

original

No. 33878-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

TYRAN SMITH,

Appellant.

COMMUNICATIONS
DIVISION
APPELLANT'S BRIEF

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Stephanie A. Arend, Judge

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing an exceptional sentence without statutory authority, in violation of appellant's state and federal due process rights. State v. Davis, 2006 Wash. App. LEXIS 1043 (2006) was wrongly decided and should not control.

2. The trial court violated the mandates of Blakely v. Washington¹ and State v. Hughes² and the Sixth Amendment by making its own findings of fact regarding aggravating factors and relying on those findings in imposing an exceptional sentence. Appellant assigns error to Findings VII, IX, X and XI of the Findings of Fact and Conclusions of Law for Exceptional sentence ("Sentence Findings") in their entirety. CP 260-64.

3. The trial court violated the doctrine of separation of powers in imposing the exceptional sentence.

4. The exceptional sentence violated appellant's state and federal constitutional rights to equal protection and due process.

5. The jury was not properly instructed on the prosecution's burden of proof for the aggravating factors.

6. Abuse of a position of trust and deliberate cruelty are not proper aggravating factors for felony murder where the underlying felony is criminal mistreatment.

7. The court erred in refusing to dismiss a juror who had a

¹542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

²154 Wn.2d 118, 110 P.3d 192 (2005), overruled in part on other grounds by Washington v. Recuenco, __ U.S. __, 2006 U.S. LEXIS 5164 (June 26, 2006).

strong racial bias and the error was not harmless and was a violation of due process.

8. The prosecutor committed flagrant, prejudicial misconduct deprived appellant of his state and federal due process rights to a fair trial.

9. Counsel was ineffective.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. This case was tried after Blakely but before the Legislature changed the exceptional sentencing scheme in light of that case. Is reversal required where the trial court made and relied on its own findings in support of the exceptional sentence, in violation of the Sixth Amendment mandates of Blakely?

Further, where the only applicable statute did not authorize anyone but a trial judge to make factual findings to support an exceptional sentence, did the trial court err and violate the doctrine of separation of powers and appellant's due process rights in exceeding its statutory authority and writing into the statute the authority for submitting the aggravating factors to the jury?

2. Under the trial court's interpretation of the relevant exceptional sentencing statute, a defendant could receive an exceptional sentence only if that person went to trial but could not receive such a sentence without their consent if they entered a plea. Did imposition of the exceptional sentence violate appellant's equal protection and due process rights and impermissibly burden the exercise of his Fifth and Sixth Amendment rights?

3. An aggravating factor will only support an exceptional

sentence if that factor distinguishes the offense as much more egregious than usual and is not something which inheres in the offense and if the facts supporting the finding of that factor are much more egregious than is typical for an offense. Was the jury improperly instructed on the prosecution's burden of proving the aggravating factor where it was never given any information on how to evaluate the evidence or on these requirements but was allowed to find aggravating factors based simply upon the presence of minimal facts to support them and, possibly, the very same facts it relied on in finding the elements of the crime?

4. Can abuse of trust and deliberate cruelty serve as aggravating factors for a crime which requires that a defendant be in a position of taking care of the "dependent" victim to commit that crime and also requires deliberate deprivation of essential needs for basic survival?

5. A prospective juror indicated a strong, longstanding bias against associating with African-Americans, admitted raising his children with that bias, and confessed that he was prejudiced against the idea of African-Americans such as appellant having relationships with whites. The court did not remove the juror for cause and Mr. Smith was required to use a peremptory challenge to do so. Is reversal required where Washington law guarantees the free enjoyment of peremptory challenges as a statutory and common law right and the deprivation of that right violated Mr. Smith's due process rights?

Further, does the bare majority decision in State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001), control where it did not address the due process argument here and the second majority of Fire recognized Washington

precedent to the contrary?

6. Did the prosecution commit flagrant, prejudicial misconduct which mandates reversal when the prosecutors repeatedly invited the jury to draw a negative inference from Mr. Smith's exercise of his right to jury trial and to have the prosecution meet its burden of proof, compared Mr. Smith to a former codefendant who pled guilty and declared that the codefendant had accepted responsibility, told the jury it could only acquit if it found the defendant was telling the truth, and told the jury it could find Mr. Smith guilty based upon his mere presence at the scene of the crime?

7. Was counsel ineffective in failing to object to flagrant, prejudicial misconduct?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Tyran Smith was charged by amended information with homicide by abuse and second-degree felony murder and with committing the crimes with deliberate cruelty, to a particularly vulnerable victim, with an abuse of trust. CP 5-6; Former RCW 9.94A.535 (2003); RCW 9A.32.050; RCW 9A.32.055; RCW 9A.36.011(1)(c); RCW 9A.36.021; RCW 9A.42.020. After pretrial and a jury trial before the Honorable Stephanie Arend on October 12, 2004, March 17, June 17, and July 5-6, 11-14, 18- 22, and 25-27, 2005, the jury found Mr. Smith guilty of both

offenses and of committing them as alleged. CP 171-76³.

At sentencing on September 23, 2005, Judge Arend did not sentence Mr. Smith for the second-degree murder, finding that to do so would be a violation of the prohibition against double jeopardy. CP 217-18. She imposed an exceptional sentence of 600 months in custody for the homicide by abuse. RP 1771-72; CP 188-199, 258-264. Mr. Smith appealed, and this pleading follows. See CP 257.

2. Overview of facts relating to offense⁴

Tyshell Smith was a few months shy of her third birthday when, on July 30, 2004, medics were called to the house of her father, Tyran Smith, because she was not breathing. RP 527, 532, 557, 582, 708, 725. Efforts to revive her were unsuccessful. RP 838. Medics and others working on the child noticed a number of bruises which made them suspicious, and an investigation began. RP 839. Initially, suspicions focused on a babysitter that Mr. Smith, his 10-year old daughter, Lakisha, and Mr. Smith's girlfriend, Christina Tierce, said had been taking care of the children while Mr. Smith and Ms. Tierce, who lived together at the house, were off camping. RP 536-38, 589, 722, 779. Mr. Smith and Ms. Tierce had said that, when they got home, the child had not been eating or drinking and they had been trying to get her to do so when she slumped down in her

³There are 18 volumes of the verbatim report of proceedings, which will be referred to as follows:

October 12, 2004, as "1RP;"

March 17, 2005, as "2RP;"

June 17, 2005, as "3RP;"

the 15 chronologically paginated volumes containing the trial and sentencing, as "RP."

⁴More detailed discussion of relevant facts is discussed in the argument section, *infra*.

high chair the day she died. RP 537, 542. They had also said they saw bruises on her lower back when they changed her diaper earlier that day. RP 606, 731.

Eventually, the police turned their focus to Ms. Tierce and Mr. Smith. RP 783, 927-35. A number of neighbors had heard and seen things indicating the family was home when they said they were camping, including hearing a child screaming and a man saying, “that’s what you get.” RP 937, 760, 766, 771, 779-80, 822-26, 1122. Police ultimately arrested Ms. Tierce and Mr. Smith. RP 938-40.

Tyshell and her then 10-year old sister, Lakisha, did not live with Mr. Smith but had only been visiting for the month of July. RP 706. Lakisha testified that Mr. Smith had sometimes used a belt to discipline Tyshell. RP 712. Lakisha also made it clear that Ms. Tierce also spanked Tyshell and Lakisha saw Ms. Tierce smack the child in her head once shortly before her death. RP 712, 716. Both Ms. Tierce and Mr. Smith would spank Tyshell’s hands and pop her in her head. RP 737. Just before her death, Lakisha described Tyshell as having lots of bruises, walking “funny” and running “into walls.” RP 714, 729. Lakisha was told by both Ms. Tierce and Mr. Smith to tell the camping/babysitter story, which was a lie. RP 722, 741.

Tyshell arrived at the hospital with no heart rate and no spontaneous breathing and bruises all over her body, which was very thin and did not have normal hydration. RP 838-844, 870, 875-83. The abrasions on the back of the forehead appeared to be three to five days old. RP 886. She had no fractures, but was bleeding in her head from trauma

apparently no more than 24 hours old . RP 867, 890-94. The cause of death was found to be blunt trauma or injury to the brain causing the brain function and her heart to stop, and also the “contributing factors” of dehydration and multiple contusions on her body. RP 897-98.

Ms. Tierce testified that Tyshell had fallen and hit her head on the cement earlier that week. RP 1153. She admitted that she would smack the child’s hand, spank her on the bottom, and yell at her, but claimed she did not hit the child with anything else. RP 1164. Ms. Tierce she only saw Mr. Smith use a belt once on Tyshell, and it was within a day or so of her death. RP 1165, 1215. He was slapping her on her legs with the belt, telling her to eat her food, and she was crying and yelling, “[d]addy, stop.” RP 1166. Ms. Tierce said Mr. Smith was trying to potty train Tyshell and she heard him yelling about that while the child was “whining.” RP 1162. Ms. Tierce said she did not know there was a real problem with the child on the day of her death until she heard Tyshell make gurgling sounds where she sat in her highchair and then the child stopped responding. RP 1182.

According Ms. Tierce, Mr. Smith told her to tell the camping/babysitter story the day of the incident. RP 1184, 1193. Ms. Tierce claimed that Mr. Smith had stopped the CPR he was doing on the child to tell Ms. Tierce not to call police, and then that he told her they needed to tell that story to explain what happened. RP 1184, 1193.

Mr. Smith testified to the contrary, saying that, when he started CPR on Tyshell, Ms. Tierce was pacing, saying, “oh my God, oh my God.” RP 1341. She said they had to tell police that Tyshell was left with

a babysitter because she did not want to get in trouble “for the bruises on her head” which had occurred when Tyshell had fallen down. RP 1341. He then heard Ms. Tierce make up the babysitter/camping story as she was on the phone calling police for help, and he went along with it. RP 1343, 1482. Indeed, he admitted, he added onto the lies. RP 1389, 1399. He did not know what had happened because he was gone from home much of that week, working on the car, and had seen nothing wrong with Tyshell in the brief time he was home. RP 1312-47, 1504. He had seen her drinking juice earlier on the day she died and was unaware of her dehydration. RP 1640-66. He was also unaware of the bruising and the extent of it on his daughter until he saw the autopsy photos. RP 1368. He never saw Ms. Tierce strike his children in a way that would have given him concern but just saw her do it for “regular discipline.” RP 1512. On the day of the incident, he was sleeping and woke up to the sound of Tyshell’s highchair being scooted across the floor. RP 1505.

Ms. Tierce conceded that Mr. Smith was gone a lot during that time in the week or two weeks before and even complained to him that it made no sense for him to be “getting his kids and he don’t spend no time with him.” RP 1192. Ms. Tierce was pregnant at the time and suffering mightily from mood swings, depression and nausea. RP 1141-42, 1170. She also had an 11 month old at the time who had shunts in her head to help her “brain drain” and they required attention, as did the child. RP 1139-40. She had suffered the deaths of her younger brother, her best friend’s sister, her dad, her uncle, and two of her children, in the previous few years. RP 1141.

Mr. Smith admitted lying with the babysitter/camping story and several other things at trial. RP 1315-1409.

He presented witnesses who confirmed that he had been working on the car in the week or so prior to the incident and on the day of the incident in the morning and later in the afternoon, as he said, and had been at a gas station earlier the day of the incident. RP 1026-1087.

