

No. 38014-5-II

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

STATE OF WASHINGTON,

Respondent,

Vs.

JOHN K. MCNEAL

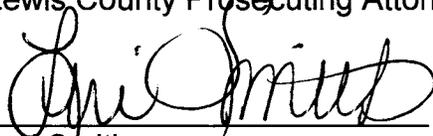
Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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**RESPONDENT'S STATEMENT OF ISSUES PRESENTED FOR
REVIEW**

1. Whether a sentencing jury may be impaneled pursuant to RCW 9.94A.537(2) to consider the alleged aggravating factor in RCW 9.94A.535(2)(c), which is referenced by, but not expressly listed in, RCW 9.94A.535(3), where an exceptional sentence was previously imposed and a new sentencing hearing is required on remand due to a Blakely error.

2. Whether the notice provision of RCW 9.94A.537(1) applies to cases remanded for resentencing due to a Blakely error where the State again requests an exceptional sentence be imposed pursuant to RCW 9.94A.537(2), or where the State seeks to impose an exceptional sentence on remand under RCW 9.94A.535(2)(c).

SUMMARY OF STATE'S ARGUMENT

Respondent concedes that in its zeal to comply with Blakely on remand, the State likely misconstrued the legislature's "Blakely/Pillatos fix" statutes, when it based its request to impanel a sentencing jury on the aggravating factor in RCW 9.94A.535(2)(c). If this Court agrees, then the trial court's order impaneling a jury based upon the State's analysis cannot stand. However, if this Court finds that factor cannot be considered by a jury, since the

aggravating factor in RCW 9.94A.535(2)(c) may be considered *by the trial court* as a basis to impose an exceptional sentence, the proper remedy is to remand this case for resentencing to allow the trial court to consider that factor.

McNeal's interpretation of the notice provision in RCW 9.94A.537(1) flies in the face of the expressed intent of the legislature when it amended the sentencing statutes to comply with Blakely/Pillatos. McNeal's interpretation nullifies the 2007 amendments to the Sentencing Reform Act, and renders subsection (2) meaningless. This cannot be what the Legislature intended. But McNeal's interpretation of the notice provision would also extend to exceptional sentences properly considered and imposed by the court. This Court should not follow such reasoning. Accordingly, this Court should find that RCW 9.94A.537(1) does not apply to cases remanded for resentencing, where the State again seeks an exceptional sentence on remand--regardless of whether the aggravating factors are considered by the court or by a jury.

RESPONDENT'S STATEMENT OF THE CASE

Introduction:

The procedural history of this case is somewhat complicated and the record regarding the Blakely issues discussed on remand

is also a bit confusing. But the record also shows that the State and the trial court agonized over the best way to protect McNeal's right to a jury on the aggravated sentencing factors, while at the same time trying to abide by this Court's latest ruling in this case. If nothing else, this record shows that applying the law to post-trial cases like this in the wake left by Blakely, is a bit like walking through a field riddled with landmines. Respondent hopes that setting out parts of the record in detail will help all of us better understand why the State and the trial court made the decisions they did after remand by this Court. Doing so make this response a bit long, but it also better sets the scene for understanding the argument that follows.

Procedural History and Proceedings on Remand

Appellant John McNeal was convicted by a jury on September 18, 1997, of: Count I-- vehicular homicide; Count II, -- vehicular assault; Count III--possession of methamphetamine with intent to deliver. CP 104-113. At sentencing on October 16, 1997, the trial court imposed an exceptional sentence in the form of consecutive sentences, and an above-range sentence on Count III (the drug charge). State v. McNeal, 98 Wn.App. 585, 991 P.2d 649 (1999). The sentences on each count were listed as follows: Count

I--116 months; Count II--84 months; Count III 240 months. The sentences were consecutive so the total sentence was 440 months. McNeal, supra at 597. McNeal's convictions and sentence were affirmed in his direct appeal. Id. Then, In State v. McNeal, 140 Wn.2d 1013, 5 P.3d 8 (2000), review was granted in part, and was affirmed by State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2002).

McNeal then filed a Personal Restraint Petition (PRP), claiming that the sentence imposed on the drug conviction (Count III), together with the community placement term, exceeded the statutory maximum for the crime. June 9, 2006, this Court granted McNeal's petition and remanded for vacation of his sentence, and for resentencing. In re Personal Restraint Petition of John McNeal, "Order Granting Petition," Court of Appeals case number 33894-7-II (June 19, 2006). In that Order, this Court further notes that some of the additional issues McNeal had raised in his supplemental brief addressing additional sentencing issues (not accepted by this Court) would be better raised and considered in the trial court upon resentencing. Id., page 2.

At the September 29, 2006 resentencing hearing on remand, the trial court addressed the issues that McNeal had raised in his supplemental PRP brief, including McNeal's claim that the ruling of

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403(2004), should apply to his case upon resentencing. State v. McNeal, 142 Wn.App. 777, 175 P.3d 1139 (2008). The trial court disagreed at resentencing in 2006, and ruled that Blakely did not apply because McNeal's case was final before Blakely was issued. McNeal, 142 Wn.App. at 784; CP 111. The trial court then reimposed an exceptional sentence, including running the sentences consecutively. McNeal, 142 Wn.App. at 785. The total sentence imposed at the 2006 resentencing was 428 months of confinement. Id. This again included exceptional consecutive sentences. CP 106, 109-113. Among several factors forming the basis for the exceptional sentence imposed upon resentencing in 2006 were the following, as found by the trial court and as relevant here :

2.2 RCW 9.94A.535(2) authorizes a sentencing court to impose an exceptional sentence if the defendant committed multiple offenses and the defendant's high offender score would result in some of the current offenses going unpunished.

2.3 This court adopts for resentencing purposes the findings of the original sentencing judge as entered on 16 October 1997.

* * *

2.5 At the time judgment was rendered in this case, pursuant to State v. Stephens 116 Wn.2d 238, 243 (1991), an exceptional sentence is justified as to each count, based

on defendant's high offender score coupled with multiple current convictions, which is a basis for an exceptional sentence.

2.6 As to Counts I and II, the defendant's high offender score combined with multiple offenses is such that a standard sentence would result in crimes for which there is no additional penalty, which is a basis for an exceptional sentence, pursuant to Stephens.

CP 112, 113(2006); State v. McNeal, 142 Wn.App. at 788. After resentencing in 2006, McNeal again appealed his sentence, arguing *inter alia*, that the trial court erred when it ruled that Blakely did not apply at his resentencing, and that it was error for the trial court to impose exceptional sentences based on its own factual findings, rather than on factual findings by a jury. Id.

