

*Original*

NO. 35928-6-II  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

Respondent,

v.

DALE E. HALE,

Appellant.

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*Handwritten initials*

ON APPEAL FROM THE  
SUPERIOR COURT OF PACIFIC COUNTY

Before the Honorable Michael J. Sullivan, Judge

OPENING BRIEF OF APPELLANT

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Peter B. Tiller, WSBA No. 20835  
Of Attorneys for Appellant

The Tiller Law Firm  
Corner of Rock and Pine  
P. O. Box 58  
Centralia, WA 98531  
(360) 736-9301

*PM 8/27/07*

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying appellant's motion to dismiss the case due to the violation of his right to speedy trial.

2. The trial court erred in entering Findings of Fact 12, 13, 14, 15, and 16 in support of its ruling granting a continuance pursuant to CrR 3.3(f)(2) on October 11, 2006. The Findings are found at Appendix A.

3. The trial court erred in entering Conclusions of Law 2, 3, 4, 5, and 6, granting the State's request for continuance on October 11, 2006. The Conclusions are found at Appendix A.

4. The trial court erred in entering Findings of Fact 1, 2, 3, 4, 5, 6, 7, and 8 on November 28, 2006, insofar as they were necessitated by the initial continuation of October 11, 2006. The Findings are found at Appendix B.

5. The trial court erred in entering Conclusions of Law 2, 3, 4, and 5, on November 28, 2006, insofar as the conclusions were necessitated by the initial continuance of October 11, 2006. The Conclusions are found at Appendix B.

6. The State failed to establish that appellant had the mental intent required to commit second degree assault.

7. Prosecutorial misconduct denied appellant a fair trial.

8. The trial court erred in imposing an exceptional sentence.

9. The trial court erred in failing to enter Findings of Fact and Conclusions of Law for an exceptional sentence.

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

1. Where the trial court granted two continuances that extended beyond appellant's speedy trial expiration date, and where appellant did not waive his right to speedy trial beyond October 30, 2006, and where the first continuance was based on the unavailability of a witness, where the witness's son had surgery scheduled for October 24, and where trial was set to begin October 24, and where the witness—Chief Criminal Deputy Sheriff Ron Clark—did not inform the prosecutor's office of his unavailability until October 10, and where trial was reset for November 29, and where the second continuance was due to a snow storm on November 28, necessitating an additional continuance of twelve days, until December 11, for a total continuance of 41 days beyond October 30, did the trial court err in granting two continuances under CrR 3.3(f)(2)? Assignments of Error No. 1, 2, 3, 4, and 5.

2. Where appellant stated that he was "trying to get out of Long Beach" when he drove a pickup truck in Ocean Park pursued by police, and where appellant's actions supported the contention that he did not want to confront police but did support the contention that wanted to escape, did the

State prove that appellant had the mental intent required to commit second degree assault? Assignment of Error No. 6.

3. Did appellant receive a fair trial when the deputy prosecutor asked him during cross-examination to opine that the reason the testimony of the State's witness—Chief Criminal Deputy Clark—who investigated the case and who was an alleged victim of second degree assault—differed from appellant's testimony because the Chief Criminal Deputy was "a liar"? Assignment of Error No. 7.

4. Did the trial court abuse its discretion in denying appellant's motion for a new trial when the prosecutor committed misconduct by asking appellant whether the officer was "a liar"? Assignment of Error No. 7.

5. Is the *Blakely*-fix unconstitutional because a defendant can avoid the possibility of a harsher sentence by entering a plea of guilty, which either chills a defendant's exercise of constitutional trial rights or punished him for choosing to exercise his or her right to trial? Assignment of Error No. 8.

6. Absent valid legislation authorizing a jury to determine facts supporting an exceptional sentence, is a trial court prohibited from imposing an exceptional sentence under *Blakely* and *Apprendi*? Assignment of Error No. 8.

7. Did the trial court abuse its discretion by failing to exercise discretion in the imposition of an exceptional sentence and its failure to enter written Findings of Fact and Conclusions of Law? Assignment of Error No. 9.

**C. STATEMENT OF THE CASE<sup>1</sup>**

**1. Procedural history:**

Appellant Dale Hale was convicted by jury of second degree assault (count 1) and attempting to elude a pursuing police vehicle, (count 2) as charged in a second amended information filed by the State in Pacific County Superior Court on December 11, 2006. Clerk's Papers [CP] at 33-34, 64, 65.

**a. Exceptional sentence.**

The State alleged, pursuant to RCW 9.94A.535, that count 1 was aggravated by the following circumstances:

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

CP at 33-34.

The jury found that hale committed second degree assault against an officer as alleged in count 1. CP at 64. Two additional instructions were

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<sup>1</sup>This Statement of the Case addresses the facts related to the issues presented in accord with

submitted to the jury pertaining to the alleged aggravating circumstances. CP at 59, 60. After deliberation, the jury found that that the State proved the aggravating factors alleged beyond a reasonable doubt. CP at 66. 3Report of Proceedings [RP] at 195-202.<sup>2</sup>

**b. First Motion for Continuance.**

On October 11, 2006, the court heard the State's first motion for continuance. The prosecution reported that it learned on October 10, 2006 that the son of Chief Criminal Deputy Sheriff Ron Clark, the alleged victim in count 1, had a medical emergency and that Clark would be unavailable for two weeks, until from October 24 to November 6. 1RP (October 11, 2006) at 2, 3. The State requested a continuation pursuant to CrR 3.3(f)(2). Hale had previously waived his right to speedy trial through October 30, 2006. CP at 14. Trial was scheduled to begin October 24, 2006. 1RP (August 18, 2006) at 2. Defense counsel opposed the motion and asked that the case be dismissed with prejudice. 1RP (October 11, 2006) at 5-7. The deputy prosecutor submitted a declaration in which he stated that he first heard that

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RAP 10.3(a)(4).

<sup>2</sup>The verbatim report of proceedings consists of four volumes:

1 RP June 16, 2006 Pretrial hearing, August 17, 2006 Pretrial hearing, August 18, 2006 Scheduling hearing, September 29, 2006 Scheduling hearing, October 11, 2006 Motion for continuance, October 12, 2006 CrR 3.5 Suppression hearing, October 13, 2006 Suppression hearing.

2 RP December 11, 2006 Jury trial

3 RP December 12, 2006 Jury trial

Clark was going to be unavailable on October 10, that he would be absent between October 24 and November 5, 2006, and that he was unavailable “due to the fact that his child is undergoing a significant surgical procedure. . . .” 1RP (October 11, 2006) at 13-14. CP at 21-23. Appendix A-7 through A-9. The deputy prosecutor told the court that the procedure was brain surgery. 1RP (October 11, 2006) at 14.

The court, citing CrR 3.3(f)(2), granted the continuance requested by the State. 1RP (October 11, 2006) at 15. The court entered the following Findings of Fact and Conclusions of Law on February 9, 2007:

THIS MATTER having come before the Court on October 11, 2006, on the State’s motion for an order continuing the trial date past the expiration of the speedy trial period, the Court having read the documents submitted by the parties and heard arguments of counsel, and having considered the records and files herein, now makes the following:

**FINDINGS OF FACT**

1. Dale Hale was charged with Assault in the Second Degree and Attempting to Elude a police officer.
2. The defendant knowingly, intelligently, and voluntarily waived his right to a speedy trial through October 30, 2006. The defendant has been incarcerated in the State prison system on an unrelated felony conviction stemming from an incident in Pierce County.
3. Trial was set to begin on this case on October 24, 2006.

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4 RP February 9, 2007 Entry of findings and conclusions and sentencing.

4. On October 11, 2006, the State filed a Motion and Declaration to continue the trial date beyond the expiration of the speedy trial period.
5. The defendant has not waived his right to a speedy trial beyond October 30, 2006.
6. The defendant objected to the setting of the trial on any date beyond the speedy trial deadline. The defendant argued that this case should be dismissed with prejudice if it could not be tried by the end of the speedy trial period.
7. The defendant argued at the hearing on the motion to continue the trial that he would be prejudiced if a continuance were granted because his mental competency would deteriorate if he were housed in the Pacific County Jail. Alternatively, the defendant asserted that he would be prejudiced if he were sent back to prison because he would not have ready access to his court-appointed attorney.
8. Because the State's Declaration submitted with its motion to continue the trial was basically uncontested, and because the Court is relying upon the facts in that declaration in making this decision, the Court hereby incorporates by reference the State's Declaration into these factual findings.
9. As the State's Declaration attests, the key witness for the State had a serious and unavoidable conflict if the trial would have commenced on October 24, 2006. Ron Clark, the Chief Criminal Deputy for Pacific County, who was the victim named in County I of the Information, needed to attend to his son who was scheduled to have brain surgery on October 24, 2006.
10. Ron Clark was a material State witness.
11. Due to the brain surgery performed on his son, Ron Clark was unavailable to testify from October 24, 2006 to November 5, 2006. This short absence indicates that Ron Clark would be available to testify within a reasonable period of time.
12. The State was not negligent in bringing its motion for continuance on October 11, 2006. While there could

have been more communication between the Pacific County Prosecutor's Office and Chief Criminal Deputy Ron Clark, the State did not mismanage this case.

