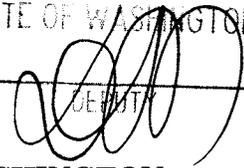


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

**NO. 37452-8-II**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

**STATE OF WASHINGTON**

**Respondent**

**v.**

**JAY RICHARD RICH**

**Appellant**

**THE HONORABLE BARBARA JOHNSON  
JUDGE OF THE SUPERIOR COURT  
OF CLARK COUNTY, STATE OF WASHINGTON**

**APPELLANT'S BRIEF**

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*P.M. 2-16-2010*

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## **A. ASSIGNMENTS OF ERROR**

1. Did the trial court err in denying defendant's repeated request for sentencing under Blakely v. Washington, 542 U.S. 296 (2004).
2. Did the trial court err in reversing its order denying the state's motion to impanel a jury? The order provided defendant should be sentenced within the applicable standard range. It was entered on December 12, 2005 (CP 206, attached as Exhibit D). It was reconsidered in an order entered March 12, 2008 (CP 246, attached as Exhibit C).
3. Did the trial court err in concluding on September 14th, 2007, EHB 2070 allowed defendant to be sentenced under a retroactive version of RCW 9.94A.537 allowing an exceptional sentence determination by a jury when said provision did not exist at the time of Appellant's original sentencing.
4. The trial court's decision to allowing an impaneling of a jury according to the 2007 amendments to RCW 9.94A.537 (the second Blakely fix legislation, after State v. Pilatos 159 Wn.2d 470) violated separation of powers principals, the presumption against retroactivity of legislation, and violated the ex post facto clause of the State and Federal Constitution.

### **Issues Related to Assignments of Error**

1. Was Defendant's right to a speedy sentencing under RCW 9.94A.500 and Article I, § 10, of the Constitution of the State of Washington violated by the court's continuous refusal to sentence him despite his repeated requests?
2. Does denial to the defendant of the finality of a sentence prejudice him to be a denial of right to speedy sentencing and due process of law?
3. Do the factors alleged by the state for an exceptional sentence allow application of RCW 9.94A.537 (the second Blakely fix)?
4. Is there sufficient evidence of the factors alleged by the state for and exceptional sentence to allow application of RCW 9.94A.537?

#### **B. STATEMENT OF THE CASE**

The report of the proceedings has been ordered. The facts are not in dispute. They are summarized in the unpublished court of appeals decision No. 28342-5-II, attached as Exhibit A and in CP 246 (Relevant procedural history, conclusions of law and order denying state's motion to empanel a jury to determine aggravating circumstances in support of state's request for aggravated exceptional sentence), also attached as Exhibit B.

In 2000, Appellant was 17 years old, a junior at Evergreen High School and employed at the Safeway Store in Battle Ground, Washington. He participated in high school wrestling and civil air patrol. His grade point average was approximately

3.4. While employed at the Safeway store in Battle Ground, Washington, he worked with the victim and a girl. There developed a competition for the girl's affection. On January 13, 2001 the victim turned up missing during a shift with defendant at the Safeway store. Eventually the employees began to look for him, including the appellant. They looked throughout the Safeway building and around its parking lot. When the victim did not appear, his parents requested the involvement of Battle Ground Police and issued flyers throughout the community concerning their missing son.

Appellant's step-father was in appellant's room and found personal property of the victim. He turned this personal property over to the Battle Ground Police who further searched the appellant's room and arrested the appellant. Appellant denied for many hours. The Battle Ground Police requested the assistance of VPD Polygraph Officer, Jeff Sundby. Officer Sundby interrogated the appellant and eventually appellant admitted to killing the victim. He took the police to the location of the body. He did a taped confession and a video reenactment of the crime.

Autopsy and appellant's confession would establish that the victim was stabbed two to three times in the area of the Battle Ground Safeway. At one time his chest was stepped upon to stop the gurgling noise. His body was initially hid in a swampy area behind the Battle Ground Safeway and then transported to the Gifford

Pinchot National Forrest. After approximately one year of pre-trial motions concerning admissibility of his confession and the search and seizure of his house and his arrest, the defendant entered into a change of plea on September 12, 2001. His standard range was 240 to 320 months, with additional deadly weapons enhancement for a total of 26 years (CP 71, 121). State was entitled to request an exceptional sentence as part of the plea bargain.

Trial court imposed a 540 months exceptional sentence. Appellant appealed the exceptional sentence to the Court of Appeal's, Division II, in Case Number 28342-5-II. The decision was reversed and remanded to trial court for reconsideration of the factors used in the exceptional sentence.

The appellant court's ruling was that the trial court's findings of fact and conclusions of law combined the factors it used for exceptional sentence in a manner that made it unclear as to whether any one factor would be sufficient for an exceptional sentence.

Defendant appeared for re-sentencing in May of 2004. Blakely v. Washington, 542 U.S 296 (2004) had just been argued and his counsel had a transcript of the oral argument. A motion was filed to stay sentencing pending the ruling in Blakely. Defendant submits the following chronology of events is undisputed:

1. On May 5, 2004, Defendant filed a “Motion for Jury Determination of Any Fact Relied upon for an Exceptional Sentence.” Defendant had received a mandate from the Court of Appeals, Division II remanding his case for re-sentencing on February 12, 2004. Defendant asked the Court in this motion to exclude from any consideration the grounds for an exceptional sentence and facts not found by a jury. Since no jury was called on his case this would exclude all facts for an exceptional sentence. Defendant requested to be sentenced within the standard range of 264-344 months. It was filed and served to all parties (CP 160)
2. On October 12, 2001 and May 27, 2004, Defendant entered into a “Waiver of Speedy Sentencing.” The reason he waived speedy sentencing was to allow the United States Supreme Court to make a decision in a case pending known as Blakely v. Washington, 542 U.S. 296 (2004). Attached as Exhibit’s H, I, J, K L.
3. On May 27, 2004 the Court entered an order continuing sentencing which had been set for May 27, 2004. Sentencing was continued and was to be set after the decision in the case of Blakely (CP 164).
4. On August 9, 2004, Defendant filed a Motion and Memorandum to apply Blakely to Defendant’s Sentencing. It was requested that he be sentenced within the standard range (CP 170).
5. On November 4, 2004, Defendant’s Proposed Findings of Fact and

Conclusions of Law on the Court's order for continuance was filed. It noted Defendant's request for sentencing at that time and his objection that they continue sentencing. He noted his objection to sentencing continuance beyond two weeks (CP181).

6. The Court entered Findings of Fact and Conclusions of Law on December 7, 2004 and noted on Page 1 Line 23 "defendant objected to a continuance of his sentencing beyond two weeks" (CP 186), Exhibit M.

7. An order continuing sentencing was entered on January 27, 2005. As noted on Page 1, Line 16, Defendant reaffirmed his desire to go forward to sentencing. A review date was set for March 29, 2005 (CP 187, attached as Exhibit N).

8. On March 31, 2005, an Order was filed continuing sentencing dated March 29, 2005. A review date was set for May 26, 2005. The Order once again noted at Line 16 that the defendant reaffirmed his desire to go forward with the sentencing (CP 189, attached as Exhibit Q).

9. On April 19, 2005, defendant filed a Motion for Transport to bring defendant back for sentencing.

10. On October 12, 2005, an Order for Transport and Waiver of Future Presence at Hearings was signed by the Court, and defendant returned to the Department of Corrections, and waived his presence at all future pre-trial and pre-sentence hearings.

11. On December 12, 2005, the Court filed a Memorandum of Opinion denying the State's Motion to Empanel a Jury and providing the Court will enter an order consistent with this opinion (CP 206), attached as Exhibit D.

12. The Court entered an Order on February 3, 2006, requiring the transport of the defendant from the Department of Corrections to the Clark County jail for purposes of re-sentencing.

13. On March 16, 2006 Defendant filed a Proposed Order on the Court's Memorandum Opinion of December 12, 2005. Defendant repeated his desire to be sentenced within the standard range and in a speedy manner, Page 2, Line 18 (CP 210), attached as Exhibit O.

14. On March 16, 2006 the State prepared a document called "Relevant Procedural History, Conclusions of Law, and Order Denying State's Motion to Empanel a Jury to Determine Aggravating Circumstances in Support of State's Request for Aggravated Exceptional Sentence." The Court concluded there was no authority to empanel a jury and the defendant must be re-sentenced within the standard range. The order denied the state's motion to empanel a jury and provided the defendant shall be re-sentenced within the applicable standard range. The order also provided due to the State's indication of intent to appeal this order the Court delays re-sentencing pending the appeal (CP 246).

15. On May 24, 2006, and filed in June, Defendant filed with the Court of Appeals, Division II, in Case No. 34672-9-II, a document known as “Respondent’s Response to Motion Pursuant to RAP Rule 17.3(a) to stay proceedings pending the decision by the Washington State Supreme Court on issue before this court.” This document noted again the defendant’s desire to be re-sentenced and objected to any further continuances, Exhibit F.

16. On April 17, 2007, Defendant filed an Affidavit Waiving His Presence at Sentencing and requested the Court to amend his previous judgment and sentence for 26 years, the maximum of the standard range.

17. The State filed with the Court of Appeals, Division II, on or about April 23, 2007, a motion asking for its appeal to be dismissed and the case remanded to the trial court for re-sentencing.

18. The Court of Appeals, Division II, entered a ruling on May 8, 2007 dismissing with “prejudice” the State’s appeal.

19. The parties appeared before this Court on September 14, 2007 and the Court heard arguments as to the applicability of EHB 2070 to the re-sentencing of this case. In his presentation to the Court, Prosecuting Attorney, Art Curtis told the Court that he had contacted Representative Joseph Zarelli of the Washington State House of Representatives to help draft or help in the preparation or processing of

EHB 2070, specifically to allow impaneling of a jury in defendant's case and similar situated defendant's.

20. The trial court ruled that EHB 2070 was retroactive and allowed the impaneling of a jury to determine aggravating factors, reversing her previous decision on this issue (CP 246, Exhibit C). Appellant filed a timely notice of appeal. The appeal was pre-sentencing. The state agreed to postpone impaneling the jury in order to hear results of various cases appearing before the Washington State Supreme Court and Court of Appeals before the Washington State Supreme Court concerning the application of EHB 2070 retroactively.

21. By order of the commissioner of the Court of Appeals, Division II, the case was stayed on May 22, 2008.

22. The case was removed from stay on March 18, 2009.

## **C. ARGUMENT**

### **Speedy Sentencing and Due Process**

Appellant has a right to a speedy sentencing under RCW 9.94A.500 and Article 1, § 10 of the Washington Constitution (justice in all cases shall be administered openly without unnecessary delay). Sentencing was continuously postponed, at least three times over his objection (CP 3, 4, 6, 16, 17, 18 and Exhibits F, H, K, L, M, N, O, P, Q attached). Appellant did request a postponement of

sentencing in order to determine the impact of Blakely v. Washington but after that one request he objected to any further continuances. The court continued the sentences on the rational any sentencing under the standard range would still have him in prison for many years for a maximum of 26 years minus good time and credit for time served. The court did finally enter an order requiring a sentencing within the standard range, but only after numerous continuances, after the Supreme Court ruled in State v.

Hughes, 154 Wn.2d 118 (2005). Sentencing was postponed to allow the state to appeal. The Appellant objected to the granting of a stay of sentencing in a response filed in the Court of Appeals, Division II, Case No. 34672-9-II in May of 2006. A copy is attached as Exhibit D.

Defendant consistently, diligently and on the record objected to continuances of the sentencing. The delay in sentencing denied him protection of double jeopardy clause guaranteed by the state and federal constitution by postponing its application. His double jeopardy rights are protected by Article I, § 9, of the Constitution of the State of Washington, Fifth Amendment of the United States Constitution. Furthermore, once he is sentenced he is protected from the retroactive application of procedural as well as substantive changes in the law as a violation of double

jeopardy, separation of powers and violation of ex-post facto law (Article I, § 9 and the Fifth Amendment of the United States Constitution).

