRUCTION THAT OMITTED AN ELEMENT OF THE AGGRAVATING FACTO.. 12

    a. In a trial on an aggravating factor for an exceptional sentence, the jury must be instructed on every element of the aggravating factor. 12

        i. *Aggravating circumstances are elements of the greater offense* ..... 12

        ii. *The “to convict” instruction must set forth every essential element of the crime charged*..... 13

        iii. *This issue is properly raised on appeal* ..... 14

    b. Greater than usual disregard and higher than usual threat or culpability, shown by the pattern and similar nature of prior offenses, are elements of this aggravating factor which must be included in the “to convict” instruction ..... 16

    c. Without the non-statutory essential elements of the rapid recidivism aggravating factor, the “to convict” instruction was fatally flawed..... 20

    d. The error is not harmless and reversal of the exceptional sentence is required..... 22

3. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THE AGGRAVATING CIRCUMSTANCE OF “RAPID RECIDIVISM .....	24
4. THE COURT’S FINDINGS OF FACT AND THE RESULTING EXCEPTIONAL SENTENCE VIOLATED MR. WILLIAMS’ RIGHTS TO A JURY TRIAL. ....	25
a. The Washington and United States Constitutions guarantee a jury trial on aggravating circumstances.....	25
b. The sentencing court’s Findings of Fact and Conclusions of Law were based on facts that were not found by the jury beyond a reasonable doubt .....	27
c. The error was not harmless, requiring reversal.....	32
5. THE COURT’S FAILURE TO INSTRUCT THE JURY ON THE PRESUMPTION OF INNOCENCE RELIEVED THE STATE OF ITS BURDEN TO PROVE THE AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT.....	33
a. Mr. Williams had the Due Process right to have the jury instructed that he was presumed innocent of the aggravating factor .....	33
i. After Apprendi, the presumption of innocence applies to aggravating factors.....	35
c. Failure to instruct the jury on the presumption of innocence, particularly in the context of a bifurcated trial, was constitutional error requiring reversal .....	38
i. <i>This Court should find the error is structural</i> .....	38
ii. <i>Even if the error is not structural, it is not harmless</i> .....	44
6. THE PHRASE “SHORTLY AFTER BEING RELEASED FROM INCARCERATION” VIOLATES THE DUE PROCESS VAGUENESS DOCTRINE.....	50
a. Traditional due process analysis applies to aggravating factors which must be found by a jury.....	50
b. The term “shortly after” is inherently subjective and relative and therefore unconstitutionally vague.....	52
c. The term “released from incarceration” is undefined and indefinite and therefore unconstitutionally vague .....	54
d. RCW .94A.535(3)(t) is unconstitutionally vague under both prongs.....	57

7. SPECTATOR MISCONDUCT CREATED AN IMPERMISSIBLE RISK THAT THE JURY WAS IMPROPERLY INFLUENCED, VIOLATING MR. WILLIAMS’ RIGHT TO A FAIR TRIAL ON THE AGGRAVATING FACTOR ..... 59

    a. The contact constituted serious spectator misconduct, violating Mr. Williams’ rights to a fair trial..... 59

    b. The trial court abused its discretion in denying the defense motion to strike the jury panel and empanel a new jury ..... 63

    c. Reversal is required..... 64

E. CONCLUSION ..... 70

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court**

<u>Bellevue v. Miller</u> , 85 Wn.2d 539, 536 P.2d 603 (1975).....	53
<u>City of Bellevue v. Lorang</u> , 140 Wn.2d 19, 992 P.2d 496 (2000).....	50
<u>In re Lile</u> , 100 Wn.2d 224, 668 P.2d 581 (1983).....	34, 38, 48, 49
<u>Linbeck v. State</u> , 1 Wash. 336, 25 P. 452 (1890) .....	65
<u>Seattle v. Drew</u> , 70 Wn.2d 405, 423 P.2d 522 (1967) .....	53
<u>Seattle v. Gellein</u> , 112 Wn.2d 58, 768 P.2d 470, 775 P.2d 448 (1989).....	8
<u>Seattle v. Pullman</u> , 82 Wn.2d 794, 514 P.2d 1059 (1973).....	53
<u>Seattle v. Rice</u> , 93 Wn.2d 728, 612 P.2d 792 (1980).....	53, 56
<u>Sofie v. Fibreboard Corp.</u> , 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).....	26
<u>Spokane v. Douglass</u> , 115 Wn.2d 171, 795 P.2d 693 (1990) .....	50, 52
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	63
<u>State v. Beito</u> , 167 Wn.2d 497, 220 P.3d 489 (2009) .....	31
<u>State v. Bergeron</u> , 105 Wn.2d 1, 711 P.3d 1000 (1985).....	14
<u>State v. Boogaard</u> , 90 Wn.2d 733, 585 P.2d 789 (1978) .....	60
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997) .....	66, 67
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995).....	14, 23
<u>State v. Caliguri</u> , 99 Wn.2d 501 , 664 P.2d 466 (1983).....	64
<u>State v. Cox</u> , 94 Wn.2d 170, 615 P.2d 465 (1980) .....	38
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003).....	14
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	23, 44
<u>State v. Flores</u> , 164 Wn.2d 1, 186 P.3d 1038 (2008).....	30, 31, 32
<u>State v. Glas</u> , 147 Wn.2d 410, 54 P.3d 147 (2002).....	54
<u>State v. Goldberg</u> , 149 Wn.2d 888, 72 P.3d 1083 (2003).....	60
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	8
<u>State v. Hagar</u> , 158 Wn.2d 369, 374, 144 P.3d 298 (2006).....	31
<u>State v. Hilt</u> , 99 Wn.2d 452, 662 P.2d 52 (1983).....	53
<u>State v. Hopson</u> , 113 Wn.2d 273, 778 P.2d 1014 (1989) .....	65
<u>State v. Hughes</u> , 54 Wn.2d 118, 110 P.3d 192 (2005)17, 18, 19, 22, 25, 53, 56, 57	
<u>State v. Johnson</u> , 100 Wn.2d 607, 674 P.2d 145 (1983).....	14
<u>State v. Kirkman</u> , 159 Wn.2d 918, 115 P.3d 125 (2007).....	15
<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996).....	14, 15
<u>State v. Maciolek</u> , 101 Wn.2d 259, 676 P.2d 996 (1984).....	52
<u>State v. McHenry</u> , 88 Wn.2d 211, 558 P.2d 188 (1977).....	38
<u>State v. Mills</u> , 154 Wn.2d 1, 103 P.3d 415 (2005) .....	15
<u>State v. Nordby</u> , 106 Wn.2d 514, 723 P.2d 1117 (1986).....	51

<u>State v. O’Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	14
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008)(“Recuenco III”) .....	27, 35, 42, 43
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2000) .....	15
<u>State v. Roswell</u> , 165 Wn.2d 186, 196 P.3d 705 (2008).....	16
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	8
<u>State v. Shutzler</u> , 82 Wash. 365, 144 P. 284 (1914).....	65
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997) .....	14, 23
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003) .....	26
<u>State v. Suleiman</u> , 158 Wn.2d 280, 143 P.3d 795 (2006).....	21, 22, 26
<u>State v. Tili</u> , 148 Wn.2d 350, 60 P.3d 1192 (2003).....	21, 22, 51
<u>State v. Waite</u> , 135 Wash. 667, 238 P. 617 (1925).....	65
<u>State v. Weber</u> , 99 Wn.2d 158, 659 P.2d 1102 (1983) .....	65
<u>State v. White</u> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	53
<u>State v. Williams</u> , 144 Wn.2d 197, 26 P.3d 890 (2001) .....	50
<u>State v. Williams-Walker</u> , ___ P.3d ___, 2010 WL 118211 (Jan. 14, 2010) .....	26, 29, 32, 42, 43
<u>State v. Wroth</u> , 15 Wash. 621, 47 P. 106 (1896) .....	65

### **Washington Court of Appeals**

<u>State v. Briggs</u> , 55 Wn.App. 44, 776 P.2d 1347 (1989) .....	69
<u>State v. Butler</u> , 75 Wn.App. 47, 54, 876 P.2d 481 (1994), <u>rev. denied</u> , 125 Wn.2d 1021 (1995).....	17, 18, 19, 22, 25, 53, 56
<u>State v. George</u> , 67 Wn.App. 217, 834 P.2d 664 (1992), <u>rev. denied</u> , 120 Wn.2d 1023 (1993).....	17
<u>State v. Gordon</u> , ___ P.3d ___, 2009 WL 4756146 (Dec. 14, 2009)14, 15, 16, 20, 21, 22, 23, 24, 29, 31	
<u>State v. J.D.</u> , 86 Wn.App. 501, 937 P.2d 630 (1997).....	57
<u>State v. Jacobsen</u> , 92 Wn. App. 958, 965 P.2d 1140 (1998).....	50, 51
<u>State v. Kruger</u> , 116 Wn.App. 685, 67 P.3d 1147, <u>rev. denied</u> , 150 Wn.2d 1024 (2003).....	9
<u>State v. Lord</u> , 128 Wn.App. 216, 114 P.3d 1241 (2005) .....	60, 61, 62, 69
<u>State v. Owens</u> , 95 Wn.App. 619, 976 P.2d 656 (1999).....	50
<u>State v. Saltz</u> , 137 Wn.App. 576, 154 P.3d 282 (2007).....	18, 53, 56
<u>State v. Saraceno</u> , 23 Wn.App. 473, 596 P.2d 297 (1979).....	64
<u>State v. Spruell</u> , 57 Wn.App. 383, 788 P.2d 21 (1990). .....	11
<u>State v. Zimmerman</u> , 130 Wn.App. 170, 121 P.3d 1216 (2005) .....	43

## United States Supreme Court

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	12, 13, 35, 36, 37, 48
<u>Blakely v. Washington</u> , 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	12, 13, 27, 31, 37, 41, 50, 51, 53
<u>California v. Roy</u> , 519 U.S. 2, 5, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996)	41
<u>Carella v. California</u> , 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989).....	41
<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) .....	23, 39
<u>Coffin v. United States</u> , 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895) .....	34
<u>Duncan v. La.</u> , 391 U.S. 145, 177, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) .....	25
<u>Giacco v. Pennsylvania</u> , 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).....	52
<u>Gideon v. Wainwright</u> , 372 U.S. 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....	38
<u>Grayned v. City of Rockford</u> , 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).....	52
<u>Harris v. United States</u> , 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).....	13
<u>Holbrook v. Flynn</u> , 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) .....	26, 69
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)..	8, 33, 36, 39, 44
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	8
<u>Kentucky v. Whorton</u> , 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979).....	39
<u>McKaskle v. Wiggins</u> , 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).....	38
<u>Mullaney v. Wilbur</u> , 421 U.S. 624, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)	9
<u>Neder, v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).....	40, 41, 43, 48
<u>Pope v. Illinois</u> , 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987)...	41
<u>Remmer v. United States</u> , 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) .....	64
<u>Ring v Arizona</u> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)	12, 35, 37
<u>Rose v. Clark</u> , 478 U.S. 570, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986) .....	39

<u>Sattazahn v. Pennsylvania</u> , 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).....	13, 35
<u>State v. Powell</u> , 167 Wn.2d 672, __ P.3d __, 2009 WL 4844354 (Dec. 17, 2009) .....	13
<u>Sullivan v. Louisiana</u> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).....	23, 38, 39, 40, 42, 43
<u>Taylor v. Kentucky</u> , 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) .....	34, 35
<u>Tumey v. Ohio</u> , 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed.2d 749 (1927).....	38
<u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (“Recuenco II”) .....	41, 42

