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NO. 86-1-00213-2

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**CHARLES DENNIS HAWKINS,**

**Appellant.**

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**BRIEF OF APPELLANT**

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40745-1

**John A. Hays, No. 16654  
Attorney for Appellant**

**1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084**

**ORIGINAL**

**TABLE OF CONTENTS**

	Page
A. TABLE OF AUTHORITIES .....	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error .....	1
2. Issue Pertaining to Assignment of Error .....	2
C. STATEMENT OF THE CASE .....	3
D. ARGUMENT	
<b>I. COWLITZ COUNTY SUPERIOR COURT JUDGE     WARNING VIOLATED WASHINGTON CONSTITUTION,     ARTICLE 4, § 7, WHEN HE PRESIDED OVER THE     DEFENDANT’S CASE BECAUSE THE RECORD DOES     NOT CONTAIN A REQUEST FROM A LEWIS COUNTY     JUDGE THAT JUDGE WARNING SIT <i>PRO TEMPORE</i> .....</b>	<b>7</b>
<b>II. JUDGE WARNING VIOLATED RCW 4.12.050 WHEN     HE FAILED TO RECUSE HIMSELF AFTER THE     DEFENDANT FILED AN AFFIDAVIT OF PREJUDICE     AGAINST HIM .....</b>	<b>8</b>
<b>III. THE COURT’S FAILURE TO APPOINT COUNSEL     TO REPRESENT THE DEFENDANT AT RESENTENCING     VIOLATED THE DEFENDANT’S RIGHT TO COUNSEL     UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22,     AND UNITED STATES CONSTITUTION, SIXTH     AMENDMENT .....</b>	<b>13</b>
<b>IV. THE TRIAL COURT VIOLATED THE     DEFENDANT’S RIGHT TO A JURY DETERMINATION OF     ALL OF THE FACTS NECESSARY FOR PUNISHMENT     UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21,     AND UNITED STATES CONSTITUTION, SIXTH     AMENDMENT, WHEN IT FAILED TO VACATE THE     DEFENDANT’S EXCEPTIONAL SENTENCE .....</b>	<b>15</b>

E. CONCLUSION ..... 24

F. APPENDIX

1. Washington Constitution, Article 1, § 21 ..... 25

2. Washington Constitution, Article 1, § 22 ..... 25

3. Washington Constitution, Article 4, § 7 ..... 26

4. United States Constitution, Sixth Amendment ..... 26

5. RCW 4.12.050 ..... 27

**TABLE OF AUTHORITIES**

Page

***Federal Cases***

*Apprendi v. New Jersey*,  
530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) . . . . . 15, 17

*Blakely v. Washington*,  
542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) . . . . 16-18, 22, 23

*Coleman v. Alabama*,  
399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) . . . . . 13

*Coleman v. Thompson*,  
501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) . . . . . 13

*Washington v. Recuenco*,  
548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) . . . . . 17

***State Cases***

*State v. Belgarde*, 119 Wn.2d 711, 837 P.2d 599 (1992) . . . . . 11

*State v. Clemons*, 56 Wn.App. 57, 782 P.2d 219 (1989) . . . . . 11

*State v. Harell*, 80 Wn.App. 802, 911 P.2d 1034 (1996) . . . . . 13-15

*State v. Hughes*, 154 Wn.2d 119, 110 P.3d 192 (2005) . . . . . 16-18

*State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009) . . . . . 21-23

*State v. Rock*, 65 Wn.App. 654, 829 P.2d 232 (1992) . . . . . 11, 12

*State v. Torres*, 85 Wn.App. 231, 932 P.2d 186 (1997) . . . . . 10-12

*State v. Valentine*, 132 Wn.2d 1, 935 P.2d 1294 (1997) . . . . . 13

*State v. Winston*, 105 Wn.App. 318, 19 P.3d 495 (2001) . . . . . 14

*State v. Womac*, 160 Wn.2d 643, 160 P.3d 140 (2007) . . . . . 17, 19, 20

***Constitutional Provisions***

Washington Constitution, Article 1, § 21 . . . . . 15, 20

Washington Constitution, Article 1, § 22 . . . . . 13-15

Washington Constitution, Article 4, § 7 . . . . . 7

United States Constitution, Sixth Amendment . . . . . 13-15, 20

***Statutes and Court Rules***

AR 6 . . . . . 8

CrR 7.8(b) . . . . . 9

RCW 4.12.050 . . . . . 8, 9

## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. Cowlitz County Superior Court Judge Warning violated Washington Constitution, Article 4, § 7, when he presided over the defendant's case because the record does not contain a request from a Lewis County judge that Judge Warning sit *pro tempore*.

