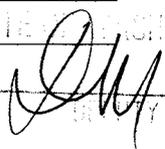


FILED  
COURT OF APPEALS  
DIVISION II  
06 OCT 20 PM 2:03

NO. 33859-9

STATE OF WASHINGTON  
BY 

---

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

QUALAGINE HUDSON, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable John A. McCarthy

No. 03-1-01939-1

---

**BRIEF OF RESPONDENT**

---

GERALD A. HORNE  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. . . . . 1

1. Did the trial court properly instruct the jury on leading organized crime when its instructions were consistent with the means alleged in the amended information? . . . . . 1

2. Should the Legislature’s 2005 amendments to the SRA apply to this case when it went to trial after the effective date of the legislation, the amendments are procedural, and when retroactive application does not violate the *ex post facto* clause? . . . . . 1

3. Should the exceptional sentence imposed below be upheld when the procedures employed comport with Blakely and the newly enacted RCW 9.94A.537? . . . . . 1

4. Has defendant failed to show that trial court acted contrary to the decision in State v. Hughes or that it exceeded its authority by imposing an exceptional sentence? . . . . . 1

5. Has defendant failed to show the existence of an equal protection violation or any infringement on his right to trial? . . . . . 1

6. Has defendant failed to demonstrate a violation of his sixth amendment right to trial based upon the fact that the court did not submit the issue of his prior convictions or the issue of whether he was on community placement at the time of the offense to a jury for determination? . . . . . 1

7. Did the court properly calculate defendant’s offender score, sometimes including juvenile convictions and sometimes not, depending on the offense date of the current offenses? . . . . . 2

B. STATEMENT OF THE CASE. . . . . 2

1. Procedure . . . . . 2

2. Facts . . . . . 4

C. ARGUMENT.

1. THE COURT PROPERLY INSTRUCTED THE JURY ON THE ONLY MEANS OF COMMITTING LEADING ORGANIZED CRIME THAT WAS CHARGED IN THE INFORMATION. .... 13
2. THE LEGISLATURE’S 2005 AMENDMENTS TO THE SRA WHICH BRING IT INTO CONFORMITY WITH THE PROCEDURAL REQUIREMENTS OF BLAKELY SHOULD APPLY RETROACTIVELY TO THIS CASE; THE EXCEPTIONAL SENTENCE IMPOSED BELOW CONFORMED WITH THE REQUIREMENTS OF RCW 9.94A.537. .... 19
3. BY IMPOSING AN EXCEPTIONAL SENTENCE, THE TRIAL COURT DID NOT VIOLATE DEFENDANT’S SIXTH AMENDMENT RIGHT, ACT CONTRARY TO STATE V. HUGHES, OR EXCEED ITS STATUTORY AUTHORITY. .... 29
4. THE COURT DID NOT VIOLATE DEFENDANT’S SIXTH AMENDMENT RIGHTS BY FINDING THAT HE HAD PRIOR CONVICTIONS OR THAT HE WAS ON COMMUNITY PLACEMENT AT THE TIME OF THE OFFENSE. .... 42
5. THE COURT PROPERLY CALCULATED DEFENDANT’S OFFENDER SCORE ON THE CONSPIRACY AND LEADING ORGANIZED CRIME CONVICTIONS. .... 50

D. CONCLUSION..... 57

## Table of Authorities

### Federal Cases

<u>Almendarez-Torres v. United States</u> , 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).....	25, 42, 44, 45, 46
<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	25, 42, 43, 44, 45, 46
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	passim
<u>Braverman v. United States</u> , 317 U.S. 49, 52, 63 S. Ct. 99, 87 L. Ed. 2d 23 (1942).....	55
<u>Cleburne v. Cleburne Living Ctr.</u> , 473 U.S. 432, 440-41, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).....	39
<u>Dobbert v. Florida</u> , 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).....	19, 20, 22
<u>Guzman v. United States</u> , 404 F.3d 139 (2 <sup>nd</sup> Cir. 2005).....	22
<u>Jones v. United States</u> , 526 U.S. 227, 249, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).....	42
<u>McReynolds v. United States</u> , 397 F.3d 479, 480-481 (7 <sup>th</sup> Cir. 2005).....	22
<u>Oyler v. Boles</u> , 368 U.S. 448, 452, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962).....	26, 27
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).....	20, 21, 25, 46
<u>Schriro v. Summerlin</u> , 542 U.S. 348, 124 S. Ct. 2519, 2523-24, 159 L. Ed. 2d 442 (2004).....	22
<u>United States v. Ameline</u> , 376 F.3d 967, (9 <sup>th</sup> Cir. 2004).....	36

United States v. Kissel, 218 U.S. 601, 607, 31 S. Ct. 124,  
54 L. Ed. 1168 (1910)..... 55

United States v. Price, 400 F.3d 844, 845 (10<sup>th</sup> Cir. 2005)..... 22

**State Cases**

Foundation for the Handicapped v. Department of Social and Health  
Services, 97 Wn.2d 691, 628 P.2d 884 (1982) ..... 35

Haekins v. Rhay, 78 Wn.2d 389, 399, 474 P.2d 557 (1970) ..... 37

Helsley v. State, 809 N.E.2d 292, 296-301 (Ind. 2004)..... 21

In re F.D. Processing, Inc., 119 Wn.2d 452, 832 P.2d 1303 (1992)..... 21

In re PRP of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004)..... 24

In re the Personal Restraint of Jones, 121 Wn. App. 859, 870,  
88 P.3d 424 (2004)..... 50

Johnston v. Beneficial Management, 85 Wn.2d 637, 641,  
538 P.2d 510 (1975)..... 19

Marine Power & Equipment Co. v. Washington State Human Rights  
Com'n Hearing Tribunal, 39 Wn. App. 609, 616-17,  
694 P.2d 697 (1985)..... 21

Miebach v. Cloasurdo, 102 Wn.2d 170, 180-181,  
685 P.2d 1074 (1984)..... 19

People v. Ford, 198 Ill. 2d 68, 72 n.1, 260 Ill. Dec. 552,  
761 N.E.2d 735 (2001)..... 25

Poole v. State, 846 So. 2d 370; (Ala. Crim. App. 2001)..... 25

Scarsella Bros., Inc. v. State Dept. of Licensing, 53 Wn. App. 882,  
771 P.2d 760 (1989)..... 21

State ex rel. Dawes v. Wash. State Highway Comm'n, 63 Wn.2d 34, 38,  
385 P.2d 376 (1963)..... 35

<u>State v. Allen</u> , 359 N.C. 425, 438, 615 S.E.2d 256 (N.C. 2005) .....	25
<u>State v. Ammons</u> , 105 Wn.2d 175, 189-90, 713 P.2d 719 (1986) .....	47
<u>State v. Badoni</u> , 133 N.M. 257, 62 P.3d 348 (2002) .....	25
<u>State v. Ball</u> , 127 Wn. App. 956, 960-61, 113 P.3d 520 (2005) .....	43
<u>State v. Base</u> , Supreme Court Case No. 76081-1 .....	28
<u>State v. Becker</u> , 132 Wn.2d 54, 61, 935 P.2d 1321 (1997) .....	37
<u>State v. Berry</u> , 141 S.W.3d 549 (Tenn. 2004) .....	26
<u>State v. Blank</u> , 131 Wn.2d 230, 249, 930 P.2d 1213 (1997) .....	21
<u>State v. Bobic</u> , 140 Wn.2d 250, 265, 996 P.2d 610 (2000) .....	54, 55
<u>State v. Bowerman</u> , 115 Wn.2d 794, 799, 802 P.2d 116 (1990) .....	40, 41
<u>State v. Bray</u> , 52 Wn. App. 30, 34, 756 P.2d 1332 (1988) .....	13
<u>State v. Butters</u> , Case No. 75989-8 .....	40
<u>State v. Cabrera</u> , 73 Wn. App. 165, 169 n.3, 868 P.2d 179 (1994) .....	47
<u>State v. Carroll</u> , 81 Wn.2d 95, 110, 500 P.2d 115 (1972) .....	55
<u>State v. Chino</u> , 117 Wn. App. 531, 540, 72 P.3d 256 (2003) .....	13
<u>State v. Clark</u> , 129 Wn.2d 805, 920 P.2d 187 (1996) .....	27
<u>State v. Courser</u> , 199 Wash. 559, 560, 92 P.2d 264 (1939) .....	36
<u>State v. Davis</u> , 133 Wn. App 415, 138 P.3d 132 (2006) .....	33, 34
<u>State v. Davis</u> , 6 Wn.2d 696, 108 P.2d 641 (1940) .....	37
<u>State v. Dent</u> , 123 Wn.2d 467, 476, 869 P.2d 392 (1994) .....	55
<u>State v. Falling</u> , 50 Wn. App. 47, 747 P.2d 1119 (1987) .....	28
<u>State v. Finch</u> , 137 Wn.2d 792, 806-807, 975 P.2d 967 (1999) .....	27
<u>State v. Fowler</u> , 187 Wash. 450, 60 P.2d 83 (1936) .....	36

<u>State v. Furth</u> , 5 Wn.2d 1, 104 P.2d 925 (1940), <u>overruled by</u> , <u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003) .....	36
<u>State v. Giles</u> , 132 Wn. App. 738, 742, 132 P.3d 1151 (2006).....	48, 49
<u>State v. Gunther</u> , 45 Wn. App. 755, 727 P.2d 258 (1986).....	28
<u>State v. Hennings</u> , 129 Wn.2d 512, 919 P.2d 580 (1996).....	21
<u>State v. Hochhalter</u> , 131 Wn. App. 506, 518-24, 128 P.3d 104 (2006).....	48
<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005).....	1, 22, 29, 30, 31, 32, 34
<u>State v. Hunt</u> , 128 Wn. App. 535, 542, 116 P.3d 450 (2005).....	49
<u>State v. Irizarry</u> , 111 Wn.2d 591, 592, 763 P.2d 432 (1988).....	13
<u>State v. Jones</u> , 126 Wn. App. 136, 107 P.3d 755, <u>review granted</u> , 155 Wn.2d 1017, 124 P.3d 659 (2005).....	48
<u>State v. Lei</u> , 59 Wn.2d 1, 3, 395 P.2d 609 (1961).....	27, 28
<u>State v. Lopez</u> , 147 Wn.2d 515, 519, 55 P.3d 609 (2002).....	47
<u>State v. Manuel</u> , 94 Wn.2d 695, 700, 619 P.2d 977 (1980).....	34
<u>State v. Manussier</u> , 129 Wn.2d 652, 682, 921 P.2d 473 (1996), <u>cert. denied</u> , 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997).....	45
<u>State v. Martin</u> , 94 Wn.2d 1, 4, 614 P.2d 164 (1980).....	40, 41
<u>State v. McCarty</u> , 140 Wn.2d 420, 424-25, 998 P.2d 296 (2000) .....	17
<u>State v. McGary</u> , 37 Wn. App. 856, 859-60, 683 P.2d 1125 (1984) .....	17
<u>State v. Metcalf</u> , Supreme Court Case No. 76077-2.....	28
<u>State v. Miller</u> , 71 Wn.2d 143, 146, 426 P.2d 986 (1967).....	17
<u>State v. Munson</u> , 120 Wn. App. 103, 83 P.3d 1057 (2004).....	17