D. ARGUMENT

1. THE EXCEPTIONAL SENTENCE MUST BE REVERSED

In this case, Mr. Smith received an exceptional sentence of 600 months in custody. CP 188-199. This Court should reverse that sentence, because it was not statutorily authorized, its imposition violated Mr. Smith's due process and equal protection rights, the sentence was imposed in violation of the separation of powers doctrine and the sentence violated Mr. Smith's right to equal protection and improperly infringed on the exercise of his Fifth and Sixth Amendment rights. In addition, the jury was not properly instructed on the prosecution's burden of proof on the aggravating factors and those factors did not all support the sentence.

a. Relevant facts

The incident in this case occurred on July 30, 2004. CP 5-6. In the information, the prosecution alleged that both the homicide by abuse and the second-degree murder were aggravated by, inter alia, deliberate cruelty, particular vulnerability to the victim, and that they were facilitated by an abuse of trust. CP 5-6. At trial, over defense objection, the prosecution proposed and the court submitted to the jury special verdict

forms for both crimes on those aggravating factors. CP 95-101, 125, 174-76; RP 1582-83, 1613.

At sentencing, the prosecutor admitted that recent changes to the exceptional sentencing scheme did not apply because the offense had occurred well prior to their effective date. RP 1747. The prosecutor nevertheless argued that an exceptional sentence above the 250-333 month maximum of the standard range was proper, because it had “pled and proved” that the crimes were committed with the aggravating factors and “[t]here’s no reason for this Court to be lenient with this defendant.” RP 1748-49.

Counsel objected that there was no statutory authority for the court to impose an exceptional sentence by this method and that the new statutory changes did not apply retroactively. RP 1750-54. He also argued that there were serious constitutional problems, including an equal protection problem, with imposing an exceptional sentence on Mr. Smith because others such as Ms. Tierce in the same situation could not be subject to an exceptional sentence without agreeing to it under Blakely. RP 1750-54. He argued that creating the scheme to impose an exceptional sentence on Mr. Smith amounted to punishing Mr. Smith for exercising his constitutional right to trial. RP 1750-54.

In imposing the exceptional sentence, the judge stated that she agreed with the prosecution “in their legal analysis.” RP 1771-72. In written findings and conclusions later entered to support the sentence, the judge made her own factual findings on the aggravating factors and relied on those findings, as well as the jury’s findings, in imposing the 600

month sentence. See CP 258-64. Specifically, the court found “there are three aggravating circumstances in this case that justify an exceptional sentence above the standard range,” which were “the same as those found by the jury,” based upon facts set forth in the findings. CP 258-62.

- b. The court violated Mr. Smith’s Sixth Amendment rights, exceeded its statutory authority and violated the doctrine of separation of powers and due process in imposing the exceptional sentence

The exceptional sentence must be reversed. At the outset, it is now well-settled that it is a violation of the Sixth Amendment for a trial judge to make factual findings and then increase a defendant’s sentence based upon those findings. Blakely, 542 U.S. at 304-305; Hughes, 154 Wn.2d at 137. Here the trial judge did so, making her own factual findings in support of the exceptional sentence and relying on those finding in imposing the sentence. CP 258-64. It is clear that the court’s making and relying on its own factual findings was in direct conflict with the holding of Blakely and in violation of Mr. Smith’s Sixth Amendment rights.

More importantly, the trial court exceeded its statutory authority in imposing the exceptional sentence. A court may only impose those sentences authorized by statute. See In re Breedlove, 138 Wn.2d 298, 304, 979 P.2d 417 (1999). Where a sentence is not statutorily authorized, it is not simply error, it is a “fundamental defect” of the kind that will support relief even on collateral attack, normally a far more difficult method of seeking relief than direct appeal. In re Personal Restraint of Moore, 116 Wn.2d 30, 33, 803 P.2d 300 (1991). Indeed, failure to correct a sentence not authorized by statute will amount to a violation of due process. See

Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980).

Thus, in Moore, the Supreme Court reversed this Court's decision upholding a sentence of life without the possibility of parole where the defendant had pled guilty and agreed to such a sentence. 116 Wn.2d at 32-33. At the time of the plea, the relevant sentencing statute provided that "[i]f . . . the *jury* finds that there are one or more aggravating circumstances but fails to find that there are not sufficient mitigating circumstances to merit leniency," the sentence would be life in prison without the possibility of parole, and that "[i]n all other convictions" for first degree murder, the sentence was life in prison. 116 Wn.2d at 33-34, quoting, former RCW 9A.32.040 (emphasis added). Another statute provided an exception for a sentence of life in prison with the possibility of parole for a first degree murder conviction if the prosecutor had filed a death penalty request and the same jury as that which heard the trial was reconvened for a "separate special sentencing proceeding" to determine if the death sentence should be imposed. Moore, 116 Wn.2d at 34, quoting, former RCW 10.94.020(2).

On appeal, the prosecution argued that, despite the clear language of the statutes, a sentence of life without the possibility of parole was proper when a defendant entered a plea to first degree murder. 116 Wn.2d at 34-35. The Supreme Court rejected this argument. Because the statutes specifically required a *trial jury* to find aggravating or mitigating factors in order to impose such a sentence, the Court held, "[n]o provision is made in the statutes for any other means of establishing aggravating or mitigating

circumstances,” including by agreement or stipulation. 116 Wn.2d at 36-37.

Further, the Court rejected the argument that the defendant had agreed to the sentence and thus was bound by that agreement. 116 Wn.2d at 38-39. Regardless of the agreement, the Court held, a plea bargain “cannot exceed the statutory authority given to the courts” and a defendant could not “agree to be punished more than the Legislature has allowed for” in the sentencing statutes. 116 Wn.2d at 38-39.

Similarly, in State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), the Court addressed the argument that a defendant who pled guilty could receive a death sentence under the existing statutes at the time. The defendant had tried to enter a plea of guilty to first degree murder in order to avoid “the possible imposition of the death penalty resulting from a jury trial.” 94 Wn.2d at 2-3. The relevant statute specifically provided that “if the trial jury returns a verdict of murder in the first degree. . . the trial judge shall reconvene the same trial jury to determine” whether to impose a death penalty. 94 Wn.2d at 8, quoting, former RCW 10.94.020(2) (emphasis omitted). The prosecution argued, *inter alia*, that the defendant could still be subject to the death penalty if he entered a plea. 94 Wn.2d at 7-8.

The Court disagreed. The “statute’s mandate” was clear, and the Court refused to “imply the existence of a special sentencing procedure” not provided in the statute. 94 Wn.2d at 7-8. Because there was “no current statutory provision that authorizes the impaneling of a special jury to decide the death penalty when a capital defendant pleads guilty,” the

Court rejected the prosecution's claim. 94 Wn.2d at 7-8.

In so doing, the Court recognized - and resisted - the inherent seductiveness in the prosecution's arguments:

Clearly the legislature did not anticipate the possibility that an accused might plead guilty to a charge of first degree murder. Thus, it simply failed to provide for that eventuality. *As attractive as the State's proposed solution may be, we do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or inadvertent omission.*

94 Wn.2d at 8 (emphasis supplied). It rebuffed a similar argument in State v. Frampton, 95 Wn.2d 469, 476-79, 627 P.2d 922 (1981), concluding that, regardless of the relative merit of the prosecution's proposals, the request must be directed to the Legislature, not the court).

More recently, in In re the Personal Restraint of West, 154 Wn.2d 204, 110 P.3d 1122 (2005), the Supreme Court reversed this Court in a case where the defendant had agreed to serve "flat time" without any right to earned early release credit and the sentencing court included that provision in the judgment and sentence. The relevant statute granted authority for determination or grant of early release time only to the "correctional agency having jurisdiction," not the court. 154 Wn.2d at 212. As a result, because there was no statutory authority for a court to restrict imposition of earned early release time, the sentence was not authorized by the SRA and the defendant was entitled to relief. 154 Wn.2d at 213. Regardless of whether the defendant had agreed to the sentence, the Court held, that fact "does not cure" the sentencing court's having "acted outside its authority." 154 Wn.2d at 214; see also, In re Personal Restraint of Mota, 114 Wn.2d 465, 478, 788 P.2d 538 (1990)

(where statute granted authority for awarding good time only to the Department of Corrections, there was no authority for the trial court to do so).

Washington is not alone in this line of cases. No less than the U.S. Supreme Court has rejected a claim that a statute providing for imposition of the death penalty by “the jury” somehow permitted empaneling a jury to impose a death sentence when a defendant pled guilty. See United States v. Jackson, 390 U.S. 570, 571-72, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1967). The Court rejected the government’s claim that the statute could be so interpreted “without the slightest indication that Congress contemplated any such scheme” when it enacted the statute. 390 U.S. at 578. And the Court rejected the idea that the omission from the statute by Congress was “an oversight that the courts can and should correct.” Id. Even if the omission could be assumed to be wholly inadvertent, the Court held, “it would hardly be the province of the courts to fashion a remedy.” 390 U.S. at 578-79.

Applying those cases here, it is clear the trial court exceeded its statutory authority by submitting the aggravating factors to the jury and relying on that process in imposing the exceptional sentence. In Washington, the superior court’s authority to impose a sentence is controlled by the Sentencing Reform Act (SRA). See State v. Freitag, 127 Wn.2d 141, 144-45, 896 P.2d 1254, 905 P.2d 355 (1995). At the time the crime was committed on July 30, 2004, Blakely had just been decided. See CP 5-6; Blakely, 542 U.S. at 296 (June 24, 2004). In Blakely, the Supreme Court struck down as unconstitutional the Washington state

scheme of imposing an exceptional sentence. 542 U.S. at 304-305. The Court held that it violates a defendant's Sixth Amendment rights for a judge to make findings of fact by a preponderance of the evidence, and then rely on those findings to impose an exceptional sentence above the statutory maximum (defined as the maximum of the standard range). 542 U.S. at 302-305.

The Washington Legislature did not amend the exceptional sentence scheme in Washington in response to Blakely until April 15, 2005. See Laws of 2005, ch. 68, § 7. On that date, amendments to the scheme became law. Id. Those amendments granted the authority for aggravating circumstances to be charged by the prosecutor and submitted to a jury, which must unanimously find the aggravating facts beyond a reasonable doubt and so indicate by a special interrogatory. RCW 9.94A.535 (2005), RCW 9.94A.537 (2005). For all but a very few aggravating circumstances, the judge's role in the new exceptional sentencing scheme is limited to determining whether, considering the purposes of the SRA, the aggravating factors found by the jury amount to "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535 (2005).

As the prosecution correctly conceded below, however, this "Blakely fix" legislation is not applicable to this case. See RP 1747. The legislation was not effective until well after the crimes, and the Supreme Court has held that a similar statutory "fix" cannot be applied retroactively without running afoul of the prohibitions against ex post facto laws. In re Hinton, 152 Wn.2d 602, 56 P.3d 853, 861 (2004).

Thus, for this case, the only statutory authority for imposition of an exceptional sentence was under the version of the statutory scheme specifically disapproved in Blakely. That scheme consisted of two statutes. Under former RCW 9.94A.535 (2003),

[t]he court may impose a sentence outside the standard range for an offense if it finds, considering the purposes of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(Emphasis added). The statute went on to list illustrative mitigating and aggravating factors the court could make such findings about, and to require written findings and conclusions detailing the court's reasons for imposing the sentence. See former RCW 9.94A.535(2) (2003). The second statute making up the exceptional sentencing scheme at the time was former RCW 9.94A.530(2) (2002), which allowed the "*trial court*" to make the factual findings to support an exceptional sentence based upon "a preponderance of the evidence." (Emphasis added).

Just as in Moore, Martin, Jackson and the other cases, here the statutes are clear. The aggravating factors are to be found by the *court*. The statutes do not authorize having those facts found by the jury, nor do they provide for submitting to the jury a special verdict form for that purpose. Thus, there was no statutory authority for the procedure used to impose an exceptional sentence in this case.