13. The State did not engage in governmental misconduct or arbitrary action which prejudiced the rights of the defendant.
14. The administration of justice would be compromised if the State's motion for a continuance were not granted because the unavailability of the State's key witness would have necessitated the dismissal of Count I. The administration of justice mandates that the State be given the opportunity to fully present its case provided that the defendant is not thereby unfairly prejudiced.
15. Granting a continuance in this case to November 29-30, 2006, would not prejudice the defendant in the presentation of his defense. The defendant made no showing that the continuance would prevent him from calling any witnesses so support his theory of the case. The defendant's bare assertions that a continuance would cause him to suffer mental anguish by being incarcerated in the Pacific County Jail or that a continuance would prevent him from having access to his attorney were not credible. Continuing this case to November 29-30, 2006, in no way impacts the defendant's ability to fully present his case to the jury.
16. Due to court congestion, the first available date for a two-day trial was November 29, 2006. Breaking up the trial would have negatively impacted the administration of justice.

#### **CONCLUSIONS OF LAW**

1. Under Superior Court Criminal Rule 3.3(f)(2), continuance can be granted on motion of the court or a party "when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense."

If the Court grants a motion for continuance under this subsection, the trial must be moved to a specific date.

A continuance under this subsection, the trial must be moved to a specific date. A continuance also can be granted due to unavailable or unforeseen circumstances beyond the control of the court or the parties, if the defendant is not prejudiced. CrR 3.3(e)(8).

2. The dismissal of a criminal charge is an extraordinary remedy that is available only as a last resort when there has been prejudice to the rights of the accused that materially affects the right to a fair trial. No such prejudice exists in this case; therefore, this case should not be dismissed.
3. “Loss of freedom” by the defendant during a continuance period does not by itself constitute prejudice under Superior Court Rule No. 3.3(f)(2). Moreover, this argument is inapposite because the defendant has been incarcerated due to a separate felony conviction.
4. The unavailability of a material witness is a valid ground for continuing a criminal trial where (1) there is a valid reason for unavailability, (2) the witness will become available within a reasonable time, and (3) there is no substantial prejudice to the defendant. The State has demonstrated that there is a valid reason for the unavailability of Chief Criminal Deputy Ron Clark – a material State witness. The State also has shown that the Chief Criminal Deputy Ron Clark will be available to testify within a reasonable time. Finally, there has been no showing that the defendant would be prejudiced by having this trial continued.
5. Because the presentation of the defendant’s case would not be prejudiced by a continuance and because the interests of justice support a continuance, a continuance should be granted under the authority of Superior Court Criminal Rule 3.3(f)(2). The failure to grant a continuance would undermine the administration of justice.

6. In order to ensure that the continuance is as short as possible, the trial should be continued to November 29-30, 2006.

Supplemental Clerk's Papers at 1-9. Appendix A-1 through A-9.

**c. Second Motion for Continuance**

Trial was reset to November 29, 2006. 1RP (October 11, 2006) at 26. On November 28, 2006 the State motioned the court for a second continuance on the basis of an ice and snow storm in Pacific County and Western Washington on November 28, 2006. CP at 71-75. Defense counsel opposed the motion, arguing that the State should not have waited until the day before trial to transport him from Monroe Correctional Facility. 4RP at 6-7. The court granted the continuance and trial was reset to December 11, 2006. The following Findings of Fact and Conclusions of Law were entered on February 9, 2007.

THIS MATTER having come before the Court on November 28, 2006, on the State's motion for an order continuing the trial date, the Court having read the documents submitted by the parties and heard arguments of counsel, and having considered the records and files herein, now makes the following:

**FINDINGS OF FACT**

1. A severe ice/snow storm enveloped Pacific County and Western Washington on November 28, 2006. On the scheduled date of trial, November 29, 2006, the defendant would not have been in court. The Pacific

County Sheriff's Office attempted to pick up the defendant where he was housed at the Monroe Correctional Facility. The Sheriff's Office was unable to complete the transport due to dangerous road conditions.

2. The winter storm event made travel virtually impossible through Pacific County and Western Washington.
3. The road conditions were going to be so dangerous in Pacific County on the scheduled trial date that the lives of prospective jurors would have been endangered if they attempted to travel to the Courthouse in South Bend. Many of the prospective jurors would have had to travel up to 50 miles to reach the Courthouse. Since the roads in Pacific County were going to be extremely dangerous on the scheduled trial date, it would have been foolhardy to place the lives of the prospective jurors at risk. Therefore, the administration of justice required that the trial be continued.
4. Because Pacific County only has one Superior Court Judge (this Judge also presides in Wahkiakum County), and because of certain docket days are scheduled far in advance, the Court had limitations with regard to when this trial could be held. Nevertheless, the Court moved other cases to ensure that this case was tried as soon as possible.
5. Because this case was going to take at least two days, December 11, 2006 was the first available date for a two-day trial. It would have been imprudent to move the trial to November 30, 2006, because the weather forecast was problematic. Friday, December 1, 2006, was a weekly motion docket. December 4, 2006, was the Wahkiakum County motion day. A "dependency" docket was set for December 5, 2006. A juvenile docket was scheduled for December 7, 2006. December 8, 2006, was a weekly motion docket. Thus, it would have been unwise to have attempted to start the trial earlier than December 11, 2006, because

the trial would have had to be continued to December 11, 2006, in any event.

6. Breaking up the trial would have negatively impacted the administration of justice.
7. The Findings of Fact pertaining to the continuance granted on October 11, 2006, are hereby incorporated by reference.

### **CONCLUSIONS OF LAW**

2. Under Superior Court Criminal Rule 3.3(f)(2) continuances can be granted on motion of the court or a party “when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” If the Court grants a motion for continuance under this subsection, the trial must be moved to a specific date. A continuance also can be granted due to unavailable or unforeseen circumstances beyond the control of the court or the parties, if the defendant is not prejudiced. CrR 3.3(e)(8).
3. In this instance, the extreme weather conditions constituted unavoidable unforeseen circumstances affecting the time for trial that were beyond the control of the Court or the parties. Moreover, even if the defendant would have been present in court on November 29, 2006, the severe weather conditions justified the postponement of the trial because the prospective jurors would have had to risk life and limb in traveling to South Bend.
4. “Loss of freedom” by the defendant during a continuance period does not be itself constituted prejudice under Superior Court Rule No. 3.3(f)(2). Moreover, this argument is inapposite because the defendant has been incarcerated due to a separate felony conviction.
4. Continuing the trial from November 29-30, 2006, to the second week of December does not prejudice the defendant in the presentation of his defense. This

continuance is required in the administration of justice. Therefore, a continuance should be granted under the authority of Superior Court Criminal Rule 3.3(f)(2).

5. In order to ensure that the continuance is as short as possible, the trial should be continued to December 11-12, 2006.

CP at 71-75. Appendix B-1 through B-4.

**d. CrR 3.5 suppression hearing.**

Hale was arrested in Ocean Park on April 27, 2006 after the truck he was driving crashed into a ditch while being pursued by police. He fled on foot and was caught several hours later. 1RP (October 12, 2006) at 10; 1RP (October 13, 2006) at 7. Deputy Sean Eastham transported Hale to the Pacific County Sheriff's Office at Long Beach and there read Hale his *Miranda Warnings* from a printed card. 1RP (October 12, 2006) at 13. chief criminal deputy Ron Clark said Hale told him he had already had his rights read to him about two minutes prior to Clark asking Eastham if he had read Hale the *Miranda Warnings*. Clark testified that Hale told him he had not stopped for Clark because Hale had panicked and had warrants for his arrest, that Hale told him that he had escaped from release out of Tacoma; that one month prior he had escaped and was "laying low" before heading south, and that Hale came at him head-on in order to "back off the cops[.]" 1RP (October 13, 2006) at 13-14.

Hale did not remember being read his constitutional warnings and did not remember the statements attributed to him by Clark. 1RP (October 13, 2006) at 49-50. Hale stated that he had been awake for nine days on cocaine and methamphetamine and was sleep deprived. 1RP (October 13, 2006) at 49.

The defense moved to suppress Hale's post-*Miranda* statements to Clark pursuant to Criminal Rule 3.5. The motion was heard by Judge Sullivan on October 12 and 13, 2006. Counsel argued that Hale was not administered his full *Miranda Warnings* and that his waiver was not knowingly, intelligently, and voluntarily made. 1RP (October 13, 2006) at 76-87. The court denied the motion and issued a Memorandum Opinion containing the following findings and conclusions on October 26, 2006:

#### **UNDISPUTED FACTS**

1. The Defendant, Dale Hale ("Hale") remembers driving a motor vehicle on the beach south of Bay Avenue, Ocean Park, Washington;
2. Chief Criminal Deputy Ron Clark ("Clark") was driving home north of Klipsan Beach Road and observed a white, Chevy pickup driving on the clam beds, which is illegal;
3. There were three occupants in the pickup: two females and a male;
4. The driver of the pickup was Hale;

5. Clark pursued the pickup with his lights activated;
6. At one time, the two female passengers were looking back toward Clark's pursuing vehicle;
7. The pickup failed to stop for the police vehicle driven by Clark;
8. The pickup turned and headed north up the beach and Clark followed and also had activated his siren;
9. The pickup's speed while being pursued on the beach was approximately 40 m.p.h.
10. Clark ran the license plate and dispatch returned a "stolen" on the white pickup;
11. The pickup stopped and one of the two female passengers exited the vehicle and "took off";
12. Clark had radioed for additional law enforcement support and there were at least two additional police vehicles on the beach somewhere near Bay Avenue approach waiting for Hale to reach them;
13. Hale's pickup turned into the soft sand, sped up, and at one point became airborne when it crossed the canal;
14. Hale turned right sharply after crossing the canal to avoid hitting pedestrians and headed east on Bay Avenue;
15. Clark called Deputy Langendorfer ("Langendorfer") to continue the chase eastward on Bay Avenue:
16. Hale continued across Bay Avenue at an approximate speed of 80-90 m.p.h. without stopping at the stop sign at the intersection of Bay Avenue and SR 103;