<u>State v. Parker</u> , 132 Wn.2d 182, 937 P.2d 575 (1997) .....	52
<u>State v. Phelan</u> , 100 Wn.2d 508, 512, 671 P.2d 1212 (1983) .....	38, 39
<u>State v. Pillatos</u> , Supreme Court Case No. 75984-7 .....	28, 40
<u>State v. Rice</u> , 98 Wn.2d 384, 399, 655 P.2d 1145 (1982) .....	39
<u>State v. Ring</u> , 65 P.3d 915, 928 (Ariz. 2003).....	21, 22
<u>State v. Rivas</u> , 49 Wn. App. 677, 682-83, 746 P.2d 312 (1987).....	17
<u>State v. Rivers</u> , 130 Wn. App. 689, 694-697, 128 P.3d 608 (2005).....	43, 44, 46
<u>State v. Roberts</u> , 142 Wn.2d 471, 509 n.12, 14 P.3d 713 (2000) .....	34
<u>State v. Rodriguez</u> , 61 Wn. App. 812, 815, 812 P.2d 868 (1991) .....	21
<u>State v. Sawatzky</u> , 339 Ore. 689, 697, 125 P.3d 722, 726 (2005) .....	26
<u>State v. Smith</u> , 144 Wn.2d 665, 670, 30 P.3d 1245 (2001) .....	19, 50
<u>State v. Smith</u> , 150 Wn.2d 135, 144, 75 P.3d 934 (2003) .....	36, 43, 44
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934, <u>cert. denied</u> , 541 U.S. 909 (2004).....	46
<u>State v. Thorne</u> , 129 Wn.2d. 736, 779, 921 P.2d 514 (1996) .....	26
<u>State v. Todd</u> , 78 Wn.2d 362, 474 P.2d 542 (1970) .....	37
<u>State v. Tvedt</u> , 153 Wn.2d 705, 718, 107 P.3d 728 (2005) .....	17, 18
<u>State v. Varga</u> , 151 Wn.2d 179, 183, 86 P.3d 139 (2004) .....	50
<u>State v. Weiding</u> , 60 Wn. App. 184, 187 n.3, 803 P.2d 17 (1991) .....	17
<u>State v. Wheeler</u> , 145 Wn.2d 116, 34 P.3d 799 (2001), <u>cert. denied</u> , 535 U.S. 996 (2002).....	43-44, 45-46

**Constitutional Provisions**

Fifth Amendment, United States Constitution..... 25

Fourteenth Amendment, United States Constitution ..... 25, 38

Sixth Amendment,  
United States Constitution ..... 1, 20, 29, 34, 35, 42, 45, 46, 48

Article 1, § 12, Washington State Constitution ..... 38

**Statutes**

Former RCW 9.94A.030(12)(b) (1996)..... 50

Laws of 1997, ch. 338, § 2..... 50

Laws of 2002, ch. 107, §§ 2(13)..... 50

Laws of 2002, ch. 107, §§ 3(18)..... 50

Laws of 2005, c. 68, §1..... 22

Laws of 2005, Ch. 68..... 23, 32

Laws of Washington 2003 c 53 § 88 ..... 14

RCW 10.37.056 ..... 17

RCW 10.95.040(2)..... 27

RCW 2.28.150 ..... 32, 34

RCW 69.50.435 ..... 37

RCW 9.92.030 ..... 36

RCW 9.94A.525..... 50

RCW 9.94A.530(2)..... 37

RCW 9.94A.535..... 32, 34, 35

RCW 9.94A.535(2)(d) ..... 23

RCW 9.94A.535(3)(d) .....	23
RCW 9.94A.537.....	1, 19, 22, 29, 40
RCW 9.94A.537(1).....	23
RCW 9.94A.537(2).....	23
RCW 9A.28.040(1).....	54
RCW 9A.82.010(14).....	53
RCW 9A.82.010(15).....	53
RCW 9A.82.010(4).....	53
RCW 9A.82.060.....	14
RCW 9A.82.060(1).....	14
RCW 9A.82.060(1)(a) .....	15, 16, 53
RCW 9A.82.060(2)(a)(b).....	14
RCW 9A.82.085.....	54

**Rules and Regulations**

CrR 4.2(a) .....	40
CrR 6.1(a) .....	33
CrR 6.1(b) .....	34
CrR 6.16(b) .....	33
RAP 2.5(a) .....	13

**Appendices**

Appendix "A"

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly instruct the jury on leading organized crime when its instructions were consistent with the means alleged in the amended information?
2. Should the Legislature's 2005 amendments to the SRA apply to this case when it went to trial after the effective date of the legislation, the amendments are procedural, and when retroactive application does not violate the *ex post facto* clause?
3. Should the exceptional sentence imposed below be upheld when the procedures employed comport with Blakely and the newly enacted RCW 9.94A.537?
4. Has defendant failed to show that trial court acted contrary to the decision in State v. Hughes or that it exceeded its authority by imposing an exceptional sentence?
5. Has defendant failed to show the existence of an equal protection violation or any infringement on his right to trial?
6. Has defendant failed to demonstrate a violation of his sixth amendment right to trial based upon the fact that the court did not submit the issue of his prior convictions or the issue of whether he was on community placement at the time of the offense to a jury for determination?

7. Did the court properly calculate defendant's offender score, sometimes including juvenile convictions and sometimes not, depending on the offense date of the current offenses?

B. STATEMENT OF THE CASE.

1. Procedure

On April 25, 2003, the Pierce County Prosecutor's Office filed an information charging appellant QUALAGINE APERO HUDSON (defendant), with two counts of trafficking in stolen property in the first degree and two counts of possessing stolen property in the first degree in Pierce County Superior Court Cause No. 03-1-01939-1. CP 1-5. The State amended the information so that defendant was also charged with two counts of bribery, conspiracy to commit trafficking of stolen property in the first degree, and leading organized crime. CP 21-26.

After the United States Supreme Court issued its decision in Blakely v. Washington, the State filed a notice of intent to seek exceptional sentence alleging that defendant's crimes were a major economic offense (or series of offenses) aggravator applied to defendant case. CP 57.

The trial began on May 2, 2005, before the Honorable John A. McCarthy. RP 3, 40-41. Just prior to trial, and two years after the filing of the original information, defendant filed a motion for a bill of

particulars. CP 87-94. The motion was discussed but the court did not order the State to file a bill of particulars. RP 17-28.

After hearing the evidence, the jury convicted the defendant of trafficking in stolen property in the first degree (Court I), two counts of bribery (Counts V and VI), conspiracy to commit trafficking of stolen property in the first degree (Count VII), and leading organized crime (Count VIII). The jury acquitted defendant of trafficking as charged in Count II and two counts of possession of stolen property in the first degree as charged in Counts III and IV. RP 909- 911; CP 203-210. The jury returned a special verdict finding the leading organized crime was a major economic offense. RP 910; CP 211.

At sentencing, the State presented certified copies of defendant's prior convictions. CP 321-389. The court did not include defendant's pre-15 juvenile conviction in the calculation of the offender score on Count V, but did include them in the calculation on the remaining counts. CP 402-413; 09/23/05 RP 36-40. The court also included a point because defendant was on community placement at the time of the offense. CP 402-413. The court imposed standard range sentences on Counts I, V, VI, and VII. 9/23/05 RP 51-54; CP 402-413. The court imposed an exceptional sentence of 180 months on the leading organized crime. Id. The court entering findings of fact and conclusions of law regarding its sentence. CP 397-399.

Defendant filed a timely notice of appeal from entry of this judgment. CP 414-425.

2. Facts

In the summer of 2001, Detective Terry Krause was working on the Auto Theft Task Force for the Tacoma Police Department. RP 56-58.<sup>1</sup> He spoke with a man called Dyvonne Dorcy regarding the activities of a man called "Q," who was later identified as defendant. RP 59-60, 76. As Det. Krause began to investigate the information provided to him, he discovered that the criminal activity appeared to be occurring outside his jurisdiction in either King County or Southern Pierce County. RP 60-61. Det. Krause relayed what he had learned during his investigation to law enforcement from these other jurisdictions at a regional meeting of the task force. RP 61-63. Detective Triplett of the Washington State Patrol picked up the investigation and involved other detectives from various jurisdictions. RP 63, 85-92. Det. Triplett would receive stolen vehicle reports from various jurisdictions and many of these vehicles were registered to companies or addresses that were affiliated with Mr. Tracey

---

<sup>1</sup> There are nine volumes with sequentially numbered pages covering the trial proceedings in this case. These shall be referred to as "RP." All other volumes shall be referred to by the date of the hearing preceding the "RP" notation in the following format "MM/DD/YR RP."

Holmes; defendant's name also came up in this investigation connected to stolen El Caminos, whose VIN<sup>2</sup> plates had be switched. RP 100-101, 116.

Det. Triplett obtained a search warrant for the home of defendant's mother. RP 103. The search uncovered many pictures of defendant around high-end SUVs, a number of vehicle registrations, titles, vehicle plates, VIN plates, and VIN -altering equipment. RP 103. Later that same day, December 17, 2002, Det. Triplett served a search warrant on the residence of Tracey Holmes near Graham in Pierce County. RP 63-64, 101-102, 104. There were between 40-60 vehicles on Holmes's property. RP 106. A Corvette was being disassembled and "re-VIN'd" in the garage. RP 111, 113. There were a number of SUV's on the property in various states of assembly; the detective described the scene as "almost a wrecking yard." RP 114. Law enforcement gave each vehicle a number then began recording identifying information, such as VIN numbers, about each one. RP 114. Mr. Holmes was arrested later that night. RP 115.

Tracey Holmes testified that he worked in several jobs having to do with cars including, car part sales, towing, and being a mechanic. RP 310.