State v. Hughes, supra, is instructive. In Hughes, the Supreme Court addressed the proper remedy on remand from the reversal of an exceptional sentence based upon Blakely. Hughes, 154 Wn.2d at 146-50. Citing the very same language of former RCW 9.94A.535 (2003)

applicable here, the Court held that the statute:

explicitly directs the trial court to make the necessary factual findings and does not include any provision allowing a jury to make those determinations *during trial, during a separate sentencing phase, or on remand.*

154 Wn.2d at 149 (emphasis added). The parties conceded that there was “no procedure” in place to allow convening a jury on remand or after conviction to find aggravating factors. 154 Wn.2d at 149. Because the language of the statute was so clear, the Court refused to tread upon the legislative function by “imply[ing] a procedure. . . which would be contrary to the explicit language of the statute.” 154 Wn.2d at 149. Relying on Martin and Frampton, the Supreme Court held that the exceptional sentencing statutory scheme could not be rewritten by the Court in order to create a sentencing procedure not contained therein.

Hughes, 154 Wn.2d at 150-51. Put plainly, the Court said:

This court will not create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure and, instead, *explicitly assigned such findings to the trial court.* To create such a procedure out of whole cloth would be to usurp the power of the legislature.

154 Wn.2d at 152-53 (emphasis added).

Thus, Hughes establishes that the same statutory scheme authorizing exceptional sentences as here contained no provision for a jury to make the necessary findings to support an exceptional sentence. Although Hughes addressed only the question of the appropriate remedy on remand, the Court’s holdings regarding the provisions of the statute and the authority granted therein apply equally whether the jury is being empaneled on remand or given a special verdict form at trial. Hughes

establishes that, at the time that the offenses occurred in this case, the exceptional sentence statutory scheme provided only for a judge, not a jury, to make the findings necessary to support an exceptional sentence. Under Hughes, Martin, Moore, Jackson and the other caselaw, neither the trial court nor this one can judicially amend the procedure set forth in the statute to support the exceptional sentence here.

This point is further supported by the doctrine of separation of powers. The founders of this country were concerned that one branch of the government might become too powerful, or try to usurp, encroach upon or somehow impair the power of another. See State Bar Ass'n. v. State, 125 Wn.2d 901, 907-909, 890 P.2d 1047 (1995). Hence the doctrine of "separation of powers," described by the Washington Supreme Court as "one of the cardinal and fundamental principles of the American constitutional system, both federal and state." Id. Under that doctrine, the independence of the judicial branch of government and constitutional limits on its power is ensured in part by preventing the judiciary from being "assigned or allowed" to do tasks which are more properly accomplished by another governmental branch. See Carrick v. Locke, 125 Wn.2d 129, 136, 882 P.2d 173 (1994).

It is well-settled that sentencing policy, establishing penalties for crimes, and indeed the very "determination of crime and punishment" itself is a legislative, not judicial, function. State v. Ermert, 94 Wn.2d 839, 847, 621 P.2d 121 (1980); State v. Smith, 93 Wn.2d 329, 337, 610 P.2d 869 (1980). Thus, in State v. Ammons, the Supreme Court rejected a claim that the SRA violated the doctrine of separation of powers by taking

away judicial discretion at sentencing, because “[t]his court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function” and sentencing judges only possessed such discretion at sentencing as the Legislature chose to give by statute. 105 Wn.2d 175, 179-80, 713 P.2d 719 (1986); see also, State v. Hunter, 102 Wn. App. 630, 636, 9 P.3d 872 (2000) (judicial discretion granted by the Legislature must be exercised within statutory limits). Similarly, in State v. Roy, although not using the phrase “separation of powers” by name, the Court held that, where the Legislature had granted the authority to revoke a DOSA sentence only to the Department of Corrections, “the court cannot reserve authority for itself that has been specifically granted to DOC by the legislature.” State v. Roy, 126 Wn. App. 124, 107 P.3d 750 (2005).

Here, the Legislature specifically placed the authority for making findings on aggravating statutes in the court. It had not yet changed the relevant statutes to place that authority in a jury at the time of this crime. The trial court’s actions below, the effect of which were to amend the exceptional sentencing statutes to remove the authority for finding aggravating factors from the court and place it with the jury, was a violation of the separation of powers doctrine.

For those few defendants like Mr. Smith whose crimes were committed during the time between Blakely and the date the Legislature chose to enact and render effective the amendments to the exceptional sentencing statutes, the only statutorily authorized means of imposing an exceptional sentence was if a judge made findings on aggravating factors, based upon a preponderance of the evidence standard. Because Blakely

struck down that procedure as unconstitutional, and because the Legislature chose not to provide another method of imposing such a sentence until after the crimes were committed in this case, the cases falls under a “statutory hiatus” during which there was no authority for a contested exceptional sentence to be imposed.⁵ Just as in Martin, a court may find that hiatus “unfortunate.” 94 Wn.2d at 8. But as the Supreme Court held in Martin, “it would be a clear judicial usurpation of legislative power” to judicially rewrite the former statute in order to support a procedure the legislature specifically did not provide. 94 Wn.2d at 8.

In addition, the sentence was imposed in violation of due process. In Hicks, supra, the defendant received a sentence which was imposed by a judge, despite a statute providing that such a sentence would be imposed by a jury. 447 U.S. at 346-47. In reversing, the U.S. Supreme Court held that, by declaring that a jury would impose the sentence, the statute had created a liberty interest in that procedure, protected by the due process clause. 447 U.S. at 346-47. A statute will create a liberty interest if it imposes very specific limits on governmental action such as decisionmaking. See State v. Baldwin, 150 Wn.2d 448, 460, 461, 78 P.3d 1005 (2005). Thus, in Baldwin, the Court held that a defendant has no protected liberty interest in receiving a standard range sentence because the statutes creating the standard range give the trial court substantial discretion in whether to depart from that range, in contrast to statutes

⁵There is no question that during the same time a defendant could agree to imposition of an exceptional sentence by knowingly and voluntarily waiving Blakely rights as part of a valid plea of guilty. See Blakely, 542 U.S. at 310.

which contain a specific directive that, if a certain thing occurs, a certain result will follow. Id.

Here, the statutes authorizing the imposition of an exceptional sentence at the time of this offense did not grant any discretion as to the identity of the statutorily authorized fact finder for any aggravating circumstances. Instead, those statutes provided that the judge would be the fact finder, in every circumstances. Former RCW 9.94A.530(2) (2002); former RCW 9.94A.535 (2003). Under Hicks, the procedure used here, outside the statutory authority of the court and in violation of the doctrine of separation of powers, was also a violation of Mr. Smith's due process rights. This Court should reverse.

- c. Neither RCW 2.28.150 nor CrR 6.16(b) granted the missing statutory authority and the flawed reasoning of *Davis* has already been rejected by the Supreme Court

In response, the prosecution may urge this Court to rely on a case just ordered published in Division Three, State v. Davis, 2006 Wash. App. LEXIS 1043 (2006). In Davis, Division Three held that it was not error for a court to give the jury "an interrogatory" regarding an aggravating factor and impose an exceptional sentence in a case where the offense occurred in the same statutory hiatus as existed here.

Davis, however, does not help the prosecution, for several reasons. First, Davis improperly limited the relevance of Hughes by simply dismissing it as a case which only presented the question of the appropriate remedy on remand, rather than the question of "whether juries may be given special verdict forms or interrogatories to determine

aggravating factors at trial.” Davis, 2006 Wash. App. LEXIS 1043 at *15. There is no question that, in Hughes, the Court stated that it was only addressing the question of “the appropriate remedy on remand.” Hughes, 154 Wn.2d at 149. But in reaching its conclusion in Hughes, the Supreme Court specifically construed the very same statute at issue here and reached the conclusion that the statute, former RCW 9.94A.535 (2003), “explicitly directs the trial court to make the necessary factual findings and does not include any provision allowing a jury to make those determinations during trial, during a separate sentencing phase, or on remand.” 154 Wn.2d at 148-49.

That interpretation of the very same statute applicable to the situation here and in Davis is not suddenly irrelevant because the circumstances were different in Hughes, as the Davis Court seemed to believe. The same statutory language which the Hughes Court found unequivocally authorized only the trial judge to make findings on aggravating factors still only authorizes the trial judge to make such findings here.

Another holding of Hughes which transcends the limits of the facts of Hughes is the Court’s holding that Blakely and former RCW 9.94A.535 (2003) together present a situation “distinct from those where a statute merely is silent or ambiguous on an issue and the court takes the opportunity to imply a necessary procedure.” 154 Wn.2d at 151. And yet a third holding of Hughes which is relevant to the issues here is the Court’s finding that former RCW 9.94A.535(2) (2003) provides for aggravating factors “so technical and legalistic that it is difficult to

conceive that the legislature would intend or desire for lay juries to apply them.” 154 Wn.2d at 151. Although arguably the Legislature may now have indicated a contrary intent in enacting the Blakely fix legislation and allowing jurors to find many of those same aggravating factors, the point of this holding of Hughes is still valid that, when it was crafted, the exceptional sentencing scheme was specifically designed to be based upon findings by the trained legal mind of a judge, as evidenced by the complexity and subtlety of many of the aggravating factors. That fact supported the Hughes Court and supports Mr. Smith’s position here because it further establishes that former RCW 9.94A.535 (2003) did not and was not intended to provide for a jury to make findings on aggravating factors.

Division Three’s superficial limitation of Hughes to its specific facts ignored the most fundamental tenets of legal analysis: that a case which may not be directly precedential on all points can still be authoritative on others. And Division Three is bound by the Supreme Court’s interpretations of the statute in Hughes, to the extent those interpretations apply here. See, e.g., State v. Hairston, 133 Wn.2d 534, 539, 946 P.2d 397 (1997).

Davis also erroneously relied on RCW 2.28.150 and CrR 6.16 as providing authority to go outside the statutory limits of former RCW 9.94A.535 (2003). RCW 2.28.150 provides:

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 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.

CrR 6.16 provides that a trial court “may submit to the jury forms for such special findings which may be required or authorized by law.” In Davis, Division Three held that the trial court had the authority to “submit forms to the jury for special findings” under CrR 6.16 and that the procedure used was proper under RCW 2.28.150 because “[a]t the time of Mr. Davis’s [sp] trial, there was no specific procedure for imposing an exceptional sentence” after Blakely, so the court could properly fashion one. Davis, 2006 Wash. App. LEXIS 1043 at *15-16.

The first problem with this reasoning is obvious just from the plain language of the statute and rule. The rule only allows the court to submit forms to the jury to make “such special findings which *may be required or authorized by law.*” CrR 6.16 (emphasis added). But there is no applicable law requiring or authorizing a jury to make findings on aggravating circumstances to support use of the rule here. Former RCW 9.94A.535 (2003) did not authorize submitting the issue to the jury. As the Hughes Court made clear, the language of that statute provided authority only for a judge to find aggravating factors. 154 Wn.2d at 151.

Further, RCW 2.28.150 specifically applies only if the “course of proceeding is not specifically pointed out by statute.” The statute only allows “the courts to adopt suitable procedures to effect their jurisdiction when no procedures are specifically provided.” In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983). Where the statute is being applied in a situation involving deprivation of a liberty interest, the statute is strictly

construed. Id.; see State v. Nelson, 53 Wn. App. 128, 134, 766 P.2d 471 (1988).