### Decisions of Federal Courts

<u>Gibson v. Clanon</u> , 633 F.2d 851 (9th Cir.1980) .....	69
<u>Llewellyn v. Stynchcombe</u> , 609 F.2d 194 (5th Cir.1980) .....	69
<u>Norris v. Risley</u> , 918 F.2d 828 (9 <sup>th</sup> Cir. 1990).....	60, 61, 62
<u>United States v. Bagley</u> , 641 F.2d 1235 (9th Cir.1981).....	69
<u>United States v. Bagnariol</u> , 665 F.2d 877 (9th Cir.1981) .....	69
<u>United States v. Wivell</u> , 893 F.2d 156 (8th Cir. 1990) .....	51

### Decisions of Other Courts

<u>Johnson v. Commonwealth of Virginia</u> , 259 Va. 654 S.E.2d 769, <u>cert. denied</u> , 531 U.S. 981, 121 S.Ct. 432, 148 L.Ed.2d 439 (2000) .....	61
<u>Nguyen v. Texas</u> , 977 S.W.2d 450 (1998).....	61
<u>State v. Braxton</u> , 344 N.C. 702, 477 S.E.2d 172 (1996).....	61
<u>State v. Franklin</u> , 174 W.Va. 469, 327 S.E.2d 449 (1985) .....	60, 61, 62
<u>State v. McNaught</u> , 238 Kan. 567, 713 P.2d 457 (1986).....	61

### Statutes and Rules

BMC 10.62.030.....	57
RAP 2.5.....	14, 15
RCW 10.58.020 .....	33
RCW 9.94A.535.....	2, 4, 5, 16, 18, 20, 21, 27, 28, 30, 53, 57
RCW 9.94A.537.....	27
RCW 9A.36.031.....	9, 28

### **Other Authorities**

9 J. Wigmore, Evidence § 2511 (3d ed. 1940).....	35
Laws 2005, ch. 68, § 1 .....	13, 18
Laws 2005, ch. 68, § 5 .....	13

### **Washington Constitution**

Wash. Const. article I, § 3 .....	1, 2, 14, 25
Wash. Const. article I, § 21 .....	1, 2, 25, 26
Wash. Const. article I, § 22.....	1, 2, 14, 25, 26

### **United States Constitution**

U.S. Const. amend. VI .....	1, 2, 13, 25
U.S. Const. amend. XIV .....	1, 2, 4, 5, 14, 25, 33, 50

A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to convict Taliferro Williams of assault in the third degree.

3. The trial court erred in issuing a “to convict” instruction which relieved the State of its burden of proving every element of the aggravating factor, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and article I, §§ 3 and 22 of the Washington Constitution.

3. The State presented insufficient evidence to prove the “rapid recidivism” aggravating factor.

4. The exceptional sentence was based in part on facts not found by a jury, in violation of Mr. Williams’ rights to a jury trial under the Sixth Amendment to the Constitution of the United States and article I, §§ 21 and 22 of the Washington Constitution.

5. The trial court erred in failing to instruct the jurors regarding the constitutional presumption to be applied in determining whether aggravating circumstance had been proven, in violation of the due process clause of Fourteenth Amendment to the Constitution of the United States.

6. The “rapid recidivism” aggravator is unconstitutionally vague, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

7. Spectator misconduct during the exceptional sentence phase of the trial violated Mr. William's rights to a fair jury under the Sixth and Fourteenth Amendments and article I, §§ 3, 21 and 22 3 21 22.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An accused person has the right under the Sixth and Fourteenth Amendments to require the State to prove every essential element of a criminal charge to a jury beyond a reasonable doubt. To convict Mr. Williams of assault in the third degree, the State had to prove he acted intentionally. Without evidence that Mr. Williams possessed the requisite mens rea, did the resulting conviction violate due process, requiring reversal?

2. Jury instructions may not relieve the State of its burden to prove every element of the crime charged beyond a reasonable doubt. Because facts which increase the maximum punishment to which an accused person is exposed are elements of the greater crime, this principle applies to an aggravating factor as firmly as it does to an underlying conviction. In order to pass constitutional muster, RCW 9.94A.535(3)(t) has been construed to require proof that the defendant's pattern of past similar offenses demonstrates heightened harm or culpability and a greater disregard for the law than otherwise would be the case. The "to convict" instruction on the aggravating factor incorrectly told the jury to consider

only whether the offense was committed shortly after Mr. Williams was released from incarceration. Does a “to convict” instruction containing a misstatement of the law constitute manifest constitutional error, requiring reversal?

3. Both the United States and Washington Constitutions require that any fact, other than a prior conviction, which increases the defendant’s maximum sentence must be found by a jury beyond a reasonable doubt. Here, the State proved only the number of hours which elapsed between Mr. Williams’ last release from King County Jail and the commission of the current offense. The State offered no evidence to indicate his pattern of past similar offenses demonstrated heightened harm or culpability and a greater disregard for the law than otherwise would be the case. Did the special verdict, finding the existence of the “rapid recidivism” aggravating factor violate due process, requiring reversal?

4. Corollary to the State’s burden of proof is the accused’s constitutional right to be presumed innocent. The court failed to instruct the jury it must presume Mr. Williams innocent of the aggravating factor, while the circumstances of the bifurcated trial suggested that there was no presumption of innocence in the second phase. Did this omission violate Mr. Williams’ due process rights, requiring reversal?

5. The jury made a single finding: that Mr. Williams committed the current assault “shortly after being released from incarceration.” The court went on to enter written findings stating the number and nature of Mr. Williams’ prior convictions, describing the offense that led to his last incarceration before the current offense, and concluding this set of facts “qualifies as rapid recidivism.” The court also found, unrelated to the charged aggravator, that the assault was committed with a weapon and without provocation. As none of these facts were found by the jury, did the resulting exceptional sentence violate Mr. Williams’ jury trial rights?

6. A statute is void for vagueness if it fails to provide sufficient guidance to law enforcement and the courts. Under RCW 9.94A.535(3)(t), the court may impose a sentence above the standard range if the jury finds “the defendant committed the current offense shortly after being released from incarceration.” “Shortly after” is an inherently subjective term, open to widely varying and inconsistent interpretations. Different prosecutors, judges, and juries may interpret “shortly after” differently in the application of this statute. Does the vagueness of RCW 9.94A.535(3)(t) allow arbitrary and ad-hoc enforcement of the law, in violation of the due process clause of the Fourteenth Amendment?

7. The plain statutory language “release from incarceration” provides no guidance on how to interpret the term “incarceration.”

Caselaw connecting the “rapid recidivism” factor to indicators of heightened harm or culpability and particular disregard or disdain for the law answer some, but not all questions about this term. With or without jury instructions on the components provided in caselaw, the term “incarceration” is undefined and indefinite. Does the vagueness of RCW 9.94A.535(3)(t) allow arbitrary and ad-hoc enforcement of the law, in violation of the due process clause of the Fourteenth Amendment?

8. The United States and Washington Constitutions guarantee a criminal defendant the right to a fair trial with an impartial jury and a verdict based solely on the evidence presented, not extraneous circumstances. Before the jury deliberated on Mr. Williams’ aggravating factor, spectators approached them, saying “I am very mad” and “you put my son in jail.” The court denied the defense motion to empanel a new jury for the aggravating factor phase only. Did the spectators’ contact with the jury create an impermissible risk of influence, requiring a new trial on the aggravating factor?

#### C. STATEMENT OF FACTS

At approximately 11:30 pm on September 13, 2008, Seattle Police Department Officers James Shearer and Kerry Ziegler were at Second and Blanchard in Seattle. 1/14/09RP 11, 16; 1/15/09RP 15. Officer Shearer testified he heard someone yelling words to the effect of “Hey asshole, I

can kick your ass.” 1/14/09RP 17. He saw the speaker, later identified as Taliferro Williams, walking behind two other men. 1/14/09RP 17-18.

The officers rode their bicycles across the street to contact Mr. Williams. 1/14/09RP 19. They approached Mr. Williams from behind and did not identify themselves as police as they approached. 1/15/09RP 30, 58.

Officer Ziegler testified he saw a small bottle in Mr. Williams’ left hand and grabbed his left wrist, simultaneously telling him to drop the bottle. 1/15/09RP 31. Officer Shearer testified he grabbed Mr. Williams’ right arm as Mr. Williams attempted to pull or “jerk” away from Officer Ziegler, saw Mr. Williams’ arm come back, and felt multiple “stinging sensations” on his knee. 1/14/09RP 22-23; 1/15/09RP 53-54. Officer Zieger testified that Mr. Williams dropped the bottle in his left hand and made a “downwards stabbing motion” with his right. 1/14/09RP 34. Both officers described Mr. Williams’ motions at this moment as “flailing.” 1/14/09RP 23; 1/15/09RP 40. They then pushed Mr. Williams onto the nearest car. 1/15/09RP 39. Officer Shearer testified Mr. Williams was trying to conceal a hemostat in his right hand. 1/14/09RP 22. The entire episode, from Officer Zieger telling Mr. Williams to drop the bottle to Mr. Williams being held against the car, lasted two to three minutes. 1/15/09RP 40, 50.

The officers arrested Mr. Williams and Officer Ziegler found him “obviously intoxicated.” 1/15/09RP 42. The two other men were gone by this time. 1/14/09RP 18. Officer Shearer testified he sustained two to three small cuts, totaling about four inches, on his left leg. 1/14/09RP 23.

Mr. Williams was charged with assault in the third degree and with having committed the offense shortly after release from incarceration. CP 43. In the guilt phase of the bifurcated proceeding, the jury convicted him as charged. CP 25. The exceptional sentence phase, the “rapid recidivism” aggravating factor was put before the jury, over a defense objection to the vagueness of statute. 1/16/09RP 13-15. King County Jail Captain Todd Clark testified Mr. Williams had been released from the jail at 8:58 a.m. on September 13, 2008. 1/16/09RP 9. The jury found by special verdict that the assault was committed “shortly after being released from incarceration.” CP 26.

At sentencing, the court found Mr. Williams had three previous third degree assault convictions, the last of which led to the incarceration just prior to the current offense, and committed the current offense with a weapon and without provocation. CP 41-42. Based on these findings, court imposed an exceptional sentence of 36 months. CP 44-54.

D. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT MR. WILLIAMS' CONVICTION FOR ASSAULT IN THE THIRD DEGREE.

a. Sufficient evidence must be presented to support each element of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989). On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id.

b. Insufficient evidence was presented to convict Mr. Williams of assault in the third degree. Mr. Williams was charged with assault in the third degree under RCW 9A.36.031(1)(g). CP 43. To convict Mr. Williams, the State was required to prove beyond a reasonable doubt that, “under circumstances not amounting to assault in the first or second degree” Mr. Williams assaulted a law enforcement officer or “a law enforcement officer or other employee of a law enforcement agency who was performing his... official duties.” RCW 9A.36.031.

The State was also required to prove intent, a non-statutory element of assault. State v. Kruger, 116 Wn.App. 685, 692, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003); see also Mullaney v. Wilbur, 421 U.S. 624, 699, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (State must prove mental state associated with the crime charged). Intent is a non-statutory element of assault. The jury here was properly instructed that assault is intentional and that “[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 21-22.