On appeal, the State conceded that Blakely should have been applied at the 2006 resentencing hearing because McNeal's sentence had been vacated for an entirely new sentencing hearing (rather than just to amend the sentence), and this Court agreed. Id. at 781, 786, 787 (where this Court noted, "had we simply remanded this case for amendment of the judgment and sentence, our analysis would likely be different"). This Court then again remanded this case for resentencing--this time due to a Blakely error, and expressly noted that on remand, "[u]nder the 2007 amendments to RCW 9.94A.537, the trial court may impanel a jury

to make the necessary factual findings to support any potential exceptional sentence." Id.

On remand in June, 2008, the State again requested an exceptional sentence, relying upon the 2007 amendments to RCW 9.94A.537, as well as this Court's ruling in its most recent opinion in this case. State v. McNeal, 142 Wn.App. 777, 175 P.3d 1139 (2008) ("unless McNeal shows that the 2007 amendments do not apply to him or that the amendments are otherwise invalid, the trial court will have the authority to impanel a jury to make new exceptional-sentence factual determinations on remand"). On remand in 2008, the State at first selected four of the aggravating sentencing factors previously relied upon for the exceptional sentence, in support of its motion to impanel a sentencing jury. CP 79-81. However, the State changed course, and said it would seek an exceptional sentence that could instead be properly considered and imposed by the court alone, pursuant to RCW 9.94.535(2)(c); 06/06/2008 RP 2,3. But when the State informed the trial court it planned to rely on an aggravator that could be considered by the court without a jury, the trial court was very concerned that doing so might again violate Blakely, as well as the mandate of this Court. 06/08/08 RP 4, 8,9.

Indeed, the uncertainty, confusion, and differing opinions surrounding how Blakely could be correctly complied with upon resentencing in this case can be seen from reading the reports of proceedings, for example, at the June 6, 2008, hearing on remand the following exchange took place:

DEFENSE COUNSEL: The State was attempting to consider impaneling a jury. I think the State may be withdrawing that claim at this time. . . .

THE COURT: Well, they're not withdrawing it as far as I'm concerned.

* * *

PROSECUTOR: [A]t this point, the State is not going to be seeking to impanel[sic] a jury. I think we have the right to do that, but the State has chosen to focus--basically a strategic move on our part, to focus on just the defendant's criminal history as a basis of an exceptional sentence. As I stated in my brief, statute 9.94A.535 allows the court to hear that without a jury, and it's our intent to ask the Court to set this matter for a sentencing hearing, to be heard by the Court without a jury so we can present testimony and other evidence to the Court to consider, including the--the offender score of the defendant.

THE COURT: Judge Hunt and the Court of Appeals decision, the last line of that opinion specifically stated that the court could impanel a jury to consider the aggravating factors. Are you telling me now that you're ignoring all of the other aggravating factors, except criminal history; therefore, you don't think you need to have a jury; is that what you're telling me?

PROSECUTOR: Yes, and the choice is not - - I mean, the Court used the word "ignore." . . . [I]t's actually a strategic choice on our part, given those particular factors and the fact

the sentencing format has now eliminated a lot of those factors for consideration by the Court. * * * As stated in my brief, the State's position on that is the Court in its . . . the Court of Appeals, Division II, in its opinion . . . specifically stated that we didn't have to allege that particular criminal history as part of the element of the crime. That's not something . . . the State has to prove to a jury. It's something the Court can consider outside the presence of a jury.

06/08/08 RP 2-5. After reconsidering its position, the State then made a "hybrid" choice of sorts when it ultimately decided to go forward on the aggravating factor found in the "judge-may--consider- it" provision in RCW 9.94A.535(2)(c), but asking that a jury be impaneled to hear that factor nonetheless. CP 28,29.

McNeal objected to the State's decision, and, as shown by the following detailed excerpts from the proceedings held on July 2, 2008, the trial court again voiced its concerns about complying with this Court's ruling and Blakely, and explained how it ultimately came to what was obviously not an easy decision, given the "Catch 22" situation presented by the thorny resentencing issues in this case. The following indented section of quotes comes from the July 2, 2008, hearing:

DEFENSE COUNSEL: The Court entered its ruling last time we were addressing the situation that the State was allowed to provide notice under --of a factor as set forth in subsection 3 of 535 in order to allow a jury to be impaneled. The State has filed its notice. The notice does not include any alleged factors under subsection 3. So we're--we're kind

of back to the question of whether a jury can be impaneled under the circumstances, and I would submit that the Court does not have the power to do that. The legislature does not provide for this procedure. * * * The Court may impanel a jury to consider any alleged aggravating circumstances listed in 535, subsection 3. . . . So the State does not have the authority to provide notice of something under--other than subsection 3 and then ask that the jury be impaneled.

This specific issue was addressed in State v. Vance, a case that I cited to the Court previously in my memorandum. . . . Vance goes into many other things, but they specifically addressed this precise issue. The State attempted to request a jury for a factor that was not set forth in subsection 3, and the Court of Appeals - -

THE COURT: The Vance factors, though, were not in subsection 2 either, right?

DEFENSE COUNSEL: Right. . . . it's Mr. McNeal's position that the Court does not have the authority to impanel a jury to consider the aggravating factor as alleged by the State here.

THE COURT: How do I get around the specific ruling of the Court of Appeals that the prosecuting attorney's office in Lewis County could impanel a jury to determine the aggravating factor? Isn't that the law of the case? [p.5]

DEFENSE COUNSEL: . . . The Court of Appeals was not advised nor were they aware that the State would allege something other than subsection 3.

THE COURT: Judge Hunt, in the Court of Appeals' decision said, at Page 2, "Accordingly, we vacate McNeal's sentence and we remand again for resentencing under Blakely." Under the 2007 amendments, RCW 9.94A.537, "[t]rial court may impanel the jury to make the necessary factual findings to support any potential exceptional sentence." Now, nobody took an appeal for that. Nobody asked for reconsideration. My question to you, again, is: Is

that not the law of the case? Am I not obligated to follow the law of the case?

* * *

THE COURT: [The deputy prosecutor is] arguing that the procedure under 9.94A.535 --537 rather--well, 535 first, when it talks about exclusive list, what it means basically is you can't go outside those lists except for the ones that are listed in subsection 2. . . . So the real question here is: Can the State piggy back a subsection 2 factor, which, according to the statute, is supposed to be decided by the judge, into a jury trial question under subsection 3 and under 9.94A.537? That's the issue that I see. And your position is no? [p. 6,7]

DEFENSE COUNSEL: . . . [U]nder the language in 537, where they specifically refer to, "The court may impanel the jury in considering any aggravating factor listed in 535, sub 3" that controls.

* * *

PROSECUTOR: Well, the State's position is that it's a poorly worded statute, I think. . .

THE COURT: Well, I don't disagree with that.