Thus, in Nelson, the Court held that, although the superior court had jurisdiction to impose restitution, it could not rely on RCW 2.28.150 to order the defendant's property sold to pay for it. 53 Wn. App. at 134-35.⁶ RCW 2.28.150 did not apply, because the relevant restitution statutes specifically provided a "course of proceeding" by providing that a court could either confine a defendant or modify monetary payments or community service obligations. 53 Wn. App. at 135.⁷ The Court rejected the prosecution's argument that RCW 2.28.150 could be used to support the additional proceeding of selling property when there was already a proceeding not including that option, specified in the statute. 53 Wn. App. at 135.

In this case, this Court need not decide whether former RCW 9.94A.535 (2003) already provided a "course of proceeding" so that RCW 2.28.150 does not apply. The Supreme Court already has. In Hughes, the Court specifically declared that the very same statutory scheme presented a "situation. . . distinct from those where a statute merely is silent or ambiguous on an issue and the court takes the opportunity to imply a necessary procedure." 154 Wn.2d at 151.

Even further, the Hughes Court specifically declared its

⁶After Nelson was decided, the Legislature amended the statute to add that authority. See State v. Wiens, 77 Wn. App. 651, 653, 894 P.2d 569 (1995), review denied, 127 Wn.2d 1021 (1995).

⁷The Court went on to find that, even if RCW 2.28.150 was applicable, executing against personal property in order to pay a restitution order was not "most conformable to the spirit of the laws," as the statute also required. Nelson, 53 Wn. App. at 135-36.

disagreement with Division One's decision on this point in State v. Harris, 123 Wn. App. 906, 922-26, 99 P.3d 902 (2004), overruled by Hughes, 154 Wn.2d at 153 n. 16. In Harris, Division One had primarily relied on RCW 2.28.150 and CrR 6.16 - the same statute and rule Division Three relied on in Davis. Harris, 123 Wn. App. at 922-26. The Harris Court held that the statute and the rule "envison situations in which the superior courts will use procedures that are not specifically prescribed by statute." 123 Wn. App. at 923-24. Next, it cited cases such as State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940), in which the Supreme Court held that a statute which did not provide for a jury trial for determining "habitual criminal status" was unconstitutional. Harris, 123 Wn. App. at 925. According to Division One, Furth and similar cases indicated the authority of trial courts to "supply a jury procedure when it is constitutionally required." 123 Wn. App. at 925.

Finally, the Harris Court found cases like Martin and Frampton inapplicable, because the statutes in those cases provided no procedure for imposing a death penalty on someone who pled guilty. 123 Wn. App. at 926 n. 57. In contrast, the Harris Court posited, the exceptional sentencing statutes "provide both a penalty and an implementing procedure." Id. As a result, Division One found "no doubt here, as there was in Frampton and Martin, regarding the Legislature's intent to provide a procedure." Id. In effect, the Blakely decision was deemed to have rewritten the statute and eliminated the relevant procedure, which the court could then provide by using the general authority of RCW 2.28.150 and CrR 6.16. The Harris Court concluded that it was proper for a trial court to empanel a jury on

remand under the statute and the rule, to consider aggravating factors set aside on appeal as invalid under Blakely. 123 Wn. App. at 926-27.

In specifically overruling Harris, the Hughes Court indicated that former RCW 9.94A.535 (2003) was not “silent or ambiguous” on the issue of whether the jury or judge was authorized to find aggravating factors to support an exceptional sentence. 154 Wn.2d at 151. The Court went on:

We recognize that Division One of the Court of Appeals came to the opposite conclusion in State v. Harris. . . However, we disagree with that conclusion as well as the court’s reasoning supporting it - that because there is nothing in the statute to prohibit the procedure and because trial courts have some inherent authority to imply procedures where they are absent, that we could do so here in the face of legislative intent to the contrary. We reach the opposite conclusion.

154 Wn.2d at 151 n. 16.

Thus, the highest court in this state has already rejected the very same reasoning used by Division Three in Davis. It has already rejected the idea that former RCW 9.94A.535 (2003) did not specifically point out a “course of proceeding” so that RCW 2.28.150 applies. It has also already implicitly rejected the idea that the fact that Blakely invalidated that “course of proceeding” as unconstitutional somehow removed the proceeding from the statute and created the authority for a court to act under RCW 2.28.150 and CrR 6.16.

Further, the highest court in this state has already held that Martin and Frampton and similar cases *are* relevant and applicable to interpretation of the scope of former RCW 9.94A.535 (2003). Hughes, 154 Wn.2d at 150-51. In contrast to Division One’s claim in Harris, in Hughes the Supreme Court *specifically relied* on those cases and their

holdings about the prohibition against judicial creation of procedure not contained in a statute “for the sole purpose of rescuing a statute from a charge of unconstitutionality.” 154 Wn.2d at 150-51, quoting, Martin, 94 Wn.2d at 18 (Horowitz, J., concurring).

Notably, the Hughes Court’s application of those cases, and its rejection of the arguments in Harris, makes it clear that the holdings of Martin, Frampton and similar cases are not limited in their application to cases where a statute provided for a procedure but had a “hole” in it somewhere. Hughes establishes that those cases also apply where, as here, the procedure was all-encompassing but constitutionally infirm. In both situations, the Legislature has written a statute, either without anticipating a need or without anticipating that it would later be found unconstitutional. And in both situations, the court does not have the authority to add to or amend the statute to patch the hole, regardless whether that hole was created by Legislative oversight or subsequent judicial decision.

Former RCW 9.94A.535 (2003) simply did not provide a procedure to use in the event the procedure it required was found constitutionally infirm. And the statute clearly and unequivocally granted authority only to the trial court to make findings of fact regarding the aggravating factors necessary to support an exceptional sentence. Washington appellate courts have been repeatedly asked to expand the scope of a trial court’s authority beyond statutory limits and has repeatedly refused to do so, even in circumstances where exceptional sentences have been involved. See, State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980) (reversing order because it exceeded the court’s statutory

authority); State v. Akin, 77 Wn. App. 575, 892 P.2d 774 (1995) (reversing juvenile sentences where the court exceeded its statutory authority by recommending work ethic camp without statutory authority); State v. Paine, 69 Wn. App. 873, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993) (reversing exceptional sentence because the court had exceeded its statutory authority in ordering it); State v. Theroff, 33 Wn. App. 741, 657 P.2d 800, review denied, 99 Wn.2d 1015 (1983) (reversing the sentencing order requiring a payment to a charity as a condition of probation as outside the court's statutory authority). There was no statutory authority for the court to submit the aggravating factors to the jury for determination and then base an exceptional sentence on those findings. The trial court's use of such a statutorily unauthorized procedure here was improper, in violation of the separation of powers doctrine and due process. This Court should so hold and should reverse and remand for imposition of a standard range sentence, the only sentence which can be statutorily and constitutionally imposed.

d. Mr. Smith's rights to equal protection and Fifth and Sixth Amendment rights were violated

In addition, the procedure used in this case violated Mr. Smith's state and federal rights to equal protection and impermissibly infringed upon his exercise of his constitutional rights.

Both Article I, §12, of the Washington constitution and the Fourteenth Amendment require that similarly situated individuals receive like treatment under the law. See Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997); Dandridge v. Williams, 397 U.S. 471, 518, 90 S. Ct.

1153, 25 L. Ed. 2d 491(1970).⁸ When conducting an equal protection analysis, the first step is to determine the appropriate standard of review. See State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). This is done by looking at the nature of the interests or class affected. See State v. Garcia-Martinez, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998). Where it is a fundamental right or a suspect class, “strict scrutiny” is applied. See State v. Ward, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994); State v. Schaaf, 109 Wn.2d 1, 19-20, 743 P.2d 240 (1987).

Here, Mr. Smith is in that class of people whose cases arose in the short window of time after Blakely and before the effective date of the Blakely fix statute. Under the trial court’s analysis of former RCW 9.94A.535 (2003), the members of that class who exercise their constitutional right to trial, like Mr. Smith, can be subjected to an exceptionally long sentence without their consent because the jury already empaneled for trial has the authority to decide aggravating factors to support that sentence. But those who did not exercise the constitutional right to trial and instead pled guilty cannot be subjected to an exceptional sentence without their consent. See, e.g., State v. Ermels, 156 Wn.2d 528, 539-40, 131 P.3d 299 (2006). Because no jury is empaneled in their case, the only way an exceptional sentence could be imposed upon them would be if they knowingly, voluntarily and intelligently waived their Blakely

⁸Washington courts have thus far construed the Washington clause as “substantial identical” to the federal clause, and use the same analysis. See State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

rights. See id.

Applying “strict scrutiny” here, the prosecution cannot meet its burden of proving that the different treatment received by defendants in the class who pled guilty versus defendants in the class who went to trial was constitutional. A law must be narrowly drawn and necessary to further compelling governmental interests to meet that standard. See Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971); City of Sumner v. Walsh, 148 Wn.2d 490, 505, 61 P.3d 1111 (2003). By definition, the different treatment of risking an exceptional sentence is based solely upon the exercise of the fundamental constitutional right to have a jury trial.

Thus, interpreting former RCW 9.94A.535 (2003) as the trial court did here resulted in a violation of Mr. Smith’s Fifth and Sixth Amendment rights. Under the Fifth Amendment, a defendant has a right not to plead guilty, while the Sixth Amendment guarantees the right to jury trial. See State v. Bowerman, 115 Wn.2d 794, 802, 802 P.2d 116 (1990). Where a statute is interpreted as providing a maximum penalty which is lesser for those who plead guilty and greater for those who go to trial, that statute imposes an impermissible burden upon the Fifth and Sixth Amendment rights. See United States v. Jackson, 390 U.S. at 571-71; Robtoy v. Kincheloe, 871 F.2d 1478 (9th Cir. 1989), cert. denied, 494 U.S.1031 (1990).

In Jackson, the Supreme Court addressed the constitutionality of the death penalty portion of the Federal Kidnapping Act, which imposed the death penalty only on people who were convicted by a jury. 390 U.S.

at 571-72. Under the Act, the Court noted, “the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed,” while the defendant “ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die.” 390 U.S. at 582. As a result, the Court struck down that portion of the statute, because:

The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.

Jackson, 390 U.S. at 581. Even if the procedure set forth in the Act was not “inherently coercive,” it need not be in order to “impose an impermissible burden upon the assertion of a constitutional right.” 390 U.S. at 583.

Similarly, in Robtoy, the 9th Circuit held impermissible a statutory scheme which set the maximum for those who entered pleas as life with the possibility of parole while setting the maximum for those who went to trial at life *without* that possibility. 871 F.2d at 1481. As the Washington Supreme Court has held, the Robtoy Court declared that, “due to the qualitative difference between the penalties, imposing a sentence of life without possibility of parole only on those who are found guilty by a jury also violates the defendant’s right to a jury trial.” Bowerman, 115 Wn.2d at 802. These cases all “stand for the principle that a statutory scheme that punishes people charged with the same offense differently, depending upon whether they plead guilty or have a jury trial, is unconstitutional.”

Bowerman, 115 Wn.2d at 803.

Here, under the trial court's interpretation of former RCW 9.94A.535 (2003), Mr. Smith was subject to an exceptional sentence only because he exercised his constitutional right to jury trial. And someone who was charged with the very same offense but pled guilty would not be subject to such a sentence involuntarily, as Mr. Smith was, because that person would have to agree to imposition of an exceptional sentence in order for one to be imposed. Clearly, the statutory scheme, as interpreted by the trial court and applied here, punishes people who exercise their right to trial more severely, because only those people could be involuntarily ordered to serve an exceptional sentence. There can be no compelling governmental interest which would support such punishment under the equal protection clause.

Because the imposition of the exceptional sentence here violated Mr. Smith's rights to equal protection, his Fifth Amendment right not to plead guilty, and his Sixth Amendment right to a jury trial, reversal is required.