Both officers testified that they approached Mr. Williams from behind. 1/15/09RP 30, 52. Officer Shearer testified they did not identify themselves as police as they approached. 1/15/09RP 58. Officer Shearer testified that when he grabbed Mr. Williams, he was facing the opposite

direction, and Officer Zieger did not see Mr. Williams look at Officer Shearer at any point during the purported assault. 1/15/09RP 41, 53. The conclusion that Mr. Williams saw them and knew they were police officers (before it was too late) was based exclusively on Officer Shearer's testimony that "he looked back and saw both of us as we came up on him." 1/15/09RP 59. But Officer Shearer also testified that just before he grabbed Mr. Williams, he looked to his left and right and "within seconds, we were on him." 1/15/09RP 53. Officer Shearer extrapolated that in those seconds, "knew who we were" and "knew we were closing in." 1/14/09RP 19; 1/15/09RP 53. This assumption is purely speculative and, especially in light of Officer Shearer's observation that Mr. Williams "appeared irrational," did was not evidence upon which a reasonable fact finder would rely. 1/14/09RP 19.

It is easy to imagine, then, how Mr. Williams experienced the situation: on a Belltown sidewalk in the middle of the night, he suddenly felt one, then the other arm grabbed from behind, by unknown persons.

Unsurprisingly, Mr. Williams' reaction was to "jerk" or pull away from Officer Zieger. 1/14/09RP 22. Tellingly, both officers described his actions as "flailing." 1/14/09RP 23, 40. Officer Zieger testified he had already begun to push Mr. Williams against the nearest car with the objective of "disrupt[ing] his balance." 1/15/09RP 39. That objective was

easily achieved, especially given that Mr. Williams was quite intoxicated, according to Officer Zieger's testimony. 1/15/09RP 42. As Mr. Williams attempted to pull away from whoever was grabbing and pushing him, he lost his balance and involuntarily "flailed" his arms. As he flailed, his right hand, containing a hemostat, inadvertently struck Officer Shearer's leg.

No reasonable trier of fact could find beyond a reasonable doubt that Mr. Williams intentionally cut Officer Shearer. Instead, a reasonable trier of fact would find his involuntarily movements, in reaction to an alarming situation, unintentionally caused Officer Shearer's injury. The State failed to prove the requisite mens rea.

c. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Williams had the requisite intent to commit third-degree assault, this Court should reverse his conviction and dismiss the charge against him. See e.g. State v. Spruell, 57 Wn.App. 383, 389, 788 P.2d 21 (1990) (reversing a possession conviction where the State produced evidence of fleeting, but not actual possession).

2. MR. WILLIAMS WAS DENIED HIS RIGHT TO TRIAL BY JURY AND TO DUE PROCESS WHEN THE JURY WAS PROVIDED A “TO CONVICT” INSTRUCTION THAT OMITTED AN ELEMENT OF THE AGGRAVATING FACTOR.

a. In a trial on an aggravating factor for an exceptional sentence, the jury must be instructed on every element of the aggravating factor.

i. Aggravating circumstances are elements of the greater offense. In Apprendi and Blakely, the United States Supreme Court clarified the long-standing requirement that *any* fact that increases the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). This is true even when the fact is labeled a “sentencing factor” or “sentence enhancement” by the Legislature. Apprendi, 530 U.S. at 482-83; Blakely, 542 U.S. at 306-07.

In Ring v Arizona, the Court held “aggravating circumstances that make a defendant eligible for the death penalty or an exceptional sentence ‘operate as the functional equivalent of an element of a greater offense.’” 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), quoting Apprendi, 530 U.S. at 494 n.19. In Sattazahn v. Pennsylvania, the Court reiterated this principle:

Our decision in [Apprendi] clarified what constitutes an “element” of an offense for purposes of the Sixth Amendment’s jury-trial guarantee. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt.

537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). Likewise, in Harris v. United States, the Court explained such facts “would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.” 536 U.S. 545, 557, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).

The Legislature intended its 2005 amendments to the SRA’s exceptional sentencing procedure to conform the statute to Blakely. State v. Powell, 167 Wn.2d 672, \_\_ P.3d \_\_, 2009 WL 4844354 (Dec. 17, 2009) at 2. The Legislature specifically stated its intent “that aggravating facts, other than the fact of a prior conviction, will be placed before the jury.” Laws 2005, ch. 68, § 1. In keeping with Blakely, the Legislature explicitly required the facts supporting aggravating factors be found by a unanimous jury beyond a reasonable doubt. Laws 2005, ch. 68, § 5.

*ii. The “to convict” instruction must set forth every essential element of the crime charged.* The State bears the burden of proving beyond a reasonable doubt every essential element of the crime

charged. Winship, 397 U.S. at 364; State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); U.S. Const. amend. XIV; Wash. Const. art 1, §§ 3 3, 22 22. The “to-convict” instruction carries special weight, serving as a “‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003) (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)).

Jurors cannot be expected or required to guess at the meaning of an element or supply a missing element from other instructions. Deryke, 110 Wn.App. at 820; Smith, 131 Wn.2d at 262-63. At the most basic level, “if the jury might assume that an essential element need not be proved,” then “it cannot be said that the defendant has had a fair trial.” State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), overruled on other grounds in State v. Bergeron, 105 Wn.2d 1, 711 P.3d 1000 (1985).

*iii. This issue is properly raised on appeal.* Failure to instruct the jury on every element of an aggravating factor is manifest error affecting a constitutional right that may be raised for the first time on appeal. RAP 2.5(a); State v. Gordon, \_\_\_ P.3d \_\_\_, 2009 WL 4756146, at 8 (Dec. 14, 2009), citing State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), abrogated on other grounds by State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

“Errors are ‘manifest’ for purpose of RAP 2.5(a)(3) when they have ‘practical and identifiable consequences in the trial of the case.’” State v. Mills, 154 Wn.2d 1, 9, 103 P.3d 415 (2005), quoting State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000). The focus of the inquiry “must be on whether the error is so obvious on the record that the error warrants appellate review.” State v. Kirkman, 159 Wn.2d 918, 935, 115 P.3d 125 (2007).

For reasons discussed in further detail below, this Court recently found a comparable error – failure to instruct a jury on the nonstatutory elements of aggravating factors in “to convict” instructions – violated the defendants’ constitutional rights and was “patently obvious on the record” and therefore manifest. Gordon, WL 4756146 at 8-9. Although the defendants had not raised the issue at trial, the Court found manifest constitutional error warranting appellate review. Id.

This case is indistinguishable from Gordon. Although Mr. Williams did not challenge the “to convict” instruction or offer an alternate instruction, the omission, exactly like that in Gordon, presents a manifest error of constitutional magnitude which may be raised for the first time on appeal. Gordon, WL 4756146 at 8-9; RAP 2.5(a); LeFaber, 128 Wn.2d at 900.

b. Greater than usual disregard and higher than usual threat or culpability, shown by the pattern and similar nature of prior offenses, are elements of this aggravating factor which must be included in the “to convict” instruction. Under RCW 9.94A.535(3)(t), the court may impose a sentence above the standard range if the jury finds beyond a reasonable doubt that “the defendant committed the current offense shortly after being released from incarceration,” an aggravating circumstance commonly referred to as “rapid recidivism.” Mr. Williams was charged with this factor in a bifurcated proceeding with the same jury that convicted him of the underlying assault.

This Court recently clarified that “aggravating factors are elements of the crime for purposes of instructing the jury on exceptional sentencing.” Gordon, WL 4756146 at 8 (emphasis added), citing State v. Roswell, 165 Wn.2d 186, 194, 196 P.3d 705 (2008). The Court went on to hold that “where an appellate court has further defined the legal standard of a statutory aggravating factor,” the jury must be instructed accordingly. Gordon, WL 4756146 at 8. Like the aggravating factors at issue in Gordon, the “rapid recidivism” aggravator has been substantially defined by the appellate courts over the years.

More than a decade before the rapid recidivism factor was codified in statute, this Court recognized it as an aggravating circumstance

justifying an exceptional sentence. State v. Butler, 75 Wn.App. 47, 54, 876 P.2d 481 (1994), rev. denied, 125 Wn.2d 1021 (1995). This Court explained that although a sentence could not be increased beyond the maximum based on prior convictions alone, in that case the trial court's findings were "distinguishable from mere criminal history" because the defendant's "immediate reoffense ... reflect[ed] a disdain for the law so flagrant as to render him particularly culpable in the commission of the current offense." Id. The Court relied on its earlier opinion holding an exceptional sentence was justified when the defendant committed the crime while on parole, indicating "a greater disregard for the law than otherwise would be the case." Id., citing State v. George, 67 Wn.App. 217, 224, 834 P.2d 664 (1992), rev. denied, 120 Wn.2d 1023 (1993).

Shortly after Blakely, the Washington Supreme Court held the rapid recidivism factor must be found by a jury beyond a reasonable doubt. State v. Hughes, 54 Wn.2d 118, 141-42, 110 P.3d 192 (2005), citing Blakely, 542 U.S. at 306-07. Critically, Hughes relied on Butler to hold this factor required a factual finding beyond criminal history and was therefore an essential element pursuant to Blakely. Hughes, 54 Wn.2d at 141-42, citing Butler, 75 Wn.App. at 53-54. The Hughes Court observed that the sentencing court had found the circumstances of recidivism

“demonstrated a flagrant disregard for the law and complete lack of remorse.” These findings are extremely similar to the court’s conclusion in Butler that the short time between release from prison and reoffense demonstrated a disregard and disdain for the law. The conclusions go well beyond merely stating Hughes’ prior convictions. Indeed, if that was all that the aggravating factor was based on, it could not support an exceptional sentence under Washington law.... Instead, the factor must consider the combination of the various similar offenses and the heightened harm or culpability that pattern indicates.

Hughes, 154 Wn.2d at 141-42.

When the Legislature included the rapid recidivism factor in the exclusive list of aggravating circumstances, it stated its intent “to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances.” Laws 2005, ch. 68, § 1; RCW 9.94A.535(3). At that time, the rapid recidivism aggravator was already well-defined by the courts as not merely reciting the fact of prior convictions and the number of hours before recidivism, but actually requiring a pattern of similar prior offenses indicating particular “harm or culpability” and “disregard and disdain for the law.”

Hughes, 154 Wn.2d at 141-42.

Only one published case has addressed this factor since the amendments to RCW 9.94A.535(3). State v. Saltz, 137 Wn.App. 576, 154 P.3d 282 (2007). Saltz’s aggravating factor was not put before a jury

because he stipulated to having committed the offense “shortly after being released from incarceration.” Id. at 584. However, he argued this fact could not support an exceptional sentence as a matter of law, because it was indistinguishable from “an ordinary case of recidivism or the mere fact of his prior convictions.” Id. at 585. The Court disagreed, holding rapid recidivism is a substantial and compelling reason for an exceptional sentence only when “the circumstances show ‘a greater disregard for the law than otherwise would be the case’ based on the ‘especially short time period between prior incarceration and reoffense.’” Id., quoting Butler, 75 Wn.App. at 54. The sentencing court in Saltz found such “disregard” after considering not only the speed of reoffense, but also the fact that it was the same crime against the same victim as the last offense for which he was incarcerated. Saltz, 137 Wn.App. at 585-86.

