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ASSIGNMENTS OF ERROR

1. Mr. Steen was convicted under a statute that is unconstitutionally vague.
2. The Information was deficient because it failed to notify Mr. Steen that the prosecution was seeking an exceptional sentence.
3. The trial court erred by imposing an exceptional sentence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Joseph Steen was convicted under a statute that criminalizes “open and obscene exposure of [the person]” made with knowledge “that such conduct is likely to cause reasonable affront or alarm.” The statute does not define the term “obscene” or the phrase “open and obscene exposure.”

1. Is the indecent exposure statute unconstitutionally vague because it fails to define the term “obscene?” Assignments of Error No. 1.
2. Is the indecent exposure statute unconstitutionally vague because the undefined phrase “open and obscene” is too subjective to allow ordinary people to understand what conduct is proscribed? Assignments of Error No. 1.
3. Is the indecent exposure statute unconstitutionally vague because the undefined phrase “open and obscene” is too subjective to provide ascertainable standards of guilt to protect against arbitrary enforcement? Assignments of Error No. 1.
4. Does the indecent exposure statute violate the due process clause of the Fourteenth Amendment? Assignments of Error No. 1.

The prosecuting attorney alleged that “one of the purposes for which the defendant committed the crime of indecent exposure was for the purpose of his sexual gratification.” The Information did not state that the

prosecuting attorney planned to seek an exceptional sentence, as required under RCW 9.94A.537. Mr. Steen was convicted, the court found that he'd committed indecent exposure for the purpose of sexual gratification, and imposed an exceptional sentence.

5. Was the Information deficient because it failed to notify Mr. Steen that the prosecution planned to seek an enhanced sentence? Assignments of Error Nos. 2-3.

6. Did the trial court err by imposing an exceptional sentence? Assignments of Error Nos. 2-3.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Joseph Steen was charged in Grays Harbor Superior Court with Indecent Exposure and Possession of Methamphetamine. CP 16. The operative language of the charging document read as follows relating to the Indecent Exposure count: “[Mr. Steen] did intentionally make an open and obscene exposure of his person knowing that such conduct is [sic] likely to cause reasonable affront or alarm...” CP 16. In addition, the Information alleged that “one of the purposes for which the defendant committed the crime of indecent exposure was for the purpose of his sexual gratification; contrary to RCW 9.94A.030(39) and RCW 9.94A.535(2)(f).” CP 16.

At a bench trial, evidence was produced that Mr. Steen had opened his pants, pulled out his genitals and “flipped them all over the place” while Diane Earl was watching from her apartment. RP 16, 22. Mr. Steen testified that he had urinated on a bush while waiting for a friend. RP 54. After the police came, Mr. Steen was found to be in possession of methamphetamine. RP 57.

Mr. Steen was convicted as charged. RP 115-116. At his sentencing hearing, the state requested an aggravated sentence based on a finding of sexual motivation. RP (5/15/06) p. 2-3. The court gave Mr.

Steen an aggravated sentence of 24 months in prison, which was 4 months above the standard range for the offense. RP (5/15/06) 10-11.

Mr. Steen appealed. CP 29.

ARGUMENT

I. RCW 9A.88.010 IS UNCONSTITUTIONALLY VAGUE BECAUSE IT DOES NOT DEFINE THE TERM “OBSCENE” OR THE PHRASE “OPEN AND OBSCENE EXPOSURE.”

Under the due process clause of the Fourteenth Amendment, a criminal statute is unconstitutionally vague if it fails to define an offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or if it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Williams*, 144 Wn.2d 197 at 203-204, 26 P.3d 890 (2001), citing *City of Bellevue v. Lorang*, 140 Wn.2d 19 at 30, 992 P.2d 496 (2000). A statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability. *Williams, supra, at 204.*

The purpose of the vagueness doctrine is to provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement. *Williams, supra, at 203-204.* A statute is unconstitutionally vague if either

requirement is not satisfied. *Williams, supra, at* 203-204. Special caution is applied in examining statutes that implicate First Amendment interests. *Lorang, at* 31. A criminal statute is unconstitutionally vague when it is overly subjective, allowing officers, judges, and juries to decide what conduct the statute proscribes and what conduct will be in compliance with the statute. *Lorang, supra, at* 31.

Under RCW 9A.88.010(1), “A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm...” Nowhere in the Revised Code of Washington is the word “obscene” defined; nor is there any definition for the phrase “open and obscene exposure.”