- e. The jury was not properly instructed on the aggravating factors and the deliberate cruelty and abuse of trust factors could not be used for the felony murder with the predicate of criminal mistreatment

Even if former RCW 9.94A.535 (2003) had authorized having the jury decide aggravating factors, reversal would still be required because the jury was not properly instructed on those factors, the factors were not all valid in this case, and the factors did not support the sentence. To be constitutionally proper under the state and federal due process clauses, jury

instructions must inform the jury of the prosecution's burden of proof. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Failure to do so is manifest constitutional error which may be raised for the first time on appeal. See State v. Miller, 89 Wn. App. 364, 949 P.2d 821 (1997); RAP 2.5(a)(3).

Until Blakely, Washington courts had not had occasion to craft jury instructions for aggravating factors, because those factors were not submitted to juries. Now, the question before this Court is the propriety of jury instructions on aggravating factors after Blakely. In deciding this issue, it is important to recognize the limits of pre-Blakely caselaw regarding review of exceptional sentences. Most significantly, prior caselaw addressed the issues surrounding exceptional sentences in light of the lesser burden of proof of a "preponderance of the evidence." Under former RCW 9.94A.370(2), aggravating factors only had to be proven by that less stringent standard. Under Blakely, however, the prosecution must prove those facts beyond a reasonable doubt. Hughes, 154 Wn.2d at 150-53. Pre-Blakely caselaw finding sufficient evidence to support an aggravating factor thus does not control, because it was based upon a burden of proof far less than that which is mandated now.

Also significant is that, under Blakely, it has become clear that an aggravating factor is now considered as an element of the crime. See State v. Mills, 154 Wn.2d 1, 12, 109 P.3d 415 (2005); Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (facts necessary to impose an exceptional sentence are "the functional equivalent of an

element of a greater offense”). It is deemed so because, regardless whether it is placed within sentencing provisions, it is a fact which must be proved by the prosecution in order to prove the aggravated offense for which the higher sentence is being imposed. Ring, 536 U.S. at 609.

These two points are significant because they signal the care and caution which must be used in crafting instructions for aggravating factors for the first time, as here. See, e.g., State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). In addition, they inform the questions which arise in this new task.

For example, because an aggravating factor is now considered an element of the aggravated crime, caselaw regarding proper jury instruction on other elements is relevant. Under such caselaw, failure to properly instruct on an element can be a violation of due process. See State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 682 (1988). In addition, the error cannot be harmless unless the prosecution proves, beyond a reasonable doubt, that the jury verdict would have been the same absent the error in the instructions. See State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002).

Here, there were several errors in the jury instructions on the aggravating factors. Verdict forms A and B, the forms for those factors, asked the jurors if the prosecution had proven

the existence of the following beyond a reasonable doubt?

- (1) The crime. . . was facilitated by the defendant’s abuse of a position of trust towards Tyshell Smith.
...
- (2) At the time that the crime. . . was committed, the defendant knew or should have known that Tyshell Smith was particularly vulnerable to the crime, or incapable of

resisting the crime, due to extreme youth.

...

- (3) The defendant's conduct during the commission of the crime. . . manifested deliberate cruelty to Tyshell Smith.

CP 174-75. The jury was also given instructions on "deliberate cruelty" and "abuse of trust." CP 166-67.

These instructions were defective. Nothing in them gave the jury the proper standard to apply in finding the aggravating factors. It is a fundamental principle of sentencing in this state that an exceptional sentence must not be based upon facts or circumstances which inhere in the offense, because such factors were necessarily considered by the Legislature in setting the standard range and thus cannot justify departing from it. See State v. Thomas, 138 Wn.2d 630, 635-36, 980 P.2d 1275 (1999). Another fundamental principle is that aggravating factors will not support an exceptional sentence unless those factors are "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." State v. Grewe, 117 Wn.2d 211, 215, 813 P.2d 1238 (1991). These principles are grounded in the idea that exceptional sentences are not intended to be the norm but rather abnormal, imposed only in those limited circumstances where the standard range does not adequately reflect the gravity or heinousness of the crime.

Here, the instructions told the jury only that it should find whether those facts existed, not whether the facts were of such a magnitude that they distinguished this particular homicide by abuse or second-degree felony murder of a child from other homicide by abuse or second-degree felony murder of a child crimes. These crimes rank among the most

abhorrent that can be committed. See, e.g., State v. Russell, 69 Wn. App. 237, 253, 848 P.2d 743, review denied, 122 Wn.2d 1003 (1993). Without instruction that the facts amounting to the aggravating factors cannot, by law, be acts which inhere in the offense, and that they must significantly distinguish the crime from other homicides by abuse or second-degree felony murders of a child by assault or criminal mistreatment, the jury was not given the required framework within which to make its decision. Instead, it was free to rely on the same facts for establishing guilt and aggravating the crime, even if those facts were, as here, no more than the usual horrible facts which accompany such crimes.

In addition, the aggravating factors cannot support an exceptional sentence for the second-degree felony murder with a predicate of criminal mistreatment, as a matter of law. For the time relevant to this case, the crime of criminal mistreatment was defined as follows:

A parent of a child or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

Former RCW 9A.42.020 (2003). By definition, then, criminal mistreatment involves an abuse of trust, and the deliberate cruelty of withholding basic necessities of life from another who is also, by definition, “dependent” and thus particularly vulnerable. Those aggravating factors inhere in the offense of second-degree felony murder with a criminal mistreatment predicate for which Mr. Smith was convicted, and cannot support an exceptional sentence for that offense.

Grewe, 117 Wn.2d at 215.

2. THE TRIAL COURT ERRED IN DENYING
APPELLANT'S MOTION TO DISMISS A BIASED
JUROR FOR CAUSE AND APPELLANT'S DUE
PROCESS RIGHTS WERE VIOLATED

The trial court also erred in denying Mr. Smith's motion to dismiss juror 10 for cause after the juror openly declared his personal bias and prejudice regarding Mr. Smith's race.

a. Relevant facts

When defense counsel started his first round of voir dire, he told the jury that the questions were being asked to look for "bias," because it was important for jurors to have "a neutral stance, neither for nor against either party." RP 305. He asked whether anyone there was prejudiced against "a black man," telling them no one would judge them but that it was necessary for the court to know. RP 306. He asked if anyone was "going to tell me that they're prejudiced against black people," then said the jury would learn that Mr. Smith, a black man, has children with a white woman, asking, "[a]nybody here going to tell me that they have a bias or a prejudice against an extra-racial relationship[?]" RP 306.

At that point, Juror 10 apparently made some indication that he did, in fact, have such a bias, and the following exchange occurred:

JUROR NO. 10: I don't believe in intermarriage like that.

[COUNSEL]: We're not talking about marriage, sir.
We're talking about a relationship.

JUROR NO. 10: Marriage. Either way.

[COUNSEL]: And tell me about this. How long have you felt this way?

JUROR NO. 10: I was born and raised - - I was raised that way.

[COUNSEL]: Where were you raised, sir?

JUROR NO. 10: In Puyallup.

[COUNSEL]: In Puyallup. How do you think you formed that view?

JUROR NO. 10: I don't know. It's just the way that my family thought. I didn't intermarry or we played with other kids and like that and worked with them. I still, to this day - - I mean, I wouldn't marry a black person or an oriental or anything if I was going to get married.

[COUNSEL]: Is this going to affect your ability to go into the jury box in neutral?

JUROR NO. 10: Well, if that was the question, I suppose it would, yes.

[COUNSEL]: You would not then be able to be fair and impartial?

JUROR NO. 10: No. I think I could be, yeah.

[COUNSEL]: You could be?

JUROR NO. 10: I think so.

[COUNSEL]: How can you tell me if you could be when you tell me that you are prejudiced against an interracial relationship?

JUROR NO. 10: Well, that's his choice. That wouldn't be mine. You are asking what my choice?

[COUNSEL]: Mm-hm. No, what I'm really asking is not about your personal choice, but about your bias and if you can put that aside and go into this jury box in neutral and not hold it against Mr. Smith that he's had a relationship that was interracial. Can you do that?

JUROR NO. 10: I think so.

[COUNSEL]: But you're not sure?

JUROR NO. 10: Well, I don't know what to tell you.

[COUNSEL]: How strongly do you feel about this?

JUROR NO. 10: I feel strongly about that. I've raised my children the same way.

[COUNSEL]: Do you think that based upon these strong feelings that you would be unable to be fair and impartial to Mr. Smith in this case?

JUROR NO. 10: I think so.

[COUNSEL]: But you're not sure?

RP 306-308. At that point, counsel moved on. RP 308-309.

The next day, before the jury panel was brought in, counsel raised a "for cause on Juror No. 10." RP 357. He argued that it was improper to seat a juror who has admitted bias against interracial relationships, because such a relationship is "prominent in this case." RP 357. The juror was brought back in and counsel asked:

I'm concerned, sir. I know that you have told me, and I believe that you mean you can act fairly and impartially in spite of the fact that you have an admitted bias against interracial relationships. You are going to hear testimony, I suspect, if you were on the panel, that Mr. Smith has had several interracial relationships, many of them resulting in children. And I just need to be clear in my mind because this is a very serious matter, that this - - the fact of these interracial relationships is not something your admitted bias would interfere with your ability to be fair and impartial. Could you agree to that for me?

RP 358-59. The juror said he felt he could, that he had no "problem" with other people, but it was just what he believed. RP 359. He also said, "[e]verybody's prejudiced in their own way, some way or another. That's just what I believe, you know, one of the things. We can go into a lot of things that would really, you know, that I don't believe in, but - - I'm a fair

person.” RP 359. Counsel then asked if the juror thought he could put his “emotional reaction to that” behind him and judge the case based on evidence, and the juror said he did not “consider it an emotional reaction,” that it was something he believed, that other people believe “other things” and that was their “prerogative,” and that he was friendly with people at work of “all different races.” RP 359-60. The prosecutor then asked the juror if he was going to lower the standard of proof or find Mr. Smith guilty because he was involved in an interracial relationship and if he could separate out how he feels about it from deciding the case. RP 360-61. The juror said, “I think so.” RP 361.

With the juror out of the room, counsel renewed his motion for cause. RP 361. He sincerely believed that the juror believed he was being “truthful and honest” but argued that the juror still has an admitted bias which would directly impact on the facts of the case even if it “doesn’t go directly to any elements of proof in this case.” RP 361. The court denied the motion, finding that the juror had not “given us any indication that he’s going to hold that against Mr. Smith in any way.” RP 362.

The peremptory challenges sheet indicates that Mr. Smith used his very first challenge to remove Juror 10. Supp. CP ____ (Peremptory challenges, filed 7/12/05). He also used all of his peremptory challenges for the panel, as did the prosecution.⁹ Supp. CP ____.

⁹Both parties passed on exercising the peremptory challenges which can only be exercised against proposed alternates. Supp. CP ____.

b. The court erred in denying the challenge for cause and appellant's due process rights were violated

Both the Sixth Amendment and Article I, § 22, of the Washington constitution guarantee every criminal defendant the right to a fair and impartial jury. See Irwin v. Dowd, 366 U.S. 717, 723, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983). In addition, the right to a fair trial in a fair tribunal is a basic requirement of due process. Irwin, 366 U.S. at 722. To ensure these rights, a juror is excused for cause if his or her views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” State v. Hughes, 106 Wn.2d 176, 181, 721 P.3d 902 (1986), quoting, Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); RCW 4.44.150(2), RCW 4.44.170.