Thus, Washington Courts have consistently held that the rapid recidivism factor is not proven merely by the objective calculation of time since the defendant’s release. The State must prove the “pattern” of the “various similar offenses” demonstrate “heightened harm or culpability” and “a greater disregard for the law than otherwise would be the case.” Hughes, 54 Wn.2d at 142; Butler, 75 Wn.App. at 54. These considerations necessarily define the sparse language of the statute, and thus are themselves elements of the aggravating factor.

c. Without the non-statutory essential elements of the rapid recidivism aggravating factor, the “to convict” instruction was fatally flawed. The “to convict” instruction in the aggravating factor phase of the trial read as follows:

To convict the defendant of having committed the crime of assault in the third degree shortly after being released from incarceration, the following element must be proved beyond a reasonable doubt:

(1) That the crime of assault in the third degree occurred shortly after the defendant was released from incarceration;

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a special verdict of “yes.”

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a special verdict of “no.”

CP 30. The special verdict form asked, “Did the defendant commit the crime of assault third degree shortly after being released from incarceration?” CP 26.

As this Court recently held “where an appellate court has further defined the legal standard of a statutory aggravating factor yet the jury instruction fails to include the legal standard, an error of constitutional magnitude is present.” Gordon, WL 4756146 at 8. Before or after Blakely, through judicial creation or RCW 9.94A.535(3)(t), no published case has held that the rapid recidivism factor may be based only on the

fact that the defendant committed the current offense shortly after release from incarceration. The State must also prove a) that the prior offense bore some similarity to the current offense; b) that the recidivism demonstrated a heightened threat or culpability; and c) that the recidivism demonstrated greater than usual disregard for the law. Mr. Williams' jury was not instructed to consider any of these questions.

In Gordon, two co-defendants were convicted of second degree murder and charged with the aggravating factors of deliberate cruelty and particular vulnerability of the victim. WL 4756146 at 6. As in the instant case, the statutory expression of each of these factors had been further defined by the appellate courts<sup>1</sup> but the “to convict” instructions and special verdict forms for each aggravating factor simply mirrored the statutory language. Id.

As discussed above, this Court first held that further definition of a statutory aggravating factor supplied by the appellate courts becomes an

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<sup>1</sup> RCW 9.94A.535(3)(a) provides for an exceptional sentence if the jury finds “[t]he defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.” The Supreme Court has defined “deliberate cruelty” as “gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself... the cruelty must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense.” State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003) (citation omitted).

RCW 9.94A.535(b) sets forth the aggravating factor that “[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” The Supreme Court has held “particular vulnerability” also requires that the victim's vulnerability was a substantial factor in the commission of the crime. State v. Suleiman, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

element of that aggravator, for purposes of instructing the jury. Id. at 8. Thus, for the particular vulnerability and deliberate cruelty factors, the definitions supplied in Tili and Suleiman were essential to provide the jury with an accurate statement of the applicable law. Id. at 9-10.

The omission of these definitions presented a “patently obvious” manifest error of constitutional magnitude. Id. 8-10. The erroneous “to convict” instructions did not merely fail to define technical terms, but omitted essential elements of the aggravators, leaving the jury “to deliberate with a misleading and incomplete statement of the law. Id. at 7, 9. The Court found it “impossible to conclude, beyond a reasonable doubt, that the jury would have reached the same conclusion had its deliberations been framed by this additional inquiry” into the considerations described by the Supreme Court in Tili and Suleiman. Id. at 10. The error therefore could not be harmless. Id.

d. The error is not harmless and reversal of the exceptional sentence is required. This case is indistinguishable from Gordon. The record plainly shows that the “to convict” instruction omitted the essential component supplied by Butler and Hughes.

An error of constitutional magnitude is harmless only if the appellate court is convinced beyond a reasonable doubt that the error did not affect the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct.

824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The harmless error inquiry, when the error is of constitutional magnitude,

is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee.

Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (emphasis in original).

It is impossible to say that the jury would have reached the same result if asked whether the pattern and nature of Mr. Williams' recidivism indicated heightened harm or culpability and particular disdain or disregard for the law. As in Gordon, the deficient instruction renders the jury's verdict "fatally flawed." WL 4756146 at 10. The error cannot be harmless. Id.; see also Smith, 131 Wn.2d at 263, 265 ("when [a 'to convict'] instruction fails to state the law completely and correctly, a conviction based upon it cannot stand... failure to instruct on an element of an offense is automatic reversible error"); Byrd, 125 Wn.2d at 713-14 (failure to instruct the jury on every element of the crime is reversible error because it relieves the State of its burden of proving every element

beyond a reasonable doubt). Therefore, as in Gordon, Mr. Williams' special verdict on the aggravating factor must be dismissed and the exceptional sentence reversed.

3. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THE AGGRAVATING CIRCUMSTANCE OF "RAPID RECIDIVISM."

As discussed above, the facts supporting aggravating factors must be found by a unanimous jury beyond a reasonable doubt, and greater than usual disregard and higher than usual threat or culpability, shown by the rapidity of recidivism and the similarity of the prior offense, are elements of this aggravating factor. Gordon, WL 4756146 at 8. The State did not prove any of these elements, only that Mr. Williams committed the crime shortly after release from incarceration.

In the aggravating factor phase of the trial, King County Jail Captain Todd Clark testified that according to the booking records, Mr. Williams was released from the jail at 8:58 am on September 13, 2008 and was rebooked late the same night on the current offense. 1/16/09RP 9.

Taking the evidence in the light most favorable to the State, there was no evidence that Mr. Williams was previously incarcerated for a conviction, that the prior offense or offenses were of a similar nature to the current assault, or that the pattern of recidivism indicated particular harm, culpability, or disregard for the law. The jury only knew the amount of

time between Mr. Williams' release and the current offense. This evidence cannot prove the elements supplied in Butler and Hughes. The special factor must therefore be reversed and dismissed without prejudice, and the case remanded for resentencing within the standard range.

4. THE COURT'S FINDINGS OF FACT AND THE RESULTING EXCEPTIONAL SENTENCE VIOLATED MR. WILLIAMS' RIGHTS TO A JURY TRIAL.

a. The Washington and United States Constitutions guarantee a jury trial on aggravating circumstances. A criminal defendant is entitled to trial and unanimous verdict by jury. U.S. Const. amend. VI<sup>2</sup>, XIV<sup>3</sup> § 1; Wash. Const. art. I, §§ 3,<sup>4</sup> 21,<sup>5</sup> 22;<sup>6</sup> 3 21 22 Duncan v. La., 391 U.S. 145, 177, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that one accused of a crime is entitled to have his guilt or innocence

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<sup>2</sup> Wash. Const., article I, §22 provides, "In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed..."

<sup>3</sup> Wash. Const., article I, §22 provides, "In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed..."

<sup>4</sup> Wash. Const., article I, § 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

<sup>5</sup> Wash. Const., article I, §21 provides, "The right of trial by jury shall remain inviolate..."

<sup>6</sup> Wash. Const., article I, §22 provides, "In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed..."

determined solely on the basis of the evidence introduced at trial, and not on ... other circumstances not adduced as proof at trial.

Holbrook v. Flynn, 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (citations omitted).

Washington's guarantee of trial by jury is broader than the federal right. Wash. Const. art. I, §§ 21, 22;<sup>7</sup> 21<sup>8</sup> 21<sup>9</sup> 22; State v. Williams-Walker, \_\_ P.3d \_\_, 2010 WL 118211 (Jan. 14, 2010) at 2, 4, citing State v. Smith, 150 Wn.2d 135, 153, 75 P.3d 934 (2003). The "inviolable" right to an impartial trial by jury in Washington is one that is "deserving of the highest protection." Id. at 150, quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989).

As discussed above, the federal and State constitutions guarantee a jury trial on any fact which would increase a defendant's statement beyond the "statutory maximum" – the maximum that a judge may impose "without any additional findings." Suleiman, 158 Wn.2d at 289

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<sup>7</sup> Wash. Const., article I, §22 provides, "In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed..."

<sup>8</sup> Wash. Const., article I, §22 provides, "In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed..."

<sup>9</sup> Wash. Const., article I, §22 provides, "In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed..."

(emphasis added), quoting Blakely, 542 U.S. at 303-04. See e.g., State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008)(“Recuenco III”) (jury trial right violated by imposition of firearm enhancement without jury finding that defendant committed underlying offense with a firearm).

b. The sentencing court’s Findings of Fact and Conclusions of Law were based on facts that were not found by the jury beyond a reasonable doubt. RCW 9.94A.535(3) sets forth an exclusive list of aggravating circumstances, other than criminal history, that can support an exceptional sentence if found by a jury beyond a reasonable doubt. “The jury’s verdict on the aggravating factor must be unanimous, and by special interrogatory.” RCW 9.94A.537(3). Even then, the court retains discretion to impose an exceptional sentence only if it finds “that the facts found are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.537(6). The court must explain its reasons in written findings of fact and conclusions of law. RCW 9.94A.535.

Here the sentencing court entered the following Findings of Fact:

1. The defendant was previously convicted of multiple felony assault in both Washington State and Alaska. His last assault third conviction was reduced from an original charge of assault second degree.<sup>10</sup>
2. He was in custody in the Kind County Jail within 24 hours of when this offense occurred.

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<sup>10</sup> The findings were not numbered in the court’s actual Findings of Fact and Conclusions of Law, but are numbered here for ease of reference.

3. He assaulted a police officer without provocation in this incident.
4. He used a weapon to do so.
5. The court incorporates all of its oral rulings into this document as well.

CP 42-43. Of these Findings, only Number 2 was found beyond a reasonable doubt – or even considered – by the jury. The facts set forth in Number 1 were never before the jury, and Numbers 3 and 4 are wholly irrelevant to any applicable aggravating factor.<sup>11</sup>

The court also entered the following Conclusions of Law:

1. The defendant committed this assault within a day of release from jail on his last incarceration. This qualifies as rapid recidivism.
2. He used a weapon to commit this assault.
3. He committed this assault without provocation.
4. The defendant was previously convicted of assault third degree in 2001 in Alaska, 2003 in Alaska, 2007 in King County, and was sentenced on 9/28/07 on his latest assault third degree conviction. He was just released on that conviction when he committed this offense on 9/14/2008.

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<sup>11</sup> Under RCW 9.94A.535(3)(v), it is an aggravating circumstance if:

[t]he offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

But even if charged in this case, this aggravating factor could not apply because the victim's status as a law enforcement officer was an element of assault in the third degree. RCW 9A.36.031(1)(g).

CP 43. Again, the jury did not find Numbers 2-4 (which would be more properly characterized as Findings of Fact than Conclusions of Law) and in fact never heard the facts contained in Number 4.

In Gordon, the court's findings of fact included evidence that it claimed "supported the jury's verdict and that also supports the court's conclusions of law." Gordon, WL 4756146 at 10. However, this Court pointed out that the evidence in the findings was not found by the jury. Id. The jury was directed to answer only a single question about the existence of the aggravating factor. Id. Thus, the Court held "[t]o the extent the trial court went beyond the findings made by the jury, it erred." Id.

Even more recently, the Supreme Court reviewed three cases where the State alleged a firearm enhancement, the jury was given a special verdict form for a deadly weapon enhancement and consequently authorized a deadly weapon enhancement, and the sentencing court imposed a firearm enhancement. Williams-Walker, WL 118211 at 4. In two of these cases, the defendants were convicted of first-degree assault with a firearm; therefore, the jury had already found beyond a reasonable doubt that they each used a firearm in the commission of their offense. Id. Even so, the Court held those verdicts could not support the imposition of firearm enhancements not found by a jury. The Court found the sentencing courts had impermissibly relied on the underlying guilty

verdicts and disregarded the juries' special verdicts. Id. There was no error in the charging document, instructions, or jury findings; “[t]he error occurred when the judge imposed a sentence not authorized by the jury's express findings,” violating the defendants' rights to a jury trial under both the federal and State constitutions. Id. at 5.