PROSECUTOR: . . . if you look at it in terms of its consistency of what supposedly the legislature intended, you have --I mean, under [defense counsel's] reading, it could potentially lead to results where we have two separate trials because it's two set of factors. I'm not sure they intended that. Secondly, the law of the case . . . the Court of Appeals did say, any of the factors listed. And lastly, this particular factor was one of the few . . . that was in the initial consideration by the Court in its initial sentencing in this case, so it was before the Court of Appeals. . . . [p.7]

* * *

THE COURT: If I just say we're going to have a hearing by the judge under subsection 2 and not subsection 3, isn't there a recent case out there where this--you're not arguing too lenient. You're arguing current offenses from

being unpunished because of the . . . offender score. . . .
isn't any case on that aspect, is there?

PROSECUTOR: I couldn't find one.

COURT: Well, isn't there a relatively recent case or
more than one case where they dealt with the issue of
clearly too lenient?

PROSECUTOR: Yes, I believe so.

COURT: Okay. If you follow the logic and argument
about clearly too lenient, didn't they--correct me if I'm wrong,
didn't they determine you still need a jury for that? . . . well,
if you follow that same line, then logically does it follow that
you have to have a jury for this factor as well?

PROSECUTOR: I would expect so your honor. . . .

COURT:[to defense counsel] . . . I'm going to direct that Mr.
McNeal is entitled to and will have a jury determine whether
or not the criteria requested by the State for an aggravating
factor, multiple offenses and his offender score result and
[sic] some of the offenses going unpunished, aside from your
argument that there's no authority to do that, how is he
harmed? Isn't it better having a jury than a judge?

DEFENSE COUNSEL: . . . All I can say is that I don't
believe the Court has jurisdiction to do that. . . .

COURT: [to defense counsel] . . . If I were to rule today
that. . . the State's version of how to construe the statute is
correct when they're talking about exclusive list, that means
an exclusive list other than adding in the four factors that are
listed in subsection 2 in 9.94A.535, subsection 2. . . .
subsection 2(c) rather, is that something that the defense
would consider requesting discretionary review on before we
have a trial? * * * On the other hand, if there's no other
authority to try Mr. McNeal by jury --it's got to be one way or
the other, as I see it. The authority is there for a judge to do
it. If I go ahead and say, no, we're not going to have a jury.
We'll have a judge, if the Court determines there's a basis for

the aggravating factor and then resentencing Mr. McNeal under the . . . factoring in the aggravating factor and he appeals that again, we run the risk of the Court of Appeals or the Supreme Court saying, no, he's entitled to a jury under Blakely, notwithstanding whatever the statute says. . . . On the other hand, if I go ahead and rule that he's entitled to a jury on the matter, we try the case to a jury and again the jury comes back with a finding . . . of no, case over. . . . if it comes back with a finding of yes, then again he appeals that, then we're in a situation where the defense argues there wasn't any authority for this in the first place. . . . You either have an authority to do it by the court without a jury, or you've got the authority to have a jury do it notwithstanding the way the legislature wrote the statute. It can't be both ways, and I don't think it can be either. I think the legislature's intent here is that there had to be a method by which to get around Blakely and allow an individual to be sentenced to an exceptional sentence based upon a find[ing] of the aggravating factors. What's the State's position on that? [p.10, 11]

PROSECUTOR: . . . the State's position is that we should have a jury

COURT: All right. I'm going to enforce the issue. I'm ruling that, notwithstanding the language references in 9.94A.537 to the procedures and the . . . aggravating factors listed in subsection 3 of RCW 9.94A.535, that inasmuch as the factors set forth in 9.94A.535 subsection 3 are exclusive except as to the factors listed in 9.94A.535 subsection 2. . . . inasmuch as the statute requires those factors to be determined by a judge and as it appears to me that Mr. McNeal is entitled to have a jury determine at least this one of those four factors that are identified in that subsection of the statute, that the State is entitled to convene a jury to hear and decide the aggravating factor set forth in 9.94A.535, subsection 2(c), specifically the defendant has committed multiple offenses and the defendant's high offender score results in some of the current offenses going . . . unpunished. . . . [p.11,12]

I'm also willing to stay the proceedings to allow the defense to file a petition for discretionary review with the

Court of Appeals . . . or perhaps even ultimately if they can get the Supreme Court to accept direct review, we can get a definitive ruling one way or the other. . .

But again, it seems to me we're in catch 22 here. If the Court says, as I've just gone through saying, he's entitled to a jury, then he's in a situation where he has to go through a jury trial. . . . on the other hand, if I say no, he's not entitled to the jury, the State, by statute as least, is still entitled to ask a judge to decide those factors. . . . But I still don't think that the trend in the cases that have been coming down from the Court of Appeals and Supreme Court indicates anything other than that these things should be determined by a jury under the Blakely decision and the cases that have adopted it [p.12]

Sometimes the legislature thinks they're writing a statute that says x, in fact by the time the courts get through interpreting it, it's something other than that. I don't want to say no jury, go ahead and have a hearing and make a determination and end up resentencing Mr. McNeal, only to have them send the thing back again and say, no, you should have had a jury. On the other hand, if we do a jury and they say no, you shouldn't have a jury because there's no jurisdiction. . . then you're left with, okay, exactly how do we do this? [p. 14]

If the Court of Appeals - - if the course of the stay [sic] is going to throw out the idea that someone, who has a case like Mr. McNeal's where he was ...[given] an exceptional sentence, because of N, the sentence was vacated and he comes back for resentencing and then it's determined that there is no method by which the State can again ask for a[n] aggravating sentence based on aggravating factors, I think it's important that either the Court of Appeals or Supreme Court say that, and not one trial judge in one of the 39 counties. So that's where I'll leave it.

07/02/08 RP 3-14. And so it is that the trial court granted the State's motion to impanel a sentencing jury to hear the aggravator set out in RCW 9.94A.535(2)(c) ("the defendant has committed

multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.") Id.; CP 28, 29. This factor in RCW 9.94A.535(2)(c), was one of the factors previously relied upon to impose the exceptional sentence at McNeal's resentencing hearing in 2006. CP 112,113; CP 28-29 (filed June 20, 2008).