Juror bias is defined as either “actual” or “implied.” RCW 4.44.170. In general, the denial of a challenge to a juror for cause under a claim of implied bias is within a trial court’s discretion. See State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). Where, however, a potential juror demonstrates actual bias and is not rehabilitated, the trial court is required to excuse the juror for cause. See State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996).

Actual bias is defined as “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” RCW 4.44.170(2). Under RCW 4.44.190, a juror who

appears to be actually biased will be dismissed if he or she cannot be rehabilitated sufficiently so that the court is satisfied the juror can disregard their opinion and “try the issue impartially.”

Thus, in State v. Witherspoon, 82 Wn. App. 634, 919 P.2d 99 (1996), review denied, 130 Wn.2d 1022 (1997), the defendant, an African American, was charged with possessing a controlled substance, and a potential juror admitted a prejudice by stating a belief that, based upon what he read in the media, lots of African Americans deal drugs. 82 Wn. App. at 637-38. The prosecution attempted to rehabilitate the juror, who ultimately agreed to apply the presumption of innocence despite the bias he had confessed. 82 Wn. App. at 638. In reversing, the Court of Appeals held that it was an abuse of discretion for the court to deny the challenge for cause, because the juror had demonstrated actual bias and the rehabilitation had not mitigated the obvious prejudice the juror had against African Americans. 82 Wn. App. at 637-38.

The Court reached a similar conclusion in State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994), review denied, 126 Wn.2d 1003 (1995), which is instructive in this case. In Jackson, the issue of juror bias arose in the slightly different context of a juror who had indicated no bias during voir dire and then was heard to repeatedly use a derogatory term for African Americans and complain about having to socialize with “coloreds.” 75 Wn. App. at 542-43. The trial judge denied a motion for a new trial on the basis that the comments only showed use of arcane language but not real bias. 75 Wn. App. at 542.

In reversing, the Court disagreed, finding clear evidence of bias.

75 Wn. App. at 543. The juror's comments were evidence of the jurors "aversion toward associating with African-Americans" and "a predisposition toward making generalizations about African-Americans as a group." 75 Wn. App. at 543. The Court found that, as a matter of due process and based on the right to an unbiased and unprejudiced jury, "[p]resumptively, these statements demonstrated that juror X held certain discriminatory views which could affect his ability to decide Jackson's case fairly and impartially."

Similarly, here, juror 10 candidly admitted to having been raised with a such strong bias against African Americans that he would not associate with them romantically and had raised his children to believe the same thing. Quite apart from the fact that the juror was obviously, admittedly biased against the very relationship which was central to this case and in which Mr. Smith, a black man, had engaged in relationships with white women, the juror's very strong belief against association indicated a deep racial bias. The fact that he was willing to overcome that bias somewhat and be friendly with African Americans in order to bring home a paycheck from work does not indicate a willingness to set aside those strong preconceived ideas about African Americans and decide the case impartially, as required to rehabilitate him. See State v. Fire, 100 Wn. App. 722, 724, 998 P.2d 362 (2000), reversed on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001).

Appellate deference to the trial court's decision regarding a challenge for cause "is not a rubber stamp." 100 Wn. App. at 728-29. Just as in Jackson, here the juror's comments revealed a racial bias which

compelled his removal for cause. The trial court erred in denying the request, and this Court should so hold.

- c. State v. Fire does not control because it did not address due process and Mr. Smith was entitled to exercise all his peremptories without being required to use one to remove a biased juror for cause

Until recently, the improper denial of a challenge for cause would compel reversal if the defense subsequently used all its peremptory challenges. Washington courts had held that an improper denial of a challenge for cause was reversible error even if the defendant had removed the juror by peremptory challenge, because the result was the deprivation of a peremptory challenge which could have otherwise been used. See State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1969), overruled by, State v. Fire, *supra*.

In State v. Fire, however, a bare majority of the Washington Supreme Court departed from that longstanding rule and held that, because a defendant had exercised a peremptory challenge and removed a juror who should have been dismissed for cause and there was no evidence a biased jury sat on his panel, reversal was not required. 145 Wn.2d at 154, citing, United States v. Martinez-Salazar, 528 U.S. 304, 315-16, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). That same majority also relied on the Roberts decision, in which a similar result was reached in a case where the defendant actually declined the offer of additional peremptory challenges after challenges for cause were improperly denied. Fire, 145 Wn.2d at 162-66, citing, State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000).

There are several reasons why Fire is not dispositive in this case.

As a threshold matter, there are actually two separate majorities in Fire. Five justices (Bridge, Alexander, Smith, Ireland and Owens) (“majority 1”) held that Martinez-Salazar was dispositive on the federal constitutional issues so that a defendant must show prejudice over and above the loss of a peremptory challenge for reversal to be required based on an error in a challenge for cause under the federal law. 145 Wn.2d at 153. But a different five justice majority (Sanders, Madsen, Chambers, Johnson and Alexander) (“majority 2”) agreed that longstanding Washington law had established that “a defendant in a criminal case is presumed to be prejudiced if that person is forced to use” a peremptory challenge to remove a juror who should have been removed for cause, if all of her peremptory challenges were used. See 145 Wn.2d at 166 (Alexander, J., concurring). As a result, the portion of majority 1’s decision regarding the existence of such a rule in Washington common law is actually the decision of the minority.

Notably, in creating the second majority and breaking the tie regarding the result, Justice Alexander specifically declared that he was only going against existing, settled law in Washington because he believed that law was not “constitutionally based.” Id. That conclusion, however, was based upon the focus of majority 1 on the Sixth Amendment protections under Martinez-Salazar. Majority 1 focused solely on that federal standard and declined to address whether the Washington constitution provided more protection than the Sixth Amendment right to an impartial trial. Fire, 145 Wn.2d at 164.

Thus, majority 1 focused on the portion of Martinez-Salazar which

addressed the Sixth Amendment right to an impartial trial. But Martinez-Salazar also addressed a due process issue under the Fourteenth Amendment as well. That issue was whether, looking at the law of the state in which the trial occurred, the defendant was deprived of some right guaranteed under that law. 528 U.S. at 315; see Ross v. Oklahoma, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988).

In Ross, the Court addressed in more detail how a due process claim arises under the Fourteenth Amendment in the context of being forced to use a peremptory challenge to remove a juror who should have been removed for cause. 487 U.S. at 89. Because the Ross Court had found that peremptory challenges were not required by the federal constitution, it was

for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. As such, the “right” to peremptory challenges is “denied or impaired” only if the defendant does not receive that which state law provides.

487 U.S. at 89-90. It was a longstanding principle of the law of the relevant state (Oklahoma) that a defendant was required to exercise a peremptory challenge to remove a juror not removed for cause, and prove not only that all his peremptory challenges were exhausted but also that “an incompetent juror” was forced upon him. 487 U.S. at 88. As a result, the Ross Court found, there was no violation of the Fourteenth Amendment due process clause.

In contrast to Oklahoma law, Virginia law had a long established right for a defendant to use a peremptory strike and only had to prove deprivation of such a strike to be entitled to reversal for a failure to

dismiss a juror for cause. Brown v. Commonwealth, 33 Va. App. 296, 306 n. 2, 533 S.E. 2d 4 (2000). Noting the holding of Martinez-Salazar, the Court found it irrelevant to the state law issue, then found that the relevant statute and also early caselaw established the right. See Brown, 33 Va. App. at 306; see also, Justus v. Commonwealth, 220 Va. 971, 975, 266 N.Ed. 2d 87 (1980).

In Washington, it is a longstanding principle of law that a defendant is entitled to reversal for deprivation of a peremptory challenge based upon having to exercise such a challenge in order to unseat a juror who should have been excused for cause, so long as the defendant uses up all of his peremptory challenges. Majority 2 in Fire specifically so found. See Fire, 145 Wn.2d at 166 (Alexander, C.J., concurring). In concurring only in the result, Justice Alexander specifically declared:

I agree. . . that under Washington law a defendant in a criminal case is presumed to be prejudiced if that person is forced to use his or her last peremptory challenge in order to remove a juror who should have been removed for cause. In other words, a defendant need not show that he was prejudiced in order to obtain reversal of a conviction that followed the defendant's use of his or her last peremptory challenge to overcome the wrongful denial of a challenge to a juror for cause. In this regard I am in accord with the dissent's view that our decision in Parnell has not been undermined and remains good law in Washington.

Id.

Justice Alexander did not mention the due process implications of his decision under Ross and Martinez-Salazar. Id. But by agreeing with the dissent that it was established in Washington that a defendant did not have to show further prejudice beyond loss of the peremptory challenge and use of all such challenges, Justice Alexander established that fact as

the majority opinion. And it cannot truly be challenged that Washington has long so held.

As early as 1893, the Supreme Court indicated that a defendant who had to exercise a peremptory challenge in order to remove a juror who should have been removed for cause would be prejudiced if he had to exhaust all of his peremptory challenges. See State v. Moody, 7 Wash. 395, 397, 35 P. 132 (1893) (the defendant was “without prejudice” because, although he had to use one of his peremptory challenges to remove the juror, he was “in no manner injured by having to exercise his right in that regard as he did not exhaust all of his peremptory challenges during the impaneling of the jury”). Just a few years later, the Supreme Court again declared that, where a defendant who was “wrongfully compelled to exhaust peremptory challenges on jurors who should have been dismissed for cause, his rights were invaded as much as though the jurors had been accepted after his peremptory challenges were exhausted.” State v. Rutten, 13 Wash. 203, 204, 43 P. 30 (1895). And later, in State v. Stentz, 30 Wash. 134, 134-35, 70 P. 241 (1902), the Supreme Court again held that a defendant who was forced to use a peremptory challenge to remove a juror for cause is entitled to reversal as it is prejudicial to the defendant if he has “been compelled subsequently to exhaust all his peremptory challenges before the final selection of the jury.” 30 Wash. at 135; see also State v. Muller, 114 Wash. 660, 661, 195 P. 1047 (1921).

In addition, Washington has specifically declined to follow the rule of the majority of other states - later reflected in Martinez-Salazar - that more than loss of a peremptory challenge was required before relief would

be granted. In 1925, the Washington Supreme Court rejected that requirement, finding that the rulings to the contrary in other states and federal courts were faulty and “entirely overlook[] at least one of the purposes of the peremptory challenges allowed by law. . . [which is] to enable parties to excuse from the jury those whom they may, for any reason, feel would not make fair jurors even though nothing is disclosed on the voir dire.” McMahon v. Carlisle-Pennell Lumber Co., 135 Wash. 27, 30, 236 P. 797 (1925). Thus Washington, unlike other jurisdictions and the federal courts, has long placed greater importance in the freedom to use a peremptory challenge and that deprivation of that opportunity based on trial court error is a loss.

Further, the relevant statute and rule provide a broad definition of the statutory right to exercise peremptory challenges. Under RCW 4.44.130, a defendant is entitled to peremptory challenges of jurors, and the use of such challenges is not restricted in any way. The statute defining peremptory challenges, RCW 4.44.140 provides no limits to the exercise of a peremptory challenge, instead requiring that a court “shall” exclude the juror when an objection is made “for which no reason need be given.” RCW 4.44.210 provides the procedure for exercising peremptory challenges, and provides only that a person who declines to exercise a peremptory challenge during the process cannot later change their mind and start exercising challenges again, except as to jurors later added to the group. That statute has been in existence in substantially the same form at least as far back as 1881. See Code of 1881 § 215. Nothing in the statute, or in CrR 6.4, require a defendant to exercise a peremptory challenge to

remove a juror in order to preserve the issue of whether the juror should have been removed for cause, as was the case in Ross. See 487 U.S. at 89. And while there are - and historically have been - provisions in Washington for excepting to a challenge for *cause* and having the court decide the dispute, there are no provisions for any interference by an opposing party or the court into exercise of a peremptory challenge. See RCW 4.44.230; Code of 1881 § 217.