In State v. Flores, an exceptional consecutive sentence was based on the “major VUCSA” aggravator under former RCW 9.94A.535(2)(e). 164 Wn.2d 1, 186 P.3d 1038 (2008). The statute provided for an exceptional sentence if:

[t]he current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so.

Former RCW 9.94A.535(2)(e) (emphasis added), quoted in Flores, 164 Wn.2d at 21. Flores was convicted by a jury of six counts of unlawful delivery of a controlled substance and one count of possession with intent to deliver, obviously more than the three transactions needed to qualify for the aggravator. Id. at 5, 22. However, the Court observed the statute did

not compel the finding of a “major VUCSA” where three transactions were found, it only permitted such a finding. Id. at 22.

Thus, the trial court had to make factual determinations in order to justify the exceptional sentence. In particular, the trial court had to infer the offenses were “more onerous than the typical offense.” In drawing that inference – an inference the State correctly observes is sufficiently supported (but not compelled) by the jury verdict – the trial court made a factual determination that must be made by a jury... Because the jury verdict does not necessarily imply Flores' multiple offenses were a “major VUCSA,” the exceptional sentence is based on a finding made by the judge, not the jury.

Id. at 22-23; see also State v. Hagar, 158 Wn.2d 369, 372, 374, 144 P.3d 298 (2006) (court improperly found defendant’s crimes constituted a “major economic offense” based on his pre-Blakely plea agreement, in which he stipulated to many facts but not to the fact that his current theft convictions constituted a “major economic offense); State v. Beito, 167 Wn.2d 497, 503-04, 220 P.3d 489 (2009) (despite defendant’s pre-Blakely stipulation to other facts, court could not impose exceptional sentence based on unstipulated fact).

Here, there can be no question that Findings of Fact 1, 3, and 4 and Conclusions of Law 2-4 went beyond the jury’s finding. As in Gordon, the jury was instructed to answer a single question: whether “the defendant committed this assault within a day of release from jail on his last incarceration.” CP 26, 30. The court had no authority to enter

additional factual findings and did so in violation of Mr. Williams' jury trial rights.

Conclusion of Law 1 also violated Mr. Williams' right to a jury trial. As discussed above, the "to convict" instruction was constitutionally deficient in that it did not tell the jury to consider whether the pattern and nature of the prior offenses indicated heightened harm or culpability and particular disdain or disregard for the law. Similarly, the court erred in entering Conclusion of Law 1, stating "this qualifies as rapid recidivism."<sup>12</sup> It reached that conclusion by considering the details of Mr. Williams' recidivism (as set forth in Finding of Fact 1 and Conclusion of Law 4) which were never before the jury and therefore could not have been part of the jury's finding. CP 42-43. Like the sentencing courts in Flores and Williams-Walker, the court attempted to supplement the jury's special verdict with its own inferences -- inferences which could only be in the province of the jury itself. The resulting sentence "violates both the statutory requirements and the defendant's constitutional right to a jury trial." Williams-Walker, WL 118211 at 4.

c. The error was not harmless, requiring reversal. In Williams-Walker, the Court stated in no uncertain terms, "the sentencing judge is

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<sup>12</sup> The court's oral ruling also implies, but not state, a finding of greater than usual disregard for the law. 3/6/09RP 15-18.

bound by [the jury's] finding. Where the judge exceeds that authority, error occurs that can never be harmless." *Id.* at 5 (emphasis added).

Here, the issue is even simpler. Even assuming *arguendo* that the "to convict" instruction was correct, the jury found only that Mr. Williams committed the offense shortly after release from incarceration. The court made several findings that far outside the scope of the jury's special verdict. The court's conclusion that the circumstances constituted rapid recidivism was neither found by the jury nor based on jury findings. The court engaged in impermissible fact-finding, outside its authority, and the error could not be harmless, requiring reversal of the exceptional sentence.

5. THE COURT'S FAILURE TO INSTRUCT THE JURY ON THE PRESUMPTION OF INNOCENCE RELIEVED THE STATE OF ITS BURDEN TO PROVE THE AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT.

a. Mr. Williams had the Due Process right to have the jury instructed that he was presumed innocent of the aggravating factor. The Due Process Clause of the Fourteenth Amendment "protect[s] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364. The presumption of innocence is corollary to that standard and equally essential to a fair trial, as has been repeatedly recognized by both the Legislature and the courts. RCW 10.58.020; *In re*

Lile, 100 Wn.2d 224, 227, 668 P.2d 581 (1983); Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895).

A reasonable doubt instruction does not stand in for a missing presumption of innocence instruction; even when the jury is properly instructed on the burden of proof beyond a reasonable doubt, the presumption of innocence instruction is “equally fundamental.” Taylor v. Kentucky, 436 U.S. 478, 483-84, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978), citing Coffin, 156 U.S. at 458-61. Discussing legal scholars’ warnings against abandoning the instruction, the Court explained,

This admonition derives from a perceived salutary effect upon lay jurors. While the legal scholar may understand that the presumption of innocence and the prosecution’s burden of proof are logically similar, the ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence.

Taylor, 436 U.S. at 484.

The two principles are distinct but functionally inseparable – two sides of the same coin. The presumption of innocence serves to anchor and define the State’s burden of proof, acting as a “safeguard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.” Coffin, 156 at 487; Lile, 100 Wn.2d at 227.

[T]he rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, nothing but the evidence, i.e., no surmises based on the present situation of the accused. This caution is indeed particularly needed in criminal cases.

Taylor, 436 U.S. at 484 (emphasis in the original), quoting 9 J. Wigmore, Evidence § 2511 (3d ed. 1940) at 407. In other words, the presumption of innocence ensures that the State will be required to prove its case, while the standard of proof beyond a reasonable doubt dictates how the State must prove its case. Neither can function without the other. Due process therefore requires that the jury be properly instructed on both the standard of proof and the presumption of innocence.

b. After Apprendi, the presumption of innocence applies to aggravating factors. A defendant has a due process right to have a jury determine beyond a reasonable doubt whether a charged aggravating circumstance is present. Sattazahn, 537 U.S. at 111; Ring, 536 U.S. at 609; Apprendi, 530 U.S. at 494; Recuenco III, 163 Wn.2d at 440. When an aggravating factor is sent to the jury, the defendant has already been convicted and thus is no longer presumed innocent of the underlying crime. However, at that stage the jury is asked to find the existence of the charged aggravating factor. Just as the State has the burden to prove the

aggravator beyond a reasonable doubt, so the defendant has the protection of the presumption of innocence as to the aggravator.<sup>13</sup> Apprendi made clear that, for facts which increase the maximum sentence the defendant would face, the presumption of innocence necessarily accompanies the standard of proof beyond a reasonable doubt.

The Apprendi Court did not view the presumption of innocence as one of those “procedural protections,” like the reasonable doubt standard, which are necessary to reduce the risk of erroneous punishment and stigma. 530 U.S. at 484. Instead, those procedural protections serve to “provid[e] concrete substance for the presumption of innocence” itself. Id. (emphasis added), quoting Winship, 397 U.S. at 363. The Court held:

If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached.

Apprendi, 530 U.S. at 484.

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<sup>13</sup> In the context of a trial on an aggravating factor, it might be more accurate to refer to the “presumption of absence” instead of the “presumption of innocence.” The question is not the defendant’s guilt or innocence at this point, but whether the aggravating factor is present. It is presumed to be absent, in precisely the same way that the defendant is presumed innocent at the guilt stage of trial. For the sake of clarity and because the principle functions in exactly the same way for exactly the same purposes, the term “presumption of innocence” will nonetheless be used here.

The Court has not addressed the court's duty to instruct the jury on the presumption of innocence on an aggravating factor, in Apprendi or since. (Nor has any Washington case). However, Apprendi's holding that the aggravator must be proven to the highest standard was based on the premise that this standard "provides substance to the presumption of innocence." Id. It logically flows, then, that the jury must be instructed on the presumption of innocence as well. If the jury does not know it must presume the absence of the aggravating factor, then the presumption has no substance at all in this context. It would be illogical to require a reasonable doubt instruction in order to strengthen the presumption of innocence without strengthening the presumption in the most direct and effective way possible – by requiring an instruction.

Where a jury is asked to find an aggravating circumstance, the jury must presume the circumstance does not exist, unless and until the State proves it beyond a reasonable doubt. Nothing in the jury's underlying guilty verdict should – or even can – negate the defendant's right to this presumption. The underpinning of Apprendi, Ring, and Blakely is the protection of criminal defendants from arbitrary and unfair punishment through fundamental procedural rights. The presumption of innocence serves that purpose completely, as recognized in Apprendi, and therefore must be given its full effect in aggravating factor instructions.

c. Failure to instruct the jury on the presumption of innocence, particularly in the context of a bifurcated trial, was constitutional error requiring reversal.

i. This Court should find the error is structural. Some federal constitutional errors are subject to harmless error analysis, but others “will always invalidate the conviction” and are considered “structural” errors. Sullivan, 508 U.S. at 278-79. Among the errors deemed structural by the United States Supreme Court are the issuance of a constitutionally-deficient reasonable doubt instruction (id.); the total deprivation of the right to counsel (Gideon v. Wainwright, 372 U.S. 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)); trial by a biased judge (Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed.2d 749 (1927)); and the denial of the right to self-representation (McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)).

In Washington, failure to instruct the jury on the presumption of innocence was deemed structural error warranting reversal of the conviction. State v. Cox, 94 Wn.2d 170, 174 n. 1, 615 P.2d 465 (1980), citing State v. McHenry, 88 Wn.2d 211, 213-14, 558 P.2d 188 (1977). The Supreme Court reversed this position in Lile, finding the omission “does not in and of itself violate the constitution” but “must be evaluated in light of the totality of the circumstances.” Lile, 100 Wn.2d at 229,

citing Kentucky v. Whorton, 441 U.S. 786, 789, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979). However, subsequent decisions have re-opened the question.

In Sullivan v. Louisiana, the United States Supreme Court examined the harmless error rule itself to establish which constitutional standard must apply. 508 U.S. at 279. Constitutional harmless error inquiry focuses not on a hypothetical trial, but on what effect the constitutional error had on the guilty verdict in question. Id., citing Chapman, 386 U.S. at 24. Accordingly, the Court found harmless error analysis “illogic” where the jury was given a constitutionally deficient definition of “reasonable doubt” because that inquiry would require the reviewing court to engage in “pure speculation.” Sullivan, 508 U.S. at 280. “And when it does that, ‘the wrong entity judge[s] the defendant guilty.’” Id. quoting Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986). Where instructional error “vitiates all the jury’s findings,” the Court held, the error must be structural. Sullivan, 508 U.S. at 281 (emphasis in the original).

The presumption of innocence is just as fundamental to the trial process and resulting verdict as the reasonable doubt standard. It is “that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.” Winship, 397 U.S. at 363 (internal citations omitted). If the bedrock is removed, the structure

collapses. It is no great leap, then, to say that omission of such a fundamental principle vitiates all the jury's findings. As the Supreme Court observed,

a person accused of a crime... would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

Id.

The failure to properly instruct the jury of the State's burden to prove each element beyond a reasonable doubt is structural error. Sullivan, 508 U.S. at 281. Because, as discussed above, the reasonable doubt standard and the presumption of innocence are two sides of the same coin, it logically follows that failure to instruct on the presumption of innocence must also be structural.