17. At Vernon Street And Bay Avenue, Hale turned south onto Sandridge Road and continued south until 133<sup>rd</sup> Street;
18. At approximately 144<sup>th</sup> and Sandridge Road, Hale traveled in the opposite land of traffic at speeds between 80 and 90 m.p.h.;
19. Hale made a U-turn on 133<sup>rd</sup> and proceeded north on Sandridge to approximately 180<sup>th</sup> Street where he crashed his pickup and then fled on foot;
20. At some point, there was between four (4) and eight (8) law enforcement vehicles at the scene of the crash;
21. Hale was found and taken into custody near a residence approximately one hour after Hale had crashed his vehicle;
22. Deputy Eastham (“Eastham”) arrived and took custody of Hale at approximately 199<sup>th</sup> Court/Street and Sandridge Road;
23. Eastham cuffed and searched Hale and place him into his patrol vehicle;
24. Eastham searched Hale’s vehicle as directed by Clark;
25. Eastham transported Hale to the Pacific County Sheriff’s Office at Long Beach and there read Hale his *Miranda Warnings* from a printed card carried on Eastham’s person;
26. Eastham did not read the last sentence (question) on the bottom of his printed *Miranda Warnings* card: That sentence would have read: “Having these rights in mind, do you wish to talk to us now?;
27. Eastham did not ask Hale any questions and heard Hale make only small talk;

28. At the Pacific County Sheriff's office in Long Beach, Clark began to read Hale his *Miranda Warnings* while Hale was still in the back of Eastham's patrol vehicle;

29. Clark said Hale told him he had already had his rights read to him about two minutes prior to Clark asking Eastham if he had read Hale the *Miranda Warnings*.

30. Hale told Clark that Hale had said he understood his rights;

31. Hale did not remember making the statement in #29 above;

32. Clark said that the topic of "lawyer" never came up while he was speaking with Hale;

33. Clark asked Hale if he would agree to speak with Clark and Hale said "Yes";

34. Hale did not remember the statement in #30, above;

35. Hale believed he would not have spoken to Clark if he had not been high on meth for the prior nine (9) days. Hale also believed because of his sophistication in the system, Hale would have asked for a lawyer;

36. Clark testified that Hale told him he had not stopped for Clark because Hale had panicked and had warrants;

37. Hale did not remember the statements in #36 above;

38. Clark testified that Hale told him that he had escaped from release out of Tacoma; that one month prior he had escaped and was "laying low" before heading south;

39. Hale did not remember making this statement in #38 above;

40. Clark testified that Hale came at him head-on in order to “back off the cops”;

41. Hale does not remember make the statement in #40 above;

42. Clark asked Hale what he hit on Sandridge Road and Hale said “a rock”;

43. Hale does not remember making the statement in #42 above;

### **DISPUTED FACTS**

1. During the initial chase on the beach, Hale saw an officer running toward him on foot aiming a pistol at his car; Hale saw a chrome color object in the officer’s hand, maybe a spike from the tire spikes the officer was carrying;

2. Clark saw a deputy carrying a black “tire-spike” bag while running toward Hale’s anticipated route in order to lay down the spikes ahead of Hale’s vehicle;

3. At the time of Hale’s capture, Hale testified that he was wet from running through a swamp;

4. Clark and Eastham did not notice that Hale’s clothes were wet;

5. Clark testified that he put Hale onto the ground during his arrest;

6. Hale testified that he was not on the ground at any time during his arrest;

7. Both Eastham and Clark stated that Hale’s demeanor was calm and that he answered their questions in a clear and intelligent manner;

8. Hale stated that the “life was out of him” due to his “nine-day drug vacation”. He was wet and did not know what was going on.

### **CONCLUSIONS OF LAW**

1. *Miranda Warnings* were sufficiently given so as to satisfy constitutional requirements.

2. All statements made by Hale subsequent to his apprehension and arrest are admissible in the State case-in-chief.

**RESERVATION:** The Court reserves counsel’s right to request modification of the Court’s Findings and Conclusions.

CP at 28-31.

2. **Jury Instructions:**

Defense counsel objected to Instruction 12 regarding the definition of “deadly weapon.” CP at 49. 3RP at 149.

3. **Verdict:**

On December 12, 2006 the jury found Hale guilty of second degree assault and attempted elude of a police vehicle, as charged in the second amended information. CP at 64, 64. Following the jury’s verdict in count 1, the court held a bifurcated hearing on the alleged aggravating circumstances in support of an exceptional sentence. An interrogatory and instructions were presented to the jury. CP at 59, 60, 66. The jury found that the State had

proved the aggravating circumstances alleged by the State beyond a reasonable doubt. CP at 66.

**4. Sentencing:**

The matter came on for sentencing on February 9, 2007. The standard range sentence for count 1 was 63 to 84 months, and 22 to 29 months for count 2. Trial court Judge Michael Sullivan imposed an exceptional sentence of 100 months for count 1 and a standard range sentence of 29 months for count 2, to be served concurrently. 4 RP at 42, 43. The court ordered that sentence be served consecutively to any time Hale has in prison. CP at 81.

Timely notice of this appeal followed. CP at 92-93.

**5. Substantive facts:**

**a. On Klipsan Beach, April 27, 2006.**

While on patrol on Klipsan beach, near Ocean Park, Washington, Chief Criminal Deputy Ron Clark of the Pacific County Sheriff's Department saw a white pickup truck driving the beach spraying water while driving in the surf. 2 RP at 24. Deputy Clark turned on his lights, which were mounted in the vehicle's grill. 2RP at 24, 42. The pickup truck made a U- turn, after which Deputy Clark turned on his siren. 2 RP at 25. In addition to the driver, there were two passengers in the truck. 2 RP at 26. The truck stopped at one

point on the beach and a one of the passengers got out, after which the truck resumed moving. 2RP at 26. The truck went toward a channel or slough on the beach, went down one side of the channel then up the other side, and then briefly went airborne. 2RP at 28, 104. The truck landed and then went up an approach onto paved roads leading to Ocean Park. 2RP at 28.

**b. In Ocean Park, Washington.**

Deputy Clark lost sight of the truck, which was pursued by other officers through Ocean Park 2RP at 115-123. The truck made another U-turn, using a residential horseshoe driveway, and then went back toward Clark's vehicle. 2RP at 121, 123. Clark stated:

I saw the vehicle coming towards me and it went into my lane and drove straight to me and I'm looking for an avenue to escape from. So I didn't want to hit all these trees and stuff. Just before this driveway was 144<sup>th</sup> and it's a lane. It's probably wide enough for maybe two cars to squeeze in but more like a car and a half. And I pulled in, just dove into that drive, stopped and the suspect vehicle went right by us—went by me and I would say our mirrors almost hit.

2RP at 33.

The truck was approximately fifty feet from Clark's vehicle when he pulled into 144<sup>th</sup>. 2RP at 53. He stated that it was "no more than ten seconds" before the truck passed his position on 144<sup>th</sup>. 2RP at 53, 54.

Clark told the pursuing officers to stop the pursuit. 2RP at 36, 125.

Shortly thereafter Clark saw the truck with its front in a ditch. 2RP at 38, 126. A female passenger was arrested at the scene. 2RP at 38, 27.

The driver—identified as Dale Hale—was caught approximately three hours later. 2RP at 105, 127. When he was asked why he allegedly drove into oncoming traffic, Clark stated that Hale said “[t]o back the cops off.” 2RP at 35, 3RP at 143. Hale denied making the statement as the police interpreted it, stating that after his arrest he was in the back of a police car, and, scared, told an officer to “back off” when he approached Hale. 3RP at 101, 103.

Hale testified that in Ocean Park he drove the truck into the opposite lane of travel in order to pass cars and that he tried to avoid hitting them. 3RP at 66-67, 69. He denied going into the opposite lane in order to run cars off the road. 3RP at 70. He denied trying to run a school bus off the road, as police alleged he had done. 3RP at 72. Hale said that he was driving fast because he was “trying to get out of Long Beach” and that he did not want police to catch him. 3RP at 72.

Hale testified that on Klipsan Beach an officer ran toward him with his handgun drawn. 3RP at 76, 84. Hale denied that he had an intent to hit Clark’s vehicle, stating that he went into that lane of travel because of cars parked on Hale’s side of the road. 3RP at 81, 83.

Hale testified that he had been awake since April 22 on methamphetamine “and other drugs” at the time of the incident. 3RP at 87.

Clark stated that Hale told him that he ran because he panicked and because he had a warrant for his arrest. 3RP at 141.

**c. Motion for mistrial.**

Hale moved the court for a mistrial based on prosecutorial misconduct during Hale’s cross-examination based on the following examination:

Q. (By Mr. Anderson) Now, Mr. Hale, I just want to confirm some things as you testified today, okay?

A. Yes, sir.

Q. You specifically testified -- and I'll kind of go from latter to former so it's more recent in your memory hopefully and for the jury's as well. You testified that you didn't remember having a conversation with Deputy Clark, yet you specifically remember saying, well, I said some stuff, I had a conversation, I was near an officer, but I specifically remember not saying what I said. In other words, you -- it's your testimony that you specifically did not tell Deputy Clark that you went into the other lanes of traffic, and specifically patrol vehicles, to make them back off?

