

CO. 38575-9-II  
COURT OF APPEALS  
STATE OF WASHINGTON  
BY: [Signature]  
DEPT. OF JUSTICE

NO. 38575-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

ROBIN HYLTON,

Appellant.

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REPLY BRIEF

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Sheryl Gordon McCloud  
710 Cherry St.  
Seattle, WA 98104-1925  
(206) 224-8777  
Attorney for Appellant  
Robin Hylton

ORIGINAL

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## I. INTRODUCTION

The state's Response seems to acknowledge that the trial court was required to exercise discretion in deciding whether to accept Mr. Hylton's jury waiver or not. It argues, instead, that failure to exercise discretion does not necessarily amount to abuse of discretion. Controlling authority, however, holds to the contrary. The state further argues that just because the record does not show that the trial judge exercised discretion, does not mean that the trial judge did not privately exercise discretion without putting it on the record. Controlling authority, however, holds that where as here the trial judge is required to exercise discretion, he or she must do so on the record. If the trial judge fails to make his or her exercise of discretion clear on the record, the appellate court cannot assume that discretion was exercised. Instead, it must reverse and remand. Section II.

The state then argues that the excluded defense-proffered evidence and testimony was essentially all irrelevant hearsay. The key issue in this case, however, was credibility, and each of the excluded pieces of evidence was relevant to the credibility of the state's key witness. The state errs in contending that all of it – including e-mails containing insults and threats, which are not assertions of fact at all, and a journal page containing a heart, which is not a statement at all – constitutes hearsay. Section III.

The Response further argues that the prosecutor permissibly argued that his witnesses were “credible,” “telling the truth,” and “believable.” The state claims that these words do not constitute vouching for the credibility of the witness. Controlling authority, however, is to the contrary. Section III.

The state next argues that the abuse-of-trust aggravating factor applied to Mr. Hylton was already codified in RCW 9.94A.390(2)(c)(iv) pre-*Blakely*,<sup>1</sup> so its codification in new RCW 9.94A.535 was not a change in the statute that was applied retroactively to Mr. Hylton. The state errs; the only abuse-of-trust aggravating factor listed in any statute pre-*Blakely* applied solely to economic crimes. The state further argues that the trial court might even have been applying a common law abuse-of-trust aggravating factor to Mr. Hylton, rather than the new statutory one. If that is the case, then the exceptional sentence violates *Blakely* and RCW 9.94A.535 for another reason: they bar imposition of an exceptional sentence above the Guidelines range unless it is based on a statutory aggravating factor, of which the defendant was given notice prior to trial, by a statute listing that factor and by a charging document. They do not

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

permit reliance on any aggravating factor that is not on the RCW 9.94A.535 list. Section V.

The Response continues that imposition of an exceptional sentence above the range after the second trial, when no aggravating factor was even charged during the first trial, does not create a presumption of vindictiveness because the trial court might have imposed an equally lengthy sentence if the initial conviction had not been vacated. Response, p. 40. But the trial court could not have imposed an exceptional sentence after the first trial because the state did not charge and the jury did not find any exceptional sentencing factors at that trial. The state further argues that the trial judge “had little role in Mr. Hylton suffering an additional penalty after his second sentence,” so the judge could not have been vindictive for that reason. *Id.* Again, the state errs; actually, the trial court had discretion to impose an exceptional sentence or not after the jury ruled that the evidence supported an aggravating factor. Section VI.

Finally, the Response rejects the claim that the abuse-of-trust aggravating factor is impermissibly vague to the average juror (even if it was clear to judges who previously made the exceptional sentence decision without juries). It asserts, first, that this claim cannot be raised for the first time on appeal. RAP 2.5(a)(3), however, provides an exception to the contemporaneous objection rule for manifest

constitutional errors. A vagueness claim neatly fits into this category; it is a Fourteenth Amendment due process claim. The Response asserts next that the instruction is not vague. Prior caselaw and the new WPIC Pattern Instruction, however, highlight just how vague the instruction was; it lacked the narrowing language concerning the duration of the trust relationship, its content, whether victim access and vulnerability can be blamed on that relationship, etc., contained in the new instructions. Section VII.