---

<sup>2</sup> The VIN (vehicle identification number) is a seventeen digit number that manufacturer's put on vehicles in known and hidden locations. RP 65, 103-104, 167-169. The first three digits indicate in what country the car was made and the manufacturer; the next five digits provide information about the make and model; the next one is called a check digit and is computer generated; number also includes the year of the vehicle, the manufacturing plant and a sequential number that is unique to each car. RP 167. There is a public VIN located on a plate attached to the dash by rivets. RP 103, 168. The easiest way to remove or switch this plate is to remove the windshield. RP 104. The VIN is also inscribed on the engine, transmission, frame and other locations. RP 168-169.

He had two legitimate businesses with his wife, under the names of Bill's Graham Custom Auto and 4-Horseman. RP 311. He testified that he was also engaged in the illegal activity of switching VIN numbers on cars. RP 311-312. He would remove the windshield to replace the VIN plate in the window; he would get the new VIN plate from the person who wanted the new plate in the window. RP 312-313. He worked with DeV Vaughan (sic) Dorsey, Qualagine Hudson, and Nathaniel Neef doing this type of work. RP 313. Holmes met defendant through Dorsey. RP 314. He testified that Dorsey drove him to defendant's house in Federal Way where he pulled out a windshield so Dorsey could switch the VIN number. RP 315.

About a month later defendant contacted him and said that he had a lot of work for him. RP 316-317. Holmes indicated that defendant would call him at least once a week to do work for him. RP 400-401. Holmes did between 5 to 10 "re-VINs" in the garage of Hudson's mother's home in Federal Way. RP 319-320. He also went several times to defendant's home in Kent, which defendant shared with his girlfriend and their child. RP 320- 321. Holmes estimates that he was involved in 20-25 "re-VINs" with defendant; sometimes he brought the cars back to his place to take care of them. RP 322. Holmes said that defendant found out where he lived and began dropping cars off at his house. RP 323. Holmes was paid \$350-\$400 per car, in cash. RP 324. Sometimes the steering column was cracked on these cars which led Holmes to suspect that they were stolen; he would fix these cars so that they could be driven. RP 324-325. When

the search warrant was served on his property, he had two flatbed trucks on it that he had gotten from defendant. RP 328. One of them defendant had gotten for him because Holmes needed it for his business. RP 329. Holmes knew it was stolen because it had a broken lock and ignition; he painted it and repaired the damage. RP 328-329. The other flatbed defendant was using to pick up vehicles but the clutch went out and was inoperable; Holmes had switched its VIN. RP 330. Holmes recalled switching VINs on three or four Chevy Tahoes, all at defendant's request. RP 330-331, 335-336. Except for a couple of times, defendant provided the replacement VIN plates for the switch. RP 331. Many of the switches were on SUV type vehicles. RP 336-340. Holmes was charged with many counts of possession of stolen property and trafficking and leading organized crime. He pleaded guilty to one count of trafficking and nine counts of possession of stolen property and faced a sentence of five years in prison. RP 340-341.

Daniel Bailey, defendant's older brother, testified that officers found a notary stamp for Hans Johnsen during a search of his home on March 24, 2004. RP 415-416, 419, 421. He testified that the stamp was dropped off with some other stuff by a man named "Maynard" who he met through his brother. RP 416. "Maynard" came to his house and said that a "friend of his got arrested with some stuff and he said he needed to drop that stuff off at my house." RP 416. Bailey had told his probation officer

that he was holding this stamp for his brother while he was in custody. RP 133.

VIN numbers are used by insurance companies and by the Department of Licensing (DOL); a vehicle is registered using the VIN. RP 169. DOL keeps track of titled or registered vehicles; you must have a registered vehicle to get a license plate for it. RP 171-172. DOL can access its information by either a license plate number or a VIN. RP 172-173.

A person seeking to register their vehicle must: fill out an application for title or go to a DOL office in person; have a Certificate of Origin from the manufacturer with the VIN listed; and, provide an Odometer Disclosure Statement. RP 174-176. DOL records also include "Affidavits of Loss[/]Release of Interest" which someone would use if he had lost his title and sought issuance of a new one from DOL. RP 176-177. An "Affidavit in Lieu of Title" is sometimes used to accomplish this same task. RP 181. Before DOL will issue a replacement, it will check to see if the vehicle has been reported stolen; it will not issue a replacement title if there is a report of stolen vehicle. RP 177. Anyone selling a vehicle must report the sale to DOL within five days. RP 178. DOL also keeps Washington State Patrol Statement of act forms in its records which indicates that agency has performed a physical inspection of the vehicle.

RP 179. This form is used when a vehicle has been rebuilt after being declared as a total loss for insurance purposes – a procedure designed to ensure that stolen parts are not used to rebuild the vehicle. RP 180. In Washington, county auditors are appointed to handle vehicle licensing under the oversight of DOL. RP 182. County auditors may contract with private businesses as sub-agents to handle these tasks. RP 182-183. The Fairwood Department of Licensing is a private business under contract with King County. RP 184.

Angela Jametsky worked at the Fairwood licensing office as a title clerk and supervisor. RP 270. Ms. Jametsky identified defendant, whom she knew as “Q,” as one of her repeat customers that she would see a couple of times a week, over a period of six to eight months. RP 272-274. Sometimes Mr. Hudson would come in with him. RP 276. Defendant would usually come in for a title transfer, bringing in a notarized affidavit of lost title. RP 273. Ms. Jametsky testified that defendant would slip her extra money in the transaction so she would process the transaction into the name of the different companies that he was using. She indicated that by doing this she was illegally transferring the title into the name that he gave her. RP 278. She pleaded guilty to bribery for this activity. RP 277. Frequently, defendant would have her transfer titles in to his mother’s name or a dealership’s name. RP 278, 296-297. He did not have a

notarized power of attorney necessary to handle a transfer of title for someone else. RP 278-279. She testified that Exhibits 14 and 15<sup>3</sup> reflected two of the title transfers she handled for defendant. RP 275, 280. He never had titles transferred to the name of Qualagine Hudson. RP 297. Ms. Jametsky never altered any of the information given to her or entered information which she knew had been altered. RP 302-303, 305-306.

After Ms. Jametsky left the Fairwood licensing office in October of 2002, defendant approached Shawn Bell, a title clerk who worked there, and asked if he could help him out. RP 501, 506. Defendant wanted Bell to transfer some titles and sometimes to alter some information by changing the make, model, or VIN number. RP 500, 511. Defendant came in around six times over the course of two months and had Bell issued 10 to 20 titles. RP 500-501. In payment, defendant slipped Bell extra cash in the transaction and gave him a pair of car speakers. RP 501-502. Defendant would call in advance and give VIN numbers to Bell so he could check to see if there were any holds on any of them, because a hold would stop the transaction from going through. RP 509. Defendant would arrive with the paperwork filled out. RP 508. Mr. Bell knew that what he was doing was wrong and terminated his dealings with defendant. RP 503-504.

---

<sup>3</sup> These exhibits pertained to the title for two flatbed trucks. RP 305.

In January 2003, employees of Dwayne Lane Chrysler Jeep dealership in Everett, Washington, completed a year –end inventory and discovered that a 1999 Chevrolet Tahoe, VIN number 1GNEK13R4XJ514154, was missing from the lot and reported it stolen. RP 265. This 1999 Chevrolet was found on the lot of Hanson’s Auto sales. RP 229. On January 20, 2003, two detectives went to Hanson’s lot while tracing the previous history of one of the vehicles found on Holmes’s property during the search. RP 575-577. The detectives were looking at any SUV type vehicles and also looking for any vehicle with plates with the letter combination PLW, PVX or PGL, as these had been issued from the Fairwood licensing office. RP 578, 618 .

On the lot, the detectives noticed a black Tahoe sitting amongst the used vehicles. RP 579. The Tahoe’s public VIN plate read 1GTCS1948TK511466. RP 581. When the officers ran the license plates they came back as associated with both a Chevy Tahoe and a pick up truck. RP 229-331, 579-580. The title history for VIN 1GTCS1948TK511466 showed it belonged to a 1996 GMC S-10 pick up. RP 581. The DOL records on this vehicle showed that the registered owner of the “re-VIN’d” Tahoe was Matt Locher who lived at 27240 121<sup>st</sup> Avenue SE in Kent, Washington. RP 231, 573. This was the same address defendant had given DOL in March of 2002 in connection with his

driver's license. RP 572. The records indicated that the vehicle had been sold to Locher by a Jeff Voyt, who also lived at 27240 121<sup>st</sup> Ave SE in Kent. RP 574. These documents had been notarized by Hans Johnsen, which was the name on the notary stamp found in defendant's brother's possession. RP 415-416, 419, 421, 575. Shawn Bell had handled this title transfer. RP 575. The Tahoe was impounded and searched for its correct VIN; the true VIN was 1GNEK13R4XJS14154. RP 583, 585. This matches the Tahoe stolen from the dealership in Everett. RP 265.

Detectives identified about 25 vehicle registered to defendant's mother, Veronica Hudson, over 30 registered to his girlfriend, Sheila Severson. RP 616, 721. Ms. Severson testified that she only owned one car. RP 741. Ms. Severson acknowledged that she had falsely reported her Honda Accord as being stolen from a Denny's parking lot and that she had falsely filed an insurance claim knowing that Holmes had her car. RP 746-750.

Defendant presented the testimony of several witnesses, but did not testify. The defense argued that the trafficking was being organized by Tracey Holmes and/or Daniel Bailey, but that there was little evidence that directly linked defendant to these crimes. RP 866-889.

C. ARGUMENT.

1. THE COURT PROPERLY INSTRUCTED THE JURY ON THE ONLY MEANS OF COMMITTING LEADING ORGANIZED CRIME THAT WAS CHARGED IN THE INFORMATION.

A criminal defendant must be informed of the charges against him; he cannot be tried for an uncharged offense. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). Accordingly, when there are alternative means of committing an offense, it is error to instruct the jury on a means that is not alleged in the information. State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988); State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). An instruction that offers an uncharged alternative means as a basis for conviction is "presumed prejudicial unless it affirmatively appears that the error was harmless." Bray, 52 Wn. App. at 34-35.

Defendant contends that the jury was allowed to convict upon an uncharged alternative means of committing leading organized crime. Brief of Appellant at pp. 10-15. The "to convict" instruction for this offense was Instruction No. 28. CP 169-202. Defense did not object to this instruction in the trial court. RP 831. Nevertheless, defendant avers that this may be raised for the first time on appeal as manifest error of constitutional magnitude under RAP 2.5(a). Brief of Appellant at p. 11. The State submits that appellant is unable to show that any error occurred,

much less that it was manifest constitutional error, as the jury was instructed only on the one means alleged in the amended information.