A. Yes, sir.

Q. You specifically said that?

A. Yes, sir.

Q. Well, if you don't remember the conversation then how in the world can you remember not saying that?

A. I would never say that because it's not true.

Q. You would never say that?

A. No.

Q. So what you're saying is what Ron Clark testified under oath is not true.

A. It's not true.

Q. So you're basically calling Ron Clark a liar.

3RP at 90-91.

Defense counsel objected and the court issued the following curative instruction:

At this time, members of the jury, I want to give you what's called an instruction. I'll just leave it at that. I'm instructing you not to consider in any way, shape, or form, in other words, I'm striking it and ordering you not to consider the line of questioning that you heard earlier when Mr. Anderson was asking questions of Mr. Hale. There was a certain point in there where there were some questions regarding differences in testimony, differences in statements between what Deputy Clark said regarding his version of the testimony and the Defendant's. Specifically, there was a line of questioning where Mr. Anderson turned to Deputy Clark -- excuse me, Chief Criminal Deputy Clark and said something like, "So Deputy Clark's a liar." You're not to consider that particular line of questioning in any way, shape, or form. You're to disregard that entirely.

3RP at 104-05.

Defense counsel moved for mistrial. 3RP at 109. After argument, Judge Sullivan engaged in the following colloquy and then denied the motion,

citing *State v. Padilla*, 69 Wn. App. 295, 846 P.2d 564 (1993) and *State v. Davis*, 133 Wn. App. 415, 138 P.3d 132 (2006):

THE COURT: I have read both *State v. Padilla*, P-a-d-i-l-l-a, 69 Wn. App. 295 which is a 1993 case. I've also read *State v. Anthony D. Davis*, a May 23, 2006 case, 133 Wn. App., 415. I also went on-line to Lexis and saw that *Padilla* pretty much was followed and also distinguished because there was no, you know, glaring reversals or anything but there were three distinguished times that the case was distinguished and I saw three right away that they were followed. The *Davis* case appears to be followed with two other very recent cases and I frankly didn't print those out but I couldn't find any -- obviously it's a recent case but I still didn't find anything to overturn it. Based upon the *State v. Padilla* case where it talks about -- let me find the language that it uses. On page five of six of the printout, which is -- I think the way this works is page 301, there's three things I need to consider: Whether there was prosecutorial misconduct in asking that question about the lying and I find there was, and the State admitted that, that that question shouldn't have been asked. Then I need to find whether or not -- two things. Under *Padilla*, I need to find whether the State's testimony was believable and/or corroborated and I'm not going to review all the information there based upon the record, especially Mr. Anderson bringing out the corroboration of the one officer watching -- regarding Deputy Clark's vehicle almost being hit by the Defendant's vehicle. I find that that testimony was corroborated sufficiently. Whether the defense witness's testimony was believable and/or corroborated. Well, Mr. Karlsvik, you mentioned on one of those that the believability is up to the jury and that's true, although in this particular case I assume that I'm supposed to try to make the best decision on whether or not the testimony was believable. It could certainly be believable. Your client was direct in his answers, he was lucid, he was very articulate and answered the questions and I think it's in the realm of being believable. What the jury decides, I have no idea but as far as this

standard. Corroborated, I still think it was somewhat corroborated, especially by Kendall Biggs. It was clear -- even by your own client's testimony, it was clear that -- whether the jury believed it or not, I don't know, but it was certainly corroborated that your client was moving in and out of lanes of traffic and not only did he say he wasn't intending to hit anybody or hurt anybody but in fact he didn't so that in itself is corroboration. The end result is corroboration. Now, regarding Davis, a little different language the Court uses there and I want to go to that language. I believe that under Davis that language is also met. It's on page 10 of 14 of the printout. It looks like it's on page -- let's see here, -- well, I'm not positive because I don't know if they're citing all this. It's either 422, 424, 423. It's footnotes seven, eight and nine. "Misconduct is prejudicial only when in context...there is a substantial likelihood that it affected the jury's verdict." I cannot find, in my opinion, that there's a - a substantial likelihood. I suppose there's a likelihood but substantial means substantial and I just can't find that there's a substantial likelihood. I'm finding that there was a timely objection and that certainly was timely. The request for a curative instruction, that was actually on the Court's motion for the curative instruction, although there was no disagreement and I think -- I know the State was okay with that and I think you mentioned earlier, Mr. Karlsvik, that you were okay with that without giving up ground on raising your motion for a mistrial, so that doesn't really apply. Then it says, "Liar...." -- and that's in bold and I assume -- doesn't say emphasis -- it must just be the way they've typed the opinion. "Liar questions and comments are harmless if they were not so egregious as to be incapable of a cure by an objection and an appropriate instruction to the jury." I believe that it was not that egregious. I think there's testimony on both sides that corroborates both witnesses' statements, the State and the Defendant. And I believe the instruction I gave to the jury was very down to earth, very simple, plain English. I emphasized to them they're not to consider in any -- I think I used the phrase, "any way, shape, or form", which to me is just real basic simple English. I used the word "strike it",

they're not to consider it, and I believe I actually repeated myself to the jury regarding that. The law is clear on this final point, that the jury is presumed to follow the Court's instructions and that's what I'm presuming and that's what the law presumes. So I'm denying your motion.

3RP at 130-34.

**D. ARGUMENT**

**1. HALE'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED.**

A defendant has a fundamental right to a speedy trial under Article I, § 22 (Amendment 10) of the Washington State Constitution and the Sixth Amendment to the United States Constitution. *Barker v. Wingo*, 407 U.S. 514, 33 L. E. 2d 101, 92 S. Ct. 2182 (1972); *State v. Franulovich*, 18 Wn. App. 290, 567 P.2d 264 (1977), review denied 90 Wn.2d 1001 (1978). Courts will not presume a waiver of the fundamental constitutional right to a speedy trial from a silent record.” *Id.* at 291. The heavy burden of proving that a constitutional right has been voluntarily, knowingly, and intelligently waived, is carried by the state. *Id.*; *State v. Carlson*, 2 Wn. App. 104, 108, 466 P.2d 539 (1970).

Additionally, CrR 3.3 provides that a defendant has a right to be brought to trial within 90 days of the arraignment if the defendant is not held in custody, or within 60 days if the defendant is incarcerated during that

period. CrR 3.3 ensures that criminal defendants are granted a speedy trial by governing the time for arraignment and trial. *State v. Huffmeyer*, 145 Wn.2d 42, 56, 32 P.3d 996 (2002). The State and defense counsel are each responsible for seeing that the defendant is tried in a timely manner, although the trial court is ultimately responsible for enforcing the speedy trial rule. *State v. Ross*, 98 Wn. App. 1, 4, 982 P.2d 888 (1999). In bringing the defendant to trial, the prosecution must uphold its duty in good faith and must act with due diligence. *Ross*, 98 Wn. App. at 4. The failure to comply with the speedy trial rule requires dismissal, whether or not the defendant can show prejudice. *Id.* at 5.

The trial court may continue the trial date either upon written agreement of the parties or when required in the administration of justice where the defendant will not be substantially prejudiced in the presentation of his or her defense. CrR 3.3(h). *State v. Silva*, 107 Wn. App. 605, 611-12, 27 P.3d 663 (2001). If the court grants a continuance under the “administration of justice” subsection of the rule, it must state on the record the reasons for the continuance. *Id.* When a continuance is granted extending the time of trial beyond the time periods of the rule, and the record does not state the reasons for the extension, the defendant is entitled to a dismissal. *State v. Cunningham*, 18 Wn. App. 517, 520-21, 569 P.2d 1211 (1977), review

denied, 90 Wn.2d 1001 (1978).

CrR 3.3 is intended protect a defendant's constitutional right to a speedy trial. *State v. Mack*, 89 Wn.2d 788, 791-92, 576 P.2d 44 (1978). The rule requires that an incarcerated defendant be brought to trial within 60 days of his arraignment, or that the charge against him "be dismissed with prejudice." CrR 3.3(h).

Where the State fails to exercise due diligence in bringing the defendant to trial in a timely manner, the matter must be dismissed with prejudice. *State v. Gownens*, 27 Wn. App. 921, 925-26, 621 P.2d 198 (1980).

The Supreme Court has long held that the superior court's failure to contend with its own congested dockets cannot be good cause for continuances under CrR 3.3. *State v. Mack*, 89 Wn.2d at 794. The rule should also be applied where the delay stems, as here, from an inability of the prosecutor and the Pacific County Sheriff's Department to communicate. The record is clear that Chief Criminal Deputy Clark's son's surgery was not as emergent as the deputy prosecutor intimated during his oral presentation on October 11, but was in fact previously scheduled surgery. In short, the scheduling difficulties of the officer was foreseeable and avoidable.

Although a witness's unavailability may be an "unavoidable or unforeseen circumstance" sufficient to support a five-day extension and may

justify a brief trial continuance, a defendant's speedy trial right may be violated where the continuances are multiple in number and for extended periods of time. See *State v. Palmer*, 38 Wn. App. 160, 684 P.2d 787 (1984), *State v. Carson*, 128 Wn.2d 805, 912 P.2d 1016 (1996).

In Hale's case, the trial court relied on CrR 3.3(f)(2)<sup>3</sup> for the October 11, 2006 thirty day continuance (from the last day of speedy trial, which was October 30) and an eleven day continuance pursuant to the November 28 motion to continue. Hale did not agree to either of the continuances. He did not execute a written waiver of speedy trial beyond the waiver to October 30, 2006.