**II. THE STATE ADMITS THAT THE TRIAL COURT FAILED TO EXERCISE DISCRETION ON THE RECORD; ITS ARGUMENT THAT THE COURT MIGHT HAVE EXERCISED DISCRETION OUTSIDE THE RECORD IS IRRELEVANT, BECAUSE THE RECORD ALONE MATTERS**

The state does not dispute the fact that CrR 6.1(a) requires the trial court to exercise discretion when deciding whether to accept or reject a jury waiver. It even admits that the trial court “failed to exercise discretion” “on the record” when rejecting Mr. Hylton’s jury trial waiver. Response, p. 1. It argues, instead, that the failure to exercise discretion does not amount to an abuse of discretion or, conversely, that the failure to exercise discretion on the record does not mean that no discretion was exercised.

Both arguments fail.

First, the failure to exercise discretion – where as here the trial court is required to make a discretionary decision – *does* amount to an abuse of discretion under controlling authority. Division II of this Court has expressly stated: “Failure to exercise discretion is an abuse of discretion.” *Brunson v. Pierce County*, 149 Wn. App. 855, 205 P.3d 963, 966 (2009) (discussing agency failure to exercise discretion).

That Division II holding was based squarely upon controlling Washington Supreme Court authority holding that, in the criminal context, a prosecutor’s mandatory policy of filing habitual criminal charges against all defendants who had three or more felony convictions amounted to a failure to exercise discretion – and that such a failure to exercise discretion constitutes an abuse of discretion. *State v. Pettit*, 93 Wn.2d 288, 295-96, 609 P.2d 1364 (1980). As the court in *Pettit* explained, “In our view, this fixed formula which requires a particular action in every case upon the happening of a specific series of events constitutes an abuse of the discretionary power ....” *Pettit*, 93 Wn.2d at 296.<sup>2</sup>

The state’s first argument – that the failure to exercise discretion does not constitute an abuse of discretion – thus fails.

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<sup>2</sup> A failure to exercise discretion even amounts to arbitrary and capricious conduct. *Nat’l Elect. Contractors Ass’n. v. Riveland*, 138 Wn.2d 9, 32, 978 P.2d 481 (1999) (citation omitted).

The state's next argument, that the failure to exercise discretion on the record does not mean that the judge did not exercise discretion someplace else, must also fail. To determine whether a trial court exercises discretion, the appellate court looks only at the record. *See, e.g., State v. Flieger*, 91 Wn. App. 236, 241-42, 955 P.2d 872 (1998), *review denied*, 137 Wn.2d 1003 (1999); *State v. Lara*, 66 Wn. App. 927, 930, 932, 834 P.2d 70 (1992). There is nothing else for an appellate court to look at. Hence the failure to exercise discretion *on the record*, when discretion is required, constitutes reversible error, even if the trial court exercised discretion silently without putting it on the record. *Lara*, 66 Wn. App. 927, 930-32.

The state's final argument on this point is that even if the trial court improperly rejected the jury waiver, Mr. Hylton suffered no prejudice and, hence, can claim no remedy. Response, p. 5. It cites *State v. Maloney*, 78 Wn.2d 922, 928, 481 P.2d 1, 5 (1971), for this proposition.

The court in *Maloney*, however, did not hold that there is no remedy for a trial court's abuse of discretion in rejecting a jury waiver. Instead, *Maloney* upheld the validity of a statute conditioning a jury waiver on the judge's approval and it concluded that when the judge *does* exercise discretion in rejecting such a waiver, the defendant does not lose any constitutionally guaranteed right. *Maloney*, 78 Wn.2d at 928.

Thus, *Maloney* did not address the situation we have here, that is, a trial judge who failed to exercise discretion in rejecting a jury waiver.