In Neder v. United States, the Court held harmless error analysis applied to a "to convict" instruction which omitted an essential element. 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The Court explained the distinction in that structural constitutional errors

contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Such errors "infect the entire trial process," and "necessarily render a trial fundamentally unfair," Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or

innocence ... and no criminal punishment may be regarded as fundamentally fair.”

Id. at 8-9 (internal citations omitted). Relying on Sullivan’s reasoning, the Court held the omission of an element neither rendered the trial necessarily unfair nor “vitiat[e] all the jury’s findings,” so harmless error analysis was appropriate. Id. at 9-11. The Court affirmed this rule with regard to a Blakely sentencing error in Washington v. Recuenco, 548 U.S. 212, 218-219, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (“Recuenco II”). There, the Court explicitly held Sullivan could not apply to cases where the jury did return a verdict, albeit one which was incomplete because the instructions omitted or misstated an element. Id. at 219-20, 222 n.4, citing Neder, 527 U.S. at 10-15 (discussing Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987) (misstatement of element); Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (mandatory conclusive presumption); California v. Roy, 519 U.S. 2, 5, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996) (“misdescription” or omission of element)).

Sullivan is still good law and its reasoning perfectly applicable to cases, like this one, where harmless error analysis is simply unworkable because the verdict has been so vitiated. Where the instructions misstate or omit an element, as in Neder, the appellate court can review the record

and determine whether the jury would have reached a different verdict if properly instructed. But when the error goes not to an element which must be proven, but to a fundamental principle of how the jury should make its decision, there is nothing to review. That was the situation in Sullivan and it is here as well. It does not matter whether the State's case was strong or weak; the presumption of innocence, like the burden of proof, is not variable. When the issue is a misstated or omitted element, a reviewing court may be able to make sound assumptions about which evidence would be relevant to that element, how that evidence would be interpreted, and whether it would likely to lead to conviction. But when the issue is failure to instruct on the presumption of innocence or reasonable doubt, it is a matter of ideas, not evidence, and the only question is what impact those ideas might have had on the jurors. It is impossible to guess how deliberations might be different if the jury was properly instructed to presume the defendant's innocence. As the Sullivan Court observed, to make such a determination requires "pure speculation" – an approach that is as impractical as it is unconstitutional.

In Williams-Walker, the Washington Supreme Court reached the same conclusion, albeit in a different context. WL 118211 at 5. The Court found no error in the verdict itself, only in the sentence. As in Recuenco III (on remand from Recuenco II), the error was simply that the court

imposed an exceptional sentence based on facts not authorized by the jury. Id., citing Recuenco III, 163 Wn.2d at 441-442. Whether the facts were supported by copious evidence or not at all is irrelevant. The facts were not found by a jury, so without a valid waiver of the right to a jury trial, they could not support an exceptional sentence, any more than facts found by a judge instead of a jury could support a conviction. The inquiry is simple: were the facts found by a jury beyond a reasonable doubt, or not? If not, there is nothing to review, harmless error analysis is essentially unworkable, and the error must be structural. WL 118211 at 5.

Although the error at issue here is in the verdict, not the sentence, the reasoning in Williams-Walker and Recuenco III is the same logical principle of Sullivan: harmless error scrutiny is meaningless without something meaningful to scrutinize. Neder clarified that Sullivan applies “to only those cases where all of the jury's findings have been infected or vitiated.” State v. Zimmerman, 130 Wn.App. 170, 179, 121 P.3d 1216 (2005), summarizing Neder, 527 U.S. at 10-14. This is such a case.

Here, as in Sullivan, operation of a harmless error rule is fundamentally illogical: because the jurors commenced from the perspective of presuming Mr. Williams guilty, the finding of the aggravating circumstance may have amounted to no more than checking a box. The jurors were given the erroneous impression that no presumption

of innocence should rightfully apply at the aggravating circumstance phase of the proceedings, at a juncture when they were more likely to assume that it would not, by virtue of just having convicted him of the underlying crime. The result was a profound “lack of fundamental fairness.” Winship, 397 U.S. at 363. As in Sullivan, this Court should conclude the error here was structural.

*ii. Even if the error is not structural, it is not harmless.* If this Court determines that harmless error analysis applies, it should find the error was not harmless, particularly in the context of a bifurcated trial, where the jury began the second phase with an assumption of guilt rather than innocence. As noted above, an error of constitutional magnitude is harmless only if the appellate court is convinced beyond a reasonable doubt that the error did not affect the verdict. Easter, 130 Wn.2d at 242.

The jury was properly informed that the State had the burden of proving “each element” of the aggravating factor beyond a reasonable doubt (although the aggravator as construed in the “to convict” instruction consisted of a single element). CP 30. Other than the reasonable doubt standard, however, nothing informed the jury that the aggravating circumstance itself had to be considered akin to an element. Nor did the court’s instructions orient the State’s burden of proof to any constitutional presumption. Instead, the “to convict” instruction stated the essential

element of the aggravator was “that the crime of assault in the third degree occurred shortly after release from incarceration.” CP 30 (emphasis added). This wording stated the assault as a matter of fact; given the underlying conviction, this could be reasonable, if coupled with an instruction on the presumption of innocence. Instead, this instruction undercut the State’s burden to prove the aggravating circumstance beyond a reasonable doubt by in effect telling the jury that having found him guilty, they could then presume him guilty going forward.

Second, and more critically, the jurors were likely to infer the absence of an instruction on the presumption of innocence in the second phase meant the presumption did not apply. The jury presumably noticed the strong similarities between the “to convict” instructions of each phase, and would reasonably assume that the court issued these instructions twice because they were equally important in both phases of trial. CP 20, 30. However, the jury would also presumably notice that the guilt phase included an instruction on the presumption of innocence<sup>14</sup> while the aggravator phase did not. The reasonable inference would be that the

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<sup>14</sup> Instruction No. 4 states in part:

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

CP 16. The rest of this instruction defines “reasonable doubt.”

omission was deliberate. Therefore, omission of the presumption of innocence instruction rendered the reasonable doubt instruction nugatory.

The only other instruction given in the aggravating factor phase was a standard overview instruction touching on several points including availability of evidence and the requirement of unanimity. CP 28-29.<sup>15</sup>

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<sup>15</sup> As you deliberate the issue of special verdict, your presiding juror's duty is to see that you discuss the issues in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

All jury instructions read to you previously apply when you are making the determination of special verdict just as they did when you were making the determination of verdict in this case.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations. If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions and a special verdict form for recording your special verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the special verdict form to express your decision. The presiding juror must sign the special verdict form and notify the bailiff. The bailiff will bring you into court to declare your special verdict.

The jury would likely notice that this instruction shared several points with its counterpart from the guilt phase. CP 10. However, the comparable instruction from the guilt phase alluded generally to the presumption of innocence by admonishing the jury, “Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true.” CP 10. But in the aggravator phase, no instruction touched on the presumption of innocence.

It is true that the jurors were instructed that all instructions from the guilt phase should be applied to the aggravator phase. CP 28. But if that were sufficient, there would be no need for any duplication between the two sets of instructions. As any moderately observant juror would notice, there was duplication on several points, such as the State’s burden of proving each element beyond a reasonable doubt. The moderately observant juror would reasonably assume that such duplication was intentional, and that any omissions were just as intentional. Thus, the presumption of innocence easily fell by the wayside.

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You must fill in the blank provided in the special verdict form the word “yes” or the word “no”, according to the decision you reach. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no.”

CP 28-29.

Finally, as a matter of common sense, the jury knew full well it had just convicted Mr. Williams of assault in the third degree. In the minds of the jurors, his innocence was no longer in question; they had already found him guilty beyond a reasonable doubt. From a lawyer's perspective, this fact should not affect the State's burden of proof and the presumption of innocence in the aggravator phase. But from a layperson's perspective, innocence was no longer on the table. Unless the court put it back on the table, front and center, by explicitly instructing the jury that it was as important now as at the beginning of the guilt phase, the jury could not reasonably be expected to have the presumption of innocence in mind.

Before Sullivan, Neder, and Apprendi, the Supreme Court applied harmless error scrutiny to the failure to instruct on the presumption of innocence, and found it was not harmless. Lile, 100 Wn.2d 224. There, the Court found the self-defense instruction misallocated the burden of proof and the evidence of self-defense was "contradictory and inconclusive." Id. at 229.

Thus, correctly placing the burden of proof as to self-defense was vital. The effect of this error coupled with the fact that the jury was never given the proper starting point – that petitioner was presumed innocent until proven guilty – more likely than not actually prejudiced petitioner's right to a fair trial. We do not hold that either the instruction on self-defense or the omission of the presumption of innocence instruction separately constituted actual prejudice. Rather, petitioner has proven that it is their

combined effect in light of the particular nature of this case that constitutes actual prejudice.

Id. (emphasis added).

This trial was also afflicted by other errors which worked together with the unconstitutional omission. First, the “to convict” instruction omitted elements, relieving the State of its burden of proof and allowing the jury to convict without meeting the requirements articulated by the Supreme Court. Second, in keeping with the deficient “to convict” instruction, the State did not prove every element of the aggravating factor. Third, the jurors began their deliberations on the aggravating factor with their guilty verdict fresh in their minds and no instruction that they must presume Mr. Williams innocent of the aggravating factor. As in Lile, “the combined effect [of these errors] in light of the particular nature of this case... constitutes actual prejudice.” Id.

Mr. Williams had the due process right to have the jury instructed that he was presumed innocent of the aggravating circumstance. However, “the jury was never given the proper starting point,” and the instructions given in the context of the bifurcated trial conveyed precisely the opposite impression. Lile, 100 Wn.2d at 229. Under either standard of review, the error requires reversal.

6. THE PHRASE “SHORTLY AFTER BEING RELEASED FROM INCARCERATION” VIOLATES THE DUE PROCESS VAGUENESS DOCTRINE.

a. Traditional due process analysis applies to aggravating factors which must be found by a jury. The due process doctrine of the Fourteenth Amendment has two purposes: (1) to provide the public with adequate notice of what conduct is proscribed and (2) to protect the public from arbitrary or ad hoc enforcement. U.S. Const. amend. XIV; City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). A law violates due process vagueness prohibitions if either requirement is not satisfied. Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990) (internal citation omitted). The party challenging the prohibition has the burden of overcoming the presumption of constitutionality. Id.

Prior to Blakely, based on the faulty premise that they involved matters of judicial sentencing discretion, due process vagueness challenges to aggravating circumstances were generally deemed “theoretically and analytically unsound” and thus not given serious consideration by the appellate courts of this state. See e.g. State v. Jacobsen, 92 Wn.App. 958, 966, 965 P.2d 1140 (1998); State v. Owens, 95 Wn.App. 619, 628-29, 976 P.2d 656 (1999).

Because there is no constitutional right to sentencing guidelines – or, more generally, to a less discretionary application of sentences than that permitted prior to the Guidelines – the limitations the Guidelines place on a judge’s discretion cannot violate a defendant’s right to due process by reason of being vague. It therefore follows that the Guidelines cannot be unconstitutionally vague as applied to [the defendant] in this case. Even vague guidelines cabin discretion more than no guidelines at all. What a defendant may call arbitrary and capricious, the legislature may call discretionary, and the Constitution permits legislatures to lodge a considerable amount of discretion with judges in devising sentences.