The prohibition against leading organized crime found in RCW 9A.82.060(1)<sup>4</sup> does present two alternative means of committing the offense:

A person commits the offense of leading organized crime by:

(a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity; or

(b) Intentionally inciting or inducing others to engage in violence or intimidation with the intent to further or promote the accomplishment of a pattern of criminal profiteering activity.

The Legislature has provided that the person who commits this crime by violating subsection (1)(a) has committed a Class A felony while a violation of subsection (1)(b) is a Class B felony. RCW 9A.82.060(2)(a)(b).

In this case the State charged defendant with leading organized crime in Count VIII of the amended information as follows:

That QUALAGINE APERO HUDSON, in the State of Washington, during the period between the 1<sup>st</sup> day of January, 2002 and the 23<sup>rd</sup> day of January, 2003, did unlawfully, feloniously, and intentionally organize,

---

<sup>4</sup> All citations are to the current statutes. RCW 9A.82.060 was amended in 2003, but the changes are immaterial to the issue in this case. See, Laws of Washington 2003 c 53 § 88.

manage, direct, supervise, or finance any three or more persons with the intent to engage in a pattern of criminal profiteering activity, to wit: trafficking in stolen property, contrary to RCW 9A.82.060(1)(a), and against the peace and dignity of the State of Washington.

CP 21-26. Thus, it is clear that defendant was charged with a single means of committing leading organized crime –that found in RCW 9A.82.060(1)(a).

At trial, the jury was instructed on a single means of committing leading organized crime - that found in RCW 9A.82.060(1)(a). The definitional instruction for leading organized crime referenced just one means of committing the crime; it read:

A person commits the crime of Leading Organized Crime when he or she *intentionally organizes, manages, directs, supervises, or finances any three or more persons with the intent to engage in a pattern of criminal profiteering activity.*

CP 169-202, Instruction 18 (emphasis added). The “to convict” instruction referenced just one means of committing the crime; it read, in the relevant part:

To convict the defendant of the crime of Leading Organized Crime, as charged in Count VIII, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period between the 1st day of April, 2002, and the 23rd day of January, 2003, *the defendant intentionally organized, managed, directed, supervised, or financed any three or more persons;*

(2) That the defendant acted with the intent to engage in a pattern of criminal profiteering activity; and

(3) That the acts occurred in the State of Washington.

CP 169-202, Instruction No 28 (emphasis added). In addition, the jury was further given an instruction which read:

There are allegations that defendant *intentionally organized, managed, directed, supervised, or financed three or more persons.*

To convict defendant of the crime of Leading Organized Crime, the identity of at least three of these persons must be proved beyond a reasonable doubt and you must unanimously agree as to which three persons have been proved beyond a reasonable doubt.

CP 169-202, Instruction 20 (emphasis added). Thus, all of the instructions directed the jury to find the one means charged in the information - a violation of RCW 9A.82.060(1)(a). As the jury was not instructed on an uncharged alternative means, there was no error.

Defendant's argument on appeal pertains to the language in the amended information alleging that defendant was acting with "the intent to engage in a pattern of criminal profiteering activity, *to wit: trafficking in stolen property.*" CP 21-26. Defendant contends that "the prosecution had to prove the defendant engaged in 'at least three acts of criminal profiteering' within a specific time and that the acts had 'the same or similar intent, results, accomplices, principles, victims, or methods of commission,' or were 'otherwise interrelated by distinguishing

characteristics including a nexus to the same enterprise.” Brief of Appellant at pp. 11-12. Essentially, defendant asserts that the “to wit” language in the information limits the State to using only acts of trafficking in stolen property to prove a pattern of criminal profiteering activity. Id. at 12-14. The law does not support this argument.

An information must state all the essential statutory and non-statutory elements of the crimes charged. State v. McCarty, 140 Wn.2d 420, 424-25, 998 P.2d 296 (2000). However, surplus language - language that goes beyond the essential elements - may be disregarded in a charging document. State v. Tvedt, 153 Wn.2d 705, 718, 107 P.3d 728 (2005). “[W]here unnecessary language is included in an information, the surplus language is not an element of the crime that must be proved *unless* it is repeated in the jury instructions.” Tvedt, 153 Wn.2d at 718 (emphasis added), citing State v. Miller, 71 Wn.2d 143, 146, 426 P.2d 986 (1967); State v. Weiding, 60 Wn. App. 184, 187 n.3, 803 P.2d 17 (1991); State v. Rivas, 49 Wn. App. 677, 682-83, 746 P.2d 312 (1987); State v. McGary, 37 Wn. App. 856, 859-60, 683 P.2d 1125 (1984); see also, State v. Munson, 120 Wn. App. 103, 83 P.3d 1057 (2004) (fact that surplus language in information indicated that State was intending to show three different types of predicate offenses for leading organized crime did not preclude court from finding guilt based upon only one type). Surplusage does not render an information insufficient as a charging document. RCW 10.37.056.

The words “to wit: trafficking in stolen property” in the charging language of Count VIII in the amended information were surplusage. The State did not repeat the language in the jury instructions. CP 169-202. Under Tvedt, this language did not constrain the State’s proof in any manner.

Moreover, defendant misapprehends what the State was required to prove. Under the given instructions, the State had to prove that: 1) between the charged dates the defendant intentionally organized, managed, directed, supervised, or financed any three or more persons; and, 2) that defendant *acted with the intent to engage in a pattern of criminal activity*. CP 169-202, Instruction No. 28. The State was not required to prove that defendant *actually engaged* in a pattern of criminal profiteering, but only that he intended to do so. The State was not required to prove the existence of any completed crime in order to convict defendant of leading organized crime.

As the court properly instructed the jury on the only means of committing leading organized crime that was charged in the amended information, this court should affirm the conviction below.

2. THE LEGISLATURE'S 2005 AMENDMENTS TO THE SRA WHICH BRING IT INTO CONFORMITY WITH THE PROCEDURAL REQUIREMENTS OF BLAKELY SHOULD APPLY RETROACTIVELY TO THIS CASE; THE EXCEPTIONAL SENTENCE IMPOSED BELOW CONFORMED WITH THE REQUIREMENTS OF RCW 9.94A.537.

Generally, statutes are presumed to apply prospectively, unless the enactment is remedial in nature. Miebach v. Cloasurdo, 102 Wn.2d 170, 180-181, 685 P.2d 1074 (1984); Johnston v. Beneficial Management, 85 Wn.2d 637, 641, 538 P.2d 510 (1975). "A remedial change is one that relates to practice, procedures, or remedies and does not affect a substantial or vested right." State v. Smith, 144 Wn.2d 665, 674, 30 P.3d 1245 (2002).

There is no constitutional impediment to giving procedural changes retroactive application in criminal cases. In Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977), the United States Supreme Court considered whether a change in the Florida death penalty statute subjected defendant to trial under an *ex post facto* law. Under the statute in effect at the time Dobbert committed his crime, a recommendation of mercy by the jury was not reviewable by the judge. Dobbert, 432 U.S. at 288, n. 3. Under the statute in effect at the time of Dobbert's trial, however, the jury could render an advisory opinion only. Id. at 291. Dobbert's jury recommended a life sentence, but the trial judge overruled

the recommendation and sentenced Dobbert to death. Id. at 287. On appeal, the United States Supreme Court concluded that the application of the new law to Dobbert's sentencing was not an *ex post facto* violation; the Court emphasized the procedural nature of the change:

It is ...well settled, however, that "[t]he inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed." ... "[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation ... and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." ... Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*. ... In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.

Dobbert v. Florida, 432 U.S. at 293-294. (citations omitted).

Similarly, after Arizona's capital sentencing scheme was found to be in violation of the Sixth Amendment in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Arizona Legislature amended the relevant laws to bring them into compliance. The Arizona Supreme Court rejected the claim that re-sentencing under the amended laws violated the *ex post facto* clause.

Under the holding of Dobbert, Arizona's change in the statutory method for imposing capital punishment is clearly procedural: The new sentencing statutes alter the method used to determine whether the death penalty will be

imposed but make no change to the punishment attached to first degree murder.

State v. Ring, 65 P.3d 915, 928 (Ariz. 2003); see also, Helsley v. State, 809 N.E.2d 292, 296-301 (Ind. 2004)(post-Ring change to death penalty statute, changing the respective roles of the judge and jury, did not violate *ex post facto* clause).

Washington courts have repeatedly recognized that a remedial statute should be applied retroactively when doing so would further its remedial purpose. In re F.D. Processing, Inc., 119 Wn.2d 452, 832 P.2d 1303 (1992); Marine Power & Equipment Co. v. Washington State Human Rights Com'n Hearing Tribunal, 39 Wn. App. 609, 616-17, 694 P.2d 697 (1985). In State v. Hennings, 129 Wn.2d 512, 919 P.2d 580 (1996), this Court held that an amendment extending the time within which to enter restitution orders was a procedural change that applied retroactively. See also, State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997) (holding statute authorizing recoupment of appellate costs was procedural and retroactive); State v. Rodriguez, 61 Wn. App. 812, 815, 812 P.2d 868 (1991) (Rule of Appellate Procedure authorizing State's appeal was retroactive because procedural in nature). It is not necessary that the legislature expressly indicate that a procedural statute is to be given retroactive application as long as the legislative intent can be determined from the purpose of the statute. Scarsella Bros., Inc. v. State Dept. of Licensing, 53 Wn. App. 882, 771 P.2d 760 (1989).

On April 14, 2005, the same day that the Washington Supreme court issued its opinion in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), the Legislature passed laws amending the SRA which were designed to “create a new criminal procedure for imposing greater punishment than the standard range” in an effort to “restore the judicial discretion that has been limited as a result of the Blakely decision.” Laws of 2005, c. 68, §1. The law went into effect the next day with the Governor’s signature.

The rule set forth in Blakely was new constitutional rule of criminal procedure. See, Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 2523-24, 159 L. Ed. 2d 442 (2004), Guzman v. United States, 404 F.3d 139 (2<sup>nd</sup> Cir. 2005); United States v. Price, 400 F.3d 844, 845 (10<sup>th</sup> Cir. 2005); McReynolds v. United States, 397 F.3d 479, 480-481 (7<sup>th</sup> Cir. 2005). The 2005 amendments to the SRA simply implemented procedures to comply with Blakely. The new legislation amended RCW 9.94A.535 and created a new statute, codified as RCW 9.94A.537<sup>5</sup>, setting forth procedures to use to have the factual support for aggravating circumstances properly determined. These recent amendments are similar to those at issue in Dobbert and State v. Ring. They did not increase the punishment; rather they enacted procedural changes. As such the

---

<sup>5</sup> See Appendix A for text of statute.

amendments do not violate the *ex post facto* clause and are presumed to apply retroactively.