The improper rejection of a jury waiver does leave the defendant with a jury trial even though it has deprived him or her of the right to a judge trial. But allowing the loss of one guaranteed right to be excused by the retention of another right has been impermissible since the U.S. Supreme Court ruled that it is impermissible to condition exercise of a Fourth Amendment right on relinquishment of a Fifth Amendment trial right. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

In fact where, as here, the right concerns the framework of the trial itself, it is impossible to measure the extent of prejudice caused by the loss. In such a situation, the courts presume prejudice. For example, improper denial of a motion to substitute counsel and to retain counsel of choice results in automatic reversal.<sup>3</sup> The courts do not review such a structural error for prejudice.

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<sup>3</sup> *United States v. Childress*, 58 F.3d 693, 736 (D.C. Cir. 1995) (“the deprivation of his counsel of choice would entitle [defendant] to a reversal of his conviction as a matter of constitutional right.”), *cert. denied*, 516 U.S. 1098 (1996); *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1478-79 (9th Cir.), *cert. denied*, 513 U.S. 947 (1994), *overruled in part on other grounds*, *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000); *United States v. Collins*, 920 F.2d 619, 625 (10th Cir. 1990), *cert. denied*, 500 U.S. 920 (1991) (“When a court unreasonably or arbitrarily interferes with

Similarly, improper denial of a motion to substitute counsel due to a conflict results in automatic reversal. *State v. McDonald*, 143 Wn.2d 506, 22 P.3d 791 (2001). The courts do not review such a structural error for prejudice, as the U.S. Supreme Court explained in *Holloway*,<sup>4</sup> *Sullivan*,<sup>5</sup> *Wood*,<sup>6</sup> and their progeny. The federal courts have explained, “A defendant need not show prejudice when the breakdown of a relationship between attorney and client from irreconcilable differences results in the complete

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an accused’s right to retain counsel of his choice, a conviction attained under such circumstances cannot stand, irrespective of whether the defendant has been prejudiced.”); *United States v. Panzardi-Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987) (“A defendant’s choice of counsel cannot be reduced to a mere procedural formality whose deprivation may be allowed absent a showing of prejudice. The right to choose one’s counsel is an end in itself; its deprivation cannot be harmless.”); *United States v. Harvey*, 814 F.2d 905, 926 & n.10 (4th Cir. Va. 1987) (“prejudice is presumed from the denial of counsel of choice”); *United States v. Rankin*, 779 F.2d 956, 960-61 (3d Cir. 1986) (“A defendant who is arbitrarily deprived of the right to select his own counsel need not demonstrate prejudice.”); *Wilson v. Mintzes*, 761 F.2d 275, 284-86 (6th Cir. 1985) (agreeing with the majority of jurisdictions holding that “prejudice need not be shown when an accused is denied the right to counsel of his choice” because “right to counsel of choice, like the right to self-representation, is premised on respect for the individual and similarly is either respected or denied irrespective of the harmlessness or prejudicial nature of the error”).

<sup>4</sup> *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

<sup>5</sup> *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

<sup>6</sup> *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981).

denial of counsel.”<sup>7</sup>

Likewise, the Supreme Court has recently rejected the argument that an alleged violation of the right to counsel of choice is not “complete” unless the defendant can show that the lawyer he wants to get rid of was ineffective. In other words, prejudice is presumed from denial of this structural right regardless of how fair the rest of the trial appeared to be and even though the defendant retained his constitutional right to a lawyer. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409, 414 (2006).

Improper denial of the right to a bench trial presents the same kind of structural error. Hence, the remedy should be the same as the remedy for denial of other structural rights: reversal without proof of prejudice.

**III. THE STATE ERRS IN CLAIMING THAT EVIDENCE BEARING ON KEY WITNESSES' BIAS WAS IRRELEVANT AND THAT DOCUMENTS SUCH AS NASTY E-MAILS AND A JOURNAL PAGE WITH A HEART ARE HEARSAY, SINCE THEY ARE NEITHER STATEMENTS NOR OFFERED FOR THEIR TRUTH**

The trial court excluded evidence of vicious e-mails from the complainant's mother, Lisa Coward, to Mr. Hylton, revealing her deep bias. The state argues that the prior e-mails from Ms. Coward to Mr.

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<sup>7</sup> *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998).