Hale's trial was continued for a total of forty-one days beyond the initial waiver's expiration date of October 30. In granting the first continuance, the trial court found that the State was not negligence in bringing the motion on October 11 and that State did not mismanage the case. Findings of Fact 12 and 13. In granting the second motion, the court concentrates on the weather conditions on November 28, but does not find that the State erred by waiting until the day before scheduled trial to transport

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<sup>3</sup> CrR 3.3(f)(2) states: Motion by the Court or a Party. On motion of the court or a party, the court may continue a trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion

Hale from Monroe. Hale submits that the State mismanaged his case by waiting until the penultimate day to transport him for trial.

Hale disagrees with the Court's interpretation of CrR 3.3(f)(2). Although the court is ultimately responsible for ensuring compliance with the speedy trial rule, the State is primarily responsible for bringing the defendant to trial within the speedy trial period. *Ross*, 98 Wn. App. at 4, 900 P.2d 962. In bringing a defendant to trial, the right to a speedy trial under Criminal Rules imposes upon the prosecution a duty of good faith and due diligence. *State v. Ross*, 98 Wn. App. 1, 4, 981 P.2d 888, *amended*, 990 P.2d 962, *review denied*, 140 Wn.2d 1022, 10 P.3d 405 (1999). "The Superior Court speedy trial rules were not designed to be a trap for the unwary" (*State v. Fladebo*, 113 Wn.2d 388, 394, 779 P.2d 707 (1989)), nor were they intended to be a source of authority for the State to delay bringing a defendant to trial.

Here, the initial continuance was not required in the "administration of justice." The continuance was not necessitated by "unavoidable or unforeseen" circumstances. There is no indication that the Clark's son's surgery was an emergency or that it was otherwise unscheduled until October 10, the day the deputy prosecutor was notified of Clark's unavailability. Tellingly, there is no indication when Clark learned of the dates of his son's

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by or on behalf of any party waives that party's objection to the requested delay.

surgery. The record denotes a complete lack of communication between the Sheriff's Department and the prosecutor's office. The error was compounded by the weather on November 28. The State argued that snow would make travel by the jurors dangerous and that Hale could not be transported from Monroe to Pacific County due to conditions. Hale does not assert that the State can do anything about the weather, but does assert that the prosecution mismanaged the case by waiting until the final day to transport him, a fact that was used by the State, in part, to support its motion for continuance.

In *State v. Cornwall*, the court held that, "In promulgating CrR 3.3, the Supreme Court exercised its rule-making power in aid of the constitutional imperative that there be prompt disposition of criminal cases. The purpose of the rule is to insure speedy justice in criminal cases insofar as is reasonably possible." *State v. Cornwall*, 21 Wn. App. 309, 312, 584 P.2d 988 (1978), *review denied*, 91 Wn.2d 1022 (1979) emphasis added). It is clear that the purpose of the criminal rules in general, and of CrR 3.3 specifically, is to ensure that a defendant is brought to trial as quickly as reasonably possible.

CrR 1.2 provides that the purpose of the rules is to eliminate unjustifiable delay belies the Court's finding that surgery that was apparently scheduled in advance of the trial date but not communicated to the

prosecution did not constitute mismanagement and did not constitute negligence.

The lack of communication between the Sheriff's Department and the prosecutor's office created an unjustifiable delay in Hale's trial.

**2. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT HALE WAS GUILTY OF SECOND DEGREE ASSAULT.**

**a. The State failed to prove all of the elements of Second Degree assault beyond a reasonable doubt.**

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Moreover, circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

**b. Hale did not have the mental intent required to commit second degree assault.**

The State charged Hale with second degree assault under RCW 9A.36.021. The jury determined that Hale's pickup was a deadly weapon and

found him guilty of second degree assault. The jury instructions given in this case define assault as an act “with unlawful force done with the intent to create in another apprehension and fear of bodily injury. . . .” Instruction No. 10. Per Instruction 9, “[a] person “acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.” CP at 46.

The testimony presented in this case does not support the finding that Hale had the intent to use the pickup to create apprehension or fear of bodily injury in Clark. Hale’s intent was to “get out of Long Beach.” 3RP at 72. Hale’s actions certainly support that contention. He drove in Ocean Park, at times reaching a high rate of speed, passing cars. His actions, however, were evasive, supporting his contention that he merely wanted to escape, not to confront or harm police. He denied purposefully going into the opposite lane to run cars off the road, stating that he moved into the opposite lanes in order to pass cars. 3RP at 70. He testified that he moved into the opposite lane when he was traveling toward Clark’s vehicle because there were cars on his side of the road. 3RP at 81-82. He also testified that the steering the truck became unreliable and that he did not have “total control” of the truck. 3RP at 81. The testimony, although self-serving, is reiterated by Hale’s actions. He did not confront police after he wrecked the truck; he fled on foot. He

made no verbal threats to police. His action of allegedly attempting to hit the vehicle or scare Clark constitutes an anomaly when compared to the rest of Hale’s behavior on that day. His intent was to escape—not to threaten or create apprehension in others. Therefore the jury’s verdict in count 1 should be reversed.

3. **PROSECUTORIAL MISCONDUCT DENIED  
HALE A FAIR TRIAL**

A prosecutor is a quasi-judicial officer obligated to seek verdicts free of prejudice and based on reason. *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). A prosecutor must ensure that a defendant receives a fair trial, *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978), and has “a special duty to act impartially in the interest of justice and not as a ‘heated partisan.’” *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984) (citation omitted).” *State v. Smith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). The issue of a prosecutor’s misconduct can be raise on appeal, if at trial, the conduct was followed by a proper objection. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995); *State v. Padilla*, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

Here, during cross-examination, defense counsel objected to the deputy prosecutor’s question inviting Hale to call Clark “a liar.” This issue

therefore is properly before this Court.

**a. The deputy prosecutor's attempt to coerce Hale to call Deputy Clark a liar constituted misconduct.**

In order to establish prosecutorial misconduct, the appellant must show misconduct and resulting prejudice. *State v. Suarez-Bravo*, 72 Wn. App. 359, 365, 864 P.2d 426 (1994) (quoting *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985)).

It is misconduct for the prosecutor to seek directly or indirectly testimony as to whether another witness is telling the truth. *State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209 (1996); *State v. Padilla*, 69 Wn. App. 295, 846 P.2d 564 (1993). Such questioning invades the jury's province and is unfair and misleading. *State v. Castenda-Perez*, 61 Wn. App. 354, 362, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 833 P.2d 287 (1991). This manner of cross-examination places irrelevant information before the jury and potentially prejudices the defendant, as such questions are misleading and unfair. *State v. Wright*, 76 Wn. App. 811, 821, 888 P.2d 1214 (1995). Such arguments are misleading because the jury does not need to conclude that the State's witness is lying to believe the defendant. The jury could simply conclude that the State's witness was mistaken. evidence. *State v. Barrow*, 60 Wn. App. 868, 809 P.2d 209, *review denied*, 118 Wn.2d 1007, 822 P.2d

288 (1991). Requiring a defendant to suggest another witness in lying, however, puts the defendant in a bad light before the jury, and is thus, prejudicial. *Wright*, 76 Wn. App. at 822.

The deputy prosecutor's attempt to coerce Hale into calling Deputy Clark a liar was clearly misconduct as it is readily conceivable that a juror could conclude that an acquittal would reflect adversely upon the honesty and good faith of the police witness. *See Casteneda-Perez*, 61 Wn. App. at 360.

**b. The prosecutorial misconduct prejudiced Hale, denying him a fair trial.**

Prosecutorial misconduct is prejudicial when there is a substantial likelihood that it affected the jury's verdict. *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 412 (1995), 77. *Padilla*, 69 Wn. App. at 301. When there is a substantial likelihood that prosecutorial misconduct has affected the jury's verdict, reversal is required. *Suarez-Bravo*, 72 Wn. App. at 366.

The impact of the prosecutor's question was significant; for Hale to say that Deputy Clark was lying about the allegation that he went into the opposite lane of travel to "back the police off" would turn the jury's focus to Hale's character, and into the role of an accuser. The jury then would make a determination of guilt or innocence based on that alone. To acquit Hale, the jury would have to find that Deputy Clark deliberately gave false testimony.

Because jurors would be reluctant to make such a harsh evaluation of an officer repeatedly referred to by the State as the Chief Criminal Deputy of Pacific County, they would be inclined to find Hale guilty. See, *Casteneda-Perez*, 61 Wn. App. at 360.

Hale was the only witness for the defense. The entire case hinged on witness credibility. It is all too likely that the improper questioning affected the verdict, despite the court's instruction to the jury. When a case essentially turns on the credibility of the witnesses, in such a "swearing contest," the likelihood of the jury's verdict being affected by improper argument is substantial. *Padilla*, 69 Wn. App. at 302.

The prejudice in this case was clear. This Court should reverse this conviction and remand a new trial.

4. **RCW 9.94A.537 IS UNCONSTITUTIONAL BECAUSE A DEFENDANT CAN AVOID THE POSSIBILITY OF A HARSHER SENTENCE BY EARLIER ENTERING A PLEA OF GUILTY, WHICH EITHER CHILLS A DEFENDANT'S EXERCISE OF HIS TRIAL RIGHTS OR PUNISHES HIM FOR CHOOSING TO EXERCISE THEM.**

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the Court held that under the Sixth and Fourteenth amendments, "[o]ther than the fact of a prior conviction, any fact that

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

*Apprendi*, 530 U.S. at 490.