The “intractable” problem¹ of defining obscenity has been described as and “trying to define what may be indefinable.” *Jacobellis v. Ohio*, 378 U.S. 184 at 197, 84 S. Ct. 1676, 1683, 12 L. Ed. 2d 793 (1964) (Justice Stewart, *concurring*). However, the difficulty in reaching a constitutional definition does not excuse the legislature from trying. By prohibiting “open and obscene exposure” of the person without further

¹ *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 at 704 (1968) (Justice Harlan, *concurring and dissenting*).

defining obscenity, the statute invites juries, judges, and law enforcement officials to determine what they believe obscenity is.

In the absence of a definition, the statute is unconstitutionally vague. First, persons of common intelligence must guess at the meaning of the word “obscene” and the phrase “open and obscene exposure,” and will differ as to its applicability. Second, there are no standards for law enforcement officers, judges, and juries to decide what conduct is proscribed. One person may consider topless dancers to be obscene, while another may think only female topless dancers are obscene. The average person might believe exposure of the genitals qualifies as obscenity, while an avowed nudist might consider such exposure acceptable.

The absence of standards makes it impossible to predict what conduct will fall within the definition of “open and obscene exposure,” and gives law enforcement unfettered discretion in enforcing the statute. Because of this, the conviction must be vacated and the case dismissed.

Williams, supra; Lorang, supra.

II. THE INFORMATION WAS DEFICIENT BECAUSE IT FAILED TO NOTIFY MR. STEEN THAT THE PROSECUTION INTENDED TO SEEK AN EXCEPTIONAL SENTENCE.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth

and Fourteenth Amendments to the Federal Constitution, as well as Article I, Section 3 and Article I, Section 22 (amend. 10) of the Washington State Constitution.

A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93 at 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Kjorsvik*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Kjorsvik*, at 105-106. If the Information is deficient, no prejudice need be shown, and the case must be dismissed without prejudice. *State v. Franks*, 105 Wn.App. 950, 22 P.3d 269 (2001).

Following the U.S. Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Washington Legislature enacted procedures for imposition of exceptional sentences. Under RCW 9.94A.535 (captioned "Departures from the guidelines"),

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537...
RCW 9.94A.535

RCW 9.94A.537(1) provides (in relevant part) as follows:

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

RCW 9.94A.537

Under the plain text of the statute, the state's notice must inform the defendant that the state "is seeking a sentence above the standard sentencing range." RCW 9.94A.537. Here, the Information included factual allegations to support an exceptional sentence, but did not notify the defendant that an exceptional sentence was sought.

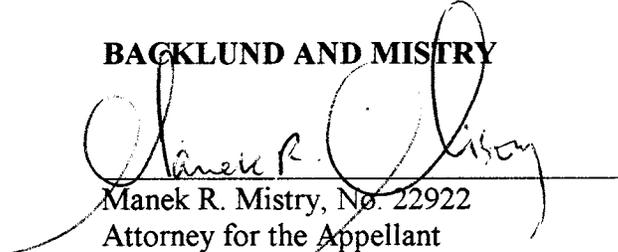
Accordingly, the Information is deficient as to the exceptional sentence. The sentence must be vacated and the case remanded for sentencing within the standard range. *See, e.g., State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

CONCLUSION

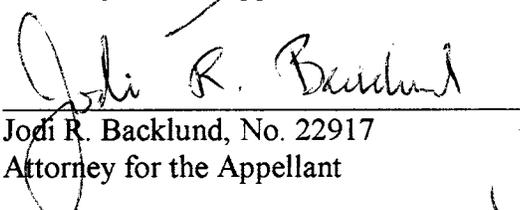
For the foregoing reasons, the conviction must be reversed and the case dismissed. In the alternative, the defendant's exceptional sentence must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted on November 3, 2006.

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krm
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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and to:

Grays Harbor Prosecuting Attorney
102 West Broadway Ave, RM 102
Montesano, WA 98563-3621

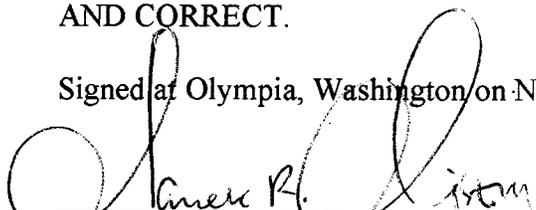
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AMID: 16
BY: [Signature]

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 3, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 3, 2006.


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