McNeal opposed impaneling a jury to consider an exceptional sentence, claiming in the first place that because he had not received "notice" that an exceptional sentence was being sought as provided in RCW9.94A.537(1), the State could not seek an exceptional sentence on remand at all. CP 62-74; CP 76-77. McNeal further argued that because the aggravating factor ultimately selected by the State appears in RCW 9.94A.535(2)(c), and is not specifically listed in RCW 9.94A.535(3), a jury could not be impaneled to consider that factor under RCW 9.94A.537(2), and Vance, supra. The State responded to McNeal's arguments in the "States Memorandum of Authorities re: Jury Trial for Aggravating Factor." CP 26,27(filed July 1, 2008). The State explained in that memorandum that it interpreted RCW 9.94A.537(2) and RCW 9.94A.535(3)(which references the factors in RCW 9.94A.535(2)) as permitting the court to impanel a jury to consider the aggravator

found in RCW 9.94A.535(2)(c). Over McNeal's objection, the trial court granted the State's motion to impanel a jury to consider the aggravating sentencing factor set out in RCW 9.94A.535(2)(c). CP 24, 25 (Order Authorizing Jury to Be Impaneled, filed July 14, 2008).

At the same time, the trial court certified for consideration by this Court the issues of whether a jury could be impaneled on remand to hear the aggravator in RCW 9.94A.535(2)(c), said section being referenced by, but not specifically named in, RCW 9.94A.535(3). And, whether the notice provision in RCW 9.94A.537(1) applies to "exceptional sentence" cases remanded for resentencing where the State seeks to impanel a jury on remand to consider aggravating factors pursuant to the procedure set out in RCW 9.94A.537(2).¹ Specifically, the trial court held:

IT IS FURTHER ORDERED ADJUDGED AND DECREED that either party may seek discretionary review of the Court's Order set forth above. . . .

IT IS FURTHER CERTIFIED pursuant to RAP 2.3(b)(4) that the Defendant has raised the legal issue whether the Court has jurisdiction to impanel a jury pursuant to RCW 9.94A.537(2) for the purpose of considering an aggravating

¹ But McNeal's position regarding the pre-trial notice provision of RCW 9.94A.537(1) would appear to apply even cases where the aggravating sentencing factors could be considered by a judge. Although the trial court's certified questions are stated in terms of factors to be considered by a jury, since the factor relied upon by the State in this case is a factor that "may" be considered by a judge--Respondent has also addressed the pre-trial notice issue in terms of judge-considered aggravators at resentencing.

factor not specifically contained in RCW 9.94A.535(3). The Court's Order as set forth above involves a controlling question of law as to which there is a substantial ground for a difference of opinion and immediate review of the Court's order may materially advance the ultimate termination of this litigation.

CP 24,25 (Order Authorizing Jury to Be Impaneled, filed July 14, 2008). In a separate order, the trial court further found that the pretrial notice provision of RCW 9.94A.537(1) is a "stand-alone" provision entirely separate from subsection (2) of that statute, and does not apply to cases such as this because doing so would be "impossible," since the trials in such cases have already occurred. CP 22(Order Denying Defense Motion to Strike Jury Determination of Aggravating Factors, filed July 17, 2008); RCW 9.94A.537(1) and (2). McNeal filed a notice and motion for discretionary review (CP 12-15), and the State filed a response agreeing that review should be granted. This Court granted review. State v. McNeal, No. 38014-5-II, Ruling Granting Discretionary Review(October 2, 2008).

The State now submits this brief in response to McNeal's claims in his opening brief on appeal.

ARGUMENT

A. RESPONDENT CONCEDES THAT THE STATE LIKELY MISINTERPRETED THE BLAKELY/PILLATOS "FIX" STATUTES WHEN ON REMAND IT BASED ITS REQUEST TO IMPANEL A SENTENCING JURY ON THE AGGRAVATING FACTOR IN RCW 9.94A.535(2)(c), BUT THE PROPER REMEDY IS TO REMAND FOR RESENTENCING TO ALLOW THE TRIAL COURT TO CONSIDER THAT FACTOR AS PERMITTED BY THE STATUTE.

McNeal argues that the trial court erred when it granted the State's motion to impanel a sentencing jury on remand to consider the aggravating factor set out in RCW 9.94A.535(2)(c) and pursuant to RCW 9.94A.537(2). McNeal claims that a jury cannot be impaneled to consider the factor in RCW 9.94A.535(2)(c) because that factor is not listed in the exclusive list of aggravating sentencing factors which can be considered by a jury as set out in RCW 9.94A.535(3).

Respondent concedes that the State likely misinterpreted² the "Blakely fix" amendments to Washington's Sentencing Reform Act (SRA), when it asked the trial court to impanel a jury to consider the aggravating factor in RCW 9.94A.535(2)(c)--a factor that can

² Respondent would happily welcome this Court to disagree, and find that the State *could* present the aggravating factor in RCW 9.94A.535(2)(c) to a jury at resentencing. Barring that, and barring a ruling to the contrary, the State plans to ask the trial court to consider that factor to impose an exceptional sentence upon remand for resentencing--as the statute seems to allow.

properly be considered and imposed by the judge. Id. If this Court agrees with the State's concession, then the trial court's order authorizing a jury to be impaneled based upon the State's overlybroad reading of RCW 9.94A.535(3) must be vacated. However, contrary to McNeal's assertion, the remedy is not remand for resentencing within the standard range. Rather, the remedy is to remand for resentencing to allow the trial court to consider that factor and decide whether to impose an exceptional sentence based upon that aggravator, as allowed by RCW 9.94A.535(2)(c).

Standard of Review

A sentencing court's statutory authority under the SRA is a question of law which is reviewed *de novo*. State v. Murray, 118 Wn.App. 518, 521, 77 P.3d 1188 (2003). Constitutional challenges are also reviewed *de novo*. City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 8785 (2004). Likewise, whether an exceptional sentence violates the Sixth Amendment is a question of law, reviewed *de novo* on appeal. State v. Saltz, 137 Wn.App. 576, 580, 154 P.3d 282 (2007). Issues of statutory interpretation are also reviewed *de novo*. State v. Alvarado, 164 Wash.2d 556, 561, 192 P.3d 345 (2008).

The law pertaining to the imposition of "exceptional sentences"--a sentence above the standard range--was turned upside down by the United States Supreme Court's opinions in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)(emphasis added); and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (2004). These cases held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id.(emphasis added). Indeed, Blakely has been referred to as a "bombshell" decision that "has thrust sentencing systems across the country into turmoil."³ This has certainly been true in Washington, as our Legislature scrambled to respond to Blakely and our own State Courts' decisions interpreting Blakely. See e.g., the "Blakely fix" and "Pillatos fix" legislation at RCW 9.94A.535 and RCW 9.94A.537(1) and RCW 9.94A.537(2)(2007); State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)("clearly too lenient" aggravator must be found by a jury), *abrogated on other grounds regarding harmless error*, by

³ See, e.g., "The Next Era of Sentencing Reform," Steven L. Chanenson, Villanova University School of Law, Villanova Law/Public Policy Research Paper(January 13, 2005; Revised April 26,2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=599645

Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed. 466 (2006); State v. Cubias, 155 Wn.2d 549, 120 P.3d 929(2005)(consecutive sentences for serious violent offenses did not violate Blakely); In re VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006)(consecutive sentences for non-serious violent offenses and the "clearly too lenient" factor violate Blakely); State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007)(legislatively overruled by Laws of 2007, ch. 205); State v Saltz, 137 Wn.App. 576, 154 P.3d 282 (2007)(factor in RCW 9.94A.535(2)(b) unconstitutional as jury must consider the "clearly too lenient" factor); State v. Newlun, 142 Wn.App. 730, 176 P.3d 529 (2008)(Blakely not violated when a judge imposes an exceptional sentence based on the factor in RCW 9.94A.535(2)(c)); accord, State v. Alvarado, 164 Wn.2d 556, 192 P.3d 345(2008)(aggravator in RCW 9.94A.535(2)(c) properly considered by the judge). And, recently, the United States Supreme Court issued another opinion pertaining to exceptional consecutive sentences under Blakely. Oregon v. Ice, ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009)(no Blakely violation where states assign to judges rather than juries, the findings necessary to impose consecutive, rather than concurrent, sentences for multiple offenses). Another thing is certain about Blakely: it can be

particularly challenging to sort out Blakely's impact on pre-Blakely exceptional sentence cases remanded for resentencing, where the State again seeks an exceptional sentence, as evidenced by the instant case. State v. McNeal, 142 Wn.App. 777, 175 P.3d 1139 (2008).

The "Blakely fix" statutes at issue in the present case are RCW 9.94A.535 and RCW 9.94A.537. On remand, the State interpreted these statutes as permitting it to impanel a jury to hear the aggravating factor in RCW 9.94A.535(2)(c). The trial court agreed. But this was probably an overly-broad application of these statutes. RCW 9.94A.537(2); RCW 9.94A.535(3) & (2). In reviewing a statute, a court interprets "unambiguous statutes according to their plain language; only ambiguous statutes will be construed." State v. Skylstad, 160 Wn.2d 944, 163 P.3d 413, 415 (2007), citing State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). "[N]o construction should be accepted that has 'unlikely, absurd, or strained consequences.'" Id., quoting State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). When interpreting a statute, the goal is to determine and enforce the intent of the legislature. Alvarado, 164 Wash.2d at 561-62, 192 P.3d 345. Where the meaning of statutory language is plain on its face, we must give

effect to that plain meaning as an expression of legislative intent. Alvarado, 164 Wash.2d at 562. In discerning the plain meaning of a provision, the reviewing court will consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. Alvarado, 164 Wash.2d at 562. Common sense informs this analysis, as absurd results in statutory interpretation are to be avoided. Alvarado, *Id.*, citing Tingey v. Haisch, 159 Wash.2d 652, 664, 152 P.3d 1020 (2007). A criminal defendant claiming that a sentencing statute has been unconstitutionally applied bears the burden of demonstrating that the statute was applied in an unconstitutional manner. State v. Hughes, *supra*.

Here, it appears to Respondent now that on remand the State likely misinterpreted RCW 9.94A.535(3) and RCW 9.94A.537(2) in its efforts to comply with Blakely, as well as trying to comply with the directive of this Court in its latest opinion in this case. State v. McNeal, 142 Wn.App. *supra* (2008). This Court held in that opinion, "[b]ecause Blakely applied to McNeal's resentencing proceedings, we hold that the trial court erred when it, rather than a jury, made the factual determinations required to impose the exceptional sentences." *Id.* at 789. To be sure, the

State would prefer to err on the side of caution and have a sentencing jury consider any aggravator (currently listed in the statutes) in support of an exceptional sentence in this case--which is why the State strained to interpret the statutes to allow such a procedure on remand. However, it appears that this is not allowed under the current sentencing scheme. RCW 9.94A.537(2); RCW 9.94A.535(3); RCW 9.94A.535(2)(c). This is partly because RCW 9.94A.537(2) directs that the aggravating factors selected on remand must be chosen from the factors previously relied upon to support the exceptional sentence. At least that is the way the State interprets the statute. RCW 9.94A.537(2), provides

[i]n any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

Id. (emphasis added). The aggravating factors previously relied on as the basis for the exceptional sentence imposed in this case, were the following :

2.2 RCW 9.94A.535(2) authorizes a sentencing court to impose an exceptional sentence if the defendant committed multiple offenses and the defendant's high offender score would result in some of the current offenses going unpunished.

2.3 This court adopts for resentencing purposes the findings of the original sentencing judge as entered on 16 October 1997.

* * *

2.5 At the time judgment was rendered in this case, pursuant to State v. Stephens 116 Wn.2d 238, 243 (1991), an exceptional sentence is justified as to each count, based on defendant's high offender score coupled with multiple current convictions, which is a basis for an exceptional sentence.

2.6 As to Counts I and II, the defendant's high offender score combined with multiple offenses is such that a standard sentence would result in crimes for which there is no additional penalty, which is a basis for an exceptional sentence, pursuant to Stephens.

CP 112, 113(2006); State v. McNeal, 142 Wn.App. at 788.

Although the "high offender score/multiple current offenses" factor is listed a couple of times in the prior findings, the State here decided to select factor 2.2, which appears in the current statute in RCW 9.94A.535(2)(c). And, while RCW 9.94A.537(2) states that a jury may be impaneled to consider any factors in RCW 9.94A.535(3), on remand the State interpreted RCW 9.94A.535(3) to include the factors in RCW 9.94A.535(2) because it specifically references that section. RCW 9.94A.535(3) states:

(3) Aggravating Circumstances--Considered by a Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard

range. Such facts should be determined by procedures specified in RCW 9.94A.537.

RCW 9.94A.535(3) (emphasis added). The State interpreted this reference to mean that the factors listed in RCW 9.94A.535(2) were *included* in the "exclusive list of factors that can support a sentence above the standard range" and could therefore also be considered by a jury. *Id.* The State also considered the fact that RCW 9.94A.535(2)(c) is stated in terms of "may" rather than "shall," since it states:

(2) Aggravating Circumstances--Considered and Imposed by the Court

The trial court *may* impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

* * *

(c) The defendant has committed multiple current offenses and the defendant's high offenders score results in some of the current offenses going unpunished.

RCW 9.94A.535(2)(c) (emphasis added). Putting these two sections of RCW 9.94A.535 together, the State below interpreted .535(2)(c) as *allowing*, but not requiring, a judge to consider the factors in that section. CP 26,27. Specifically, the State explained its interpretation of RCW 9.94A.535(3) and RCW 9.94A.535(2)(c) in its memorandum--an interpretation with which the trial court ultimately agreed:

The phrase, "Except for circumstance listed in Subsection (2) of this section" means that the jury may consider the exclusive list in section (3), in addition to the list a judge may consider in section (2). This is supported by the phrase in section (2) that states "The trial court *may* impose an aggravated exceptional sentence without a finding of fact by a jury."(emphasis added). The word "may" refers the fact that a judge *may* consider the four aggravating factors in section (2), but that to do so is discretionary. The reference does not say that a Jury cannot consider them.