The right to speedy sentencing has been recognized in State v. Modest, 106 Wn. App. 660 (2001) and State v. Amos, \_\_\_ Wn. App. \_\_\_ (No. 36104-3-II and 34375-4-II, October 2008). The right to speedy sentencing is violated if the delay is purposeful or oppressive, State v. Amos at page 15. To determine if a delay is purposeful or oppressive the Court is to balance the length and reason for the delay, the Appellant's assertion of his right to a speedy sentence and the extent of prejudice to the defendant.

Applying these principals to Appellant; the delay was purposeful, the reason was to have one sentencing hearing after the aftermath of Blakely v. Washington worked its way through the appellate system and the legislature to clarify procedure. Appellant's first appeal, over turning his sentence, was filed on July 8, 2003 and remanded February 12, 2004. There is a delay of at least six years. Appellant asserted his right to sentencing many times, Exhibits F, H, J, K, L, M, N, O, P. It is true under a standard range sentence Appellant would still be in custody. However he is prejudiced and oppressed when the delay in sentencing allowed a retroactive application on the 2007 amendments, the second Blakely fix. This is particularly prejudicial and oppressive when the trial court ruled after State v. Hughes there was

no power to impanel a jury yet refused to sentence. The Court of Appeals contributed to the prejudicial and oppressive delay by granting a stay over Appellant's objection in Case No. 34672-9-II.

### **Retroactivity, Ex Post Facto and Separation of Powers**

Appellant is aware all three divisions of the Court of appeals have ruled the second Blakely fix legislation in 2007 does not violate the presumption against retroactivity, is not an ex post facto violation and does not violate separation of powers: State v. Applegate, \_\_\_ Wn. App. \_\_\_, No. 56085-9-I, October 2008; State v. McNeal, \_\_\_ Wn. App. \_\_\_, No. 35423-3-II; State v. Mann, \_\_\_ Wn. App. \_\_\_, No. 26436-0-III. Appellant would respectfully disagree with the above cases and ask the court to reconsider its conclusions ruling retroactive application was appropriate. There was a violation of the ex post facto clause, City of Seattle v. Ludvigsen, 162 Wn.2d 660 (2007) and there was a violation of separation of powers. Had Appellant been sentenced in a timely manner his sentence would have been within the standard range and final. It is a violation of separation of powers, the ex post facto prohibition and the presumption against retroactivity to legislatively modify a judgment and sentence or in Appellant's case one that should have been entered. The trial court had ruled pursuant to State v. Hughes, 154 Wn.2d 118 (2005), Appellant had to be sentenced within the standard range because there was not authority to empanel a jury

(CP 206). The trial court refused to sentence Appellant pending the State's appeal. A stay of sentencing was requested of the Court of Appeals by the state and objected to by Appellant (as Respondent) in Case No. 34672-9-II.

In Re: Beito, \_\_\_\_ Wn.2d \_\_\_\_ (No. 77973-2, filed Nov. 12, 2009) the court could have considered issues of retroactivity, ex post facto and separation of powers, but did not. In Re: Beito the case involved a challenge to an exceptional sentence imposed by a trial judge following a plea to First Degree Murder. The court found that Mr. Beito's rape of a minor child was a motive for and closely connected to the murder. This finding was made in addition to facts contained in the Statement of Probable Cause which Beito could be used to determine the factual basis for his plea. Based on this additional fact finding, the trial court imposed an exceptional sentence. Under sentencing provisions in effect at the time of Mr. Beito's crime, it was procedurally impossible for a trial court to empanel a jury to reach a constitutionally acceptable finding of aggravating factors to support an exceptional sentence. Mr. Beito's crime was committed in 1998. On October 8, 2000, it was stipulated that the court consider as real material facts the information set out in the statement of defendant on plea of guilty and the certification for determination of probable cause. Mr. Beito did not stipulate to an exceptional sentence. He only acknowledged that the state would be seeking an exceptional sentence.

The case is similar in some respects to appellant's in that appellant pled guilty, did not stipulate to exceptional sentence, but did acknowledge the state would be seeking exceptional sentence.

In 2005 Mr. Beito filed a personal restraint petition to challenge his exceptional sentence under Blakely v. Washington. Blakely v. Washington was issued before his Judgment and Sentence became final. The trial court found that because Mr. Beito did not stipulate to the facts relied upon by the trial court to support exceptional sentence, he did not waive his Blakely Sixth Amendment right to a jury on exceptional sentence facts.

Similarly, appellant did not stipulate to the aggravating factors that the trial court found, (deliberate cruelty, multiple injuries, concealment of the body, and no remorse, CP 71, 121, Exhibit A, E). In Beito the state argued in favor of remanding the case for trial court to empanel a jury to determine that aggravating factors exist in Mr. Beito's case. The court noted "but the applicable statutes in our cases do not support the state's position". The court concluded the issue on Mr. Beito's case was how it should be resolved on remand and whether it is now procedurally possible to empanel a jury to consider whether aggravating factors exist which would support an exceptional sentence.

The court noted that the Sentencing Reform Act had been amended twice. State v. Pilatos, 159 Wn.2d 459 (2007) held the first Blakely Amendment did not apply to any cases decided before the 2005 enactment.

Following Pilatos the legislature amended the SRA, RCW 9.94A.537 to allow a trial court to empanel juries to find aggravating factors on cases that have been previously decided. Beito argues that the 2007 Amendments noted above do not apply to his case. The court noted the state did not argue to the contrary.

However, rather than deciding the retroactivity issue, the court determined RCW 9.94A.535 authorizes the impaneled jury to consider only exclusive lists of aggravating factors identified. The trial court's aggravating factor was not found the list of exclusive aggravating factors so the 2007 amendments were not applicable to Beito's case.

In Appellant's case the State filed a notice of intent to seek an aggravated exceptional sentence on July 27, 2007 (CP 236, Exhibit G). The grounds stated were deliberate cruelty, a major economic offense because the incident involved multiple incidents per victim and the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense.

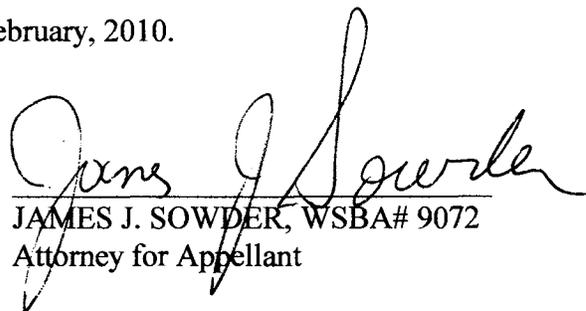
Applying the Beito analysis the major economic offense aggravator can to be sent to jury because the crime of conviction did not involve an economic offense. In

other words multiple incidents per victim without an economic impact are not on the exclusive list. Stabbing the victim two to three times and stepping on his chest are not injuries that substantially exceed the level of bodily harm necessary to satisfy the elements of the offense or deliberate cruelty. If two to three knife wounds would be all that is required to substantially exceed the level of bodily harm then virtually all assaults would be candidates for exceptional sentences. In State v. Serano, 95 Wn. App. 7 (1999) it was found that shooting a victim five times in the back was not deliberate cruelty.

#### D. CONCLUSION

Appellant's case should be dismissed for failure to sentence him in speedy time. In the alternative his case should be remanded for a sentence within the standard range and the trial court instructed it may not impanel a jury to determine aggravating factors.

DATED this 16 day of February, 2010.

  
JAMES J. SOWDER, WSBA# 9072  
Attorney for Appellant



allowed both parties to argue for an exceptional sentence and allowed the State to recommend a maximum of 50 years (600 months).

The State recommended a 600-month sentence based on the aggravating factors of deliberate cruelty, multiple injuries, and efforts to conceal the crime. A Department of Corrections Presentence Report recommended an exceptional sentence of 480 months because Rich lacked remorse.

The trial court imposed an exceptional sentence of 540 months. The court stated that deliberate cruelty and multiple injuries were the primary bases for the exceptional sentence. It also found that Rich attempted to conceal the crime when he repeatedly moved the body and eventually concealed it in a remote area. But the court did not place great weight on this factor because the legal authority supporting it as a factor was questionable. The court also found that Rich's behavior was not sufficiently egregious to show a lack of remorse.

But the court's written conclusions list all four factors in support of the exceptional sentence. Specifically, the court concluded that Rich's repeatedly moving the body and concealing it in a remote area was a "non-statutory aggravating circumstance." Clerk's Papers (CP) at 378. And it found that Rich's lack of remorse, shown by lying to police officers, was another non-statutory aggravating circumstance. At oral argument before us, the State explained that the judge had changed her mind between making her oral ruling and entering the written findings.

On appeal, Rich argues that there are no factual bases for many of the court's findings, that the named reasons do not justify an exceptional sentence, and that the sentence is excessive because Rich had no criminal record and ultimately cooperated with the police.

#### ANALYSIS

RCW 9.94A.535 allows the sentencing court to impose a sentence outside the standard range if it finds, in written findings and conclusions, "that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The statute lists aggravating and mitigating factors, but the factors are illustrative rather than exclusive. RCW 9.94A.535.

We reverse an exceptional sentence only if (1) the record does not support the sentencing court's reasons, (2) the reasons do not justify an exceptional sentence for this offense, or (3) the sentence was "clearly excessive." RCW 9.94A.585(4). Rich contends that his exceptional sentence violated all three of these requirements.

##### A. Does the Record Support the Findings?

Rich first contends that the record does not support the sentencing court's findings of fact. Specifically, Rich argues that the facts do not conclusively show that he slit the victim's throat while the victim was unconscious, that he broke the victim's ribs by stepping on him, or how long it took the victim to die. He also challenges the court's findings regarding the short time it took for Rich to kill the victim, clean up the room and himself, and hide the body.

The court relied on a variety of evidence to reach its findings of facts. In Rich's statement on plea of guilty, he admitted that he took the victim's wallet and killed the victim by slitting his throat. The interviewing officer testified that Rich admitted that he slashed the

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victim's throat, stood on the victim's chest until he stopped breathing, cleaned blood from inside the store (where the murder occurred), hid the body behind the store, and later hid the body in the woods. And the transcript of Rich's interview describes how he hid the body, cleaned up the mess and himself, and returned to work.

The medical examiner testified that the victim had two or three cuts on his neck, and possibly more. He testified that some of the victim's injuries were inconsistent with Rich's story that he slashed the victim's throat one time. Although he could not say for certain whether the victim was standing or prone when his throat was cut, the amount of blood in his lungs indicated he may have been prone. And he testified that the fractured rib was consistent with Rich's statement that he stood on the victim's chest. The Department of Corrections' pre-sentence investigation, a sealed record, also supports the trial court's findings.

Although the evidence could be read to support several different theories of how events unfolded, the record clearly supports the court's findings.

B. Do the Findings Support the Factors?

Rich next contends that the court's reasons do not justify giving an exceptional sentence. We review de novo whether an aggravating factor supports an exceptional sentence. *State v. Way*, 88 Wn. App. 830, 833, 946 P.2d 1209 (1997). The factor cannot be one the legislature considered in setting the standard range and must be "sufficiently substantial and compelling to distinguish the offense . . . from others in the same category." *Way*, 88 Wn. App. at 833.

All four factors the trial court relied on in its written findings and conclusions are valid aggravating factors. Deliberate cruelty is a statutory aggravating factor. RCW 9.94A.535(2)(a).

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Courts have upheld the use of the other three factors--multiple injuries, efforts to conceal the crime, and lack of remorse, in many cases. *See* RCWA 9.94A.535, Notes of Decisions 65, 99, 122 (2003). The question, then, is whether the facts support the conclusions of law.