In *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 2533 (2004), the Court held that *Apprendi*, applies to the Washington’s Sentencing Reform Act. (“SRA”). The Court further held that the statutory maximum for *Apprendi* purposes is not the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. *Blakely*, 124 S. Ct. at 2533. In other words, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he or she may impose without any additional findings. *Id.* When facts supporting an exceptional sentence are neither admitted by the defendant nor found by a jury, the sentence violates the defendant’s Sixth Amendment right to trial by jury. *Id.*

In an attempt to “fix” the *Apprendi/Blakely* problem, the Legislature enacted the 2005 amendment to the SRA, codified at RCW 9.94A.535 and .537, commonly referred to as the “*Blakely fix*.”<sup>4</sup> This legislation effected a substantive change to sentencing law in Washington by (1) requiring aggravating factors to be proven to a jury; (2) elevating the burden of proof of

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<sup>4</sup> Effective April 15, 2005. (Washington Laws 2005, c. 68 § 7)

aggravators to be proof beyond a reasonable doubt; and (3) permitting the state to charge aggravating factors and introduce proof in support of them in the guilt or innocence phase of the trial.<sup>5</sup>

However, the “*Blakely fix*” is unconstitutional in the cases of *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980) and *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981). The legislation fails include any mechanism for empanelling a jury to consider aggravating factors after a plea of guilty. Therefore, because a defendant can avoid the possibility of a harsher sentence by entering a please of guilty, the amendments either child a defendant’s exercise of his trial rights or punish him for choosing to exercise them. This is unconstitutional.

The Washington Supreme Court, in *State v. Hughes*, 154 Wn.2d 118, 100 P.3d 192 (2005), relied on *Martin* and *Frampton* in refusing to imply a procedure in which juries could be impaneled under the statute before the amendment. Since the new statute is devoid of a procedure for empanelling a jury after a guilty plea, no procedure can be implied for doing so. Without such a procedure, the statute is unconstitutional.

RCW 9.94A.537<sup>6</sup>, which creates the means for submitting the aggravating factors to juries, provides only that:

---

<sup>5</sup> Washington Laws 2005 c. 6; RCW 9.94A.535 and RCW 9.94A.537.

...

(3) *Evidence* regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y), *shall be presented to the jury during the trial of the alleged crime*, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3)9e((iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the *res gestae* of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

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

.... (emphasis added)

Thus, by its plain terms, the procedure set forth in RCW 9.94A.537(3) and (4) does not contemplate any situation where a jury has not been impaneled for trial.

Applying *Martin*, the *Hughes*, Court held:

[T]he statute required the *same jury* to be *reconvened* to determine the issue of death following the trial. The State asked us to *imply* a “special sentencing provision” that would allow the death penalty to apply to those who pleaded guilty. But we concluded that the legislature had not anticipated a defendant pleading guilty and had failed to provide for that

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<sup>6</sup> Washington Laws 2005 c. 68 § 4.

situation. Faced with the Legislature's omission, we concluded that we did 'not have the power to read into the statute that when we may believe the legislature has omitted, be it intentional or inadvertent omission....it would be clear judicial usurpation of legislative power for us to correct that legislative oversight.' This court held that because the statute did not allow us to convene a jury solely to consider death, we could not apply the death penalty where defendants pleaded guilty.

*Hughes*, 110 P.3d at 208-09 (citing *Martin*, 94 Wn.2d at 7-9).

The same deficiency is present in RCW 9.94A.537.

In *Frampton*, the court extended *Martin's* holding to invalidate the death penalty for all persons, whether they entered guilty pleas or exercised their rights to trial. Citing *United States v. Jackson* 390 U.S. 570, 88 S. Ct. 11209, 20 L. Ed. 2d (1968), the *Frampton* court held "[w]here, pursuant to statutory procedure, the death penalty is imposed upon conviction following a plea of not guilty and a trial, but is not imposed when there is a plea of guilty, that statute is unconstitutional. *Frampton*, 95 Wn.2d at 478-480. The statute chilled the right to go to trial and imposed the ultimate punishment for the exercise of that right. In either event it was unconstitutional.

A defendant has the right to plead guilty at arraignment under CrR 4.2. While this right is not constitutional, the state can confer such a right and has in Washington. *North Carolina v. Alford*, 400 U.S. 25, 38n.11, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *Martin*, 94 Wn.2d at 4. CrR 4.2(a) grants

this right to plead guilty “unhampered by the prosecutor’s opinions or desires.” *Martin*, at 5.

Under this clear authority, any defendant charged with aggravating factors pursuant to RCW 9.94A.537 would have the right to plead guilty to the underlying crime and thus escape an exceptional sentence. This is because the new statute does not provide any means for impaneling a jury other than the jury impaneled to try the crime. RCW 9.94A.537(3), (4). Since a guilty plea allows a defendant to avoid facing an exceptional sentence, the “*Blakely* fix” amendments either chill the right to go to trial or punish those who exercise their trial rights. In both instances the statute becomes unconstitutional.

Sentencing is a legislative power, not a judicial power. *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. *State v. Mulcare*, 189 Wn.2d 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. *State v. Monday*, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). The trial court’s discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence

unauthorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 796 (1986).

Because RCW 9.94A.537 is unconstitutional, there is no statutory procedure for a trial court to impose an exceptional sentence without running afoul of *Blakely* and *Apprendi*. Therefore, the trial court is limited to imposition of a standard range sentence and this matter must be remanded for resentencing.

5. **THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO EXERCISE DISCRETION IN THE IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED SOLELY ON A SPECIAL VERDICT BY THE JURY.**

“[T]he trial judge – the individual having the knowledge, experience and judgment in this area, and having the best opportunity to observe and evaluate a particular defendant – is best suited to determine an appropriate and fair sentence in any given case.”. *State v. Thorne*, 129 Wn.2d 736, 768, 921 P.2d 514 (1996). An abuse of discretion exists “[w]hen a trial court’s exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reason.” *State v. Neal*, 44 Wn.2d 600, 609, 30 P.3d 1255 (2001) (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

Washington courts have recognized that where the Legislature grants discretion to a public official, that discretion *must* be exercised. See, e.g.,

*State v. Pettit*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980) (prosecutor); *State v. Fliieger*, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (trial court); *State v. Grayson*, 154 Wn.2d 333, 343, 111 P.2d 1183 (2005) (sentencing judge). The failure to exercise discretion is an abuse of discretion. *Pettitt*, 93 Wn.2d at 296.

The “*Blakely* fix” effected substantive changes to sentencing law in Washington, including a requirement that aggravating factors be proven to a jury. RCW 9.94A.538(2). However, in enacting the “*Blakely* fix,” the Legislature did not intent to eliminate judicial discretion in determining whether to impose an exceptional sentence. Under RCW 9.94A.535, the trial court retains overall discretion in determining sentences about the standard range:

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 aggravating sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RW 9.94A.537. ...

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.

RCW 9.94A.535 (emphasis added).

Procedurally, the “*Blakely* fix” requires a jury to find certain

enumerated aggravating circumstance, including the circumstances at issue in the present case. The findings by a jury of aggravating circumstances “*can* support a sentence about the standard range.” RCW 9.94A.535(3) (preamble) (emphasis added). However, “the court *may*” impose an exceptional sentence on “if it finds ... that the facts are found are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.537(5). Thus, the judge must still exercise discretion in determining whether the jury’s findings, in the context of the particular criminal proceeding, are so substantial and compelling as to justify imposition of an exceptional sentence.

The Legislature’s decision to retain judicial discretion is also evident from its statement of intent to the “*Blakely* fix” legislation:

The legislature intends to conform the sentencing in reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ... (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. *The legislature intends that the sentencing court will then decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment...* While the legislature intends to bring the sentencing reform act into compliance are previously indicated, *the legislature*

*recognizes the need to restore the judicial discretion that has been limited as a result of the Blakely decision. (emphasis added).*

Washington Laws 2005, ch. 68 § 1.

Here, the trial court failed to exercise discretion. At sentencing, the court showed a fundamental misunderstanding of the legislation and utterly failed to determine whether the factor found by the jury was sufficiently substantial and compelling to impose an exceptional sentence. Instead, the court merely accepted the finding of the jury and made no findings of its own in support of the exceptional sentence. The court apparently merely accepted the interrogatory submitted to the jury, which was attached to the Judgment and Sentence. CP at 91.

The “*Blakely* fix” legislation did not abrogate the trial court’s duty to consider all of the circumstances and exercise its discretion. The jury now decides whether an aggravating factor is present. But no longer can a trial court simply decide that because an aggravating factor is present an exceptional sentence is warranted. The court must decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment. And the court must state in writing the reasons for its decision to impose exceptional sentence. RCW 9.94A.535, RCW 98.94A.537, RCW 9.94A.537(5), RCW 9.94A.585(4). In the present case, the trial court did

neither.

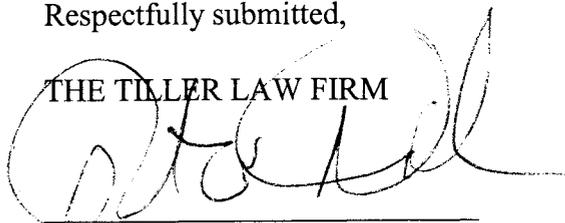
The failure to exercise discretion is reversible error, and the remedy is remand for resentencing. *State v. Grayson*, 154 Wn.2d at 343.