Hylton, expressing anger against Mr. Hylton, were inadmissible hearsay. Such threatening e-mails, however, were not even offered for the truth of the matter asserted, that is, whether a threat posed by Ms. Coward was really intended to be carried out or whether an insult was true. They were offered to show that threats and insults were made, not that they were true. Such evidence – even if characterized as statements – falls outside the definition of hearsay.

The state further argues that the foundational requirements for admitting an e-mail are strict, and that since there was no conclusive proof that Ms. Coward wrote those e-mails to Mr. Hylton the foundation was not laid. Response, pp. 12-13. Whether an e-mail is what it purports to be, however, is a preliminary question for the court under ER 104. The proof need not be absolute; a mere preponderance should suffice. *Bourjaily v. United States*, 483 U.S. 171, 176, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). That much was shown. The Response's claim that Mr. Hylton had to prove conclusively "that the messages weren't altered," even though they did not appear to be altered on "the face of the documents," Response, p. 14, to be admitted, is therefore incorrect. The question of potential alterations goes only to weight, not to admissibility.

The trial court also excluded Ms. Miller's November journal entry containing a hand-drawn heart around Robin Hylton's name around

Thanksgiving, 2004. A drawing of a heart is not a statement at all. *See, e.g., State v. Alidani*, 609 N.W.2d 152, 158 (S.D. 2000) (“victim’s drawing was not a statement, it was an illustration.”). A drawing of a heart was certainly not offered to prove the truth of the matter most likely asserted by such a drawing, that is, that the artist loves the object of the heart’s affection. It was not offered to show such love at all, but to corroborate the date on which the artist met Mr. Hylton. Hence, the heart cannot be considered a statement and the heart cannot be said to have been offered for the truth of the matter asserted. *Cf. In re Alba*, 185 Ill. App.3d 286, 290, 133 Ill. Dec. 250, 540 N.E.2d 1116 (1989) (child’s drawing of where father placed his penis was hearsay because it was offered to establish truth of matter asserted by drawing itself).

The state’s arguments that the evidence offered by Mr. Hylton was irrelevant hearsay must therefore fail.

**IV. THE STATE ERRS IN CLAIMING THAT IT CAN ARGUE THAT ITS DETECTIVE WAS “BELIEVABLE,” THAT ITS COMPLAINANT WAS “TELLING THE TRUTH,” AND THAT OTHER WITNESSES WERE “TELLING US A TRUE STORY”**

Following this credibility case, the state tried to bolster its witnesses with personal opinions during closing. The prosecutor called his witnesses “credible,” “telling the truth,” and “believable.” The state

argues that these words do not constitute vouching for the credibility of the witness.

Controlling authority of the U.S. Supreme Court and the Washington courts, however, is to the contrary. Those decisions hold that it is impermissible vouching for a prosecutor to argue that its witnesses are honest, “very credible,” “very believable,” or telling “a true story.” *See generally, Shotwell Mfg. v. United States*, 371 U.S. 341, 386, 83 S.Ct. 448, 9 L.Ed. 2d 357 (1963); *State v. Mendoza-Solorio*, 108 Wn. App. 823, 834-835, 33 P.3d 411 (2001) (“in answer to the prosecutor’s question regarding Mr. Sharpe’s trustworthiness in previous controlled buys, Deputy Brown gave an unequivocal and wide ranging answer: ‘Mr. Sharpe has been extremely honest and reliable to us. Uh, he’s never lied to me as far as I know.’... Deputy Brown improperly invaded the exclusive province of the jury when he vouched for Mr. Sharpe’s veracity before that veracity had been challenged”; statements constitute vouching, but harmless error given the amount of untainted evidence.).

**V. THE STATE ERRS IN CLAIMING (1) THAT THE ABUSE-OF-TRUST AGGRAVATING FACTOR APPLIED TO MR. HYLTON'S CASE WAS CODIFIED PRE-BLAKELY, AND (2) THAT THE JUDGE COULD HAVE APPLIED A COMMON LAW ABUSE-OF-TRUST AGGRAVATING FACTOR INSTEAD**

The Opening Brief explained that the abuse-of-trust aggravating factor was enacted for the first time in 2005 with the “*Blakely* fix.” Mr. Hylton’s crime occurred in 2004. The Opening Brief therefore argued that that aggravating factor cannot be applied retroactively to Mr. Hylton because – unlike other aggravating factors that were already on the statutory list of aggravating factors before *Blakely* – this one was placed there for the first time in 2005.