We use a “clearly erroneous” standard of review when considering whether the facts support the court’s conclusions of law. *State v. Serrano*, 95 Wn. App. 700, 712, 977 P.2d 47 (1999). Rich points out that the written conclusions include one factor the court expressly rejected in its oral ruling and another factor on which it placed little weight. At the conclusion of the sentencing hearing, the court noted that there was some question whether concealing the crime raised Fifth Amendment issues; accordingly, it did not place great weight on that factor. And the court found the record insufficient to show a lack of remorse, commenting that “the cases in this area are so extreme and beyond that of a homicide and the circumstances presented in this case that I do not find that as a legal factor in this case.” Report of Proceedings (RP) at 164. Yet the court listed all four factors, including the two it had earlier rejected, in its written findings and conclusions.

But the court’s oral opinion is only a verbal expression of its informal opinion at the time, and “may be altered, modified, or completely abandoned.” *State v. Hescock*, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999) (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963)). “[T]he trial court’s oral decision is not binding ‘unless it is formally incorporated into findings of fact, conclusions of law, and judgment.’” *Hescock*, 98 Wn. App. at 606 (quoting *State v. Dailey*, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)). Accordingly, we must rely on the

written findings and conclusions. RCW 9.94A.535; *State v. Gore*, 143 Wn.2d 288, 315, 21 P.3d 262 (2001).

### 1. Deliberate Cruelty

Deliberate cruelty is “behavior ‘not usually associated with the commission of the offense in question,’ or . . . ‘gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself.’” *State v. Ferguson*, 142 Wn.2d 631, 645, 15 P.3d 1271 (2001) (citations omitted). Unless the court’s decision was “clearly erroneous” in determining that the facts support the reason, we must affirm. *Ferguson*, 142 Wn.2d at 646.

The court found deliberate cruelty based on “the record in general and the infliction of the injuries in this particular case and the series of injuries in this particular case.” RP at 166. It found that Rich put the victim in a choke hold until he passed out, cut the victim’s throat at least two or three times and, using most of his body weight, stepped on the victim’s chest to stop the gurgling noise he made after having his throat slit. The court described several knife wounds to the victim’s throat, a fracture of the cricoid cartilage (in the throat area), and a fracture of the rib cartilage. It noted further that the knife wounds were not necessarily fatal--the victim’s life may have been spared had Rich called 911. And it observed that both mechanical asphyxia (neck and chest compression) and “sharp force injury of the neck” (knife wounds) caused the victim’s death. CP at 377.

Typically, cases finding deliberate cruelty involve facts more egregious than these. *See, e.g., State v. Buckner*, 74 Wn. App. 889, 876 P.2d 910 (1994), *overruled on other grounds by State v. Thomas*, 138 Wn.2d 630, 980 P.2d 1275 (1999) (15 separate but tightly grouped

stabbings); *State v. Scott*, 72 Wn. App. 207, 866 P.2d 1258 (1993) (20 broken bones, sexually assaulted victim and strangled her twice, prolonged attack and lingering death); *State v. Campas*, 59 Wn. App. 561, 799 P.2d 744 (1990) (repeated bludgeoning and stabbing, victim left alive in pain and agony until death). Even though a defendant shot a victim five times, he did not gratuitously inflict pain on the victim. *Serrano*, 95 Wn. App. at 713.

But in one case, the infliction of a second stab wound was deliberately cruel. *State v. Franklin*, 56 Wn. App. 915, 919, 786 P.2d 795 (1989). And the “clearly erroneous” standard requires us to give deference to the lower court’s decision. Rich inflicted multiple injuries on the victim, he inflicted the injuries in various ways (choking, cutting his throat, and standing on his chest), and he failed to call for help although it might have saved the victim’s life. Measured against the “clearly erroneous” standard, the court did not err in finding deliberate cruelty.

## 2. Multiple Injuries

Multiple injuries must be caused by multiple acts for this factor to support an exceptional sentence. *State v. Jennings*, 106 Wn. App. 532, 552, 24 P.3d 430, *review denied*, 144 Wn.2d 1020 (2001). Many of the cases that apply to deliberate cruelty also apply to this factor, and courts often use the same facts for both factors. *E.g. State v. Worl*, 91 Wn. App. 88, 955 P.2d 814 (1998); *State v. Smith*, 82 Wn. App. 153, 916 P.2d 960 (1996). Rich choked, cut, and stood on the victim. Either the choking or cutting alone would likely have caused the victim’s death. Rich inflicted more injuries than the legislature considered when it set the standard range for felony murder. This factor supports an exceptional sentence. *Way*, 88 Wn. App. at 833.

### 3. Efforts to Conceal the Crime

The court found that Rich dumped the victim's body into a swale behind the store after he killed him. Then Rich cleaned himself up, changed his clothes, mopped up the blood in the building, and lied about why he needed to change his shirt. Later he moved the victim's body again, helped look for the victim, and finished working his shift. After work, he loaded the body into his trunk, drove 20 miles into the woods and hid the body down a hill, behind a large tree, and under branches. During his first interview with the police, he emphatically denied knowing anything about the victim's disappearance.

Because a person has a constitutional right not to incriminate himself, the court cannot rely on the defendant's failure to reveal the location of a victim's body as an aggravating factor. *State v. Crutchfield*, 53 Wn. App. 916, 926-27, 771 P.2d 746 (1989). But a defendant's affirmative steps to conceal a crime can support an exceptional sentence. *State v. Vaughn*, 83 Wn. App. 669, 679, 924 P.2d 27 (1996). The court did not rely on Rich's failure to tell the police where the body was in applying this factor. Rather, like *Crutchfield*, the court focused on what Rich did to hide evidence after he committed the crime. *Crutchfield*, 53 Wn. App. at 926-27. The court emphasized that Rich repeatedly moved the body and eventually concealed it in a remote area. The facts support this factor.

### 4. Lack of Remorse

A defendant's lack of remorse, if "of an aggravated or egregious nature," may justify an exceptional sentence. *State v. Ross*, 71 Wn. App. 556, 563, 861 P.2d 329 (1993), 883 P.2d 329 (1994). In *Ross*, the State supported this factor by showing that Ross continued to blame the

justice system for his crimes and that his statement that he was sorry was not credible. *Ross*, 71 Wn. App. at 563-64. Another court found a defendant's lack of remorse sufficiently egregious where he bragged and laughed about the murder, mimicked the victim's reaction to being shot, asked the victim if it hurt to get shot, thought the killing was funny, joked about being on television for the murder, and told police he felt no remorse. *State v. Erickson*, 108 Wn. App. 732, 739-40, 33 P.3d 85 (2001), *review denied*, 146 Wn.2d 1005 (2002). In another case, a woman joked with her husband's killer about sounds her husband made after the killer shot him and went to meet a boyfriend's family 10 days after her husband's death. *State v. Wood*, 57 Wn. App. 792, 795, 790 P.2d 220 (1990). Her egregious lack of remorse supported an exceptional sentence. *Wood*, 57 Wn. App. at 800.

But here, the court's findings do not show that Rich had an egregious lack of remorse. The court supported this factor only by noting that Rich repeatedly moved and concealed the body and lied to police. But moving and concealing the body does not show egregious lack of remorse. And "[r]efusing to admit guilt or remaining silent is an exercise of one's rights, not an indication of lack of remorse." *State v. Russell*, 69 Wn. App. 237, 251, 848 P.2d 743 (1993).

"To the extent the sentence is based upon reasons insufficient to justify an exceptional sentence . . . the matter must be remanded for resentencing within the standard range." *Ferguson*, 142 Wn.2d at 649. But if the record clearly shows that the court would have given the same sentence absent the unsupported or invalid factor, we need not remand. *State v. Hooper*, 100 Wn. App. 179, 188, 997 P.2d 936 (2000).

In *Hooper*, the trial court found that “each reason was sufficient to justify the sentence, and that if [the appellate court] affirmed at least one of the factors, there would be no need for remand because the sentence would remain the same.” *Hooper*, 100 Wn. App. at 188. But the trial court made no such finding here. Thus, we remand for the court to sentence Rich without considering lack of remorse as an aggravating factor.

C. Is the Sentence Clearly Excessive?

Finally, Rich contends that the 540-month sentence is clearly excessive and does not serve the purposes of the Sentencing Reform Act. This is so, he argues, because he had no prior convictions, was a good citizen and student, and helped the police find the body. Further, he argues, the sentence is out of proportion to similar crimes, does not wisely use government resources, and is more than is needed to deter him.

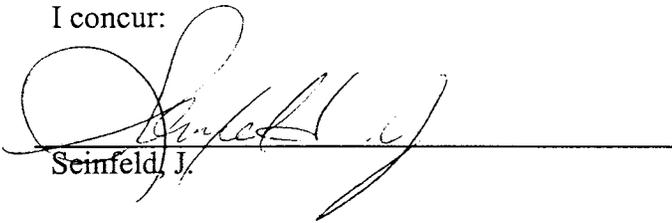
“A sentence is clearly excessive if it is based on untenable grounds or untenable reasons, or an action no reasonable judge would have taken;” that is, it is excessive if the court abused its discretion. *State v. Branch*, 129 Wn.2d 635, 649-50, 919 P.2d 1228 (1996). With the exception of lack of remorse, the exceptional sentence was based on valid reasons. The sentence was halfway between what the State recommended and what the Department of Corrections recommended. It was below what Rich agreed the State could recommend (600 months) when he signed the plea agreement. The sentence was not clearly excessive.

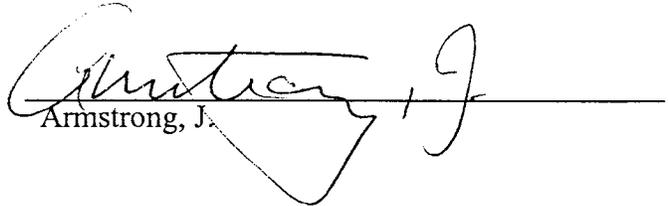
No. 28342-5-II

We remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

I concur:

  
Seinfeld, J.

  
Armstrong, J.

QUINN-BRINTNALL, A.C.J. (concurring in part and dissenting in part) — Although I agree with the legal conclusions reached by the majority opinion, I do not agree with its remedy. In my opinion, remand for resentencing is not required.

When the record clearly shows that the trial court would have imposed the same sentence absent an unsupported or invalid aggravating factor, remand is not required. *State v. Gore*, 143 Wn.2d 288, 321, 21 P.3d 262 (2001); *State v Hooper*, 100 Wn. App. 179, 188, 997 P.2d 936 (2000). Here the trial court imposed an exceptional sentence of 540 months, stating that the aggravating factors of deliberate cruelty and multiple injuries were the primary bases for the exceptional sentence. It mentioned two other factors, one of which we find deficient, but expressly indicated that those factors had little if any impact on its decision.

At oral argument, the State indicated that it was only after sentencing that the trial court requested that all four factors be listed in its written findings in support of the exceptional sentence. Therefore, the record affirmatively establishes that the deficient factor (lack of remorse) was not relied on by the trial court *at the time it imposed the 540 month sentence*. Thus, although the factor was later included in the court's written conclusions, it could have had no impact on its earlier decision to impose 540 months. Because the record clearly shows that the trial court imposed the 540-month sentence without improperly relying on the invalid lack of remorse factor, the written finding is clearly surplusage and remand for resentencing is not required. *See e.g. State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 463, 303 P.2d 290 (1956) (citing *In re Personal Restraint of Clark*, 24 Wn.2d 105, 113, 163 P.2d 577 (1945)) (when a judgment and sentence is legal in one part and illegal in another, the illegal part, if separable, may be

No. 28342-5-II

disregarded as surplusage and the legal part enforced). *See also State v. Tili*, 148 Wn.2d 350, 359-60, 60 P.3d 1192 (2003) (holding remand unnecessary because inaccurate offender score and standard range calculation in judgment and sentence on remand were without effect, as correct standard sentence calculation was reflected in findings of fact and conclusions of law for exceptional sentence, incorporated into judgment and sentence by reference). *See also Gore*, 143 Wn.2d at 321; *State v. Post*, 118 Wn.2d 596, 616-17, 826 P.2d 172, 837 P.2d 599 (1992); *State v. Fisher*, 108 Wn.2d 419, 429-30, 739 P.2d 683 (1987).