**E. CONCLUSION**

For the foregoing reasons, Dale Hale respectfully requests that this Court reverse his convictions and dismiss the charges, or in the alternative, (1) remand for new trial, or (2) remand for resentencing in accordance with arguments presented herein.

DATED: August 27, 2007.

Respectfully submitted,

THE TILLER LAW FIRM  


PETER B. TILLER-WSBA 20835  
Of Attorneys for Dale Hale

A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PACIFIC COUNTY

STATE OF WASHINGTON,	)	
	)	NO. <b>06-1-00104-2</b>
Plaintiff,	)	
	)	FINDINGS OF FACT
vs.	)	AND CONCLUSIONS OF LAW
	)	PERTAINING TO THE
<b>DALE E. HALE,</b>	)	CONTINUANCE GRANTED ON
Defendant.	)	OCTOBER 11, 2006.
_____	)	

THIS MATTER having come before the Court on October 11, 2006, on the State's motion for an order continuing the trial date past the expiration of the speedy trial period, the Court having read the documents submitted by the parties and heard arguments of counsel, and having considered the records and files herein, now makes the following:

**FINDINGS OF FACT**

1. Dale Hale was charged with Assault in the Second Degree and Attempting to Elude a Police Vehicle.
2. The defendant knowingly, intelligently, and voluntarily waived his right to

FINDINGS OF FACT &  
CONCLUSIONS OF LAW - 1

Pacific County Prosecuting Attorney  
P.O. Box 45  
Courthouse  
South Bend, WA 98586  
Phone: (360) 875-9361  
Fax: (360) 875-9362

1 a speedy trial through October 30, 2006. The defendant has been incarcerated  
2 in the State prison system on an unrelated felony conviction stemming from an  
3 incident in Pierce County.  
4

5  
6 3. Trial was set to begin in this case on October 24, 2006.  
7

8 4. On October 11, 2006, the State filed a Motion and Declaration to continue  
9 the trial date beyond the expiration of the speedy trial period.  
10

11 5. The defendant has not waived his right to a speedy trial beyond October  
12 30, 2006.  
13

14 6. The defendant objected to the setting of the trial on any date beyond the  
15 speedy trial deadline. The defendant argued that this case should be dismissed  
16 with prejudice if it could not be tried by the end of the speedy trial period.  
17

18 7. The defendant argued at the hearing on the motion to continue the trial  
19 that he would be prejudiced if a continuance were granted because his mental  
20 competency would deteriorate if he were housed in the Pacific County Jail.  
21

22 Alternatively, the defendant asserted that he would be prejudiced if he were sent  
23 back to prison because he would not have ready access to his court-appointed  
24 attorney.  
25

26 8. Because the State's Declaration submitted with its motion to continue the  
27 trial was basically uncontested, and because the Court is relying upon the facts in  
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33

1 that declaration in making this decision, the Court hereby incorporates by  
2  
3 reference the State's Declaration into these factual findings.

4  
5 9. As the State's Declaration attests, the key witness for the State had a  
6  
7 serious and unavoidable conflict if the trial would have commenced on October  
8  
9 24, 2006. Ron Clark, the Chief Criminal Deputy for Pacific County, who was the  
10  
11 victim named in Count I of the Information, needed to attend to his son who was  
12  
13 scheduled to have brain surgery on October 24, 2006.

14  
15 10. Ron Clark was a material State witness.

16  
17 11. Due to the brain surgery performed on his son, Ron Clark was unavailable  
18  
19 to testify from October 24, 2006 to November 5, 2006. This short absence  
20  
21 indicates that Ron Clark would be available to testify within a reasonable period  
22  
23 of time.

24  
25 12. The State was not negligent in bringing its motion for continuance on  
26  
27 October 11, 2006. While there could have been more communication between  
28  
29 the Pacific County Prosecutor's Office and Chief Criminal Deputy Ron Clark, the  
30  
31 State did not mismanage this case.

32  
33 13. The State did not engage in governmental misconduct or arbitrary action  
which prejudiced the rights of the defendant.

14. The administration of justice would be compromised if the State's motion

1 for a continuance were not granted because the unavailability of the State's key  
2  
3 witness would have necessitated the dismissal of Count I. The administration of  
4  
5 justice mandates that the State be given an opportunity to fully present its case  
6  
7 provided that the defendant is not thereby unfairly prejudiced.

8 15. Granting a continuance in this case to November 29-30, 2006, would not  
9  
10 prejudice the defendant in the presentation of his defense. The defendant made  
11  
12 no showing that the continuance would prevent him from calling any witnesses  
13  
14 to support his theory of the case. The defendant's bare assertions that a  
15  
16 continuance would cause him to suffer mental anguish by being incarcerated in  
17  
18 the Pacific County Jail or that a continuance would prevent him from having  
19  
20 access to his attorney were not credible. Continuing this case to November 29-  
21  
22 30, 2006, in no way impacts the defendant's ability to fully present his case to  
23  
24 the jury.

25 16. Due to court congestion, the first available trial date for a two-day trial  
26  
27 was November 29, 2006. Breaking up the trial would have negatively impacted  
28  
29 the administration of justice.

## 30 **II. CONCLUSIONS OF LAW**

31 1. Under Superior Court Criminal Rule 3.3(f)(2), continuances can be granted  
32  
33 on motion of the court or a party "when such continuance is required in the

1 administration of justice and the defendant will not be prejudiced in the  
2 presentation of his or her defense." If the Court grants a motion for continuance  
3 under this subsection, the trial must be moved to a specific date. A continuance  
4 also can be granted due to unavailable or unforeseen circumstances beyond the  
5 control of the court or the parties, if the defendant is not prejudiced. CrR  
6  
7  
8  
9  
10 3.3(e)(8).

11 2. The dismissal of a criminal charge is an extraordinary remedy that is  
12 available only as a last resort when there has been prejudice to the rights of the  
13 accused that materially affects the right to a fair trial. No such prejudice exists in  
14 this case; therefore, this case should not be dismissed.  
15  
16  
17

18 3. "Loss of freedom" by the defendant during a continuance period does not  
19 by itself constitute prejudice under Superior Court Rule No. 3.3(f)(2). Moreover,  
20 this argument is inapposite because the defendant has been incarcerated due to  
21 a separate felony conviction.  
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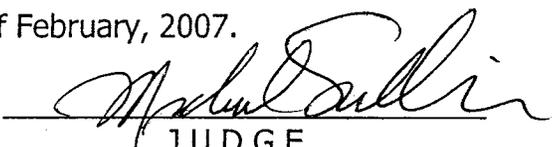
25 4. The unavailability of a material witness is a valid ground for continuing a  
26 criminal trial where (1) there is a valid reason for the unavailability, (2) the  
27 witness will become available within a reasonable time, and (3) there is no  
28 substantial prejudice to the defendant. The State has demonstrated that there is  
29 a valid reason for the unavailability of Chief Criminal Deputy Ron Clark--a  
30  
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33

1 material State witness. The State also has shown that Chief Criminal Deputy Ron  
2 Clark will be available to testify within a reasonable time. Finally, there has been  
3 no showing that the defendant would be prejudiced by having this trial  
4 continued.  
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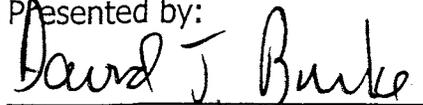
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8 5. Because the presentation of the defendant's case would not be prejudiced  
9 by a continuance and because the interests of justice support a continuance, a  
10 continuance should be granted under the authority of Superior Court Criminal  
11 Rule 3.3(f)(2). The failure to grant a continuance would undermine the  
12 administration of justice.  
13  
14

15  
16  
17 6. In order to ensure that the continuance is as short as possible, the trial  
18 should be continued to November 29-30, 2006.  
19

20 DATED this 9<sup>th</sup> day of February, 2007.

21  
22   
23 JUDGE

24 Presented by:

25   
26 DAVID J. BURKE, WSBA#16163  
27 Prosecuting Attorney  
28

29 Approved as to form:

30  
31 \_\_\_\_\_  
32 HAROLD KARLSVIK, WSBA#23026  
33 Attorney for Defendant.

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Pacific County, WA

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Virginia Leach, Clerk  
By *[Signature]* Deputy

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PACIFIC COUNTY

STATE OF WASHINGTON	)	
	)	NO. <b>06-1-00104-2</b>
Plaintiff,	)	
	)	
vs.	)	MOTION AND DECLARATION
	)	IN SUPPORT OF ORDER
<b>DALE E. HALE,</b>	)	CONTINUING TRIAL
	)	
Defendant.	)	

COMES NOW PLAINTIFF, DAVID J. BURKE, Prosecuting Attorney of the State of Washington, moves the court to continue the trial in this matter pursuant to CrR 3.3(f)(2) and (g). In the alternative, the State asks that this case be dismissed without prejudice.

DATED this 11<sup>th</sup> day of October, 2006.

*David J. Burke*  
DAVID J. BURKE, WSB#16163  
Prosecuting Attorney

**II. DECLARATION OF COUNSEL**

I, DAVID J. BURKE, Prosecuting Attorney for Pacific County, declare under the penalty of perjury of the laws of the State of Washington that the following is true to the best of my knowledge.

Pacific County Prosecuting Attorney  
P.O. Box 45  
Courthouse  
South Bend, WA 98586  
Phone: (360) 875-9361  
Fax: (360) 875-9362

1  
2 1. This case is currently set for jury trial on October 24, 2006.