On the other hand, the Defense reads sections (2) and (3) as exclusive of one another. This would lead to absurd results. For example, if a defendant was charged with both (2)(a) and (3)(b), then a trial court would have to have two trials, one by a judge to consider the first and then again by a jury to consider the second.

A more consistent reading of these two sections would be that all aggravating factors may be considered by a jury, but only (2)(a) through (d) may be considered by a trial court without a jury. This is also consistent with the current law of Mr. McNeal's case, whereby the Court of Appeals has ordered that the State may proceed to impanel a jury to decide the aggravating factors.

CP 26,27 (State's memorandum). Thus, the State ultimately argued that the court could impanel a jury to consider the factor in RCW 9.94A.535(2)(c) because subsection (2) is referenced by 9.94A.535(3) and because neither .535(3) nor 535(2)(c) prohibits a jury from considering the aggravating factor in RCW 9.94A.535(2)(c). CP 26,27. More to the point, the State concluded below that our sentencing statutes *allow* a jury to consider the

aggravators set out in *both* subsection (2) and (3) of RCW 9.94A.535. CP 26,27. The trial court granted the State's motion to impanel a jury to consider the factor in RCW 9.94A.535(2)(c), based upon the State's interpretation of the statutes. CP 24-25. However, after much reflection and exhaustive research, Respondent must reluctantly concede that the State's tortuous interpretation of these statutes at resentencing was probably a strained one. At least Respondent has not found any other authority to support the State's argument that the aggravating factor set out in RCW 9.94A.535(2)(c) *may* properly be submitted to a sentencing jury (even though subsection (2) is referenced in subsection (3)). RCW 9.94A.537(2); RCW 9.94A.535(3); RCW 9.94A.535(2)(c).

That said, the aggravating factor relied upon by the State in this case--that McNeal's high offender score and multiple current offenses results in some of the current offenses going unpunished--can be considered by the judge without a jury. RCW 9.94A.535(2)(c). Thus, Respondent disagrees with McNeal's proposed remedy if this Court agrees that the State's request to impanel a jury to consider the factor in RCW 9.94A.535(2)(c) was based upon a misinterpretation of the statutes. Contrary to

McNeal's argument, the remedy upon remand for resentencing is to allow the State to ask the *trial court* to impose an exceptional sentence based upon the same aggravator in RCW 9.94A.535(2)(c), because the statute allows it. RCW 9.94A.535(2)(c)(factor may be "considered and imposed by the Court" without a finding by a jury) Moreover, this aggravator does not run afoul of Blakely because consideration of that factor "requires simply objective mathematical application of . . . [the] sentencing grid, rather than the subjective application of factors under the former 'clearly too lenient' language." State v. Alvarado, 164 Wn.2d at 565. As the Court in Alvarado explained:

Under RCW 9.94A.535(2)(c) the legislature provided that where current offenses go unpunished based on criminal history and current offenses, this is an aggravating circumstance per se. This provision was designed to codify the "free crimes" factor as an automatic aggravator without the need for additional fact finding as to whether the existence of "free crimes" results in a "clearly too lenient" sentence.

The new statute accords with *Blakely*, which recognized that the determination of whether particular circumstances (once established) warrant an exceptional sentence remains a legal judgment for the court. *Blakely*, 542 U.S. at 305 n. 8, 124 S.Ct. 2531; *see also Hughes*, 154 Wash.2d at 137, 110 P.3d 192. It also walks the line drawn in *Hughes*. Consistent with *Blakely*, this court in *Hughes* recognized that a sentencing judge has the authority to rely on a "free crimes" factor to impose an exceptional sentence. *Hughes*, 154 Wash.2d at 139, 110 P.3d 192.

State v. Alvarado 164 Wash.2d at 567. ash.,2008). The Alvarado

Court also noted:

[t]he determination under RCW 9.94A.535(2)(c) that 'some of the current offenses [g]o unpunished' rests solely on criminal history and calculation of the offender score, without the need for additional fact finding by the jury. . . . [the defendant's] exceptional sentence imposed . . . under RCW 9.94A.535(2)(c) did not violate his Sixth Amendment right to a jury trial as defined in Blakely.

Id. at 569. See also, State v. Newlun, 142 Wn.App. 730, 742-43, 176 P.3d 529 (2008), where Division One of this Court held that the factor in RCW 9.94A.535(2)(c)--selected by the State here-- provides a constitutionally-proper basis under Blakely for imposition of an exceptional sentence without jury findings. In other words, the factor in RCW 9.94A.535(2)(c) falls squarely within Blakely's "fact- of- a- prior- conviction" exception. Apprendi/Blakely, supra. Alvarado, supra; Newlun, supra.

Additionally, one of the reasons the sentences imposed in McNeal's case were "exceptional" is because they were imposed consecutively. CP 106-113; State v. McNeal, 98 Wn.App. supra(1999)(noting the consecutive sentences). As previously mentioned, the United States Supreme Court recently rejected the application of Apprendi and Blakely to the determination of whether to impose a concurrent or consecutive sentence. Oregon v. Ice, 129 S.Ct. at 718-719. Therefore, on remand the trial court could

reimpose an exceptional sentence in the form of consecutive sentences (which was done at both prior sentencings). CP 106-113; State v. McNeal(1999) and (2008).

As he did in the trial court, McNeal again cites State v. Vance, 142 Wn.App. 398, 174 P.3d 697 (2008), *review granted*, 165 Wn.2d 1036, 205 P.3d 131 (2009), in support of some of his arguments.⁴ But Respondent believes Vance is distinguishable. The analysis in Vance regarding the aggravating factor does not apply here because in Vance the aggravator involved the "clearly too lenient" factor. This aggravator is no longer in the statutes. RCW 9.94A.535(2) & (3). The "clearly too lenient" factor discussed in Vance has been held to violate Blakely and therefore *must* be determined by a jury. State v. Hughes, 154 Wn.2d at 137-140(2005)("the conclusion that allowing a current offense to go unpunished is *clearly too lenient* is a factual determination that cannot be made by the trial court following Blakely"(emphasis added)). Thus, because the factor relied upon in the instant case did at least appear in RCW 9.94A.535(2) (unlike in Vance) and the

⁴ The Washington Supreme Court has granted review in Vance but it is not clear that the Court will reach any of the issues discussed here. 165 Wn.2d 1036, 205 P.3d 131 (2009)(granting review).

factor here does not involve the "clearly too lenient" factor discussed in Vance --the analysis from Vance does not apply here. In contrast, the factor relied upon by the State here is from RCW 9.94A.535(2)(c) and addresses McNeal's high offender score and multiple current offenses, resulting in some of the "current offenses going unpunished." As previously noted, this factor has been found by our courts to be properly considered by the trial court and thus exempt from Blakely because determination of this factor does not require the court to engage in fact finding. State v. Alvarado, 164 Wn.2d 565, citing State v. Newlun, 142 Wn.App. at 742-44(RCW 9.94A.535(2)(c) does not violate Blakely).