Jacobsen, 92 Wn.App. at 966, quoting United States v. Wivell, 893 F.2d 156, 159 (8th Cir. 1990). It was then assumed that the sentencing judge’s own understanding of what was contemplated by the Legislature in setting the standard range for the offense would be factored into his or her determination of whether the State had met its burden of proving the existence of aggravating factors, reducing the risk of a due process violation. State v. Nordby, 106 Wn.2d 514, 518-19, 723 P.2d 1117 (1986). It was further assumed that to the extent a valid aggravating circumstance justifying an exceptional sentence might exist, the court imposing the sentence would identify facts that went beyond those inherent in the verdict to support the sentence on review. See e.g. Tili, 148 Wn.2d at 369-71 (discussing cases). After Blakely, it is now irrefutable that aggravating circumstances, as facts which increase punishment, operate as elements of a higher offense which must be found

by a jury beyond a reasonable doubt. Therefore, the due process vagueness inquiry must now apply to aggravators.

b. The term “shortly after” is inherently subjective and relative and therefore unconstitutionally vague. Due process requires that criminal statutes protect against “arbitrary, erratic, and discriminatory enforcement.” Douglass, 115 Wn.2d at 180. Therefore, a statute is also void for vagueness if “invites an inordinate amount of police discretion” or “leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.” Id. at 181; Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

A statute is not unconstitutional merely because it requires subjective assessment by a police officer. State v. Maciolek, 101 Wn.2d 259, 267, 676 P.2d 996 (1984). But a statute is void if it contains “inherently subjective terms” and therefore allows “ad hoc decisions of criminality based on the moment to moment decisions” of police, prosecutors, judges, or juries. Id. (citing Seattle v. Drew, 70 Wn.2d 405,

410, 423 P.2d 522 (1967) (finding the unconstitutionally vague the phrase “wandering or loitering abroad, or abroad under other suspicious circumstances”); Seattle v. Pullman, 82 Wn.2d 794, 514 P.2d 1059 (1973) (“to loiter, idle, wander, or play”); Bellevue v. Miller, 85 Wn.2d 539, 536 P.2d 603 (1975)(“wandering or prowling”), Seattle v. Rice, 93 Wn.2d 728, 612 P.2d 792 (1980) (“lawful order”); State v. Hilt, 99 Wn.2d 452, 662 P.2d 52 (1983)(“lawful excuse”); State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982)(“lawful excuse,” “lawfully required,” and “public servant”).

Under RCW 9.94A.535(3)(t), the court may impose a sentence above the standard range if the jury finds “the defendant committed the current offense shortly after being released from incarceration.” No Washington case has defined the inherently subjective term “shortly after.” Washington Courts have upheld exceptional sentences based on rapid recidivism where the defendant committed his offense twelve hours after release (Butler, 75 Wn.App. at 54), three months after release (Hughes, 154 Wn.2d 141), and one month after release (State v. Saltz, 137 Wn.App. 576, 579, 585-86, 154 P.3d 282 (2007)). However, these cases have limited application post-Blakely because in all of them the aggravating factor was found by a judge, not a jury.

Butler, Hughes, and Saltz show a range of time periods from twelve hours to three months. However, these findings were made by

judges, who presumably had an understanding of typical recidivism, and therefore what constitutes “shortly after” release in comparison to the typical recidivist. But how does a juror define “shortly after,” and in comparison to what? For one juror, this could mean an hour, and for another juror, one year. The determination depends more than anything on the frame of reference, which must be supplied by each juror’s subjective experience, since the Legislature has failed to provide it in the statute. There is no way to ascertain that the jurors all used the same definition of this legal term of art in deciding that the State had proven the aggravators’ existence.

The statute is unconstitutionally vague insofar as the undefined term “shortly after” does not provide adequate notice of the length of time after release which would or would not be sufficient for a finding of the aggravating factor.

c. The term “released from incarceration” is undefined and indefinite and therefore unconstitutionally vague. A statute is indefinite “if persons of common intelligence must necessarily guess at its meaning and differ as to its application.” State v. Glas, 147 Wn.2d 410, 421, 54 P.3d 147 (2002). As used here, people of common intelligence would have to guess at the meaning of “release from incarceration” and could reasonably differ as to its interpretation.

The plain language of the statute refers to release from “incarceration,” commonly meaning confinement in jail, prison, or juvenile detention. Indeed, the prosecutor, in his opening statement for the second phase of the trial, told the jury,

the state has to prove one thing, one allegation, and that is that the defendant committed the crime of which you found him guilty, felony assault, shortly after having been released from incarceration. By “incarceration,” that means having been housed in the King County Jail or some other correctional institution.

1/16/09RP 6. However, the term is not that simple; incarceration does not necessarily mean confinement pursuant to a conviction; it also includes incarceration pending trial and release following an acquittal or dismissal. Although this aggravator is commonly referred to as the “rapid recidivism” factor, one who commits a crime shortly after being released from an acquittal or dismissal has not rapidly recidivated. Therefore the statute’s plain language does not indicate which circumstances of incarceration are relevant.

Of course, that is not how it has historically been defined and applied. As discussed above, the caselaw has established that a determination of this aggravator must take into account “the various similar offenses and the heightened harm or culpability that pattern indicates,” and justifies an exceptional sentence only if “a greater

disregard for the law than otherwise would be the case.” Saltz, 137 Wn.App. at 585; quoting Butler, 75 Wn.App. at 54; Hughes, 154 Wn.2d at 142. But none of this is found in the statute.

Without instructions telling the jury to consider these elements, there was no way for the jury to know whether the factor can only be applied to a defendant who has been released from incarceration arising from a conviction. The jury was instructed to answer a single, seemingly simple question: whether this offense was committed a short time after Mr. Williams’ release from incarceration. CP 26, 30. With such an undefined and indefinite term, this question only leads to more questions.

In Seattle v. Rice, the Supreme Court considered the term “lawful order” in a criminal trespass ordinance. 93 Wn.2d 728. The Court observed:

Many questions must be answered to determine if an order is a “lawful order.” Who is an authorized person? Was the substance of the order lawful? Was there a valid reason for the order? How long is the order to be in effect? The foregoing is but a sample of what must be considered and certainly there are many more questions which could be raised. A person receiving an order must thereupon be able to answer all such questions to know if he has received a “lawful order.”

Id. at 731-32. Here, the jury had to ask whether incarceration would include any detention for any reason, whether it must include conviction, whether the conviction must be of a similar nature, and whether any other

circumstances of the recidivism should matter. Particularly offensive to due process is the fact that if the prior incarceration was not the direct result a conviction, the facts clearly could not support an exceptional sentence. Hughes, 154 Wn.2d at 142.

As there is no way to know whether all the jurors contemplated “release from incarceration” similarly, the term is unconstitutionally vague.

d. RCW 9.94A.535(3)(t) is unconstitutionally vague under both prongs(3)(t). Although a statute may be found unconstitutional under either prong, the two defects often work together. Here, the vagueness of the phrase “shortly after being released from incarceration” fails to give adequate notice as to how much time is “short;” at the same time, it allows arbitrary and ad hoc enforcement based on varying interpretations of “incarceration.”

For example, in State v. J.D., this Court found an ordinance void for vagueness under both prongs. 86 Wn.App. 501, 937 P.2d 630 (1997). The Bellevue curfew ordinance provided an exception for “minors en route to or from ‘an activity including, but not limited to, dance, theater presentations, and sporting events.’” Id. at 510, quoting BMC 10.62.030(C)(6). This Court held:

Because the ordinance is unclear about what is and is not an exempted activity, it fails to provide explicit standards for enforcement. Police officers do not have sufficient guidance to determine whether a minor traveling from an event other than those specifically listed may or may not be cited under the ordinance.

Id.

The same problem is presented here. At a minimum, the language of the statute is unclear as to what type of confinement qualifies as “incarceration” under this statute, such that a crime committed shortly thereafter would fall within this aggravator. Furthermore, the statute provides no clarifying language to tie the circumstances to recidivism or to assist in interpreting the inherently subjective term “shortly after.” This lack of clarity translates into a lack of guidance to law enforcement and the courts. The trial court itself observed “this is a statute that might need future detailing.” 1/16/09RP 15. The statute as it stands now is unconstitutionally vague and the resulting exceptional sentence should be reversed.

7. SPECTATOR MISCONDUCT CREATED AN IMPERMISSIBLE RISK THAT THE JURY WAS IMPROPERLY INFLUENCED, VIOLATING MR. WILLIAMS' RIGHT TO A FAIR TRIAL ON THE AGGRAVATING FACTOR.

Just before the jury announced its special verdict on the aggravating factor, the court informed the parties that the jury had told the bailiff they were contacted by spectators outside the courtroom. The unidentified individuals had approached the jurors as they arrived that morning, and made remarks directly to one juror, including "I am really mad" and "you put my son in jail." 1/16/09RP 16.

The court denied the defense motion to strike the entire panel and empanel a new jury for the aggravating factor verdict. 1/16/09RP 18-19. Instead, the court waited until the jury returned its verdict and then asked the entire panel at once whether they believed their impartiality was affected by the improper contact or by having heard about the improper contact. 1/16/21-23. No juror spoke up, and the verdict, finding Mr. Williams committed the offense shortly after release from incarceration, was duly entered.

a. The contact constituted serious spectator misconduct, violating Mr. Williams' rights to a fair trial. By guaranteeing the right to a jury trial, the State and federal constitutions necessarily guarantee a fair and impartial jury. "The right to a jury trial includes the right to have each

juror reach his or her own verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel.” State v. Goldberg, 149 Wn.2d 888, 892, 72 P.3d 1083 (2003), citing State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978).

In State v. Lord, spectators at a murder trial wore buttons with a photograph of the victim. On the first day of trial, the court denied the defense motion to forbid the buttons, but on the fourth day the court directed the spectators to stop wearing them. 128 Wn.App. 216, 218-19, 114 P.3d 1241 (2005) The Court of Appeals agreed with Lord that the buttons were improper, but held the trial court’s ruling was neither an abuse of discretion nor a denial of Lord’s rights to confrontation and the presumption of innocence. Id. at 219.

In reaching this conclusion, the Court analyzed two similar cases from other jurisdictions, Norris v. Risley, 918 F.2d 828 (9<sup>th</sup> Cir. 1990) and State v. Franklin, 174 W.Va. 469, 327 S.E.2d 449 (1985). In Norris, spectators associated with anti-rape organizations attended a sexual assault trial wearing buttons with the words “Women Against Rape.” 918 F.2d at 829-30. Jurors saw these spectators not just in the courtroom but also in the hallway and elevator. Id. at 829-31. The Ninth Circuit ruled that by sending a message to the jury, the spectators created an unacceptable risk of influencing the jurors and reversed the conviction. Id. at 834.

In Franklin, the spectators wore buttons with the acronym “MADD,” for “Mothers Against Drunk Driving,” in a trial for driving under the influence resulting in death. 327 S.E.2d at 451, 454. The sheriff offered these buttons to jurors outside the courtroom and gave a button to at least one juror. Id. The West Virginia Supreme Court held the spectators’ buttons “constituted a formidable, albeit passive, influence on the jury,” requiring a new trial. Id. at 455-56.