2. Judge Warning violated RCW 4.12.050 when he failed to recuse himself after the defendant filed a timely affidavit of prejudice against him.

3. The court's failure to appoint counsel to represent the defendant at resentencing violated the defendant's right to counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

4. The trial court violated the defendant's right to a jury determination of all of the facts necessary for punishment under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it failed to vacate the defendant's exceptional sentence.

***Issues Pertaining to Assignment of Error***

1. Does a superior court judge from one county violate Washington Constitution, Article 4, § 7, if he or she presides over a case in another county without a request from a judge from that other county?

2. Does a Superior Court Judge violate RCW 4.12.050 if he or she continues to hear a case after a defendant files a timely affidavit of prejudice?

3. Does a trial court violate an indigent defendant's right to counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if that judge forces the defendant to proceed to resentencing *pro se*?

4. Does a trial court violate a defendant's right to a jury determination of all of the facts necessary for punishment under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, if it fails to vacate the defendant's exceptional sentence based upon facts the court found following a jury trial?

## STATEMENT OF THE CASE

On March 25, 1987, a Lewis County jury found the defendant Charles Dennis Hawkins guilty of murder in the first degree, committed in Lewis county on November 13, 1984. CP 89-92. Based upon an offender score of three points, the defendant's standard range for the offense was from 271 to 361 months in prison. *Id.* A little less than a month after the verdict, the court sentenced the defendant to an indeterminate sentence of "[a] maximum term of life imprisonment and a minimum term of 600 months." *Id.* The court based this sentence in excess of the standard range upon its determination of three aggravating factors: (1) deliberate cruelty, (2) vulnerable victim, and (3) violation of the victim's zone of privacy. CP 93-94. The defendant thereafter appealed both the conviction as well as the indeterminate sentence. CP 2-13.

By a decision filed March 14, 1989, the court of appeals affirmed the defendant's conviction. CP 2-13. However, while affirming the imposition of an exceptional term of 600 months, the court ordered the sentence of "[a] maximum term of life imprisonment" be vacated along with the designation that the term of 600 months was a "minimum." CP 13. The mandate of the Court of Appeals along with an attached copy of the court's decision was filed with the Lewis County Superior Court on August 6, 1989. CP 1. Although the Court of Appeals ordered this modification of the judgment and

sentence and mandated the case back to the Lewis County Superior Court “for further proceedings in accordance with the . . . opinion,” the Lewis County Superior Court did not follow the mandate of the court for over 21 years. CP 61.

A number of years after the court of appeals decision was filed with the Lewis County Superior Court, the defendant filed a motion with the trial court under CrR 8.3(b), moving that his conviction be vacated and the charges dismissed with prejudice. CP 16. Cowlitz County Superior Court Judge Warning presided over the motion, and ultimately denied the defendant’s requests for relief. CP 14-20. The defendant then appealed. *Id.* By unpublished opinion filed July 14, 2009, the Court of Appeals affirmed Judge Warning’s denial of the defendant’s motion to dismiss under CrR 8.3. *Id.* The Lewis County Superior Court clerk filed the mandate on this appeal on March 1, 2010. CP 14.

On March 29, 2010, Lewis County Deputy Prosecutor Lori Smith filed a letter with the Superior Court she had received from the defendant asking that he be brought back to strike his indeterminate sentence and follow the 21-year-old original decision of the Court of Appeals. CP 21. In response to this letter, Ms Smith filed a docket notice setting April 30, 2010, for a “Motion to Correct Judgment and Sentence,” with the defendant appearing by telephone and the matter to be heard before Judge Warning. CP

22. On April 12, 2010, Ms Smith filed an amended docket notice resetting the hearing for May 7, 2010. CP 24-25. In response to the docket notice, the defendant filed an Affidavit of Prejudice against Judge Warning, as well as a Motion and Affidavit for Recusal. CP 26-30, 31. The defendant also filed a Motion to Modify and/or Vacate the Sentence under CrR 7.8(b). CP 34-58.