In my opinion remand is unnecessary because the record affirmatively demonstrates that the court's decision to impose an exceptional 540-month sentence was based on the proper aggravating factors of deliberate cruelty and multiple injuries.

  
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QUINN-BRINTNALL, A.C.J.

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**FILED**  
**MAR 16 2006**  
JoAnne McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JAY RICHARD RICH,

Defendant.

No. 01-1-00135-3

RELEVANT PROCEDURAL HISTORY,  
CONCLUSIONS OF LAW AND ORDER  
DENYING STATE'S MOTION TO EMPANEL A  
JURY TO DETERMINE AGGRAVATING  
CIRCUMSTANCES IN SUPPORT OF STATE'S  
REQUEST FOR AGGRAVATED  
EXCEPTIONAL SENTENCE

THIS MATTER having come before the Court on the motion by the State of Washington to empanel a jury to determine whether aggravating circumstances exist in this case so that the Court may impose an aggravated exceptional sentence , the State of Washington being represented by Arthur D. Curtis, Clark County Prosecuting Attorney, and the defendant having appeared in person and with his attorney, James Jeffery Sowder, and the court having previously heard argument from the parties pursuant to this motion, now, therefore the Court finds as follows:

**RELEVANT PROCEDURAL HISTORY OF CASE**

1) The defendant herein pled guilty to the crime of Felony Murder in the First Degree while armed with a Deadly Weapon on September 12, 2001. At the time of the guilty plea the defendant stated he understood that his standard range sentence was 240-320 months on the underlying offense, with an additional 24 months on the deadly weapon enhancement to run consecutively for a combined total standard range sentence of 264-344 months in prison (22

RELEVANT PROCEDURAL HISTORY, CONCLUSIONS OF LAW  
AND ORDER DENYING STATE'S MOTION TO EMPANEL A  
JURY TO DETERMINE AGGRAVATING CIRCUMSTANCES IN  
SUPPORT OF STATE'S REQUEST FOR AGGRAVATED  
EXCEPTIONAL SENTENCE - Page 1 of 4

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**EXHIBIT B**

1 years to 28 and 2/3 years). The defendant also acknowledged understanding that the State was  
2 free to recommend up to 50 years in prison on this offense, which was an "aggravated sentence  
3 pursuant to RCW 9.94A.390 and RCW 9.94A.535, the Sentencing Reform Act (SRA) as it  
4 existed at the time of the guilty plea.

5 2) On January 11, 2002 a sentencing hearing was held at which time the State argued that  
6 there were three "aggravating circumstances" justifying the imposition of an aggravated  
7 exceptional sentence in this case. This Court found all three of these "aggravating  
8 circumstances", as well as a fourth that was later reversed by Division Two of the Court of  
9 Appeals, and sentenced the defendant to 516 months in prison on the underlying offense, plus  
10 an additional 24 months in prison for the deadly weapon enhancement, for a combined total of  
11 540 months in prison (45 years).

12 3) The defendant appealed his sentence, which was subsequently reversed by Division  
13 Two of the Court of Appeals due to the insufficiency of evidence related to the previously  
14 mentioned "fourth aggravator". This case was in the process of proceeding to re-sentencing  
15 when on June 24, 2004 Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403  
16 (2004) was decided by the United States Supreme Court. In pertinent part, this case held that  
17 an "aggravated sentence" such as had been imposed on the defendant herein, could only be  
18 imposed by a jury after finding an alleged "aggravating circumstance" to exist beyond a  
19 reasonable doubt.

20 4) As a result of the Blakely decision, supra, on August 13, 2004 the State filed a "Motion to  
21 Empanel Jury to Determine Aggravating Circumstances in Support of State's Request for  
22 Aggravated Exceptional Sentence".

23 5) On April 14, 2005 the Washington State Supreme Court ruled in State v. Hughes, 154  
24 Wn.2d 118, 110 P.2d 192 (2005) that a jury could not be empanelled to hear "aggravating  
25 circumstances" absent specific legislation allowing a trial court to do so.

26 6) On April 14, 2005 (the same day that State v. Hughes, supra, was decided) the  
27 Washington State legislature passed a law allowing the trial court to empanel a jury to  
determine "aggravating circumstances". The law was signed by the Governor and became

1 effective the following day, which was April 15, 2005. This law is commonly referred to as  
2 "Senate Bill 5477" and is now codified in RCW 9.94A.535 and RCW 9.94A.537.

3 7) On September 23, 2005 this court heard arguments from the parties as to whether SB  
4 5477 (RCW 9.94A.535 and RCW 9.94A.537) should be applied retroactively to this case so that  
5 the State could empanel a jury as requested in the State's motion previously referenced and  
6 filed on August 13, 2004.

7 8) The Washington State Supreme Court has heard argument in State v. Pillatos, No.  
8 75984-7, as to whether this procedure for empanelling a jury should be applied retroactively to  
9 cases such as the defendant herein. This court continued decision herein in order to await this  
10 decision; to date that court has not yet ruled on this issue.

11 9) On December 12, 2005 this court entered a Memorandum Opinion denying the State's  
12 Motion to Empanel a Jury. This court's reasoning in that regard is contained in said  
13 Memorandum Opinion, which is hereby attached hereto and incorporated by reference herein.

14 Based upon the procedural history of this case referenced above, as well as this court's  
15 Memorandum Opinion referenced herein and attached hereto, this court makes the following:

#### 16 CONCLUSIONS OF LAW

17 1) There is no legal authority for this court to empanel a jury to hear the alleged  
18 "aggravating circumstances" in this case in that SB 5477 (RCW 9.94A.535 and RCW 9.94A.  
19 537) cannot be applied retroactively to this case.

20 2) The defendant must be re-sentenced within the standard sentencing range.

21  
22 Based upon the foregoing relevant procedural history of this case, in conjunction with  
23 this court's conclusions of law there from, this court enters the following:

#### 24 ORDER

25 IT IS HEREBY ORDERED:

26 (1) The State's motion to empanel a jury to determine aggravating circumstances  
27 pursuant to sentencing in this case is denied. The defendant shall be re-sentenced within the

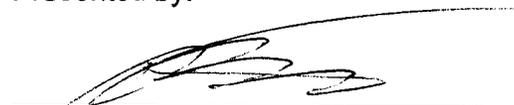
1 applicable standard range sentence upon his prior plea of guilty and conviction for the crime of  
2 "Felony Murder in the First Degree."

3 (2) Due to State's indication of intent to appeal this Order, the court delays re-  
4 sentencing pending the appeal.

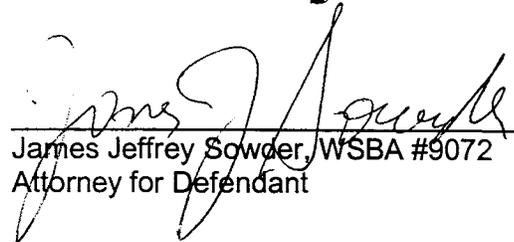
5 DATED THIS 16 day of March, 2006

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8 HONORABLE BARBARA D. JOHNSON  
9 Judge of the Superior Court

9 Presented by:

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11   
12 Arthur D. Curtis, WSBA #6092  
13 Prosecuting Attorney

14 Service accepted and receipt of true copy  
15 acknowledged this 16 day of March, 2006.

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18 James Jeffrey Sowder, WSBA #9072  
19 Attorney for Defendant

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**SCANNED**

**FILED**

**MAR 12 2008**

Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JAY RICHARD RICH,

Defendant.

No. 01-1-00135-3

RELEVANT PROCEDURAL HISTORY,  
CONCLUSIONS OF LAW AND ORDER  
GRANTING STATE'S MOTION TO EMPANEL  
A JURY TO DETERMINE AGGRAVATING  
CIRCUMSTANCES IN SUPPORT OF STATE'S  
REQUEST FOR AN AGGRAVATED  
EXCEPTIONAL SENTENCE

THIS MATTER having come before the Court on a second motion by the State of Washington to empanel a jury to determine whether aggravating circumstances exist in this case so that the Court may impose an aggravated exceptional sentence, the State of Washington being represented by Arthur D. Curtis, Clark County Prosecuting Attorney, and the defendant having waived his presence but being represented by his attorney, James Jeffery Sowder, and the court having previously heard argument from the parties pursuant to this motion on September 14, 2007, now, therefore the Court finds as follows:

**RELEVANT PROCEDURAL HISTORY OF CASE**

1) The defendant herein pled guilty to the crime of Felony Murder in the First Degree while armed with a Deadly Weapon on September 12, 2001. At the time of the guilty plea the defendant stated he understood that his standard range sentence was 240-320 months on the underlying offense, with an additional 24 months on the deadly weapon enhancement to run consecutively for a combined total standard range sentence of 264-344 months in prison (22 years to 28 and 2/3 years). The defendant also acknowledged understanding that the State

RELEVANT PROCEDURAL HISTORY, CONCLUSIONS OF LAW  
AND ORDER GRANTING STATE'S MOTION TO EMPANEL A  
JURY TO DETERMINE AGGRAVATING CIRCUMSTANCES IN  
SUPPORT OF STATE'S REQUEST FOR AN AGGRAVATED  
EXCEPTIONAL SENTENCE - Page 1 of 4

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**EXHIBIT C**

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1 was free to recommend up to 50 years in prison on this offense, which was an "aggravated  
2 sentence pursuant to RCW 9.94A.390 and RCW 9.94A.535, the Sentencing Reform Act (SRA)  
3 as it existed at the time of the guilty plea.

4 2) On January 11, 2002 a sentencing hearing was held at which time the State argued that  
5 there were three "aggravating circumstances" justifying the imposition of an aggravated  
6 exceptional sentence in this case. This Court found all three of these "aggravating  
7 circumstances", as well as a fourth that was later reversed by Division Two of the Court of  
8 Appeals, and sentenced the defendant to 516 months in prison on the underlying offense, plus  
9 an additional 24 months in prison for the deadly weapon enhancement, for a combined total of  
10 540 months in prison (45 years).

11 3) The defendant appealed his sentence, which was subsequently reversed by Division  
12 Two of the Court of Appeals due to the insufficiency of evidence related to the previously  
13 mentioned "fourth aggravator". This case was in the process of proceeding to re-sentencing  
14 when on June 24, 2004 Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403  
15 (2004) was decided by the United States Supreme Court. In pertinent part, this case held that  
16 an "aggravated sentence" such as had been imposed on the defendant herein, could only be  
17 imposed by a jury after finding an alleged "aggravating circumstance" to exist beyond a  
18 reasonable doubt.

19 4) As a result of the Blakely decision, supra, on August 13, 2004 the State filed a "Motion to  
20 Empanel Jury to Determine Aggravating Circumstances in Support of State's Request for  
21 Aggravated Exceptional Sentence".

22 5) On April 14, 2005 the Washington State Supreme Court ruled in State v. Hughes, 154  
23 Wn.2d 118, 110 P.2d 192 (2005) that a jury could not be empanelled to hear "aggravating  
24 circumstances" absent specific legislation allowing a trial court to do so.

25 6) On April 14, 2005 (the same day that State v. Hughes, supra, was decided) the  
26 Washington State legislature passed a law allowing the trial court to empanel a jury to  
27 determine "aggravating circumstances". The law was signed by the Governor and became  
effective the following day, which was April 15, 2005. This law is commonly referred to as  
"Senate Bill 5477" and is now codified in RCW 9.94A.535 and RCW 9.94A.537.