3  
4 2. The Defendant has waived his right to a speedy trial through October  
5 30, 2006.

6  
7 3. I received a phone call from Ron Clark, Chief Criminal Deputy of the  
8 Pacific County Sheriff's Office, <sup>on October 10, 2006, DJB</sup> that he will be unavailable to testify in Court between  
9 October 24, 2006 and November 5, 2006. Chief Criminal Deputy Clark is unavailable  
10 due to the fact that his child is undergoing a significant surgical procedure, and  
11 Chief Deputy Clark needs to attend to the needs of his child.

12  
13 4. Therefore, I am respectfully asking for a continuance of the trial date  
14 to as soon as possible after November 5, 2006. In the alternative, the State  
15 believes it is entitled to a dismissal without prejudice so that the case could be re-  
16 filed at a later date.

17  
18 5. The State is unaware of any prejudice to the defendant in the  
19 presentation of the case if this matter is continued as requested.

20  
21 6. Chief Deputy Clark's testimony is critical to the State's case with regard  
22 to Count I, Assault in the Second Degree with a Deadly Weapon Enhancement. No  
23 one but Chief Deputy Clark observed the actions of the defendant with respect to  
24 the allegations in Count I. Therefore, without the presence of Chief Deputy Clark at  
25 the trial, the administration of justice would be subverted.

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33  
  
**Pacific County Prosecuting Attorney**  
P.O. Box 45  
Courthouse  
South Bend, WA 98586  
Phone: (360) 875-9361  
Fax: (360) 875-9362

1  
2  
3  
4 I declare under the penalty of perjury of the laws of the State of Washington  
5 that the foregoing is true and correct to the best of my knowledge as of this date.  
6

7 DATED this 11<sup>th</sup> day of October, 2006.  
8

9  
10  
11 *David J. Burke*

12 DAVID J. BURKE, WSB#16163  
13 Prosecuting Attorney  
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Pacific County Prosecuting Attorney  
P.O. Box 45  
Courthouse  
South Bend, WA 98586  
Phone: (360) 875-9361  
Fax: (360) 875-9362

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PACIFIC COUNTY

STATE OF WASHINGTON,	)	
	)	NO. <b>06-1-00104-2</b>
Plaintiff,	)	
	)	FINDINGS OF FACT
vs.	)	AND CONCLUSIONS OF LAW
	)	PERTAINING TO THE
<b>DALE E. HALE,</b>	)	CONTINUANCE GRANTED ON
Defendant.	)	NOVEMBER 28, 2006.
_____	)	

THIS MATTER having come before the Court on November 28, 2006, on the State's motion for an order continuing the trial date, the Court having read the documents submitted by the parties and heard arguments of counsel, and having considered the records and files herein, now makes the following:

**FINDINGS OF FACT**

1. A severe ice/snow storm enveloped Pacific County and Western Washington on November 28, 2006. On the scheduled date of trial, November 29, 2006, the defendant would not have been in court. The Pacific County Sheriff's Office attempted to pick up the defendant where he was housed at the

FINDINGS OF FACT &  
CONCLUSIONS OF LAW - 1

Pacific County Prosecuting Attorney  
P.O. Box 45  
Courthouse  
South Bend, WA 98586  
Phone: (360) 875-9361  
Fax: (360) 875-9362

1 Monroe Correctional Facility. The Sheriff's Office was unable to complete the  
2 transport due to dangerous road conditions.  
3

4 2. The winter storm event made travel virtually impossible throughout Pacific  
5 County and Western Washington.  
6

7  
8 3. The road ~~conditions~~ were going to be so dangerous in Pacific County on  
9 the scheduled trial date that the lives of prospective jurors would have been  
10 endangered if they attempted to travel to the Courthouse in South Bend. Many  
11 of the prospective jurors would have had to travel up to 50 miles to reach the  
12 Courthouse. Since the roads in Pacific County were going to be extremely  
13 dangerous on the scheduled trial date, it would have been foolhardy to place the  
14 lives of prospective jurors at risk. Therefore, the administration of justice  
15 required that the trial be continued.  
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21 4. Because Pacific County only has one Superior Court Judge (this judge also  
22 presides in Wahkiakum County), and because certain docket days are scheduled  
23 far in advance, the Court had limitations with regard to when this trial could be  
24 held. Nevertheless, the Court moved other cases to ensure that this case was  
25 tried as soon as possible.  
26  
27  
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29

30 5. Because this case was going to take at least two days, December 11,  
31 2006 was the first available date for a two-day trial. It would have been  
32  
33

FINDINGS OF FACT &  
CONCLUSIONS OF LAW - 2

Pacific County Prosecuting Attorney  
P.O. Box 45  
Courthouse  
South Bend, WA 98586  
Phone: (360) 875-9361  
Fax: (360) 875-9362

1 imprudent to move the trial to November 30, 2006, because the weather forecast  
2 was problematic. Friday, December 1, 2006, was a weekly motion docket.  
3  
4 December 4, 2006, was the Wahkikaum County motion day. A "dependency"  
5  
6 docket was set for December 5, 2006. A juvenile docket was scheduled for  
7  
8 December 7, 2006. December 8, 2006, was a weekly motion docket. Thus, it  
9  
10 would have been unwise to have attempted to start the trial earlier than  
11  
12 December 11, 2006, because the trial would have had to be continued to  
13  
14 December 11, 2006 in any event.

15 6. Breaking up the trial would have negatively impacted the administration of  
16  
17 justice.

18 8. The Findings of Fact pertaining to the continuance granted on October 11,  
19  
20 2006, are hereby incorporated by reference.

## 21 **II. CONCLUSIONS OF LAW**

22  
23 1. Under Superior Court Criminal Rule 3.3(f)(2) continuances can be granted  
24  
25 on motion of the court or a party "when such continuance is required in the  
26  
27 administration of justice and the defendant will not be prejudiced in the  
28  
29 presentation of his or her defense." If the Court grants a motion for continuance  
30  
31 under this subsection, the trial must be moved to a specific date. A continuance  
32  
33 also can be granted due to unavailable or unforeseen circumstances beyond the

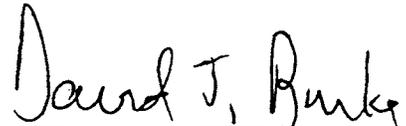
1 control of the court or the parties, if the defendant is not prejudiced. CrR  
2  
3 3.3(e)(8).  
4  
5 2. In this instance, the extreme weather conditions constituted unavoidable  
6 unforeseen circumstances affecting the time for trial that were beyond the  
7 control of the Court or the parties. Moreover, even if the defendant would have  
8 been present in court on November 29, 2006, the severe weather conditions  
9 justified the postponement of the trial because of prospective jurors would have  
10 had to risk life and limb in traveling to South Bend.  
11  
12 3. "Loss of freedom" by the defendant during a continuance period does not  
13 by itself constitute prejudice under Superior Court Rule No. 3.3(f)(2). Moreover,  
14 this argument is inapposite because the defendant has been incarcerated due to  
15 a separate felony conviction.  
16  
17 4. Continuing the trial from November 29-30, 2006, to the second week of  
18 December does not prejudice the defendant in the presentation of his defense.  
19 This continuance is required in the administration of justice. Therefore, a  
20 continuance should be granted under the authority of Superior Court Criminal  
21 Rule 3.3(f)(2).  
22  
23 5. In order to ensure that the continuance is as short as possible, the trial  
24 should be continued to December 11-12, 2006.  
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DATED this 9<sup>th</sup> day of February, 2007.

  
\_\_\_\_\_  
JUDGE

Presented by:

  
\_\_\_\_\_  
DAVID J. BURKE, WSBA#16163  
Prosecuting Attorney

Approved as to form:

\_\_\_\_\_  
HAROLD KARLSVIK, WSBA#23026  
Attorney for Defendant.

Handwritten initials "Cmm" in the top right corner.

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
DALE E. HALE,  
  
Appellant.

COURT OF APPEALS NO.  
35928-6-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Appellant's Opening Brief were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Dale E. Hale, Appellant, and David J. Burke, Pacific County Prosecuting Attorney, by first class mail, postage pre-paid on Monday, August 27, 2007, at the Centralia, Washington post office addressed as follows:

Mr. David J. Burke  
Prosecuting Attorney  
Pacific County Prosecutor's Office  
P.O. Box 45  
South Bend, WA 98586-0045

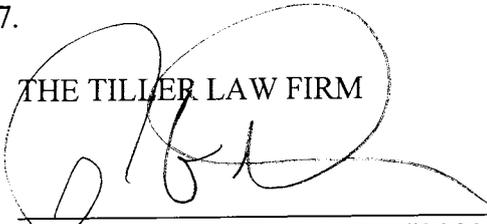
Mr. David Ponzoha  
Clerk of the Court  
WA State Court of Appeals  
950 Broadway, Ste. 300  
Tacoma, WA 98402-4454

CERTIFICATE OF  
MAILING

**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE - P.O. BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828

Mr. Dale E. Hale  
DOC #832314  
Monroe Corrections Center  
167740 170<sup>th</sup> Dr. SE  
Post Office Box 888  
Monroe, WA 98272-0888

Dated: August 27, 2007.

THE TILLER LAW FIRM  
  
PETER B. TILLER – WSBA #20835  
Of Attorneys for Appellant

CERTIFICATE OF  
MAILING

2

**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE – P.O. BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828