In this case, defendant committed his crimes before the decision in Blakely issued. CP 21-26. However, his trial occurred after the legislative fix to Blakely went into effect. Laws of 2005, c. 68; RP 40-41. Because this new legislation was remedial and procedural, it may be properly applied to his case. The prosecution below complied with the new procedures.

RCW 9.94A.537(1) requires that “prior to trial or entry of guilty plea... the state may give notice that it is seeking a sentence above the standard sentencing range” and that the notice “shall state aggravating circumstances upon which the requested sentence will be based.” The State gave defendant notice of its intention to seek a sentence above the standard range based upon the aggravating circumstance found in former RCW 9.94A.535(2)(d) (recodified as RCW 9.94A.535(3)(d)<sup>6</sup>), that the current offense was a major economic offense or series of offenses. CP 57. Secondly, RCW 9.94A.537(2) requires:

The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

---

<sup>6</sup> The state cited to the correct statutory reference at the time the notice was filed.

Here, the jury was given special verdict form and instructed that if it found defendant guilty of Leading Organized Crime in Count VIII that it was to answer the question in the interrogatory; it was further instructed that it had to be unanimously satisfied beyond a reasonable doubt to answer the question “yes.” CP 169-202, Instructions 31 and 32. The jury returned a special verdict finding the factual basis supporting the aggravating circumstance. CP 211. Based upon this finding, the court imposed an exceptional sentence on Count VIII, Leading Organized Crime. CP 397-399 (findings), 402-413 (judgment); 9/23/05 RP 51-54.

In a single paragraph, defendant dismisses the application of the new legislation to this case, claiming that to apply it would violate the *ex post facto* clause. Brief of Appellant at p.22. The only support or analysis for this claim is a citation to In re PRP of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). The reliance is misplaced however, because the amendment at issue in Hinton was not procedural:

The amendment added assault to the category of felonies that can serve as predicate felonies for second degree felony murder. The amendment was clearly substantive, and it increased criminal liability for those committing an assault that unintentionally led to death.

In re PRP of Hinton, 152 Wn.2d at 861 (2004). Hinton is not relevant to the case before the court.

Defendant also challenges the sufficiency of the notice provided below. His claim is that the State needed to allege the aggravating factors

in the charging document because they are now “elements” of the charged crime. Brief of appellant at p.43. This is an overstatement of the holdings of Apprendi and Ring.

The Supreme Court specifically declined to address the indictment question in Apprendi, noting that (1) Apprendi did not assert a constitutional claim based upon the indictment's failure to charge the extended-term sentencing factors, and (2) the due process clause of the fourteenth amendment, upon which Apprendi exclusively relied, has never been construed to make the fifth amendment right to " 'presentment or indictment of a Grand Jury' " applicable to the states. Apprendi, 530 U.S. at 477 n.3. The Supreme Court has held, however, that "an indictment must set forth each element of the crime that it charges. But it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." Almendarez-Torres v. United States, 523 U.S. 224, 228, 118 S. Ct. 1219, 1223, 140 L. Ed. 2d 350, 358 (1998) (citation omitted).

Other states faced with the claim that the constitution requires sentencing aggravators to be alleged in the charging document have rejected this argument. Poole v. State, 846 So. 2d 370; (Ala. Crim. App. 2001); People v. Ford, 198 Ill. 2d 68, 72 n.1, 260 Ill. Dec. 552, 761 N.E.2d 735 (2001); State v. Badoni, 133 N.M. 257, 62 P.3d 348 (2002); State v. Allen, 359 N.C. 425, 438, 615 S.E.2d 256 (N.C. 2005) (overruling language in prior case requiring sentencing factors which might lead to a

sentencing enhancement to be alleged in an indictment); State v. Sawatzky, 339 Ore. 689, 697, 125 P.3d 722, 726 (2005); State v. Berry, 141 S.W.3d 549 (Tenn. 2004).

Washington law does not support defendant's claim that there is a constitutional right to have sentencing factors alleged in the charging document. In State v. Thorne, 129 Wn.2d. 736, 779, 921 P.2d 514 (1996), this court held that the POAA was a "sentencing statute and not a statute defining the elements of a crime." As such, the prosecutor need not file a formal charge in order to sentence a defendant as a persistent offender. Thorne, 129 Wn.2d at 780. In rejecting Thorne's contention that he had to be formally notified of the potential sentence in the information charging him with a third most serious offense, this court stated:

Although formal charging is not constitutionally mandated because the Act involves sentencing and not the filing of a criminal charge, we nonetheless find early notice of the potential sentence to be appropriate.

Thorne, 129 Wn.2d at 781. Both the United States Supreme Court and this Court have addressed whether notice of enhanced penalties for recidivism is constitutionally required prior to a determination of guilt on the triggering conviction. Both courts found it was not required.

In Oyler v. Boles, 368 U.S. 448, 452, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), the United States Supreme Court examined a challenge to the constitutionality of procedures used in West Virginia to impose more severe penalties upon recidivist offenders. The petitioners in Oyler

contended that procedural due process required notice of the possibility of increased penalties before the trial on the offense that would render them eligible for increased punishment. As in Washington, West Virginia's allegation that a defendant was a habitual criminal did not state a separate criminal offense. Oyler, 368 U.S. at 452. The Court noted that individual states were free to combine this recidivist determination with the trial on the felony charge or keep it the subject of a separate determination as each Legislature saw fit. Id. The Court found no requirement under procedural due process that a defendant be given notice - in advance of the trial on a substantive offense - that he might be subject to the possibility of enhanced sentencing for recidivism following conviction. Oyler v. Boles, 368 U.S. at 452.

Washington Supreme Court decisions interpreting the state constitution are in accord. In State v. Clark, 129 Wn.2d 805, 920 P.2d 187 (1996), this court addressed the nature of the death penalty notice required by RCW 10.95.040(2). The court noted that Clark's case did not present a constitutional issue as the constitution requires notice of the criminal charges but not of the "penalty exacted for the conviction of the crime." Clark, 129 Wn.2d at 811, citing State v. Lei, 59 Wn.2d 1, 3, 395 P.2d 609 (1961); see also, State v. Finch, 137 Wn.2d 792, 806-807, 975 P.2d 967 (1999). In Lei, the court found no constitutional violation in informing a habitual offender after his conviction of a third felony that the State was seeking the mandatory penalty. The court held that state constitution does

not require the “accused be informed... relative to the penal provisions which may be imposed in the event of a conviction.” Lei, 59 Wn.2d at 3.

Defendant relies on cases pertaining to provisions that invoke mandatory minimum terms or otherwise automatically increase the punishment imposed. Brief of Appellant at p. 41-42. Courts have not required allegations regarding potential exceptional sentences to be alleged in the information because such a sentence is not an automatic result of conviction, but merely a possible collateral consequence that requires the exercise of judicial discretion. State v. Gunther, 45 Wn. App. 755, 727 P.2d 258 (1986); State v. Falling, 50 Wn. App. 47, 747 P.2d 1119 (1987). In short, defendant fails to present any authority for his claim that the constitution requires that aggravating factors, which might justify the imposition of an exceptional sentence, must be alleged in the charging document.

The Washington Supreme Court currently has pending before it the issue of whether the 2005 Legislative amendments aimed at bringing the SRA into compliance with the decision in Blakely should be applied retroactively. This issue is present in State v. Base, Supreme Court Case No. 76081-1 and State v. Metcalf, Supreme Court Case No. 76077-2, two of the four cases consolidated under Supreme Court Case No. 75984-7 (State v. Pillatos). After the original oral argument in these consolidated cases, the Supreme Court asked for supplemental briefing on the retroactivity of the new legislation and the matter was reargued on October

25, 2005. This case could be stayed pending the Supreme Court's decision on this issue.

If the court does not stay this matter, it should find that the legislative amendments are retroactive and applicable to this case. As the prosecution below complied with the requirements of RCW 9.94A.537, the court should uphold the jury's determination of an aggravating circumstance and the court's imposition of an exceptional sentence.

3. BY IMPOSING AN EXCEPTIONAL SENTENCE, THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S SIXTH AMENDMENT RIGHT, ACT CONTRARY TO STATE V. HUGHES, OR EXCEED ITS STATUTORY AUTHORITY.

a. The procedure used below did not violate the holding in Hughes.

The Washington Supreme Court held recently held that the exceptional sentence provisions of the SRA are not facially unconstitutional in the wake of Blakely. State v. Hughes, 154 Wn.2d 118, 126, 110 P.3d 192 (2005). Hughes was a consolidated appeal of three defendants who each received an exceptional sentences based on aggravating factors proved to the court, not a jury. While their cases were on appeal, the United States Supreme Court issued the decision in Blakely. Each of the defendant's sentences was imposed in violation of Blakely and had to be vacated. With no indication as to how the Legislature might change the sentencing procedures in reaction to Blakely, the court was

faced with the issue of what remedy should be available on remand. The Hughes court concluded that a jury could not be impaneled on remand to find aggravating factors warranting an enhanced sentence because the SRA did not provide for such a mechanism; the court opted not to create a procedure out of “whole cloth.” Id. at 151-152. The court in Hughes held that the proper remedy in this circumstance is vacation of the sentence and remand for imposition of a standard range sentence. Id. at 126, 154.

Hughes specifically declined to decide the issue presented here:

“...whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial.” Hughes, 154 Wn.2d at 149-50.

Against this backdrop, the defendant argues that the trial court exceeded its authority by creating a sentencing method not authorized under State v. Hughes, 154 Wn.2d 118, 110 P.3d 192, 208 (2005). The defendant reads more into Hughes than is warranted.

Hughes is not the absolute prohibition on judicially implied procedures for imposing sentence enhancements that defendant claims. In Hughes, the court considered the statutory procedure for imposition of exceptional sentences. The legislature had not failed to provide a procedure; it had instead specifically provided that a judge, not a jury, must find the facts to impose such a sentence. Hughes, 154 Wn.2d at 148-49, 151. When it declared the legislature's specified procedure unconstitutional because a jury must instead find those facts, the court was

unwilling to create a procedure completely opposite from that created by the legislature. Hughes, 154 Wn.2d at 150, 151-52.