7) On September 23, 2005 this court heard arguments from the parties as to whether SB  
5477 (RCW 9.94A.535 and RCW 9.94A.537) should be applied retroactively to this case so

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1 that the State could empanel a jury as requested in the State's motion previously referenced  
2 and filed on August 13, 2004.

3 8) In hearing oral arguments on September 23, 2005, regarding on whether the State could  
4 empanel a jury as requested, this Court was aware of the fact that the Washington State  
5 Supreme Court had heard arguments in State v. Pillatos, No. 75984-7, as to whether this  
6 procedure for empanelling a jury should be applied retroactively to cases such as the defendant  
7 herein.

8 9) This Court went ahead on December 12, 2005 and entered a Memorandum Opinion  
9 denying the State's motion to empanel a jury.

10 10) On April 14, 2006, the State filed a "Notice of Appeal to the Court of Appeals, Division II",  
11 seeking review of the order denying the State's motion to empanel a jury to determine  
12 aggravating circumstances in support of the State's request for an aggravated exceptional  
13 sentence.

14 11) During the pendency of that appeal, in 2007 the Washington State Supreme Court  
15 rendered its decision in State v. Pillatos, 159 Wn.2d 459 (2007). The Court in Pillatos, ruled that  
16 changes the legislature made in 2005 in Senate Bill 5477 did not apply to cases where trials had  
17 already begun or guilty pleas had already been entered. The Court in Pillatos also held trial  
18 courts did not have the inherent power to empanel sentencing juries; i.e., the Courts had to  
19 have statutory authority to do so. Thusly, the Washington State Supreme Court opinion in  
20 Pillatos was consistent with this courts ruling in the trial court.

21 12) Subsequent to the Pillatos opinion, the Washington State legislature enacted EHB 2070  
22 this past legislative session. EHB 2070 was signed by the governor with an emergency clause  
23 making the law effective upon signing on April 27, 2007.

24 13) The State subsequently moved to dismiss the appeal filed herein on April 23, 2007. This  
25 case was remanded back to this trial court for re-sentencing on May 8, 2007.

26 14) On September 11, 2007, the State filed a "Second Amended Notice of Intent to Seek an  
27 Aggravated Exceptional Sentence", relying on EHB 2070 for the proposition that the State now  
had statutory authority to empanel a jury for re-sentencing herein.

Based upon the State's second Motion to Empanel a Jury previously referenced, this  
Court on September 14, 2007 heard oral arguments from the parties as to the applicability of  
EHB 2070 to re-sentencing in this case.

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1 Based upon the foregoing, this Court now makes the following:

2 **CONCLUSIONS OF LAW**

- 3 1) EHB 2070, which was signed into law effective April 27, 2007, applies to this case.  
4 2) It is clearly the intention of the Washington State legislature to authorize this court to  
5 empanel a jury to consider allegations of aggravating circumstances which may justify an  
6 exceptional sentence in cases such as the case herein.  
7 3) Empanelling a jury will not violate double jeopardy or ex-post facto provisions of law.  
8 4) The specific factual circumstances of this case regarding timeliness of sentencing and  
9 objections raised by defendant, as supported by the record of these proceedings, do not bar  
10 application of EHB 2070 to this case.

11 Based upon the foregoing conclusions of law, it is hereby,

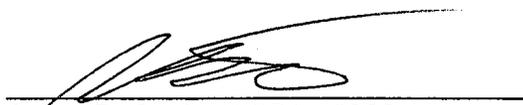
12 ORDERED that the State's motion to empanel a jury is granted in this case.

13 It is further ORDERED that this Court's prior order denying the State's motion to  
14 empanel a jury to determine aggravating circumstances in this case be, and hereby is,  
15 rescinded.

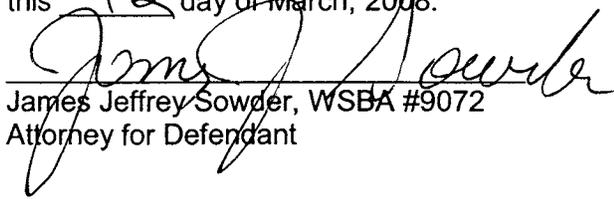
16 DATED this 12 day of March, 2008.

17   
18 HONORABLE BARBARA D. JOHNSON  
19 JUDGE OF THE SUPERIOR COURT

20 Presented by:

21   
22 Arthur D. Curtis, WSBA #6092  
23 Prosecuting Attorney

24 Service accepted and receipt of true copy acknowledge  
25 this 12 day of March, 2008.

26   
27 James Jeffrey Sowder, WSBA #9072  
Attorney for Defendant

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**SCANNED**

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**FILED**

**DEC 12 2005**

JoAnne McBride, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

State of Washington,	)	
	)	No. 01-1-00135-3
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM OPINION
	)	
Jay Richard Rich	)	
	)	
Defendant.	)	

The Court of Appeals remanded this case for resentencing by Mandate issued February 12, 2004. This court entered Findings of Fact and Conclusions of Law on December 7, 2004, which set forth the proceedings which occurred following remand through that date. The court delayed resentencing due to legal issues pending before the United States Supreme Court. Following the decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), this court delayed further pending the outcome of cases before the Court of Appeals and Supreme Court of Washington.

On April 14, 2005, the Supreme Court published State v. Hughes, 154 Wn.2d 118, 110 P.2d 192 (2005). On the following day, the Washington State Legislature passed SB 5477, Laws of 2005, Chapter 68, which became effective immediately after the Governor's signature

**EXHIBIT D**

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1 on April 15, 2005. The parties herein argued the application of these developments in the law  
2 through written Memorandums and oral argument. The court delayed ruling, once again  
3 anticipating further direction from the Court of Appeals and Supreme Court.

4 On December 6, 2005, Division II of the Court of Appeals filed the Order Amending  
5 Opinion in State v. Fero, 125 Wn.App. 84, 104 P.3d 49 (2005). In the Order Amending  
6 Opinion, the court concludes: "For the purposes of compliance with Blakely, we follow State  
7 v. Hughes, 154 Wn.2d 118, 151-52, 156, 110 P.3d 192 (2005) and remand for resentencing  
8 within Fero's standard sentence range." The court does not discuss whether SB 5477 will  
9 apply retroactively, the issue which has been argued by the parties herein, and in numerous  
10 other cases presented across the State of Washington.

11 This court concludes the decision set forth in the Order Amending Opinion in State v.  
12 Fero is controlling in this case. Although the court in Fero does not discuss application of SB  
13 5477, the court could have invited further briefing and argument regarding the legislation.  
14 With respect to this case, which was remanded for resentencing prior to State v. Hughes and  
15 prior to the enactment of SB 5477, it is the conclusion of this court the decision in Fero  
16 mandates resentencing within the standard range.

17 The State's Motion to Empanel Jury to Determine Aggravating Circumstances in  
18 Support of State's Request for Aggravated Exceptional Sentence will be denied. The court will  
19 schedule entry of an order consistent with this Opinion.

20 DATED this 12<sup>th</sup> day of December, 2005

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22 Judge Barbara D. Johnson  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

**FILED**  
FEB 11 2002

STATE OF WASHINGTON,  
Plaintiff,  
v  
JAY RICHARD RICH,  
Defendant.

No. 01-1-00135-3  
JoAnne McBride, Clerk. Clark Cr.  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
IN SUPPORT OF AGGRAVATED  
EXCEPTIONAL SENTENCE  
APPENDIX 2.4 JUDGMENT AND  
SENTENCE

On September 12, 2001, the Defendant plead guilty to Felony Murder in the First Degree. On January 11, 2002, hearing was held to impose sentence. The State was represented by Prosecuting Attorney for Clark County, Arthur Curtis. and Defendant appeared personally and through his attorney, James J. Sowder

The court considered evidence in support of and in opposition to the State's request for an exceptional sentence. The record regarding the exceptional sentence consists of the Third Amended Information, the Statement of Defendant on Plea of Guilty, testimony under oath from Lt. Roy Butler, Dr. Dennis Wickham, Dr Jack

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN  
SUPPORT OF AGGRAVATED EXCEPTIONAL  
SENTENCE

APPENDIX 2 4 JUDGMENT AND SENTENCE - 1

CLARK COUNTY PROSECUTING ATTORNEY  
1200 FRANKLIN STREET • PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 (OFFICE)  
(360) 397-2230 (FAX)

**EXHIBIT E**

1 Litman, Sarah Fontyn, Diane Petrias and Tammy McGill, exhibits which were admitted  
2 into evidence; the Declaration of James J. Sowder concerning the testimony of Kris  
3 Vinson and Teresa Waldkirch; and the Pre-Sentence Investigation of the State of  
4 Washington Department of Corrections, prepared by Stuart Kilby with the exception of  
5 any portions objected to by Defendant in Defendant's Response to Department of  
6 Correction's Pre-Sentence Report Recommendation of Exceptional Sentence

7 An exceptional sentence above the standard range should be imposed based  
8 upon the following Findings of Fact and Conclusions of Law.

### 9 I FINDINGS OF FACT

10  
11 The defendant caused the death of the victim, Bryce Powers, during the early  
12 evening hours of January 13, 2001. He did so in the back portion of the Safeway Store  
13 in Battle Ground, Washington, during the work shift of both the defendant and the  
14 victim. The separate injuries inflicted by the defendant include the following:

15 The defendant, at one point, put the victim in a choke hold until he passed out.  
16 In addition, the defendant cut the victim's throat with a knife that the defendant carried  
17 on his person. In addition to slicing the victim's throat, the defendant stepped on the  
18 chest of the victim after slicing his throat because the victim was making a gurgling  
19 noise and the defendant thought somebody might hear him. The defendant stepped on  
20 the victim's chest pretty hard and firmly with most of his body weight.

21 Medical testimony from Clark County Medical Examiner Dennis Wickham  
22 establishes with reasonable medical certainty that there were at least two or three  
23 wounds to the victim's throat which were inflicted by the defendant's knife. In addition to  
24 the neck injuries caused by the knife, Dr. Wickham found the victim had a fracture of the  
25 cricoid cartilage, located in the throat area, and a fracture of the eighth rib cartilage  
26 located on the right side of the victim's chest. The medical examiner further found the

27 FINDINGS OF FACT AND CONCLUSIONS OF LAW IN  
SUPPORT OF AGGRAVATED EXCEPTIONAL  
SENTENCE

APPENDIX 2 4 JUDGMENT AND SENTENCE - 2

CLARK COUNTY PROSECUTING ATTORNEY  
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1 cause of death of the victim to be "mechanical asphyxia and sharp force injury of the  
2 neck"

3 The initial knife wounds to the neck of the victim were not necessarily in and of  
4 themselves fatal, and had the defendant sought medical aid at that point for the victim,  
5 his life may have been saved because emergency medical treatment was available  
6 within a few minutes had the defendant called 911

7 After no further noise emanated from the person of the victim, the defendant got  
8 a flat cart and loaded the victim onto it. The defendant then wheeled the victim's body  
9 down a ramp and rolled him off the cart into the water in the swale behind the Safeway  
10 Store. The defendant then ran to his car in front of the store, took off his bloody shirt  
11 and washed the blood off his arms and face with alcohol swabs from his first aid kit. He  
12 returned to the store and finished cleaning himself in the bathroom. He then got a mop  
13 and cleaned the blood in the trailer and the blood trail to the door. He took the mop  
14 head off and threw it in the trash compactor. He then clocked out for lunch and went to  
15 the break room. He lied to his supervisor by stating that he spilled pop on his shirt.  
16 People started asking the defendant where the victim was so the defendant clocked  
17 back in from lunch and joined others looking for him. One of the employees said she  
18 was going to look out back behind the store, and that scared the defendant because he  
19 knew they would find the victim's body. The defendant ran out the front of the store to  
20 the back to move the victim's body. The defendant had to get in water almost waist  
21 deep and pull the victim thirty or forty yards through the water and placed him next to  
22 some blackberry bushes. The defendant then returned to work. Later in his work shift,  
23 the defendant and two others went up to the roof of the Safeway Store with a bright  
24 spotlight to look for the victim. The defendant knew that the victim's body was not  
25 visible from the roof. When the defendant got off work at midnight, he drove his car  
26 behind the store near the body and lifted the victim's body into the trunk of his car. The  
27 defendant then drove his vehicle about twenty miles from the Safeway Store to a

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN  
SUPPORT OF AGGRAVATED EXCEPTIONAL  
SENTENCE

APPENDIX 2 4 JUDGMENT AND SENTENCE - 3

CLARK COUNTY PROSECUTING ATTORNEY  
1200 FRANKLIN STREET • PO BOX 5000  
VANCOUVER, WASHINGTON 98668-5000  
(360) 397-2261 (OFFICE)  
(360) 397-2230 (FAX)

1 desolate wooded area on Larch Mountain where he disposed of the body off of a forest  
2 road The defendant had to drag the victim's body down a hill and over a large log in  
3 order to hide it from view The victim's body was then covered with some limbs to  
4 further conceal it. The defendant had a difficult time leading police investigators back to  
5 the body in trying to find it again because of the remote location.

