

NO. 35423-3-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

Respondent,

v.

JOHN K. McNEAL,

Appellant.

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COURT OF APPEALS  
STATE OF WASHINGTON  
BY JMT  
REPLY

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ON APPEAL FROM THE  
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable Richard L. Brosey, Judge

REPLY BRIEF OF APPELLANT

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**A. STATEMENT OF THE CASE**

The facts of this case are fully set forth in the Appellant's Brief.

**B. STATEMENT OF THE FACTS**

Appellant will rely upon the Statement of the Facts as presented in his Opening Brief.

**C. ARGUMENT**

**I. THE STATE URGES RETROACTIVE APPLICATION OF AMENDMENTS TO RCW 9.94A.537**

The State argues that "by statute the State now has the right upon remand to empanel a sentencing jury to consider the aggravating facts sought by the State to support an exceptional sentence." The State cites to chapter 205, Laws of 2007, amending RCW 9.94A.537, and 2005 ch. 68 § 4.

The 2005 amendments to the exceptional sentencing scheme were made in response to the Supreme Court's decision in *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), *overruled in part on other grounds by Washington v. Recuenco*, U.S., 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006),

The Legislature passed SB 5477, amending the exceptional sentencing statute to mandate that a jury, not a judge, will determine the existence of all factually-based aggravating factors, not by a

preponderance of the evidence but by proof beyond a reasonable doubt.  
*See* Laws of 2005, ch.68.

On January 25, 2007, our Supreme Court ruled in *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007) that the changes made to the Sentencing Reform Act regarding exceptional sentences in chapter 68, Laws of 2005 do not apply to cases where the trials had already begun or guilty pleas had already been entered prior to the effective date of the act on April 15, 2005. *Pillatos*, 159 Wn.2d at 47-75.

In reaction, the Legislature determined in Chapter 205, Laws of 2007 that “[t]he legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.”

Despite the Legislature’s second enactment “backfilling” the results of *Blakely*<sup>1</sup> and *Hughes*, McNeal argues the remedy is sentencing within the standard range. RCW 9.94A.345 provides that, “[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.” Further, there is a strong presumption against retroactive application of a statute. That presumption is “an essential thread in the mantle of protection that the law

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<sup>1</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

affords the individual citizen.” *State v. Cruz*, 139 Wn.2d 186, 190, 985 P.2d 385 (1999), quoting, *Lynce v. Mathis*, 519 U.S. 433, 439, 117 S.Ct.891, 137 L.Ed.2d 63 (1997).

Here, the law in effect at the time of the crimes in 1996 did not authorize the sentence. In § 7, the Legislature provided that the Act “takes effect immediately.” Laws of 2005, ch. 68 § 7. This establishes the effective date of the statute. *In re the Personal Restraint Petition of Stewart*, 115 Wn.App. 319, 331, 75 P.3d 521 (2003).

Therefore, the Act would have to be applied retroactively to apply in McNeal’s case. The presumption against retroactive application may be overcome only if 1) the Legislature clearly intended a statute to operate retroactively, 2) the statute is “curative,” or 3) the statute is remedial; and the retroactive application of the statute does not “run afoul of any constitutional prohibition.” *Cruz*, 139 Wn.2d at 191, citing, *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). The Act does not meet any of these limited exceptions.

First, there was *no* indication by the Legislature of an intent for retroactive application. Such intent usually must be indicated by “clear, strong, and imperative” language mandating retroactivity. *Cruz*, 139 Wn.2d at 191. In addition, under RCW 10.01.040, the “savings clause,” amendments to a statute cannot affect “penalties or forfeitures incurred”

while the previous version of the statute was in effect, “unless a contrary intention is expressly declared in the amendatory or repealing act.”

Nothing in the Legislation indicated an intent for retroactivity. Nowhere in those sections is there any indication of an intent to apply to crimes committed *before* the Act’s effective date.

Retroactive application of the amendments also cannot be justified on the grounds that the amendments were somehow “curative” or “remedial.” An amendment is only “curative” if it “clarifies or technically corrects an ambiguous statute.” *State v. Smith*, 144 Wn.2d 665, 674, 30 P.2d 1245 (2001), *superseded by statute in part and on other grounds as noted in State v. Varga*, 151 Wn.2d 179, 86 P.3d 139 (2004). If an amendment does not meet this definition, it is not “curative” but rather constitutes a substantive change in the law which may not be applied retroactively. *See F.D. Processing*, 119 Wn.2d at 462.