Here, defendant's situation is different. He does not claim that the legislature created a system inconsistent with that used by the trial court in his case. When "a statute merely is silent or ambiguous" a court may "imply a necessary procedure." Hughes, 154 Wn.2d at 151. Moreover, Hughes is even narrower, because the court emphasized the limited nature of its holding: "We are presented only with the question of the appropriate remedy on remand-we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial." Hughes, 154 Wn.2d at 149.

The Hughes case involved a completed trial where a jury had already determined defendants' guilt. Allowing the trial court to impanel a sentencing jury on remand created many obstacles for the Supreme Court to tackle. Such a remedy on remand required the court to authorize trial courts to use a sentencing procedure directly in conflict with that provided in the SRA at that time. Id. at 151-52. Additionally, such a remedy would require the court to authorize trial courts to submit technical and legalistic aggravating factors to the jury when it was "different to conceive that the legislature would intend to desire for lay juries to apply them." Id. at 151. Finally, such a remedy raised numerous logistical questions including whether the same jury is required, whether these jurors can be located, and

whether these jurors have been tainted by outside information or conversations about the case. These factors are not present in this case.

First, the passage of the Laws of 2005, Ch. 68 means that the court would be implementing procedures, under its inherent authority to do so, that would not conflict with existing law; the procedures would be consistent with them. Second, the passage of the Laws of 2005, Ch. 68 expresses the legislature's intent to instruct juries on the enumerated aggravating factors, answering the court's concern in Hughes. Finally, because the jury determined the existence of aggravating factors at trial, the logistical concerns of reconvening a prior jury panel are not present in this case. The trial court's ruling which allowed the jury to decide aggravating factors did not offend Hughes.

b. The trial court did not exceed its statutory authority

Defendant contends that the trial court exceeded its authority when it gave special interrogatories to the jury regarding one aggravating factors. At the close of evidence, the court gave the special interrogatory to the jury along with instructions relevant to answering the question it presented. CP 169-202, Instruction Nos. 31, 32. RCW 9.94A.535 provides that whenever an exceptional sentence is imposed, the court must set forth reasons for its decision in written findings of fact and conclusions of law. RCW 2.28.150 provides that:

When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

With this statutory authority, the court rules provide guidance to the superior court on how to instruct a jury regarding special findings or verdicts. First, the criminal rules require the court to provide “a jury” when the defendant has a right to a jury trial. CrR 6.1(a) (“Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.”) Under Blakely, defendant has a constitutional right to a jury trial on the aggravating factors. The criminal court rules further allow the court to submit special verdict forms to the jury regarding aggravating circumstances or other necessary factual determinations:

Special Findings. The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

CrR 6.16(b). The actions of the court below were consistent with the authority given it under these provisions.

In State v. Davis, 133 Wn. App 415, 138 P.3d 132 (2006), defendant was convicted of harassment, unlawful imprisonment and several misdemeanors. Id. At trial, the court submitted to the jury a

special interrogatory asking whether the defendant knew or should have known the victim was particularly vulnerable. Id. at 420. The jury found this aggravating factor existed. Id. The sentencing court imposed an exceptional sentence based on this aggravating factor. Id.

On appeal, defendant claimed this procedure violated defendant's Sixth Amendment right under Blakely and Hughes. Id. at 426. Division Three of the Court of Appeals disagreed, concluding that the trial court fashioned a process that conformed to RCW 2.28.150, RCW 9.94A.535, and CrR 6.1(b). Id. at 428. The appellate court reasoned that because: 1) the trial court had authority to submit the special interrogatory; 2) a jury found the aggravating factor; and, 3) the court properly exercised its discretion to impose an exceptional sentence based on that factor, that there was no Blakely error. Id. This court should follow Davis.

Previous appellate court decisions have required the trial court to submit special findings to the jury in a variety of contexts. See State v. Roberts, 142 Wn.2d 471, 509 n.12, 14 P.3d 713 (2000)(death penalty case involving accomplice liability issues, jury should be presented with special interrogatories concerning defendant's level of involvement); State v. Manuel, 94 Wn.2d 695, 700, 619 P.2d 977 (1980) (when defendant seeks reimbursement for self-defense, special interrogatories should be submitted to jury). Blakely now requires the jury to make special findings supporting an exceptional sentence before one may be imposed.

If the jury finds that the aggravating circumstances exist, the court may impose an exceptional sentence if it finds substantial and compelling reasons to do so. See Blakely, 124 S. Ct. at 2538 n.8; RCW 9.94A.535 (“The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.”) The United States Supreme Court did not hold the exceptional sentence provisions of the SRA completely void or unenforceable; it simply held that the sentencing procedures used by Blakely’s sentencing court did not comply with the Sixth Amendment.

If a statute is constitutional when interpreted in one manner but unconstitutional when interpreted in another, "the legislature will be presumed to have intended a meaning consistent with the constitutionality of its enactment." State ex rel. Dawes v. Wash. State Highway Comm'n, 63 Wn.2d 34, 38, 385 P.2d 376 (1963). “A statute held invalid as applied is not void on its face or incapable of valid application in other circumstances.” Foundation for the Handicapped v. Department of Social and Health Services, 97 Wn.2d 691, 628 P.2d 884 (1982)(due process flaw in statute corrected by procedures adopted by DSHS requiring proper notice).

By allowing sentencing procedures such as the ones used below, courts can ensure that sentencing procedures comply with the Sixth Amendment and the SRA, thereby giving effect to the statute, and

avoiding a declaration that the SRA is unconstitutional. See, United States v. Ameline, 376 F.3d 967, (9th Cir. 2004) (post-Blakely holding that federal district courts can impanel juries to decide facts concerning sentencing enhancements despite absence of federal sentencing statute explicitly providing for such a procedure).

Moreover, Washington case law recognizes that when a defendant has a constitutional right to a jury, a jury should be impaneled regardless of whether the right to jury has been incorporated into a statute. For example, Washington's habitual offender statute, RCW 9.92.030, was amended in 1909 to delete the requirement that a jury decide the defendant's habitual offender status; despite the amendment, trial courts regularly impaneled juries to make such determinations for over seventy years. See, State v. Smith, 150 Wn.2d 135, 144, 75 P.3d 934 (2003); State v. Courser, 199 Wash. 559, 560, 92 P.2d 264 (1939); State v. Fowler, 187 Wash. 450, 60 P.2d 83 (1936). In 1940 the Washington Supreme Court held that there was a constitutional right to a jury in habitual offender proceedings. State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940), overruled by, State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003). Even though the statute was not amended to conform to the holding in Furth, Washington courts continued to recognize that it had the power to impanel juries for habitual offender proceedings. See State v. Smith, 150 Wn.2d 135, 144, 75 P.3d 934 (2003).

Similarly, the school zone/bus stop sentencing enhancements set forth in RCW 69.50.435 make no specific provision for impaneling a jury to decide whether the facts support the enhancement. Yet there has been no doubt that Washington courts have the authority to instruct the jury and provide special verdict forms concerning the enhancement. State v. Becker, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997). Certainly, this court has the power to permit trial courts to submit interrogatories concerning exceptional sentence aggravating factors to the jury.

In Haekins v. Rhay, this Court found the improper exclusion of jurors for cause due to their opinions on the death penalty, mandated a new sentencing hearing, but not a new guilt phase. 78 Wn.2d 389, 399, 474 P.2d 557 (1970). The court observed that while there was no statutory framework to order a new trial on only the penalty phase, doing so would satisfy the intent of the legislature. Id. at 399-400, citing State v. Davis, 6 Wn.2d 696, 108 P.2d 641 (1940); State v. Todd, 78 Wn.2d 362, 474 P.2d 542 (1970).

Nothing in the SRA prevents a court from having the jury complete special verdict forms with respect to facts that would support the imposition of an exceptional sentence. The only portion of the SRA that can no longer be applied when a court is considering the imposition of an exceptional sentence above the standard range is part of RCW 9.94A.530(2): “Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the

point. The facts shall be deemed proved at the hearing by a preponderance of the evidence.” (Emphasis added). After Blakely these findings must be made beyond a reasonable doubt. The SRA does not mandate that the court be the finder of fact. It simply requires a hearing and findings. In the instant case, the trial court properly submitted interrogatories to the jury under Washington law. The State proved to a jury beyond a reasonable doubt the facts supporting the exceptional sentence. Accordingly, this procedure did not offend Blakely or Washington law.

- c. Defendant has failed to show the existence of an equal protection claim or the infringement on his right to trial.

The equal protection clauses of the Fourteenth Amendment and Washington Const. art. 1, § 12 require that "persons similarly situated with respect to the legitimate purpose of the law receive like treatment." State v. Phelan, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983). Someone who believes that he has been disadvantaged by a legislative enactment that treats similarly situated persons differently may challenge that law on equal protection grounds. Traditionally, two tests have been used to determine whether this right to equal treatment has been violated. Under the rational relationship test, a law is subjected to minimal scrutiny and will be upheld "unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective." Phelan, at 512. Under the strict scrutiny test, a law may be upheld only if it is shown to be necessary

to accomplish a compelling state interest. State v. Rice, 98 Wn.2d 384, 399, 655 P.2d 1145 (1982). The strict scrutiny test is used if an allegedly discriminatory statutory classification affects a suspect class or a fundamental right. Phelan, at 512; Rice, at 399. Both the United States Supreme Court and this court have recognized a third test to apply in limited circumstances. Under the "intermediate scrutiny" test, the challenged law must be seen as furthering a substantial interest of the state. Phelan, at 512. The Supreme Court typically applies this test where gender-based classifications are at issue. Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

As far as the State is aware, a court will only consider an equal protection claim when the challenge is based upon a statute or law *as enacted* by the legislature. The State is unaware of any case, and none are cited in appellant's brief, where the court has analyzed a statute on equal protection grounds while taking into consideration an overlay of recent case law which affects how the statute is implemented. None of the tests used to assess equal protection claims are appropriate in such circumstances for each looks just to the legislative goals with no consideration of how those goals may have been affected or impacted by recent judicial decisions. Defendant does not challenge any statute *as enacted* or argue how it creates two classes out of similarly situated persons. Defendant has failed to show that an equal protection claim is cognizable under the circumstances presented here.