6 On January 16, 2001, the defendant participated in a taped recorded interview  
7 with police investigators from 2:38 a m to 3:29 a m (51 minutes) in which the  
8 defendant, while under oath and under penalty of perjury, emphatically denied knowing  
9 anything about the disappearance of the victim or his death

10 During the period of time referenced in the previous two paragraphs, the  
11 defendant demonstrated a lack of remorse by repeatedly moving and concealing the  
12 victim's body while purportedly assisting in the search for the victim, and by lying to the  
13 police officers

## 14 II CONCLUSIONS OF LAW

15 (1) The defendant's conduct during the commission of the current offense  
16 manifested deliberate cruelty to the victim, an "aggravating circumstance" pursuant to  
17 RCW 9 94A 390(2)(a)

18 (2) The infliction of multiple injuries by the defendant on the person of the victim  
19 is a statutory aggravating circumstance pursuant to RCW 9 94A 390(2)(d)(i)

20 (3) The defendant's efforts to conceal the crime which he committed by the  
21 repeated moving of the victim's body and ultimate concealment in a remote area is a  
22 non-statutory aggravating circumstance pursuant to RCW 9 94A 390

23 (4) The defendant showed no remorse at the time of the crime and through the  
24 period of time on January 16, 2001, when he lied to the police officers, a non-statutory  
25 aggravating circumstance pursuant to RCW 9 94A 390.

26 FINDINGS OF FACT AND CONCLUSIONS OF LAW IN  
27 SUPPORT OF AGGRAVATED EXCEPTIONAL  
SENTENCE

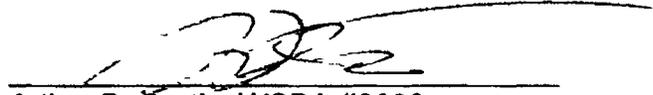
APPENDIX 2 4 JUDGMENT AND SENTENCE - 4

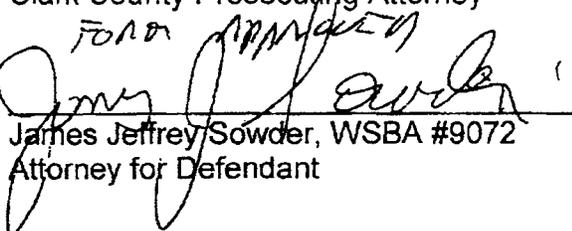
CLARK COUNTY PROSECUTING ATTORNEY  
1200 FRANKLIN STREET • PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 (OFFICE)  
(360) 397-2230 (FAX)

1 DATED February 11, 2002.

2   
3 HONORABLE BARBARA D JOHNSON  
4 JUDGE OF THE SUPERIOR COURT

5 Presented by

6   
7 Arthur D Curtis, WSBA #6092  
8 Clark County Prosecuting Attorney

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10 James Jeffrey Sowder, WSBA #9072  
11 Attorney for Defendant

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26 FINDINGS OF FACT AND CONCLUSIONS OF LAW IN  
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SENTENCE

APPENDIX 2 4 JUDGMENT AND SENTENCE - 5

CLARK COUNTY PROSECUTING ATTORNEY  
1200 FRANKLIN STREET • PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 (OFFICE)  
(360) 397-2230 (FAX)

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

STATE OF WASHINGTON,	)	
	)	NO. 34672-9-II
Appellant,	)	
v.	)	RESPONDENTS RESPONSE TO MOTION
	)	PURSUANT TO RAP RULE 17.3(a) TO
JAY RICHARD RICH,	)	STAY PROCEEDINGS PENDING THE
	)	DECISION BY WASHINGTON STATE
	)	SUPREME COURT ON ISSUE BEFORE
Respondent,	)	THIS COURT
<hr style="width: 100%;"/>	)	

COMES NOW, the defendant, JAY RICHARD RICH, in reply to the State's Motion to Stay Proceedings Pending the Decision by Washington Supreme Court as follows:

1. Procedural facts: Respondent was given an exceptional sentence on the basis of four factors by the trial court. The Court of Appeals overruled one of the factors and remanded the case for re-sentencing. The Court of Appeals review of the trial court's memorandum lead it to believe it could not clearly determine an exceptional sentence would still be granted had not all four factors been present.
2. Respondent returned to court for sentencing after oral argument on Blakely v. Washington 542 US 296 (2004), but prior to the rulings. His trial council incorporated the Blakely v. Washington arguments to Respondents case. Defendant agreed to a continuance to await the decision on Blakely v. Washington. After Blakely v. Washington had been decided however, the defendant did not agree to any further continuance to determine the states application of Blakely v. Washington. Shortly after State v. Hughes 154 Wn.2d 118 (2005) decided the

**EXHIBIT E**

application of Blakely v. Washington to pending Washington cases, the legislature enacted what is commonly known as the "Blakely Fix". The question then became whether the Blakely fix legislation would apply retroactively to the Respondent.

3. The trial court ultimately determined it did not apply as stated in its Memorandum Opinion and Findings of Fact and Conclusions of Law. Given the Respondents lengthy standard range of (22-26 years) the court ruled it would not proceed to sentencing to allow the State to request a stay of the sentencing to await the State Supreme Court's decision in pending cases as to whether or not, the Blakely fix legislation applies retroactively and is it unconstitutional.
4. Respondent has a constitutional (Article 1§ 10 of the Washington State Constitution) and statutory right to a speedy sentencing (RCW 9.94A.500). The State argues respondent is not prejudiced because of his extensive standard range. However, there is prejudice inherent in being held in limbo without a sentence. Although, Respondent has at least 22 years to do on his sentence, he is still entitled to know what his sentence is to be. The State should not be entitled to continue postponing sentencing; therefore, postponing protection of double jeopardy until a more favorable law comes into affect. Trial court legitimately postponed sentencing of which Respondent consented to, to hear the U.S. Supreme Courts decision of Blakely v. Washington. That decision went to a basic structural issue of whether defendant can be legitimately sentenced with an exceptional sentence. The States requests for continuance's now are simply based on wanting to find a more favorable application of Blakely v. Washington.
5. RAP 2.2 covers what decisions of the Superior Court may be appealed. RAP 2.2 (b) provides that a State may appeal in a criminal case only from listed Superior Court decisions and only if the appeal will not place the defendant in double jeopardy. In any event, they are all directed towards an appeal of an order terminating the case or having a fundamental impact on the parties, doing irreparable harm if not corrected promptly. There is no provision to stay a sentencing to see how the Supreme Court rules. RAP 2.3(b) covers discretionary review. Appellants motions does not satisfy its criteria; the Superior Court has not committed an

RESPONSE TO MOTION TO STAY PROCEEDINGS -2

obvious error which would render further proceedings useless.

Nor, has the Superior Court committed probable error with a decision that substantially alters the status quo or substantially limits the freedom of a party to act. The Superior Court has not so far departed from accepted or unusual courses of judicial proceedings to call for review by the appellant court. The trial court reviewed extensive materials provided by both parties and entered rulings consistent with case law.

6. Appellants motion to stay proceedings should be denied.

DATED this \_\_\_ day of May, 2006.

Respectfully submitted,

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JAMES J. SOWDER WSBA # 9072  
Attorney for Respondent

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**FILED**

JUL 27 2007

Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,  
  
Plaintiff,  
  
v.  
  
JAY RICHARD RICH,  
  
Defendant.

No. 01-1-00135-3

STATE'S AMENDED NOTICE OF INTENT  
TO SEEK AN AGGRAVATED  
EXCEPTIONAL SENTENCE

COMES NOW the Plaintiff, State of Washington, by and through its attorney, Arthur D. Curtis, Prosecuting Attorney and hereby gives notice of the State's Intent to seek an aggravated exceptional sentence pursuant to RCW 9.94A.535, RCW 9.94A.537, and EHB 2070 as enacted by the Washington State Legislature and signed into law by the Governor on April 27, 2007.

The State intends to seek an aggravated exceptional sentence on the following grounds:

- 1) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim, an "aggravating circumstance" pursuant to RCW 9.94A.535(3)(a).
- 2) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:
  - i) The current offense involved multiple incidents per victim, a statutory aggravating circumstance pursuant to RCW 9.94A.535(3)(d)(i).

**EXHIBIT** G

236

1  
2 3) The victim's injuries substantially exceed the level of bodily harm necessary to  
3 satisfy the elements of the offense, a statutory aggravating circumstance  
4 pursuant to RCW 9.94A.535(3)(y).

5 DATED this 27th day of July, 2007

6  
7   
8 Arthur D. Curtis, WSBA #6092  
9 Prosecuting Attorney

10 Service accepted and receipt of true copy  
11 acknowledged this 27 day of July, 2007.

12   
13 James J. Sowder, WSBA #9072  
14 Attorney for Defendant



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**FILED**

OCT 12 2001

JoAnne McBride, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK**

STATE OF WASHINGTON,	)	
	)	No. 01-1-00135-3
Plaintiff,	)	
v.	)	ORDER CONTINUING SENTENCING
JAY RICHARD RICH,	)	
	)	
Defendant.	)	

IT IS HEREBY ORDERED, ADJUDGED and DECREED that upon motion of the defendant for continuation of sentencing currently set for October 22, 2001, and the defendant having shown good cause, and the defendant having personally appeared and agreeing to the continuance, sentencing in the above-referenced case is continued until December 11, 2001 at <sup>1:30</sup>~~3:30~~ pm.

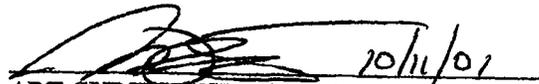
Dated this 12 day of October, 2001.

  
JUDGE BARBARA JOHNSON

Presented by:

  
JAMES J. SOWDER WSBA #9072  
Attorney for Defendant

Service accepted, consent to entry, notice of presentation waived.

 10/11/01  
ART CURTIS WSBA# 6092  
Prosecuting Attorney

ORDER - 1



James J. Sowder - Attorney at Law  
1600 Daniels Street - P.O. Box 27  
Vancouver, Washington 98666-0027  
Phone: (360) 695-4792 • Fax: 695-0227

**EXHIBIT I**

FILED

MAY 27 2004

JoAnne McBride, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, ) No 01-1-00135-3  
Plaintiff, )  
v. ) ORDER CONTINUING  
JAY RICHARD RICH, ) SENTENCING  
Defendant )

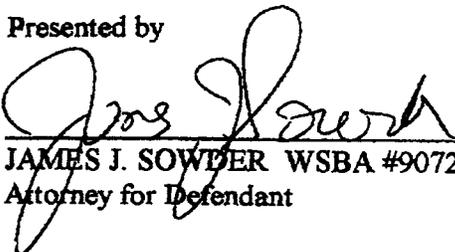
IT IS HEREBY ORDERED, ADJUDGED and DECREED that sentencing in the above-referenced case which is currently set for May 27, 2004, shall be continued with a review date of to be set after decision, 2004 at \_\_\_\_\_ AM / PM  
referred to below  
Defendant has waived speedy sentencing. The parties desire to wait for a decision in the case of Blakely v Washington, \_\_\_\_\_ US \_\_\_\_\_ (2004), in order to determine what the status of the law of sentencing on exceptional sentencing will be in the state of Washington.