Nothing in the former statutory scheme was ambiguous. It was not “technically corrected” by the amendments – it was completely rewritten. The amendments were not “curative.”

Moreover, the amendments were not remedial. A remedial amendment is one that relates only “to practice, procedures, or remedies, and does not affect a substantive or vested right.” *F.D. Processing*, 119 Wn.2d at 462-63. Changes in the criminal code (RCW Title 9 and 9A) are

presumed substantive, not remedial. *See, Cruz*, 139 Wn.2d at 192.

Further, statutory amendments are substantive, not remedial, when they affect a substantive right by “altering the standard of punishment which existed under prior law or makes more burdensome the punishment for the crime.” *In re the Personal Restraint of Sapperfield*, 92 Wn.App. 729, 740-41, 964 P.2d 1204 (1998).

Here, clearly, the amendments altered the standard of punishment which existed under prior law. Under prior law, an exceptional sentence *could not* have been imposed on Mcneal, because of *Blakely*, on *anyone* whose conviction was not final prior to the *Blakely* decision. *See State V. Evans*, 154 Wn.2d 438, 449, 457, 114 P.3d 627 (2005). As there was no constitutionally valid authorization for imposition of an exceptional sentence contained in the former law, clearly, the amendments altered the punishment and made it more burdensome – they authorized a sentence which could not previously have been imposed.

Even if this Court were to ignore the absence of any indication of intent for retroactivity in the 2005 amendments or the fact that the amendments were not remedial or curative, retroactive application would still be improper because it would clearly violate constitutional prohibitions. Article 1, § 10, of the United States constitution and Article 1, § 23, of the state constitution both forbid *ex post facto* legislation. *See*

*Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994); *Collins v. Youngblood*, 497 U.S. 37, 45, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). A law violates that prohibition if it is 1) substantive, 2) retrospective, and 3) disadvantages the person affected. *State v. Hennings*, 129 Wn.2d 512, 525, 919 P.2d 580 (1996).

Application of the 2005 and 2007 amendments to the 1996 crimes in this case would violate the prohibition against *ex post facto* laws. At the outset, it cannot be questioned that retroactive application would increase the punishment. As the Supreme Court held in *Hughes*, former RCW 9.94A.535 did not provide a statutory basis for having a jury decide aggravating factors. 154 Wn.2d at 151-52. Thus, the only exceptional sentence which was statutorily authorized was one imposed by the trial court. Under *Blakely*, however, that sentencing scheme was unconstitutional. As a result, the only sentence which could be imposed on defendants who committed crimes prior to the statutory amendments was a standard range sentence, unless an exceptional sentence was not based on “factual” findings.

Here, the Act is substantive, not procedural. An act which “fundamentally alters the sentencing scheme” is substantive. *See, In re Personal Restraint of Stanphill*, 134 Wn.2d 165, 170, 949 P.2d 365 (1998).

In addition, the Act would be applied “retrospectively.” A law is “retrospective” if it applies to events that occurred before its enactment. *Hennings*, 129 Wn.2d at 525. The crimes for which McNeal was being punished occurred in 1996. The amendments did not occur until 2005 and 2007.

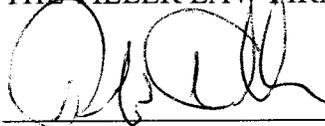
**D. CONCLUSION**

For the above-stated reasons, and those set forth in McNeal’s Opening Brief, this Court should grant the relief requested in the opening brief.

DATED: July 5, 2007.

Respectfully submitted,

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COURT OF APPEALS NO.

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SUPERIOR COURT NO.

96-1-00261-0

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Reply Brief was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to John K. McNeal, Appellant, and Lori Smith, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on July 5, 2007, at the Centralia, Washington post office addressed as follows:

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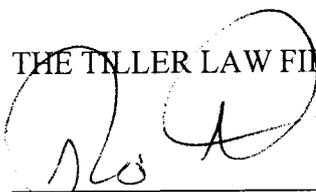
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