On May 7, 2010, Judge Warning called the case for hearing on the defendant's motions. CP 60. Nothing within the record before the superior court reveals any request by a Lewis County Superior Court Judge that Judge Warning sit as a judge *pro tempore* of the Lewis County Superior Court. CP 1-77; RP 1-26. Rather, the two docket notices appear to indicate that he presided at the request of the deputy prosecuting attorney. CP 22-25. The defendant appeared by telephone from prison without counsel. RP 1-26. At no point during the hearing did the defendant waive his right to appointed counsel, even though he remained indigent and had been continuously incarcerated since his original conviction. *Id.*

Initially, Judge Warning refused to honor the defendant's Affidavit of Prejudice, holding that his prior rulings on the defendant's previous motion to dismiss under CrR 8.3 made the current affidavit untimely. RP 1-4. Judge Warning then denied all of the defendant's other motions, except the defendant's request to implement the original decision of the Court of Appeals. RP 1-24. On this issue, the court entered the following written

order:

1. Page 3 Section 4.3 is amended as follows:

The “maximum term of life imprisonment” and the designation “minimum” are deleted; the exceptional sentence of 600 months shall be enforced.

2. All other provisions of said Section 4.3, as well as the remainder of the Judgment and Sentence shall remain in full force and effect.

CP 61 (underlining in original).

The defendant thereafter filed timely notice of appeal. CP 62. On the same date, the defendant filed a Motion and Affidavit for Order of Indigency.

CP 63-66. The court granted the motion, entered an order of indigency, and authorized the appointment of counsel to represent the defendant on appeal.

CP 85-86.

## ARGUMENT

### **I. COWLITZ COUNTY SUPERIOR COURT JUDGE WARNING VIOLATED WASHINGTON CONSTITUTION, ARTICLE 4, § 7, WHEN HE PRESIDED OVER THE DEFENDANT'S CASE BECAUSE THE RECORD DOES NOT CONTAIN A REQUEST FROM A LEWIS COUNTY JUDGE THAT JUDGE WARNING SIT *PRO TEMPORE*.**

Under Washington Constitution, Article 4, § 7, a superior court judge from one county may be authorized to sit as a judge *pro tempore* in the superior court of another county if certain preconditions are met. This constitutional provision states:

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

Washington Constitution, Article 4, § 7.

Under this constitutional mandate, there are three ways for a superior court judge to appear *pro tempore* in another county: (1) at the request of a

superior court judge of the county in which the out-of-county judge will appear; (2) at the request of the governor, and (3) if the Supreme Court pursuant to court rule has previously designated the out-of-county superior court judge as a judge *pro tempore* of the county in which the judge will preside over a particular case.

Under AR 6, the Washington Supreme Court has appointed a number of judges *pro tempore* for each of the counties within Washington. *See* AR 6. According to the list, the only judges *pro tempore* authorized to sit as Lewis County Superior Court judges are District Court Judge Buzzard and District Court Judge Roewe. *Id.* Thus, in the case at bar, Cowlitz County Superior Court Judge Warning did not have authority to preside in the current case unless a Lewis County Superior Court Judge or the Governor requested that he do so. In this case, there is no evidence in the record that either of these events occurred. In fact, the two docket notices filed by the deputy prosecutor in the case appear to indicate that she arranged for Judge Warning's appearance. Absent proof that Judge Warning had authority to preside in this case, this court should vacate the order modifying the sentence and remand for a new hearing.

**II. JUDGE WARNING VIOLATED RCW 4.12.050 WHEN HE FAILED TO RECUSE HIMSELF AFTER THE DEFENDANT FILED AN AFFIDAVIT OF PREJUDICE AGAINST HIM.**

Under RCW 4.12.050, a litigant in a criminal proceeding in Superior

Court in Washington has the right to file a single affidavit of prejudice disqualifying one Superior Court judge. Section (1) of this statute states as follows:

(1) Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: AND PROVIDED FURTHER, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

RCW 4.12.050.

In the case at bar, the defendant filed a motion to modify or vacate his sentence under CrR 7.8(b). Upon learning that Judge Warning was going to preside over his motion, and prior to the court making any discretionary decision on the defendant's motion, the defendant filed an affidavit of

prejudice. As a result, Judge Warning should have disqualified himself from presiding over the defendant's case. Apparently the court believed that since it had presided over the defendant's previous post-trial motion, the defendant was not entitled under RCW 4.12.050 to file an affidavit of prejudice for any future proceedings in the case. However, a careful review of the decision in *State v. Torres*, 85 Wn.App. 231, 932 P.2d 186 (1997), indicates otherwise. The following examines this case.