Defendant also asserts that sentencing procedures used in this case impermissibly infringed on his right to trial. One of the premises underlying this argument is that courts will not allow juries to be impaneled to determine aggravating factors after a plea of guilty. Defendant offers no support for this proposition. The 2005 legislation aimed to bring the SRA into compliance with Blakely applies to convictions obtained by either trial or guilty plea and allows for a jury to be impaneled in either circumstance. RCW 9.94A.537. If this legislation is applied retroactively there will be no different treatment. The issue of whether a court may impanel a jury for a sentencing hearing on a defendant who had pleaded guilty prior to the Blakely decision, but who has not yet been sentenced, is currently pending before the Washington Supreme Court. State v. Pillatos, Supreme Court Case No. 75984-7 and State v. Butters, Case No. 75989-8. The Supreme Court has yet to declare whether or not this may be done. Until it holds that a jury may not be impaneled after a plea, the entirety of defendant's argument is speculative.

Moreover, the State can envision another manner of ensuring the possibility of an exceptional sentence on a defendant entering a guilty plea. A defendant who pleads guilty pleads to the entirety of the information as charged. State v. Bowerman, 115 Wn.2d 794, 799, 802 P.2d 116 (1990). There is no constitutional right to plead guilty, but Washington has conferred a statutory right in CrR 4.2(a). State v. Martin, 94 Wn.2d 1, 4, 614 P.2d 164 (1980). In Martin, the supreme court held

that the criminal rule grants a defendant the right to plead guilty "unhampered by a prosecuting attorney's opinions or desires." Martin, at 5. However, that right is a right to plead guilty to the information as charged. State v. Bowerman, 115 Wn.2d at 799. Thus, if the State wants to assure it retains the ability to seek an exceptional sentence on any particular defendant, it may do so by alleging the aggravating factors in the information. If a defendant chooses to plead guilty to this information he must also admit the facts supporting the aggravating factors. If he chooses to go to trial, he faces having the factors submitted to a jury for determination. Again, there is no difference in the ability to seek an exceptional sentence and no infringement on the right to trial.

As defendant has failed to show any impropriety in the procedures used below, this court should affirm the imposition of the exceptional sentence after a jury found beyond a reasonable doubt the existence of the aggravating factor.

4. THE COURT DID NOT VIOLATE  
DEFENDANT'S SIXTH AMENDMENT RIGHTS  
BY FINDING THAT HE HAD PRIOR  
CONVICTIONS OR THAT HE WAS ON  
COMMUNITY PLACEMENT AT THE TIME OF  
THE OFFENSE.

- a. The "fact of a prior conviction" exception in Appendi includes the determination of the identity of the person convicted.

In Appendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court expressed the rule that: "*other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added). Appendi did not overrule the Court's earlier decision in Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), which held that a defendant did not have a right to a jury trial on facts of recidivism, specifically, prior convictions. The Court further clarified in Jones v. United States, 526 U.S. 227, 249, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), that facts of prior conviction were distinguishable from other factors increasing a sentence, which would have to be found by a jury because a "prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." The Supreme Court specifically applied the rule of Appendi to the SRA in Blakely v. Washington, 542 U.S. 296,

124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Both Apprendi and Blakely exclude "the fact of a prior conviction" from the proscription against using judicially determined facts to impose sentences beyond the statutory maximum. See, Blakely, 124 S. Ct. at 2536 (quoting Apprendi, 530 U.S. at 490).

In a post-Apprendi/pre-Blakely case, the Washington Supreme Court held that neither the federal nor state constitution requires prior convictions to be proved to a jury beyond a reasonable doubt. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003). The court noted that the "United States Supreme Court has never held that recidivism must be pleaded and proved to a jury beyond a reasonable doubt." State v. Smith, 150 Wn.2d at 141. Post-Blakely, Washington courts have determined that a persistent offender sentence is constitutional even though the relevant statutes permit a sentencing court to determine prior convictions by a preponderance standard, without submitting the matter to a jury. State v. Rivers, 130 Wn. App. 689, 694-697, 128 P.3d 608 (2005); State v. Ball, 127 Wn. App. 956, 960-61, 113 P.3d 520 (2005).

In Rivers, a defendant contended that after Blakely, "a jury must find beyond a reasonable doubt that *he was convicted of two prior most serious offenses.*" Rivers, 130 Wn. App. at 694(emphasis added). The Court of Appeals, Division I, rejected this argument finding that the issue was controlled by the Washington Supreme court decisions in State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996

(2002) and State v. Smith, 150 Wn.2d 135, 75 P.3d 934, cert. denied, 541 U.S. 909 (2004). The court did not find that the decision in Blakely undermined the rationale of Wheeler or Smith as Blakely specifically excluded its application to prior convictions. Rivers, 130 Wn. App. at 695. This court should follow Rivers and find that this issue is controlled by Smith. Defendant is not entitled to a jury determination regarding his criminal history.

Defendant seeks to avoid the application of Almendarez-Torres, Wheeler, and Smith as well as ignore the express exclusions made for prior convictions in Apprendi and Blakely, by arguing that the “fact of a prior conviction” is somehow distinct from the fact of “to whom” that conviction belongs. Defendant asserts that the issue of identity of a convicted person must be submitted to a jury even though the existence of prior conviction does not. The State submits that the “fact of a prior conviction” includes within it the determination of the identity of the person convicted.

The analysis of the Supreme Court in Almendarez-Torres depended greatly on the fact that the subject matter of the statute at issue was recidivism. Almendarez-Torres, 523 U.S. at 230. At issue was a federal statute authorizing increased punishment for a deported alien’s illegal return if the alien’s initial deportation had been subsequent to a conviction for an aggravated felony. Almendarez-Torres argued that the constitution required that *his* recidivism be treated as an element of his

offense. The court rejected his claim, commenting that recidivism –that is consideration of an offender’s prior record - was typically a sentencing factor rather than an element of a crime. Id. at 243-247. The court noted that while some states afforded a jury determination on the issue of prior convictions, the practice was not uniform and that “nowhere” to the court’s knowledge, did the practice rest “upon a federal constitutional guarantee.” Id. at 246-247. The court’s focus on “recidivism” is important because the very term presupposes that the court is considering whether a particular person has offended again before imposing sentence. Thus, the decision in Almendarez-Torres addressed whether the constitution required that a *particular* offender’s criminal history had to be pleaded and proved to a jury before the court could use it to increase punishment; the court concluded it did not.

Another obvious indication that the “fact of a prior conviction” includes the identity of the person convicted is the number of times that criminal defendants have raised this issue in the courts, hoping to succeed on a claim that the Sixth Amendment (or a state constitutional provision) requires a jury determination on this fact. The Washington Supreme Court rejected the claim pre-Apprendi in State v. Manussier, 129 Wn.2d 652, 682, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997) (The SRA does not provide for a jury trial when prior convictions are used to increase the penalty faced by a defendant.) The court again rejected it, post-Apprendi, in State v. Wheeler, 145 Wn.2d

116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002). The court rejected it once again, post Ring v. Arizona,<sup>7</sup> in State v. Smith, 150 Wn.2d 135, 75 P.3d 934, cert. denied, 541 U.S. 909 (2004). The Court of Appeals has now rejected the argument post-Blakely. See, State v. Rivers, supra. When Mr. Manussier, Mr. Wheeler, Mr. Smith, or Mr. Rivers were standing before the court for sentencing, only their respective prior convictions had any relevance to the sentencing court. The State has no interest in proving - and the trial court has no interest in considering - the existence of prior convictions unless they belong to the person standing before the court for sentencing. If the State tried to admit evidence that some other person had been previously convicted of a crime, any of these defendants could have challenged the evidence on relevance grounds and had it excluded. The defendants would not need to assert a constitutional basis to support their argument; the rules of evidence would suffice. It is only because the “fact of a prior conviction” includes within it the determination that it is a “prior conviction” of the recidivist offender standing before the court that a constitutional analysis is warranted. Various criminal defendants have kept reasserting a sixth amendment claim every time the United States Supreme Court issues a new case applying Apprendi. However, as long as Almendarez-Torres remains as good authority, the answer remains the same - prior convictions, including

---

<sup>7</sup> 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

the identity of the person convicted - need not be proved to a jury beyond a reasonable doubt.

At sentencing in this case, the prosecutor presented the court with certified copies of the judgments of defendant's prior criminal history as well as some supporting pleadings such as the informations; the names and birthdates on these documents matched defendant's. 9/23/05 RP 13-16; CP 321-389. Defendant represented that one of the burglary convictions was not his. 9/23/05 RP 27-28. However, when the court indicated that defendant would have to make a sworn statement if the court were going to consider this evidence, defendant decided not to make a sworn statement. 9/23/05 RP 27-29.

The unchallenged certified copies were sufficient to establish the existence and nature of the prior convictions. See, State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). Moreover, because defendant failed to allege, under oath, that he was not the person named in the documents, this evidence was also sufficient to establish identity. See, State v. Ammons, 105 Wn.2d 175, 189-90, 713 P.2d 719 (1986); State v. Cabrera, 73 Wn. App. 165, 169 n.3, 868 P.2d 179 (1994). Based on the evidence presented the court found the state had met its burden in proving by a preponderance of the evidence that the prior convictions were defendant's. 9/23/05 RP 32-33.

The court below properly determined that the alleged prior criminal history belonged to defendant.

- b. Under State v. Giles the trial court could properly increase defendant's offender score by finding that he was on community placement at the time of the current offense.

Currently pending before the Washington Supreme Court is the issue of whether a trial court may properly increase a standard sentencing range based on a judicial finding that the defendant was subject to community placement at the time he committed the current crime. State v. Jones, 126 Wn. App. 136, 107 P.3d 755, review granted, 155 Wn.2d 1017, 124 P.3d 659 (2005). Division I of the Court of Appeals and two judges from Division II have concluded that a trial court violates a defendant's Sixth Amendment right to jury trial by determining that he was serving a term of community placement at the time of the current crimes, without submitting this factual issue to a jury as required by Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Jones, supra; State v. Hochhalter, 131 Wn. App. 506, 518-24, 128 P.3d 104 (2006). Judge Quinn-Brintnall dissented from the Hochhalter majority. However, Division III of the Court of Appeals and three different judges in Division II from those sitting on Hochhalter concluded that:

Blakely's Sixth Amendment jury-trial right does not entitle a defendant to a jury determination of his prior conviction history. And "[b]ecause the fact of community placement arises out of a prior conviction, constitutional considerations under Blakely do not require that matter to be found by a jury beyond a reasonable doubt.

State v. Giles, 132 Wn. App. 738, 742, 132 P.3d 1151 (2006)(Division II), quoting State v. Hunt, 128 Wn. App. 535, 542, 116 P.3d 450 (2005) (Division III).