McNeal also again raises retroactivity and *ex post facto* issues. But these issues were rejected by this Court in its most recent opinion in this case, and this Court should do so again. State v. McNeal, 142 Wn.App. at 794, 795, citing State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). Similarly, McNeal's "separation of powers" argument should also be dismissed because if this Court agrees that the State could not properly request a jury to consider the aggravator in RCW 9.94A.535(2)(c), McNeal's separation of powers argument is moot. See also, State v. Mann, ___ P.3d ___, 2008 WL 3098675 (2008) for discussion of a

separation of powers issue pertaining to the 2007 Blakely/Pillatos amendments.

Accordingly, if this Court decides that a sentencing jury cannot be impaneled to consider the factor in RCW 9.94A.535(2)(c) as requested by the State below (and agreed with by the trial court), the remedy should be that the trial court's order impaneling a jury be vacated, and this case again remanded for resentencing so the State may present that aggravating factor to the judge to determine whether to impose an exceptional sentence-- as the statute seems to allow. RCW 9.94A.535(2)(c).

B. WHEN AN "EXCEPTIONAL SENTENCE" CASE HAS BEEN REMANDED FOR RESENTENCING AND THE STATE AGAIN SEEKS TO IMPOSE AN EXCEPTIONAL SENTENCE, THE "PRE-TRIAL NOTICE" PROVISION OF RCW 9.94A.537(1) DOES NOT APPLY.

McNeal also argues that because he did not have *pre-trial* "notice" that the State would be seeking an exceptional sentence pursuant to the notice provision set out in RCW 9.94A.535(1), the State therefore cannot seek an exceptional sentence on remand at all. McNeal's claim would preclude both a jury determination under RCW 9.94A.537(2), and a trial court's consideration of aggravators under RCW 9.94A.535(2)(c). The State disagrees with both contentions.

The general rules for interpreting statutes were set out previously above, and won't be repeated here. Suffice it to say that when interpreting statutes, we need to ascertain and carry out the legislature's intent. State v. Halsten, 108 Wn.App. 759, 762, 33 P.3d 741 (2001); In re Detention of R.P., 89 Wn.App. 212, 215, 948 P.2d 856 (1997)(statutes are construed "to effect their purpose and avoid unlikely or strained interpretations").

In 2005, in response to Blakely, the Legislature created a procedure for jury determinations of aggravating factors. Laws of 2005, ch. 68. This statute included a requirement that the prosecutor give notice of his intent to seek an exceptional sentence "prior to trial or entry of the guilty plea." Id. § 4(1), codified as RCW 9.94A.537(1). Applying this requirement, the Washington Supreme Court held that it was still impossible to impose exceptional sentences on remand, in any case where the statutorily-required notice had not been given. State v. Pillatos, 159 Wn.2d at 150.

The Legislature responded to Pillatos by enacting the following provision:

In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating factors listed in RCW 9.94A.535(3), that were relied

upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

Laws of 2007, ch. 205, § 2(2), codified as RCW 9.94A.537(2). This provision was expressly intended to overrule Pillatos:

In [Pillatos], the Washington supreme court held that the changes made to the sentencing reform act concerning exceptional sentences in chapter 68, Laws of 2005 do not apply to cases where the trials had already begun or guilty pleas had already been entered prior to the effective date of the act on April 15, 2005. The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.

Laws of 2007, ch. 205, § 1(emphasis added). Thus, the Legislature could not have stated its intent more clearly when it amended RCW 9.94A.537. Obviously, cases that come before the court "regardless of the date of the original trial or sentencing" include cases in which the trial has already occurred. And in such cases, it would be *impossible* for the State to provide "pre-trial notice" that it intends to again seek an exceptional sentence. In this way, McNeal's interpretation of RCW 9.94A.537(1) defies the clearly-stated intent of the legislature when it added subsection (2) to that statute.

Nonetheless, McNeal interprets the pretrial notice provision of RCW 9.94A.537(1) as mandatory in every case where the State

seeks an exceptional sentence on remand. But the plain language of the statute does not "require" the State to give notice of its intent to seek an exceptional sentence at all. Instead, this statute states that "[a]t any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state *may* give notice that it is seeking a sentence above the standard sentencing range." *Id.*(emphasis added). Thus, on its face, RCW 9.94A.537(1) does not *require* the State to give notice of its intent to seek an exceptional sentence, but instead unambiguously states that the giving of notice is discretionary. This interpretation is in keeping with prior decisions by our Supreme Court regarding pre-trial notice of sentencing consequences. In State v. Crawford, 159 Wn.2d 86, 147 P.3d 1288 (2006), the court held that a defendant had no constitutional or statutory right to notice he was facing a third strike and a mandatory life sentence. The court rejected a request to require such notice, holding that "we will not mandate greater procedural protections than those required by statute unless those requirements violate a constitutional guaranty." *Id.*, 159 Wn.2d at 94. Here, RCW 9.94A.537(1) reads "may give notice" not "shall give notice." It is a long-standing rule that use of the word "shall" indicates an action is mandatory, while use of the

word "may" indicates the action is discretionary. See, e.g., State v. Huntzinger, 92 Wn.2d 128, 594 P.2d 917 (1971).

Furthermore, as noted by the trial court, RCW 9.94A.537, subsection (1) is a stand-alone provision: there is no "or," "and," or any other modifying word between these two subsections to indicate that the provision in RCW 9.94A.537(2) is subject to, or limited by, the notice provision in subsection (1). That is because interpreting the pre-trial notice provision of subsection (1) as being mandatory renders RCW 9.94A.537(2) completely *meaningless*, if not absurd. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." Faben Point Neighbors v. City of Mercer Island, 102 Wn.App. 775, 782, 11 P.3d 322 (2000)(emphasis added, citation omitted). Why would the Legislature go to the trouble to add the *post-trial* procedure in subsection (2), if the *pre-trial* notice provision in subsection (1) is mandatory--meaning that subsection (2) could *never* be applied?