The Lord Court distinguished Franklin and Norris on the basis that the buttons in both cases “exclaimed a specific message” and the record established those jurors actually saw the buttons. 128 Wn.App. at 222. In contrast, the Court reviewed several cases lacking such a message. Id. at 221-22, citing Johnson v. Commonwealth of Virginia, 259 Va. 654 S.E.2d 769, 781, cert. denied, 531 U.S. 981, 121 S.Ct. 432, 148 L.Ed.2d 439 (2000) (court allowed spectators to wear buttons with victim’s photograph so long as they did not contact jurors and the jury could not see the buttons); Nguyen v. Texas, 977 S.W.2d 450, 457 (1998); State v. Braxton, 344 N.C. 702, 477 S.E.2d 172, 176 (1996) (in both Nguyen and Braxton, spectators wore buttons with victim’s photograph, but record did not show whether jurors could see them or if they could have influenced the verdict); State v. McNaught, 238 Kan. 567, 713 P.2d 457 (1986) (although spectators wore “MADD” buttons, record did not show how many people

wore them or for how long or whether any jurors saw them). The Lord Court observed that in the case before it, as in each of those cases,

[t]he record does not show that (1) any jurors ever saw the buttons; (2) even had the jury noticed the buttons, they could have seen the photo, and whom it depicted, from where they were seated; or (3) there was any contact between any juror and any spectator wearing a visible button. Moreover, the buttons did not portray a message, and only a few spectators wore them during the first three days of the 31-day trial... The record before us does not demonstrate that the buttons influenced the jury.

Id. at 223. Therefore, the Court found no constitutional violation and ruled any error was harmless.

This analysis is instructive because the facts of this case are much more similar to Norris and Franklin than to Lord and analogous cases. Here, as in Norris and Franklin, spectators communicated a specific message to the jury and there is no question that at least some of the jurors received that message. While the Franklin Court condemned the “passive” influence on the jury, the influence in this case went even further, as spectators here contacted the jury directly and aggressively. The message here was not passively communicated through buttons but directly, through face-to-face speech. Unlike Lord and the cases relied upon by the Court in that case, the “unacceptable risk of influencing the jury” is well-documented by the record here. The impermissible risk that the irregularity biased the jury violated Mr. Williams’ right to a fair trial

b. The trial court abused its discretion in denying the defense motion to strike the jury panel and empanel a new jury. A trial court abuses its discretion when it exercises that discretion on untenable grounds or reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court's ruling was based on a wholly incorrect analysis, and therefore untenable grounds. In denying the motion to strike the jury, the court stated:

[Improper influence] could be a concern, but my observation would be and my decision not to act in any way on this is that the court has no control over contact that is made with jurors in this particular case. And if you wish to have further inquiry into who it was, error should not be able to be introduced into a case as a result of the voluntary acts of individuals who may have an interest in the thing.

1/16/09RP 17. The factors considered by the court – its authority over the spectators, and the spectators' interest in the outcome of the case – were not considered by the appellate courts in any of the cases discussed above. Obviously any spectator who improperly communicates or attempts to communicate with a juror has an interest in the case, or else they would not bother. Certainly all the spectators in the cases discussed above had an interest in the case, and all engaged in voluntary acts. Whether the spectators were under the court's direct authority is irrelevant; as the court

itself pointed out, intimidation or harassment of a juror is illegal no matter where it occurs. 1/16/09RP 16-17.

In any event, both factors considered by the court miss the point. The proper inquiry, as employed by the Courts in the cases discussed above, is whether the misconduct created an impermissible risk of influencing the jury. Since the trial court did not consider that question, it abused its discretion and the special verdict must be reversed.

c. Reversal is required. Where a defendant has raised the possibility that a trial irregularity resulted in prejudice, reversal is required unless the State proves the error harmless beyond a reasonable doubt.

State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983), citing State v. Saraceno, 23 Wn.App. 473, 475-76, 596 P.2d 297 (1979).

In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during the trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

In Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954), quoted in Saraceno, 23 Wn.App. at 474. In Saraceno, finding harmless error where the trial court provided the jury additional

instructions without consulting either counsel or the defendant, the Court observed early in Washington's history, such an error would be "conclusively presumed to be prejudicial." *Id.* at 474-75, citing State v. Waite, 135 Wash. 667, 668, 238 P. 617 (1925); State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914); State v. Wroth, 15 Wash. 621, 47 P. 106 (1896); Linbeck v. State, 1 Wash. 336, 25 P. 452 (1890). Thus, the modern rule of holding the State to a high standard in proving harmlessness is well-founded.

In determining the effect of an irregularity, an appellate court should examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989), citing State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) ("To determine whether a trial was fair, a trial court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark").

The second factor is not applicable because the spectator misconduct was not a matter of evidence, cumulative or otherwise. Instead, it was harmful because of its effect on the jury's perceptions of Mr. Williams. With regard to the first and third factors, the court itself

recognized, at least partially, the gravity of the misconduct.<sup>16</sup> The court could not have cured the error by instructing the jury to disregard it because the jury informed the court of the irregularity only after reaching a verdict. 1/16/09RP 15-17.

State v. Bourgeois is illustrative. 133 Wn.2d 389, 945 P.2d 1120 (1997). There, one juror reported a spectator “glar[ed] or star[ed]” at a State’s witness and made a hand gesture “in the nature of pointing a gun” at the witness. Id. at 408. The Supreme Court dispensed with the first incident, noting that “glaring” is a subjective description and it was in any event relatively minor, since it went unnoticed by the court and most of the jury. Id. The Court agreed with the defendant that the hand gesture was more serious spectator misconduct which “may have reinforced the State’s theory” of Bourgeois’ retaliatory motive for his crimes. Id. at 409. However, the Court observed “there was no indication that Bourgeois directed the spectator to make the threat, or even that the spectator making

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<sup>16</sup> Upon being notified of the misconduct, the court addressing the courtroom in general (but outside the presence of the jury):

[T]he jurors should not be contacted either before they have reached their verdict or any time after they have reached their verdict.

First of all, it could put in jeopardy what they decide in the future, and, secondly, it is against the law and could be punishable to harass or intimidate a juror as its own separate crime....

So I make this is as just a very general observation to anyone who is listening to me.

1/16/09RP 16.

the gesture was associated with him in any way.” Id. Thus, the Court found prejudice unlikely, assumed the jury followed the instructions and disregarded extraneous matters, and affirmed the conviction. Id.

This case is similar to Bourgeois in two respects: it involves intimidating spectator misconduct which reinforces the State’s theory of the case, and there is absolutely no indication that the spectators acted at the behest or with the knowledge of the defendant. However, there is a crucial distinction: there can be no doubt that the interfering spectators in this case were associated with Mr. Williams. Because one of the reported statements was “you put my son in jail,” the record is clear that at least one of these spectators was Mr. Williams’ parent. The court recognized this fact<sup>17</sup> and certainly the jurors would have come to the same conclusion. The court also assumed the spectators’ intent was to influence

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<sup>17</sup> Upon learning of the irregularity, the court said,

Perhaps from [the statement ‘You put my son in jail’], we can determine who it was that said it, but I am not going to make decisions about who said what...

And I am not sure, Mr. Williams, who said this. I can figure this out. Though there is some evidence as far as who said it by the use of the word “son,” but I don’t know. And there aren’t that many people in the courtroom...

We don’t need to add more difficulty to this as a result of feelings of kinship or anything like that.

1/16/09RP 16-17.

the jury's verdict,<sup>18</sup> and the jurors likely made the same assumption. Thus, unlike the Bourgeois jurors, there is a much greater likelihood that this experience would color their perception of the defendant.

Furthermore, the spectator misconduct might well have reinforced negative perceptions of Mr. Williams, whom the jury had already convicted of assault. The State's theory in the first phase of the trial was that Mr. Williams was an extremely dangerous, randomly violent individual. In closing argument, the prosecutor told the jury Mr. Williams was "a man on a mission to assault somebody" and he didn't care who it happened to be. 1/15/09RP 69. This narrative was bolstered by Officer Shearer's testimony that Mr. Williams was "irrational" and "looking to get into trouble." 1/14/09RP 19; 1/15/09RP 59. This perception of Mr. Williams means that the jury might assume that his friends and family were similarly dangerous, and be more apt to fear and feel threatened by them than by a defendant's associates in another case.

The court attempted to address the irregularity with a cursory colloquy addressed at the entire jury at once, asking them to tell the court if they felt their impartiality had been affected. 1/16/09RP 20-21. No juror

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<sup>18</sup> The denial of the defense motion to empanel a new jury was largely based on the court's belief that misconduct was "the voluntary acts of individuals who may have an interest in the thing" and reluctance to allow such acts to influence the proceedings. 1/16/09RP 17.

spoke up. 1/16/09RP 22. This approach was probably not the most effective way to elicit a truthful response, but it is irrelevant in any event. This Court does not consider the jurors' mental processes in reaching their verdict, because these facts inhere in the verdict. State v. Briggs, 55 Wn.App. 44, 55, 776 P.2d 1347 (1989); Gardner v. Malone, 60 Wn.2d 836, 841-43, 376 P.2d 651, 379 P.2d 918 (1962). The focus is not the subjective thoughts of the jurors but the objective affect of the misconduct. "The question is not whether jurors actually articulated a consciousness of a prejudicial effect but whether there is an unacceptable risk of impermissible factors coming into play." Lord, 128 Wn.App. at 219, citing Holbrook, 475 U.S. at 570.

Here, the "unacceptable risk" is self-evident; in the context of this case it is likely that the spectators' threatening behavior caused at least some jurors to view Mr. Williams as more dangerous than they had before. "[A] new trial must be granted unless 'it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.'" Briggs, 55 Wn.App. at 56, quoting United States v. Bagley, 641 F.2d 1235, 1242 (9th Cir.1981) (quoting Gibson v. Clanon, 633 F.2d 851, 855 (9th Cir.1980); see also United States v. Bagnariol, 665 F.2d 877, 887 n. 6 (9th Cir.1981); Llewellyn v. Stynchcombe, 609 F.2d 194, 195 (5th Cir.1980) ("a defendant is entitled to a new trial unless there is no

reasonable possibility that the jury's verdict was influenced by the material that improperly came before it.”).

As the State cannot prove beyond a reasonable doubt that the spectator misconduct did not affect the special verdict, the sentence should be reversed.

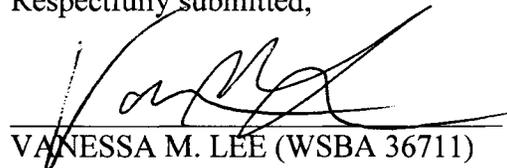
E. CONCLUSION

Because the State failed to prove each element of third degree assault beyond a reasonable doubt, Mr. Williams respectfully requests this Court reverse and dismiss his conviction.

In the alternative, because the exceptional sentence violates Mr. Williams’ rights to an impartial jury trial and to due process of the law, it should be reversed, the special verdict vacated, and the case remanded for sentencing within the standard range.

DATED this 26<sup>th</sup> day of February, 2010.

Respectfully submitted,



VANESSA M. LEE (WSBA 36711)  
Attorney for Appellant  
Washington Appellate Project-91052

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 TALIFERRO WILLIAMS, )  
 )  
 Appellant. )

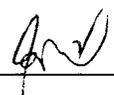
63213-2  
NO. ~~62749-0-1~~

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26<sup>TH</sup> DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] TALIFERRO WILLIAMS	(X)	U.S. MAIL
311079	( )	HAND DELIVERY
MONROE CORRECTIONAL COMPLEX-MMU	( )	_____
PO BOX 7001		
MONROE, WA 98272-7001		

**SIGNED** IN SEATTLE, WASHINGTON THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2010.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710