Thus, both the statutory scheme and established caselaw provide ample evidence that Washington has provided a very broad statutory right to peremptory challenges. And as Fire majority 2 held, Washington has a longstanding history of holding that a defendant who is forced to exercise a peremptory challenge for a juror who should have been removed for cause has suffered prejudice to the statutory right of peremptory challenges and is not required to show prejudice beyond proving that he used all those challenges up. See Fire, 145 Wn.2d at 166. Because he was deprived of his rights under Washington law to full, unfettered enjoyment of his peremptory rights, Mr. Smith's due process rights under the Fourteenth Amendment were violated. This Court should so hold and should reverse.

3. THE CONVICTION FOR FELONY MURDER WITH
SECOND DEGREE ASSAULT AS THE PREDICATE
MUST BE REVERSED

In In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), the Washington Supreme Court held that the second-degree felony murder statute did not permit conviction where the predicate felony was assault. The Legislature subsequently amended the felony murder statute, to include assault as a predicate felony for second degree felony

murder. See Laws of 2003, ch. 3, §2. The original statute had provided that a person was guilty of second degree murder if

He commits or attempts to commit any felony, other than those enumerated in RCW 9A.32.030(1)(c), and in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants[.]

RCW 9A.32.050(1)(b) (1975). With the 2003 amendments, the first two clauses now read, “[h]e commits or attempts to commit any felony, including assault.” Laws of 2003, ch. 3, §2. The “course of and in furtherance of” language was not amended. Id.

In Andress, the Court relied upon statutory construction and prior caselaw and held that the phrase “in furtherance of” as contained within the felony murder statutes did not mean that the defendant had to cause the death while taking some act to further the underlying felony. 147 Wn.2d at 609. Instead, “in furtherance of” means simply that the death “was sufficiently close in time and place” to the underlying felony “to be part of the res gestae of that felony.” 147 Wn.2d at 609, quoting, State v. Leech, 114 Wn.2d 700, 790 P.2d 160 (1990). The Andress Court held that, if assault were one of the predicate felonies for felony murder, the “in furtherance of” language in the statute would be “meaningless as to that predicate felony,” because the assault is “not independent of the homicide.” 147 Wn.2d at 610. Assuming that the Legislature did not intend this “absurd result,” the Court held that assault could not be the predicate felony for the murder charge. Id.

In amending the statute to include felony murder, the Legislature has now indicated that it does currently intend this “absurd result.” It is

now up to the courts of this state to determine whether the new statutory scheme passes muster.

Put simply, it does not. The statute still suffers from the absurdity found in Andress, because it still includes the “in furtherance of” language but now specifically includes assault.

More importantly, permitting the prosecution the discretion to choose between charging a second degree felony murder with assault as the predicate felony, instead of manslaughter, violates the state and federal rights of equal protection. Both Article 1, § 12 and the Fourteenth Amendment protect against granting the prosecution discretion to choose from “different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations.” Olsen v. Delmore, 48 Wn.2d 545, 550, 295 P.2d 324 (1956). Further, “the principle of equality before the law is inconsistent with the existence of a power in a prosecuting attorney to elect, from person to person committing this offense, which degree of proof shall apply to his particular case.” State v. Collins, 55 Wn.2d 469, 470, 348 P.2d 214 (1960).

Under RCW 9A.36.021, to prove assault in the second degree as charged, the prosecution had to prove that Mr. Smith intentionally assaulted the child and thereby recklessly inflicted substantial bodily harm and death resulted. To prove first-degree manslaughter, the prosecution had to prove that he “recklessly caused the death of another person.” RCW 9A.32.060. Second degree murder is a level XIV offense, while first degree manslaughter is a level XI offense, with significant differences

in the sentences served for each. RCW 9.94A.505; RCW 9.94A.510.

Thus, if a defendant commits an intentional assault and unintentionally but recklessly inflicts substantial bodily harm which results in death, the prosecution can charge either second degree murder or manslaughter, with the resulting differences in punishment and consequence. Similarly, with assault as the predicate felony for second degree felony murder, “a negligent third degree assault resulting in death can be second degree murder,” and can also be second degree manslaughter. See RCW 9A.32.070(1); Andress, 147 Wn.2d at 615.

The unfairness which can result from such discretion is evident and the harshness of punishing an unintentional homicide this way has been recognized by the Supreme Court itself. See Andress, 147 Wn.2d at 612. By giving the prosecution this expansive discretion to charge a higher or lesser crime for the same conduct, RCW 9A.32.050 as currently written violates the prohibitions against equal protection.

In addition, it is time for Washington to reconsider its ill-conceived notion of refusing to follow the vast majority of jurisdictions which have adopted a “merger” rule for felony murder with an underlying assault in order to prevent such drastic unfairness as currently exists in Washington. Under the merger rule, if a person is assaulted and then dies, the assault merges into the resulting homicide and cannot be the predicate felony for felony murder, “because it is not a felony independent of the homicide.” Andress, 147 Wn.2d at 606. As the Court noted in Andress, the original rejection of the merger rule was based upon the statutory scheme and caselaw in existence at the time. 147 Wn.2d at 607-608, citing, State v.

Harris, 69 Wn.2d 928, 421 P.2d 662 (1966). The most recent rejection of the merger rule was in State v. Wanrow, 91 Wn.2d 301, 306-310, 588 P.2d 1320 (1978). Since that time, however, the harshness of Washington's uniquely broad felony murder rule permitting assault as the predicate felony has "become more obvious as various issues have come before the appellate courts of this state." Andress, 147 Wn.2d at 612-13.

The Andress Court relied on this harshness as evidence that the Legislature must not have intended assault to serve as a predicate felony. 147 Wn.2d at 613. And the Court signaled the likelihood that it is receptive to overturning the cases rejecting the merger rule, declaring that the present second degree murder statutory scheme "occupies a place in the homicide statutes more analogous to that of the New York first degree felony murder statute discussed in Harris than recognized at that time" the Harris Court was rejecting the necessity for the merger rule. Andress, 147 Wn.2d at 614-15.

In addition, Washington caselaw and the decision in Andress support application of the merger requirement. Washington recognizes, as part of the "merger doctrine," the concept that one crime may be so incidental to another that it does not amount to the independent crime. See State v. Saunders, 120 Wn. App. 800, 816-17, 86 P.3d 1194 (2004). Thus, in State v. Green, 94 Wn.2d 216, 227, 616 P.2d 628 (1980), the defendant was charged with aggravated murder with kidnapping as an element of the crime, where the crime involved taking the victim from an alley, moving her about 50 feet, and then killing her. The Court held that the prosecution failed to prove the kidnapping element because, although the child had

been moved, that movement was “an integral part of and not independent of the underlying homicide.” 94 Wn.2d at 227.

Applying those principles here, this Court should hold that the predicate assault merged with the death and felony murder does not apply. The purpose of the felony murder rule is to ensure that a person who commits a homicide which results in a murder may be punished by what is, effectively, “vicarious liability.” State v. Carter, 154 Wn.2d 71, 78-79, 109 P.3d 823 (2005). Proof of felony murder has thus been described as proof both that a person “committed or attempted to commit a predicate felony *and* that he or she, or a coparticipant, committed homicide in the course of commission of the felony.” 154 Wn.2d at 78-79 (emphasis in original). Thus, when assault is the predicate felony, to prove second degree murder the prosecution has to prove that the person committed or attempted to commit an assault and that she or a coparticipant committed homicide in the course of commission of the felony.

In Leech, supra, the Supreme Court was faced with the question of when a death had to occur and in what relationship to the underlying felony for felony murder to apply. The defendant had committed arson and a firefighter had died in the subsequent fire. 114 Wn.2d at 610. The Court construed the “in furtherance of” requirement to mean that the death had to occur “sufficiently close in time and place” to be “part of the *res gestae*” of the felony.

Applying that standard and that language to an underlying felony of assault, the Andress Court held:

It is nonsensical to speak of a criminal act - - an assault - - that

results in death as being part of the res gestae of the same criminal act since the conduct constituting the assault and the homicide are all the same. Consequently, in the case of assault there will never be a res gestae issue because the assault will always be directly linked to the homicide. . . . In short, unlike the cases where arson is the predicate felony, the assault is not independent of the homicide.

147 Wn.2d at 610-611.

Thus, the Supreme Court has declared that a predicate assault effectively merges and is not independent of the homicide. Although Andress did not take the further step and declare adoption of merger in Washington, it clearly indicated its willingness to do so. This Court should follow the path cleared by Andress and should adopt the merger doctrine in this state to protect against the “absurd result” the Andress Court noted would result from including assault as a predicate felony for felony murder. In addition, this Court should reverse the conviction for felony murder with the predicate of second-degree assault.

4. THE PROSECUTOR COMMITTED FLAGRANT,
PREJUDICIAL MISCONDUCT AND COUNSEL WAS
INEFFECTIVE

It is well-settled that prosecutors are shouldered with responsibilities and duties not imposed on other attorneys. See State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1989). Because of their status as “quasi-judicial” officers, prosecutors have a special responsibility to ensure a fair trial and act “impartially in the interests of justice and not as a ‘heated partisan.’” State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). When a prosecutor fails in these duties and commits misconduct, a defendant’s right to a fair trial is violated. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174

(1988).

In this case, reversal of both convictions is also required based on the prosecutor's flagrant, prejudicial misconduct, and, in the alternative, counsel's ineffectiveness.

a. Relevant facts

At trial, it was established that Ms. Tierce had entered a plea to second degree murder for the child's death. RP 1142-43. Later, in cross-examination, the prosecutor asked about the charges, then asked if "[o]ne of the ways that the State could prove that you are guilty of murder in the second degree is by showing that you knew Tyshell needed medical care and you did not provide the medical care, wasn't that right?" RP 1218. Ms. Tierce said yes, and then testified that she had pled guilty to not having provided medical care and that Tyshell "ended up dying as a result of that." RP 1218.

Later, the following exchange occurred between the prosecutor and Ms. Tierce:

Q: Don't you wish you had taken her to the hospital, Ms. Tierce?
A: Yes.
Q: Don't you feel bad about that?
A: Yes.
Q: Is that something that you're going to have to live with?
A: Yes.
Q: *Is that why you pled guilty?*
A: *Yes.*

RP 1224-25 (emphasis added).

In closing argument, the prosecutor compared Ms. Tierce to Mr. Smith, stating:

Christina Tierce pled guilty to felony murder, and we'll go over

that in a minute. She pled guilty to committing the felony of criminal mistreatment for failing to get Tyshell medical care. That's what she pled guilty to, *and she admitted that's what she did.*

RP 1644 (emphasis added). He also argued that Mr. Smith was guilty just as Ms. Tierce:

A moment ago I said let's face it, defendant's running this show, but does it really matter? Does it really matter whose story this is? They're both culpable in her death. They're both responsible for Tyshell being beat to death. They were both there, they both participated in it and Lakisha said both of them hit her. This isn't a question of somebody having no idea of what was going on. They're both responsible. *The difference is Christina admitted it and the defendant didn't.*

RP 1647 (emphasis added).

In arguing that Mr. Smith was guilty, the prosecutor said:

If truth doesn't help you, you better come up with something else. Is his story truthful? Truth gets him convicted. Truth gets him convicted. *The innocent would tell the truth. The guilty would run from it. Run from it and come up with any story they could.*

RP 1654 (emphasis added). In ending the argument, the prosecutor declared, “[O]n July 30th of last year, Tyshell Smith was killed, and she was killed by the defendant *and she was killed by Christina Tierce. Christina's pled guilty.*” RP 1671 (emphasis added). The prosecutor then asked the jury to “[r]eturn a verdict that speaks the truth.” RP 1671.