Defendant shall be returned to the custody of the Department of Corrections pending sentencing in the above-referenced case.

Dated this 26 day of May, 2004.

  
JUDGE BARBARA JOHNSON

Presented by

  
JAMES J. SOWDER WSBA #9072  
Attorney for Defendant



ORDER - 1

James J. Sowder - Attorney at Law  
1600 Daniels Street - P.O. Box 27  
Vancouver, Washington 98666-0027  
Phone (360) 695-4792 • Fax 695-0227

EXHIBIT J

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Service accepted, consent to entry,  
notice of presentation waived.

  
\_\_\_\_\_  
JAY RICHARD RICH, Defendant

Service accepted, consent to entry,  
notice of presentation waived

  
\_\_\_\_\_  
ART CURTIS WSBA# 6092  
Prosecuting Attorney



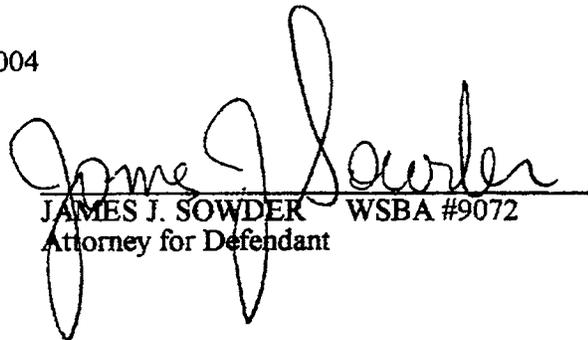


1           **GROUND FOR RELIEF AND ARGUMENT:** RCW 9 94A 500 requires a  
2 sentencing hearing shall be held within 40 days following conviction Upon good cause showing,  
3 or the agreement of the parties, the court may extend the time period for conducting a sentencing  
4 hearing

5           Article 1, § 10 of the Constitution of the State of Washington requires, "Justice in all  
6 cases shall be administered openly and without unnecessary delay "

7           Defendant is willing to waive his right to speedy sentencing He would like to be returned  
8 to the Department of Corrections to await the decision of Blakely v. Washington so that when  
9 he is sentenced again it will be for the final time

10  
11           DATED this 20<sup>th</sup> day of May, 2004

12  
13             
14           JAMES J. SOWDER WSBA #9072  
15           Attorney for Defendant

FILED

DEC 07 2004

JoAnne McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JAY RICHARD RICH,

Defendant.

No. 01-1-00135-3

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON THE COURT'S ORDER ON  
THE STATE'S MOTION FOR  
CONTINUANCE

On October 29, 2004, the parties appeared before the Court for consideration of Defendant's Motion for Sentencing within the Standard Range.

Defendant appeared personally and by and through his attorney, James J Sowder. The State was represented by Prosecuting Attorney Art Curtis.

Prosecuting Attorney Art Curtis moved for continuance until after the Washington State Supreme Court has made a decision on the application of Blakely v. Washington, 542 US \_\_\_\_ (2004). Among the issues to be decided is the authority of the court to empanel a sentencing jury.

Defendant objected to a continuance of his sentencing beyond two weeks.

The Court having heard arguments of counsel hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON THE COURT'S ORDER ON THE STATE'S  
MOTION FOR CONTINUANCE – Page 1 of 6

CLARK COUNTY PROSECUTING ATTORNEY  
1013 FRANKLIN STREET • PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 (OFFICE)  
(360) 397-2230 (FAX)

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SP

**EXHIBIT** m

FINDINGS OF FACT

- 1        1.        The Court of Appeals remanded Defendant's case for re-sentencing on the crime
- 2                    of Felony Murder in the First Degree (Robbery).
- 3        2.        The issue on remand was whether the Court would impose an exceptional
- 4                    sentence.
- 5        3.        Defendant's case was remanded and prior to appearing before the Court for
- 6                    sentencing, his attorney filed a motion to continue sentencing based on the
- 7                    pending United States Supreme Court case of Blakely v. Washington, of which oral
- 8                    argument had been given but no decision rendered. The Court agreed to continue
- 9                    sentencing
- 10        4.        Defendant agreed to waive speedy sentencing insofar as the time it took to obtain a
- 11                    decision in Blakely v. Washington, in an order signed May 26, 2004.
- 12        5.        Blakely v. Washington's opinion was rendered on June 24, 2004.
- 13        6.        Defendant filed a motion to bring the defendant back before the Court for imposition
- 14                    of sentence on June 29, 2004.
- 15        7.        The State filed a Motions and Memorandum requesting the Court empanel a jury on
- 16                    the issue of exceptional facts and then sentence the defendant
- 17        8        The Court requested briefing on the matter and was advised there were pending
- 18                    cases in the Washington State Court of Appeals and Supreme Court on the
- 19                    application of Blakely v. Washington in regards to sentencing in the state of
- 20                    Washington.
- 21        9.        The Court set a review date of October 29, 2004.
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10. On October 25, 2004, the Court of Appeals, Division I, State of Washington, issued an opinion in State v. Harris, citing (among other things) that the Court had inherent authority to empanel a sentencing jury to determine facts for an exceptional sentence.
11. Defendant's attorney prepared a response to State v. Harris and filed in with the Court on October 29, 2004.
12. Defendant's attorney agreed to a short continuance, no more than two weeks, for the Court and the State to consider Defendant's memorandum.
13. The State requested a continuance until an ultimate decision is made in the Washington State Supreme Court on the various pending appeal cases as to how to apply Blakely v. Washington.
14. Defendant has a minimum sentence of 24 years without an exceptional sentence.
15. The Washington State Legislature to date has not enacted any laws in response to Blakely v. Washington, amending The Sentencing Reform Act of 1984 or otherwise providing evidence of legislative intent or providing procedures in response to Blakely v. Washington for implementing a jury trial on sentencing issues, or redefining crimes to include aggravating factors
16. Defendant objected to any extensive continuance, specifically stating he did not want to have to argue in the future retroactivity of any legislation the State may enact effecting The Sentencing Reform Act.
17. Defendant and the deceased's family expressed the desire to have only one further sentencing hearing; with or without a jury.

18. If a jury trial is ordered, there are many unanswered questions as to how to instruct such a jury and what the jury may rule upon. If a jury verdict is not favorable to the defendant, that the defendant could appeal that decision and may be able to obtain a reversal based on pending law created by the Washington State Supreme Court. This would result in the requirement of another sentencing procedure.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter.
2. RCW 9.94A 500 (formerly 9.94A.110) provides.

“...the sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing.”

3. Although the time provision of RCW 9.94A.500 does not apply as the case has been remanded following appeal, the Court will determine whether there is “good cause” to continue sentencing.
4. In State v. Ellis, 76 Wn.App. 391, 884 P 2d 1360 (1994), the court held if a delay in sentencing is “purposeful or oppressive”, it violates speeding sentencing rights.

“A determination whether a delay is “purposeful” or “oppressive” is made by balancing the following the length and reason for the delay, the defendant’s assertion of his or her right, and the extent of prejudice to the defendant.”  
(State v Ellis, at 394.)

- 1           5.     The reason for the delay is the decision in Blakely v. Washington, which has left a  
2           number of issues for determination by the Supreme Court of Washington concerning  
3           exceptional sentences. Although allowing sufficient time for the Supreme Court of  
4           Washington to decide currently pending cases will necessitate some delay, there is  
5           no other way of achieving the objective of State and Defendant to have only one re-  
6           sentencing hearing, and to provide for judicial economy. Any decision of this court to  
7           proceed before decisions by the Supreme Court of Washington would involve  
8           further delay and lack of finality by appeal of this court's decision, and would be  
9           likely to result in more than one re-sentencing hearing.  
10  
11          6.     The length of delay is not precisely known, as there is no time schedule for decision  
12          from the Supreme Court of Washington of pending cases. However, this court has  
13          set review for January 27, 2005.  
14  
15          7.     No prejudice has been shown to Defendant. Defendant has a minimum sentence of  
16          twenty-four years to serve; continuation of sentencing will not affect his immediate  
17          incarceration. No other issues such as availability of evidence have been raised  
18          Defendant has raised the possibility of future legislative enactment, and the potential  
19          for argument about retroactivity of any such enactment. While this court cannot  
20          anticipate or rule on any possible future legislation, the Defendant has stated for the  
21          record his objection to retroactive application of any legislation that would prejudice  
22          Defendant.  
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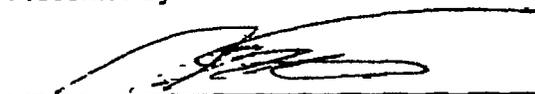
8. Balancing the factors set forth above, the court concludes good cause has been shown to delay sentencing for a reasonable period of time to receive direction from the Supreme Court of Washington. The alternative of this court proceeding to decision on the pending legal issues would result in further delay for appeal of those rulings and the possibility of more than one re-sentencing hearing..

9. A hearing for Review is set for January 27, 2005. The Defendant has waived his presence at this hearing.

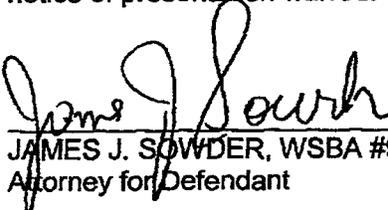
Dated this 7 day of December, 2004.

  
THE HONORABLE BARBARA D. JOHNSON  
JUDGE OF THE SUPERIOR COURT

Presented by

  
ARTHUR D. CURTIS WSBA# 6092  
Prosecuting Attorney

Service accepted, consent to entry,  
notice of presentation waived.

  
JAMES J. SOWDER, WSBA #9072  
Attorney for Defendant

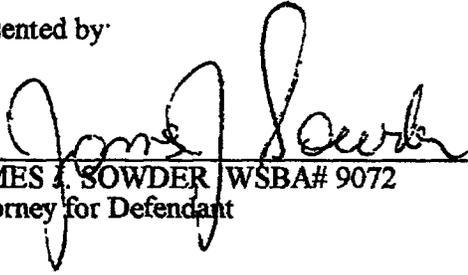
FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON THE COURT'S ORDER ON THE STATE'S  
MOTION FOR CONTINUANCE - Page 6 of 6

CLARK COUNTY PROSECUTING ATTORNEY  
1013 FRANKLIN STREET • PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 (OFFICE)  
(360) 397-2230 (FAX)



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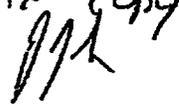
Presented by



JAMES J. SOWDER WSBA# 9072  
Attorney for Defendant

Service accepted, consent to  
entry, notice of presentation waived

Signature attached to FAX copy  
ART CURTIS WSBA# 6092  
Prosecuting Attorney



ORDER - 2

James J. Sowder - Attorney at Law  
1600 Daniels Street - P O Box 27  
Vancouver, Washington 98666-0027  
Phone (360) 695-4782 - Fax: 695-0227

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK**

STATE OF WASHINGTON,	)	No. 01-1-00135-3
Plaintiff,		
v	)	ORDER CONTINUING SENTENCING
JAY RICHARD RICH,		
Defendant	)	

The parties appeared in court on January 27, 2005 for sentencing review in the above-referenced case. The defendant was not present but was represented by and through his attorney, James J. Sowder, Attorney at Law, and had previously waived his presence. The State was represented by Prosecuting Attorney Arthur Curtis.