Unfortunately, several of our Courts have elected not to address the effect of the pre-trial notice provision in RCW 9.94A.537(1), stating that because the issue was not "ripe" at the time the parties addressed the court, the Court would not reach that

issue. See e.g., State v. Eggleston, 164 Wn.2d 61, 187 P.3d 233 (2008)(remanding for resentencing without addressing constitutional challenge to RCW 9.94A.537 because issue not ripe); Pillatos, 159 Wn.2d at 471(declining to address due process challenge because RCW 9.94A.537 had not yet been applied to the defendant); State v. Davis, 163 Wn.2d 606, 616, 184 P.3d 639 (declining to address applicability of RCW 9.94A.537); State v. Pleasant, 148 Wn.App. 408, 200 P.3d 722 (2009)(applicability of RCW 9.94A.537 not ripe); ***but see***, State v. Womac, 160 Wn.2d 643, 663, 160 P.3d 40 (2007)(noting that "RCW 9.94A.537(1) permits the imposition of an exceptional sentence only when the State has given notice, prior to trial, that it intends to seek a sentence above the standard range")(emphasis in original); *and* State v. Vance, 154 Wn.2d 1036, 205 P.3d 131 (2009)(citing Womac, supra, and noting that "the State cannot benefit from either the 2005 or 2007 legislative changes" because no notice was given pursuant to RCW 9.94A.537(1)).

Respondent believes that the Vance Court (citing Womac) got it wrong regarding the applicability of the notice provision of RCW 9.94A.537(1) when a case has been remanded for resentencing. Furthermore, "Womac is a double jeopardy case and

does not involve an analysis of exceptional sentences. . . [i]ts analysis of the concept of punishment is not controlling in this context." Alvarado, 164 Wn.2d at 562. But the real point is, under the Vance Court's analysis, the holding of Pillatos remains effective--despite the clearly-expressed legislative intent to overturn that holding when it amended these statutes in 2007. Indeed, the Vance Court's interpretation of the notice issue completely *nullifies* the 2007 amendments to RCW 9.94A.537. This is a nonsensical reading of RCW 9.94A.537, and this Court should not adopt that interpretation here. After all, "[c]ommonsense informs our analysis, as we avoid absurd results in statutory interpretation." Alvarado, 164 Wn.2d at 562. Additionally, as mentioned earlier, Vance involved a request to impanel a jury to consider an aggravating factor not listed in either RCW 9.94A.535(3) or RCW 9.94A.535(2). That is different from the circumstances in this case, where the aggravating factor selected by the State appears in RCW 9.94A.535(2)(c). And, as previously discussed, the factor in RCW 9.94A.535(2)(c) *may be* considered by a court without a jury.

Still, Vance's (and McNeal's) overly broad interpretation of the pre-trial notice provision of RCW 9.94A.537(1) would *always* prevent the State from seeking an exceptional sentence again on

remand—even if the aggravating sentencing factor is one that can properly be considered by the court under RCW 9.94A.535(2): the Vance Court agreed with the defendant's claim that "the State cannot benefit from either the 2005 or 2007 legislative changes. . . because the State did not give . . . pre-trial notice of its intention to seek an exceptional sentence." Vance at 409, citing RCW 9.94A.537(1) and State v. Womac, supra. But Respondent has not found any case stating that the pre-trial notice provision of RCW 9.94A.537(1) applies to the aggravating factors that can be considered by the trial court pursuant to RCW 9.94A.535(2)(c). And what if the court decides to *sua sponte* impose an exceptional sentence under one of the factors that can still be considered by the judge in RCW 9.94A.535(2)? Does the trial court have to provide pre-trial "notice" to a defendant if it intends to impose an exceptional sentence on remand using one of the remaining valid aggravating factors in RCW 9.94A.535(2)? Respondent has found nothing in RCW 9.94A.537 that requires the trial court go give prior notice before imposing an exceptional sentence on its own accord.

Furthermore, aren't McNeal's protestations about "lack of notice" a bit disingenuous, given the fact that even back in 1996 when McNeal committed these crimes, he knew there was a

possibility that the court would impose an exceptional sentence?

That is because pre-Blakely, "Washington had a seemingly valid exceptional sentencing system which gave fair notice of the risk of receiving such. . . [an exceptional] sentence." Pillatos, 159 Wn.2d at 470. In this way, allowing the State to request an exceptional sentence based upon valid aggravating factors on remand without "pre-trial notice" would not expose McNeal to any greater punishment than he faced at the time he committed these crimes.

In sum, the interpretations of the pre-trial notice provision in RCW 9.94A.537(1), as stated in Womac and Vance--in addition to frustrating the clear intent of the legislature in its responses to Blakely--once again show that defendants may *selectively* reap the benefits of Blakely by choosing only the parts of that case that will benefit them: They want their sentences overturned because of Blakely (because a jury had not considered the aggravating factors), but do not want "all" of Blakely to apply on remand (still don't want a jury to consider the aggravating factors). It is time to set such unjust interpretations right. This Court should rule that the pre-trial notice provision of RCW 9.94A.537(1) does not apply when an "exceptional-sentence" case has been remanded for resentencing where the State again seeks an exceptional

by a judge--meaning that the State could *never* seek an exceptional sentence when such a case is remanded for resentencing. This could not have been what the Legislature intended when it crafted the amendments to the sentencing statutes in response to Blakely. Accordingly, this Court should remand this case for resentencing to allow the State to again seek an exceptional sentence based upon the valid factor in RCW 9.94A.535(2)(c), whether that factor be considered by a judge or by a jury.

RESPECTFULLY SUBMITTED THIS 21st day of August,
2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by:



LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

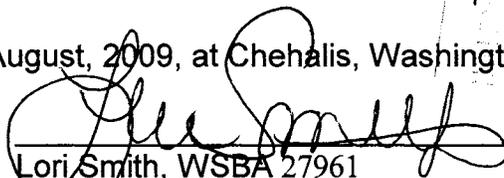
**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,) Respondent,) vs.) JOHN K. MCNEAL,) Appellant.))	NO. 38014-5-II DECLARATION OF MAILING
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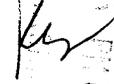
Lori Smith, Deputy Prosecutor for Lewis County, Washington, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct: On August 22, 2009, I mailed a copy of the Respondent's Brief in this matter by depositing same in the United States Mail, postage pre-paid, to the Attorney for Appellant at the name and address indicated below:

Peter B. Tiller
The Tiller Law Firm
P.O. Box 58
Centralia, WA 98531-0058

DATED this 22nd day of August, 2009, at Chehalis, Washington.



Lori Smith, WSBA 27961
Lewis County Prosecutor's Office
Chehalis, WA 98532-1900

STATE OF WASHINGTON
BY 
DEPUTY PROSECUTOR
LEWIS COUNTY
AUG 23 2009