The state argues that this aggravating factor was already listed in the statute prior to 2005, so this was not a change for the worse for the criminal defendant. The state claims that this aggravating factor was previously located in RCW 9.94A.390(2)(c)(iv). Response, p. 36. That prior aggravating factor, however, applied only to economic crimes.<sup>8</sup> Mr.

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<sup>8</sup> That former aggravating factor, actually located at RCW 9.94A.390(2)(d)(iv), stated:

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

Hylton was convicted of a sex crime. There was no such abuse-of-trust factor listed in the prior aggravating factors statute for sex crimes.

The state then argues that the trial court might even have been applying the old common law abuse-of-trust aggravating factor to Mr. Hylton, not the new statutory aggravating factor, so there was no retroactive application of anything new at all. Response, pp. 38-39. If the trial court were applying a common law aggravating factor, however, that alone would be cause for reversal. Post-*Blakely*, all aggravating factors must be contained in the aggravating factors statute, because they are akin to elements of a crime. Permitting judges to add additional aggravating factors that can raise a sentence above the standard range would be as unconstitutional as permitting judges to add additional crimes to the criminal code. Both actions would deprive defendants of the notice, due

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(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

process, and jury trial rights that the post-*Blakely* codification of an exclusive list of aggravating factors, and the RCW 9.94A.535's exclusivity, were designed to achieve.

Finally, the state uses all of these arguments to try to convince this Court that the enactment of RCW 9.94A.535's abuse-of-trust aggravating factor did not "disadvantage" Mr. Hylton within the meaning of ex post facto clause analysis. But the question, for statutory retroactivity analysis, is not whether the new statute operates to the defendant's disadvantage vis-à-vis prior common law. Instead, the question for statutory retroactivity analysis is whether the amendment is substantive or procedural. Aggravating factors are now considered the functional equivalent of elements for purposes of this analysis. *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). Any change in the elements of a crime is substantive. *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Since the change in this factor is substantive, in that it imposes statutory liability for a factor that was unlisted before, it cannot be applied retroactively under RCW 10.01.040 regardless of whether it can be applied retroactively under the ex post facto clause. *State v. Pillatos*, 159 Wn.2d

459, 472-74, 150 P.3d 1130 (2007) (procedural amendment applies retroactively; substantive amendment presumed prospective).

**VI. THE STATE ERRS IN CLAIMING THAT THE COURT MIGHT HAVE IMPOSED THE SAME EXCEPTIONAL SENTENCE BEFORE THE NEW TRIAL WAS GRANTED – IT COULD NOT HAVE DONE SO BECAUSE THERE WERE NO AGGRAVATING FACTORS THEN**

The Opening Brief argued that the abuse-of-trust aggravating factor was not charged before the first trial and was added only after the state suffered two acquittals; that the state offered no new evidence to justify an aggravated sentence; and hence that a presumption of vindictiveness should attach to imposition of such an increased sentence.

The state responds that the sentence was not increased at all – the trial court might have imposed a sentence just as long before the initial conviction was vacated and a new trial was granted. Response, p. 40.

But that is not true. The trial court could not have imposed an exceptional sentence after the first trial, and before that conviction was vacated, because the state did not charge and the jury did not find any exceptional sentencing factors. *A fortiori*, the sentence imposed after the second trial was much longer than any sentence imposed after the first trial could have been.