Defendant would reaffirm his desire to go forward with sentencing.

The court having considered previous argument of counsel and present argument of counsel,

**IT IS HEREBY ORDERED, ADJUDGED and DECREED** that the court reaffirms its previous findings of fact and conclusions of law continuing sentencing until resolution of the application of Blakely v. Washington, 542 US \_\_\_ (2004) for sentencing in the state of Washington, by the Washington State Supreme Court.

A sentencing review date is set for \_\_\_\_\_, 2005

Dated this \_\_\_\_\_ day of January, 2005.

\_\_\_\_\_  
JUDGE JOHNSON

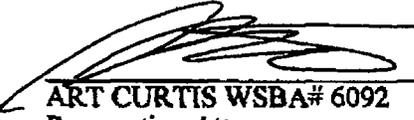
ORDER - 1

James J. Sowder - Attorney at Law  
1600 Daniels Street - P.O. Box 27  
Vancouver, Washington 98666-0027  
Phone: (360) 695-4792 - Fax: 695-0227

1 Presented by

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3  
4 JAMES J. SOWDER WSBA# 9072  
Attorney for Defendant

5 Service accepted, consent to  
6 entry, notice of presentation waived

7  
8  # 1/26/05  
9 ART CURTIS WSBA# 6092  
Prosecuting Attorney

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ORDER - 2

James J. Sowder - Attorney at Law  
1600 Daniels Street - P O Box 27  
Vancouver Washington 98666-0027  
Phone: (360) 695-4752 - Fax: 695-0227

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**FILED**  
**MAR 16 2006**  
Anne McBride, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK**

STATE OF WASHINGTON,	}	No. 01 1 00135 3
Plaintiff,	}	DEFENDANT'S PROPOSED
v	}	ORDER ON COURTS MEMORANDUM
JAY RICHARD RICH,	}	OPINION ON DECEMBER 12, 2005
Defendant.	}	

The State of Washington is represented by Prosecuting Attorney Arthur Curtis. The defendant appeared personally and by and through his counsel James J Sowder, attorney at law. The court having heard the argument of counsel on the issue of impaneling a jury to hear aggravating factors and reviewed the party's memorandums of law, the court entered a memorandum opinion on December 12, 2005 denying the States motion to empanel a jury to determine aggravating factors and concluded the defendant should be re-sentenced within his standard range. Based on the memorandum opinion it is now

**ORDERED ADJUDGED AND DECREED: That**

1 The state's motion to empanel a jury to determine aggravating circumstances in support of state's request for an aggravated exceptional sentence is denied. As pointed out in the Court's Memorandum State v Fero 125 Wn App 84 (2005) is controlling and mandates' defendant is to be sentenced within the standard range

2 There was no indication in State v Fero that SB 5477 (often called the Blakely fix legislation) would be retroactive to cases such as Defendant

3. Defendant is entitled to be sentenced within his standard range in a speedy manner. Almost two years (in May) will have passed since Defendant has been remanded. The first

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J

ORDER - 1

James J Sowder - Attorney at Law  
1600 Daniels Street - P O Box 27  
Vancouver, Washington 98666-0027  
Phone: (360) 685-4782 - Fax: 995-0227

**EXHIBIT** ○

1 continuance was requested by the defendant after he incorporated by reference the arguments  
2 made at oral argument in *Blakely vs. Washington* pending decision by the Supreme Court of the  
3 United States. After a decision was rendered by the Supreme Court of the United States  
4 defendant opposed all subsequent continuances in sentencing. The continuances were granted  
5 at the request of the state over defendant's objections. RCW 9A.04.050 provides that sentencing  
6 hearing shall be conducted within forty days following conviction unless the court extends the  
7 time for good cause shown. A delay in sentencing does not violate defendant's speedy  
8 sentencing unless the delay is purposeful or oppressive, *State v. Anderson* 92 Wn App 54, 59-60  
9 (1998). Whether a delay is purposeful or oppressive is determined by considering the length and  
10 reason for the delay, whether defendant asserted his rights, and the extent of the prejudice to the  
11 defendant. The first delay in Defendant's case for sentencing to await the determination of the  
12 constitutional validity of Washington's sentencing procedure (waiting for the decision in *Blakely*  
13 *vs. Washington*) Not to have delayed would have risked sentencing Defendant under a  
14 constitutional invalid procedure. The subsequent delays over Defendant's objections were to  
15 find guidance on the implementation of *Blakely v. Washington*. Any further delay is simply  
16 maneuvering by the State to find a more advantageous law to sentence Defendant under  
17 Defendant has asserted his right for speedy sentencing. The waiver executed by him at the  
18 beginning was only until the United States Supreme Court decided *Blakely vs. Washington*.  
19 Defendant is prejudiced by continued delays in sentencing. The right to finality in a sentence is  
20 revealed in such principles as *res judicata*, collateral estoppel and double jeopardy. Not knowing  
21 his final sentence is a burden the Defendant should not have to continue to bear.

22 4 The deceased victim's family does not have standing to intervene and request  
23 postponement of the sentence. Article I Section 35 of the Constitution of the State of  
24 Washington gives victims representatives the right to make a statement at sentencing subject to  
25 the same rules of procedure that govern the defendant's rights. No rules exist that make the  
26 victims representatives an independent party. The Prosecuting Attorney is required to act on  
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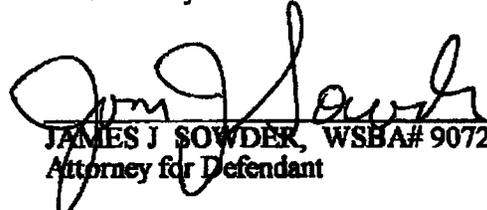
1 behalf of the State as a whole not any particular sub group within the state.

2 5 This order is entered consistent with the Court's memorandum opinion of December 12,  
3 2005 and incorporates by reference the memorandum opinion  
4 Defendant shall be brought before this court for sentencing forthwith  
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7 DATED this 16 day of March, 2006  
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12 JUDGE JOHNSON  
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14  
15 Presented by

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17   
18 JAMES J. SOWDER, WSBA # 9072  
Attorney for Defendant

19 Service accepted and consent to entry,  
20 notice of presentation waived

21  
22 \_\_\_\_\_  
ARTHUR CURTIS, WSBA # 6092  
23 Prosecuting Attorney

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ORDER - 3

James J. Sowder - Attorney at Law  
1800 Daniels Street - P O Box 27  
Vancouver, Washington 98668-0027  
Phone (360) 685-4782 • Fax 685-0227

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**FILED**

**APR 17 2007**

Sherry W. Parker, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK**

STATE OF WASHINGTON,	)	
	Plaintiff,	)
v.	)	NO. 01-1-00135-3
JAY RICHARD RICH,	)	AFFIDAVIT OF JAY RICHARD RICH
	Defendant.	)
<hr/>		WAIVING HIS PRESENCE AT
		SENTENCING

STATE OF WASHINGTON )  
 ) :ss  
 County of Clark )

I, JAY RICHARD RICH, being first duly sworn under oath, deposes and states as follows:

I am the Defendant in the above-referenced case. I am currently incarcerated at the Department of Corrections Facility at Stafford Creek Corrections Center, Aberdeen, Washington. I have obtained a good job here and if I am transported to Clark County jail for re-sentencing on my case, I will likely lose the job. The job is with the heating and air-conditioning unit. If I lose the job, it may take several years to get it back, if ever. I was able to get the job because I was in the right place at the right time.

I wish to waive my presence at sentencing. I understand I will be sentenced to the maximum of my standard range. I request the court to simply amend my previous judgment and sentence with an order amending the judgment and sentence so I will not have to be fingerprinted.

AFFIDAVIT OF JAY RICHARD RICH - 1

*James J. Sowder - Attorney at Law*  
 1800 Daniels Street - P.O. Box 27  
 Vancouver, Washington 98666-0027  
 Phone: (360) 695-4792 • Fax: 695-0227

**EXHIBIT P**

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Dated this 12<sup>th</sup> day of April ~~March~~, 2007.

Jay Rich  
JAY RICHARD RICH

SUBSCRIBED AND SWORN to before me this 12 day of March, 2007.



Conrada A. Villa-McGrath  
NOTARY PUBLIC in and for the State of  
Washington, residing at Gray's Harbor  
My Commission expires 10/04/10.

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**FILED**

**MAR 31 2005**

by Anne McBride, Clerk (CJ)

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK**

STATE OF WASHINGTON, )  
Plaintiff, )

v )

JAY RICHARD RICH, )  
Defendant )

No 01-1-00135-3

**ORDER CONTINUING SENTENCING**

~~\_\_\_\_\_~~

The parties appeared in court on March 29, 2005 for sentencing review in the above-referenced case. The defendant was not present but was represented by and through his attorney, James J. Sowder, Attorney at Law, and had previously waived his presence. The State was represented by Prosecuting Attorney Arthur Curtis.

Defendant would reaffirm his desire to go forward with sentencing.

The court having considered previous argument of counsel and present argument of counsel,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the court reaffirms its previous findings of fact and conclusions of law continuing sentencing until resolution of the application of Blakely v. Washington, 542 US \_\_\_ (2004) for sentencing in the state of Washington, by the Washington State Supreme Court

A sentencing review date is set for May 26 9:00 AM, 2005.

Dated this 29 day of March, 2005

*Barbara Johnson*  
JUDGE JOHNSON 189

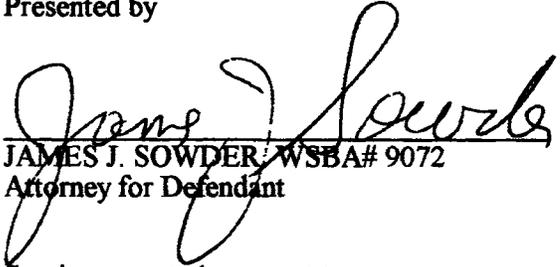
ORDER - 1

**EXHIBIT Q**

James J. Sowder - Attorney at Law  
1800 Daniels Street - P.O. Box 27  
Vancouver, Washington 98666-0027  
Phone: (360) 695-4792 • Fax: 695-0227

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Presented by



JAMES J. SOWDER WSBA# 9072  
Attorney for Defendant

Service accepted, consent to  
entry, notice of presentation waived

 8/29/05

ART CURTIS WSBA# 6092  
Prosecuting Attorney

ORDER - 2

James J. Sowder - Attorney at Law  
1600 Daniels Street - P.O. Box 27  
Vancouver, Washington 98666-0027  
Phone: (360) 695-4792 - Fax: 695-0227

FILED  
COURT OF APPEALS  
DIVISION II

10 FEB 18 PM 2:24

STATE OF WASHINGTON

BY  DEPUTY

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

STATE OF WASHINGTON,	)	
	)	NO. 37452-8-II
Plaintiff/Respondent,	)	
	)	DECLARATION OF MAILING
v.	)	
	)	
JAY RICHARD RICH,	)	
	)	
<u>Defendant/Appellant.</u>	)	

I, REBA D. GRAHAM, certify and declare under penalty of perjury and the laws of the State of Washington, the following is true and correct:

On the 16th day of February, 2010, I deposited in the United States mail in a properly stamped, addressed envelope, a copy of this declaration and a copy of Appellant's Brief to the following:

David Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

Arthur D. Curtis  
Senior Prosecuting Attorney  
PO Box 5000  
Vancouver, WA 98666-5000

Jay Richard Rich, DOC#830455  
Stafford Creek Correctional Center  
191 Constantine Way  
Aberdeen, WA 98520

DECLARATION OF MAILING -1

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DATED this \_\_\_ day of February, 2010.

  
REBA D. GRAHAM

DECLARATION OF MAILING -2