Also in closing argument, the prosecution repeatedly argued that Mr. Smith was guilty as Ms. Tierce's accomplice. RP 1668. The prosecutor argued that, even if Ms. Tierce “did a lot of this, did most of it, what we have to believe to acquit the defendant is that he did not aid, he did not encourage, he did nothing to further this crime.” RP 1699. The prosecutor also argued that by his mere presence, Mr. Smith was guilty of

the crime, because it was not believable that he did not know Ms. Tierce was hurting the child. RP 1669.

In rebuttal closing argument, the prosecutor relied heavily on this theory, stating that either Ms. Tierce did it or Mr. Smith did it and if Mr. Smith was in the house he would have known “what was going on” and would be guilty. RP 1719. The prosecutor also faulted counsel for his discussion on accomplice liability, declaring:

Counsel stopped here, but what he failed to tell you, ladies and gentlemen, is that if she beat Tyshell, and he was in that house and he encouraged or aided her in any way, if he was an accomplice to her crime, then he is guilty, guilty, guilty. Any one of those scenarios, he’s guilty. *The only way - - the only way he is not guilty is if she, in fact, did it all by herself and he was never in that house. If you believe that, you believe that; he walks out that door a free man.*

RP 1731 (emphasis added).

In rebuttal closing argument, the prosecutor told the jury that, in order to find Mr. Smith not guilty of the second degree murder, the jury would have to “believe his story,” “find that he is credible, believable, worthy of being believed, worthy of being trusted.” RP 1722. Prosecutor also reminded the jury that Tyshell

loved to sing, loved to dance, loved food, was not a character from a story. Her life is gone, and they were both responsible, culpable, how dare they - -how dare they - - he does not get off. He cannot get off because the State allowed her to plead to Murder 2. Unjust. Can’t happen.

Ladies and gentlemen, I ask you to find the truth, recognize what is the truth and what is not and recognize it using your life experience, all the things that you’ve heard and seen in your own life, that’s how you evaluate credibility, believability, truthfulness. I ask you to return a verdict that is just and that is right, the only verdict that is possible and meaningful in this case.

RP 1734-35.

b. The arguments were prejudicial misconduct

These arguments were misconduct. First, it was misconduct for the prosecutor to repeatedly compare Ms. Tierce having pled guilty with Mr. Smith's not having done so, thus disparaging Mr. Smith's exercise of his constitutional rights. Under the Sixth Amendment and Article I, § 22 of the Washington constitution, the accused have an absolute right to insist upon a trial at which the prosecution must prove them guilty beyond a reasonable doubt. See, e.g., State v. Morley, 134 Wn.2d 588, 613, 952 P.2d 167 (1988). It is clearly misconduct for a prosecutor to argue a negative inference from the exercise of that right. See Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1994); State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995). Further, it is not just misconduct but also a violation of due process for a prosecutor to argue in a way which would tend to chill the exercise of a constitutional right. Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 777 L. Ed. 2d 235 (1983); State v. Johnson, 80 Wn. App. 337, 339-40, 908 P.2d 900, review denied, 129 Wn.2d 1016 (1996).

Here, one of the obvious implications of the prosecution's argument was that Mr. Smith was guilty based upon exercising his rights. And the prosecutor declared that the only difference between Ms. Tierce and Mr. Smith was that Ms. Tierce had taken responsibility. The arguments were misconduct. See, e.g., State v. Jones, 734 So.2d 670 (La. App. 1999) (violation of the presumption of innocence and the right to trial when the prosecutor compared the defendant to the codefendant who

had pled guilty and thus “taken responsibility for his actions”). In addition, the prosecutor’s argument was made in the context of already having elicited emotional testimony that Ms. Tierce entered her plea because she felt remorse about what had happened to Tyshell. RP 1224-25. The obvious contrast is that Mr. Smith, by not entering a plea, was not remorseful at all for his daughter’s horrible death.¹⁰

The prosecutor also committed misconduct by misstating the law not once but twice in closing argument. It is serious misconduct for a prosecutor to misstate the applicable law. State v. Fleming, 83 Wn. App. 209, 214-16, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

First, the prosecutor misstated the law by telling the jury Mr. Smith was guilty based solely upon his presence at the home, and that the jury could only acquit Mr. Smith if it found that “he was never in that house.” RP 1731. The jury did not have to find Mr. Smith was never in the house in order to acquit. It simply had to disbelieve that the prosecution had proven that Mr. Smith committed certain acts in that house, or knew about Ms. Tierce’s acts in that house, beyond a reasonable doubt.

Further, the prosecution’s argument misstated the law of accomplice liability. To show such liability, the prosecution was required to show that Mr. Smith had either aided or agreed to aid “another in committing a crime by associating himself with the criminal undertaking and participating in it as something he desires to accomplish.” State v.

¹⁰Indeed, the prosecutor later continued faulting Mr. Smith for exercising his rights to trial at sentencing. RP 1750.

McPherson, 111 Wn. App. 747, 757-58, 46 P.3d 284 (2002). It is not enough that the defendant was present where the crime occurred, or even assented to its commission; he must have “sought by his acts to make it succeed.” State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). And a defendant’s culpability as an accomplice cannot extend beyond crimes of which he is shown to actually have knowledge. Roberts, 142 Wn.2d at 511.

To the extent the prosecutor was arguing that Mr. Smith would have had to know what Ms. Tierce was doing if he was living in the house, that was possibly permissible argument. But the prosecutor strayed beyond that permissible purpose by misstating the law on what was required to acquit.

The prosecutor also misstated the law by arguing that the jury had to believe Mr. Smith in order to find him not guilty. It is misconduct for a prosecutor to give the jury an improper “false choice” about its duties and role. Fleming, 83 Wn. App. at 213. Thus, in cases where the prosecutor argues that the jury cannot acquit unless it finds that the state’s witnesses were lying, that argument is a false choice and misconduct because the jury need not find that witnesses on either side were lying or telling the truth in order to render a verdict. Fleming, 83 Wn. App. at 213. The choice is false because the witnesses could simply be mistaken. Id. In addition, a defendant has no burden to disprove the prosecution’s case or provide an innocent explanation for the state’s evidence. Fleming, 83 Wn. App. at 215.

Here, the jury was not required to believe Mr. Smith in order to

acquit him. It only had to have a reasonable doubt about whether the prosecution had proved its case beyond a reasonable doubt. The prosecutor misstated the law and gave the jury a false choice in making this argument.

Finally, the prosecutor committed misconduct in the “how dare they” speech, where the prosecutor declared “how dare they, how dare they,” then told the jury “he does not get off. He cannot get off. . . Unjust. Can’t happen,” then exhorted the jury to “find the truth” and “return a verdict that is just and that is right, the only verdict that is possible and meaningful in this case.” RP 1734-35. It is improper and misconduct for a prosecutor to effectively tell the jury to “send a message,” to try to incite the jury to decide the case on an emotional basis, and to give a personal opinion as to the defendant’s guilt. See State v. Powell, 62 Wn. App. 913, 918-19, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992).

The misconduct in this case compels reversal, despite counsel’s failure to object below. Reversal is required even without objection where the misconduct was so flagrant and prejudicial it could not have been cured by instruction. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Here, the misconduct rises to above level. The misstatements of the law allowed the jury to convict based on far less evidence than was constitutionally required, based only upon Mr. Smith’s mere presence at his home. In addition, the comments carried an unusual emotional appeal for any parent in the jury box, essentially suggesting the idea that Mr. Smith should be found guilty

criminally even if he might only be guilty *morally* of not knowing what was going on with his child. The misstatements also told the jury, falsely, that it had to find Mr. Smith to be truthful in order to acquit, when it only had to find that the prosecution had failed to meet its burden of proof beyond a reasonable doubt, not believe Mr. Smith. The prosecutor's denigration of Mr. Smith for having exercised his constitutional right to trial as opposed to Ms. Tierce who took responsibility in this very emotional case involving a very heinous crime against a particularly regrettable victim was exactly the kind of argument which will remain at the back of a juror's mind, lodged tight despite efforts to erase it. And the prosecutor's exhortations to the jury to essentially "send a message" by convicting Mr. Smith, her clearly expressed opinion as to Mr. Smith's guilt and her emotional declaration of "how dare they" were exactly the kind of misconduct which is incurable, especially when it occurs just prior to the jury beginning its deliberations. See Powell, 62 Wn. App. at 919.

The evidence in this case was all circumstantial, save for the eyewitness accounts that Mr. Smith disciplined his child. Despite his credibility problems, Mr. Smith presented evidence from other witnesses indicating his claims of absence from the home were true. While the evidence that the crime occurred was obviously overwhelming, the identity of the perpetrator was not. The jury was tasked to decide a very difficult case and the prosecutor's misconduct clearly had a substantial affect on their ability to fairly do so. Even if the individual acts of misconduct, taken separately, would not support reversal, their cumulative effect compels it. See State v. Henderson, 100 Wn. App. 794, 998 P.2d 907

(2000). This Court should so hold.

In the alternative, if this Court finds that any of the misconduct could have been cured by objection, it should reverse based upon counsel's ineffectiveness. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel is ineffective if his performance fell below an objective standard of reasonableness despite a strong presumption of competence and that performance prejudiced the defendant so that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88; McFarland, 127 Wn.2d at 335.

Trial counsel repeatedly failed to object to the prosecutor's improperly drawing a negative inference from Mr. Smith's exercise of his right to trial, did not object when the prosecutor misstated the law repeatedly in the prosecution's favor, and did not object to the prosecutor's impassioned, improper arguments about Mr. Smith and the exhortation to effectively send a message with its verdict. There could be no legitimate tactical reason not to object to such misconduct. For example, allowing the jury to believe it could not legally acquit Mr. Smith and was required to convict him if it thought he was a liar allowed the jury to convict based upon character, not evidence. And allowing the jury to believe that it would be proper to convict Mr. Smith if he was just living in the house and did not know what was going on with the child but was not involved

relieved the prosecution of the true weight of its burden of proof. Failing to even attempt to mitigate the damage caused by this and the other misconduct was not a reasonable tactical decision but rather an example of ineffectiveness.

Further, there can be no question that the unprofessional errors prejudiced Mr. Smith. Mr. Smith submits that no curative instruction could have been effective, but if the Court disagrees, then counsel's failure to request such instructions prevented his client from having a fair trial. Instead, he was given a trial before a jury whose biases had been inflamed in this difficult, emotional and heinous case, who were allowed to convict upon less evidence than was required and on an improper basis and who were clearly seeing the prosecutor's belief in guilt. And the evidence in this case was far from overwhelming that Mr. Smith was in fact the perpetrator of the crime.

There is no question that someone killed Tyshell. But the evidence which tends to support the prosecution's theory of the case was all circumstantial, and Mr. Smith put on evidence which supported his defense that he was not there and Ms. Tierce was the perpetrator. There is more than a substantial likelihood that counsel's unprofessional failures affected the verdict in this close case. This Court should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 8th day of July, 2006.

Respectfully submitted,



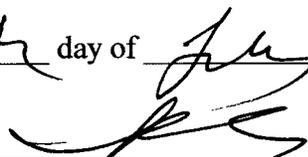
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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Tyran Smith, DOC 847670, Monroe Corrections Center,
P.O. Box 777, Monroe, WA. 98272.

DATED this 8th day of July, 2006.


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