The state next argues that the trial judge “had little role in Mr. Hylton suffering an additional penalty after his second sentence.” Response, p. 40. Actually, it was within the trial court’s discretion whether to impose an exceptional sentence or not even after the jury ruled that the aggravating factor was present. In order to impose an exceptional sentence, three prerequisites are satisfied. First, the jury must find an aggravating sentencing fact that would justify a sentence above the range; second, the judge must make a separate determination that the aggravating fact constitutes a “substantial and compelling” reason for imposing an exceptional sentence; and third, the trial court must exercise its discretion to determine whether such a sentence is appropriate. *See* RCW 9.94A.535 (“The court *may* impose a sentence outside the standard sentence range for an offense *if it finds*, considering the purpose of this chapter, that there are substantial and compelling reasons ... *If the sentencing court finds* that an exceptional sentence ... should be imposed, the sentence is subject to review ...”). The state therefore errs in claiming that the exceptional sentence was a foregone conclusion and that neither the state nor the judge have responsibility for it.

The state then argues, without factual support or a citation to the record, that the reason the state added an aggravating factor after the first conviction was vacated “is that the state did not recognize the option until

after the first trial was complete.” Response, p. 44. But that is not credible and not supported by the record. The aggravating factor charged was abuse of a position of trust based on Mr. Hylton’s role as caregiver to the alleged victim. The state clearly presented evidence that Mr. Hylton was a caregiver to the alleged victim in the first trial, and merely repeated it in the second trial. No new facts were uncovered during the first trial or presented in the second one on this point. The state’s assertion that it did not realize that grounds existed to support this aggravating factor until after the first trial was over is therefore incredible on its face.

**VII. THE CHALLENGE TO THE VAGUENESS OF THE AGGRAVATING FACTOR CAN BE RAISED FOR THE FIRST TIME ON APPEAL UNDER RAP 2.5(a)(3)**

Finally, the Response rejects the claim that the abuse-of-trust aggravating factor is impermissibly vague to the average juror (even if it was clear to judges who previously made the decision about whether such an aggravating factor was present). It asserts that this claim cannot be raised for the first time on appeal. Under RAP 2.5(a)(3), however, such a constitutional claim can be raised for the first time on appeal.

The Response asserts, next, that the aggravating factor instruction cannot be considered vague as applied. The Response apparently admits that following *Blakely* and *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192

(2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212 (2006), it is clear that such aggravating factors are the functional equivalent of elements of the crime; that prior Washington decisions holding that aggravating sentencing factors are not subject to due process protections against vagueness must be revisited; and that this aggravating factor must be analyzed to determine whether it is unconstitutionally vague.

The only dispute between Mr. Hylton and the state on this point is over how that vagueness analysis comes out. Given that RCW 9.94A.535(n) does not define what “position of trust or confidence” means; given that neither that statute nor any instruction describes the nexus between that position of trust and the crime that the state must prove; and given that the aggravating factor is really limited to instances in which a defendant abuses a position of trust for purposes of facilitating the offense (*see, e.g., State v. Jackmon*, 55 Wn. App. 562, 568-69, 778 P.2d 1079 (1989)), the failure to explain these limits to the jury renders that aggravating factor vague.

Judges might be aware of all such limiting and definitional state court decisions. But juries are not.

**VIII. CONCLUSION**

For the foregoing reasons, the conviction should be reversed. Alternatively, the sentence should be vacated and the case should be remanded for imposition of a standard-range sentence.

DATED this 3<sup>rd</sup> day of July, 2009.

Respectfully submitted,



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Sheryl Gordon McCloud, WSBA No. 16709  
Attorney for Appellant, Robin D. Hylton

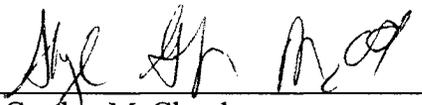
CERTIFICATE OF SERVICE

COURT REPORTER  
JULY 2009  
BY: [Signature]

I certify that on the 3<sup>rd</sup> day of July, 2009, a true and correct copy of the foregoing REPLY BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Douglas P. Ruth, DPA  
Thurston County Prosecutor  
Law & Justice Center  
345 W. Main St. - 2<sup>nd</sup> Fl.  
Chehalis, WA 98532

Robin Hylton  
c/o Lauren Hylton  
43370 Corte Gatun  
Hemet, CA 92544

  
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Sheryl Gordon McCloud