In its sentencing memorandum the State indicated that defendant should be given one point for being on community placement at the time of the offense. CP 430-435. At sentencing, defendant did not contest the inclusion of this point and appeared<sup>8</sup> to include it in his calculation of his offender score of 4. 9/23/06 RP 30-31. His challenge to the inclusion of this point is being raised for the first time on appeal.

Ultimately, the Washington Supreme Court will resolve this question. Until then, the State asks this court to apply the reasoning set forth in State v. Giles and hold that the question of whether a defendant was on community placement at the time of his current offense is not a fact that must be found by a jury beyond a reasonable doubt. The court should affirm the trial court on the inclusion of one point in the offender score for defendant being on community supervision at the time of the offense.

---

<sup>8</sup> Defendant asked the court to exclude any juvenile convictions for crimes committed before 12/18/1993, the defendant's 15<sup>th</sup> birthday. That left four juvenile convictions, which would score 2 points, and one adult felony which would score 1 point. As defendant treated all the current offenses crimes as the same criminal conduct, he must have been including a point for being on community placement.

5. THE COURT PROPERLY CALCULATED  
DEFENDANT'S OFFENDER SCORE ON THE  
CONSPIRACY AND LEADING ORGANIZED  
CRIME CONVICTIONS.

Until 1997, juvenile felonies committed when a defendant was less than age 15 were not included in calculating a subsequent offender score, and prior juvenile class B and C felonies washed after a defendant turned 23. Former RCW 9.94A.030(12)(b) (1996); State v. Smith, 144 Wn.2d 665, 670, 30 P.3d 1245 (2001). The Legislature eliminated these wash-out provisions in 1997. Laws of 1997, ch. 338, § 2. The 1997 amendment applied prospectively only and could not be used to revive juvenile felonies that had already washed at the time of its enactment. Smith, 144 Wn.2d at 674-75. Amendments to the Sentencing Reform Act that took effect in 2002, however, require the inclusion of all prior juvenile adjudications in an offender scores. State v. Varga, 151 Wn.2d 179, 183, 86 P.3d 139 (2004); In re the Personal Restraint of Jones, 121 Wn. App. 859, 870, 88 P.3d 424 (2004); Laws of 2002, ch. 107, §§ 3(18), 2(13), now codified as RCW 9.94A.525. Whether a prior juvenile adjudication is properly included in the SRA offender score for a current adult offense depends primarily on the date of the current adult offense; “[i]f the current adult offense occurred on or after June 13, 2002, the prior juvenile adjudication counts.” In re Personal Restraint of Jones, 121 Wn. App. at 870.

These 2002 changes to the SRA were pertinent to the calculation of the offender scores for defendant's crimes. Defendant's criminal history consisted of the following:

Crime	Offense Date	Court	Sent. Date	Adult or Juv	Crime Type
1 BURGLARY 2	06-12-91	King Co., WA	03-05-91	J	NV
2 BURGLARY 2	10-02-91	King Co., WA	07-18-91	J	NV
3 BURGLARY 2	11-06-91	King Co., WA	09-10-91	J	NV
4 MAL MIS 1	11-06-91	King Co., WA	09-10-91	J	NV
5 TMVWOP	11-02-92	King Co., WA	08-07-92	J	NV
6 TMVWOP	02-24-93	King Co., WA	10-12-92	J	NV
7 TMVWOP	07-17-95	King Co., WA	10-27-94	J	NV
8 ATT / ELUDE	07-17-95	King Co., WA	10-27-94	J	NV
9 TMVWOP	04-20-95	King Co., WA	11-10-94	J	NV
10 TMVWOP	07-17-95	King Co., WA	03-08-95	J	NV
11 PSP 2	02-22-02	King Co., WA	07-25-01	A	NV

Defendant had a misdemeanor conviction in 1999 which prevented any of the juvenile offenses from "washing out." 9/28/05 RP 38-39. The court also added a point to the offender score because the defendant committed the current offense while on community placement. CP 402-413.

Because the bribery conviction in Count V had an offense date of May 24, 2002, which was prior to the effective date of the 2002 amendments, defendant's juvenile convictions occurring before his 15<sup>th</sup> birthday<sup>9</sup> were not included in the offender score of "4." The offense dates on the trafficking of stolen property conviction in Count I and the bribery conviction in Count VI were after the 2002 amendments took

---

<sup>9</sup> Defendant turned 15 on December 18, 1993. CP 402-413. This would eliminate the first six juvenile convictions from the calculation of his offender score.

effect. The court included all of defendant's juvenile convictions in the calculation of the offender score of "7" on these counts. Defendant does not contest the court's determination of the offender score on these three counts. Defendant challenges the court's calculation of an offender score of "7" on the conspiracy to commit trafficking in stolen property in the first degree (Count VII) conviction as well as on the conviction for leading organized crime (Count VIII). Defendant contends that the court improperly included defendant's six convictions occurring before his 15<sup>th</sup> birthday in the calculation of the offender score on these counts.

The offense dates for the conspiracy to commit trafficking in stolen property in the first degree and the offense dates for leading organized crime were the same. The jury was instructed to find the relevant acts occurred "on or about the period between the 1<sup>st</sup> day of April, 2002, and the 21<sup>st</sup> day of January, 2003." CP 169-202, Instructions Nos. 27 and 28. The 2002 amendment went into effect on June 13, 2002, two and a half months into the almost ten month charging period. In order for the court to properly include defendant's juvenile offenses in the offender score on these counts, it had to conclude that the jury found that at least some of the acts constituting the conspiracy and the leading organized crime occurred after the effective dates of the new statutes, that is, on or after June 13, 2002. See, State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997).

a. Leading organized crime count.

A person may commit the offense of leading organized crime by:

“(a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity.” RCW 9A.82.060(1)(a). "Criminal profiteering" is "any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable" as any of a specified list of offenses. RCW 9A.82.010(4). That list includes the crimes charged in Counts I, V, VI and VII, trafficking in stolen property, bribery and conspiracy to traffic in stolen property. RCW 9A.82.010(14). Three acts of criminal profiteering within a five-year period, with "the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise..." constitute a "pattern of criminal profiteering." RCW 9A.82.010(15). Like a conspiracy, leading organized crime is a continuing offense that may span over years of time.

The State has to prove a defendant's intent to engage in three acts of criminal profiteering -- the predicate offenses -- as an element of leading organized crime. It is not necessary to charge and prove the predicate offenses; the acts merely need to be "chargeable or indictable." RCW 9A.82.010(14). However, when the State has charged a defendant with leading organized crime it is "barred from joining any offense other

than the offenses alleged to be part of the pattern of criminal profiteering activity.” RCW 9A.82.085.

Thus, it is clear that all of the charged offenses in this case were presented to the jury as part of the defendant’s pattern of criminal profiteering activity. The jury found defendant guilty of bribery for an offense committed on July 26, 2002, and a trafficking in stolen property committed in January of 2003. CP 203, 208. As both of these crimes-predicate offenses for the leading organized crime- occurred after the 2002 SRA amendment took effect, it is clear that the jury found beyond a reasonable doubt that some of the acts constituting leading organized crime occurred after June 13, 2002. The court did not err in including the juvenile convictions in the calculation of the offender score for the crime of leading organized crime.

b. Conspiracy count

Washington’s conspiracy statute is found in RCW 9A.28.040(1). The essential elements of a conspiracy are 1) an agreement between two or more persons to engage in conduct that constitutes a crime; 2) intent to perform conduct constituting a crime; and 3) a substantial step by any one of the parties in pursuance of their agreement. Id. The focus of this crime is the unlawful agreement and not the specific criminal object or objects. State v. Bobic, 140 Wn.2d 250, 265, 996 P.2d 610 (2000). Thus, if two

1

conspirators enter into one agreement to commit many crimes, only one count of conspiracy is sustainable. Bobic, 140 Wn.2d at 265-266.

Conspiracy is an inchoate crime. To obtain a conviction, all a prosecutor needs to prove is that the conspirators agreed to undertake a criminal scheme and that they took a substantial step in furtherance of the conspiracy. State v. Dent, 123 Wn.2d 467, 476, 869 P.2d 392 (1994). But while a conspiracy may be “complete” once a substantial step is taken that does not mean that the crime is at an end. Conspiracy is a continuing offense that may last over a period of time. Bobic, 140 Wn.2d at 266; Braverman v. United States, 317 U.S. 49, 52, 63 S. Ct. 99, 87 L. Ed. 2d 23 (1942); United States v. Kissel, 218 U.S. 601, 607, 31 S. Ct. 124, 54 L. Ed. 1168 (1910); State v. Carroll, 81 Wn.2d 95, 110, 500 P.2d 115 (1972) (construing former conspiracy statute). While it is true that the conspiratorial agreement is a distinct crime from the crime that is the object for the conspiracy, that does not mean that proof of a completed crime cannot be used as proof of the conspiracy. Bobic, 140 Wn.2d at 266 (“A single agreement to commit a series of crimes by the same conspirators was present here as each crime was only one step in the advancement of the scheme as a whole.”).

In this case all of the evidence of conspiracy indicates that the conspiracy was ongoing well after June 13, 2005. Defendant’s conspiracy with Tracey Holmes continued at least up until Holmes’s arrest in December, 2002. Defendant’s bribery of and illegal transactions with

Angela Jametsky, a title clerk at the Fairwood licensing office, continued after June, 2002. The jury convicted him of bribing Ms. Jametsky to do an illegal title transfer for an offense occurring on July 26, 2002. The jury also found him guilty of trafficking in stolen property for his involvement in doctoring the title on the Chevy Tahoe that was stolen in Everett and found on Hanson's Auto lot in January, 2003. The doctored titles connected to that car were done by Shawn Bell, who did not even begin aiding defendant until after Ms. Jametsky left the licensing agency in October, 2002. Thus all of defendant's conspiratorial actions with Mr. Bell occurred after the effective date of the 2002 amendments to the SRA. Based upon the evidence presented and the jury's verdicts on Counts I and VI, the trial court properly concluded that the jury had found that some of the acts constituting conspiracy to commit trafficking of stolen property occurred after June 13, 2002. The court did not err including the juvenile convictions in the calculation of the offender score on this count.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the judgment and sentence below.

DATED: OCTOBER 20, 2006

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant ~~and appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/20/06   
Date Signature

# **APPENDIX “A”**

*RCW 9.94A.537*

§ 9.94A.537. Aggravating circumstances -- Sentences above standard range

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e) (iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(4) If the court conducts a separate proceeding to determine the existence of aggravating circumstances, the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

**HISTORY:** ♦ 2005 c 68 § 4.