In *State v. Torres, supra*, the state originally charged the defendant in October of 1993 with first degree rape of a child. The court thereafter made a discretionary ruling in the case without the defendant having filed an affidavit of prejudice under RCW 4.12.050. Three months later, the court dismissed the prosecution without prejudice upon the state's motion. About four or five months later, the state again charged the defendant with the same count of first degree child molestation. This time the defendant promptly filed an affidavit of prejudice before the court made any further discretionary rulings in the matter. However, the court refused to honor the affidavit, holding that since the state had refiled the original charge, the defendant's disqualification request was untimely. Following conviction, the defendant appealed, arguing in part that the trial court had erred when it refused to honor the affidavit of prejudice.

The state responded to the defendant's claim by arguing that under the

decision in *State v. Belgarde*, 119 Wn.2d 711, 837 P.2d 599 (1992), as long as the action involves the same issue, the dismissal without prejudice does not abate the original action and the refileing of the same charge merely continues the same case. In *Belgarde*, the court concluded that retrial following reversal on appeal did not render the action a different case. Thus, the court held that the defendant's affidavit of prejudice filed after the case was remanded for retrial was untimely. See also, *State v. Clemons*, 56 Wn.App. 57, 61, 782 P.2d 219 (1989) (retrial following a mistrial does not create a new action or proceeding for the purpose of filing an affidavit of prejudice).

However, in *Torres*, the court rejected the state's analysis, finding that since a dismissal without prejudice actually abates the original action and did not continue the original case as happened in *Belgarde* and *Clemons*, the refiled charge constituted a new case. In support of its decision, the court relied upon the decision in *State v. Rock*, 65 Wn.App. 654, 829 P.2d 232 (1992). In that case, the State had voluntarily dismissed a prosecution without prejudice to avoid dismissal for failure to comply with the speedy trial rule. The underlying problem was that the state had been unable to serve a necessary witnesses. The question before the court then became whether or not the trial judge's order of dismissal without prejudice was a final order which was appealable as a matter of right. The court found that it was, since:

“[c]learly a dismissal without prejudice ‘abates or discontinues’ the case....” 65 Wn.App. at 657 n. 3. The court in *State v. Rock*, went on to clarify that “[a] dismissal without prejudice is certainly a final order in that it completely terminates that proceeding.” 65 Wn.App. at 658.

Based upon the decision in *Rock*, the court in *Torres* held that the defendant was entitled to file the affidavit of prejudice, even though the state had refiled the same charges against the defendant arising out of the same conduct. As a result, the court reversed the defendant’s conviction and remanded for a new trial.

In the case at bar, Judge Warning had heard and denied a prior post-trial motion the defendant had filed. The defendant appealed this order, and the Court of Appeals ultimately affirmed. The mandate on this appeal was filed with the Lewis County Superior Court on March 1, 2010, thereby abating the action. By no later than this date, there was no matter pending before the Superior Court. As a result, when the defendant filed the subsequent motion under CrR 7.8(b) to implement the 21-year-old appellate decision, he initiated a new action. As a result, he was entitled to file an affidavit of prejudice just as the defendant in *Torres* and *Rock* were entitled to file affidavits of prejudice. Consequently, the trial court erred when it refused to honor the defendant’s timely filed affidavit, and the decision of the trial court should be vacated.

**III. THE COURT'S FAILURE TO APPOINT COUNSEL TO REPRESENT THE DEFENDANT AT RESENTENCING VIOLATED THE DEFENDANT'S RIGHT TO COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, an indigent defendant has the right to the assistance of court-appointed counsel at any critical stage in an original criminal prosecution. *State v. Valentine*, 132 Wn.2d 1, 16, 935 P.2d 1294 (1997); *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). By contrast, there is generally no constitutional right to the appointment of counsel to pursue post-conviction relief, even in death penalty cases. *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The decisions of our courts addressing a defendant's right to the appointment of counsel to pursue a motion to withdraw a guilty plea as long as the motion is filed before sentencing illustrates this dichotomy.

For example, in *State v. Harell*, 80 Wn.App. 802, 911 P.2d 1034 (1996), the defendant pled guilty to three counts of rape. Prior to sentencing, the defendant instructed his appointed counsel to file a motion to withdraw his guilty plea. Trial counsel refused, and the defendant brought the motion *pro se*. During a hearing on the motion, the state called the defendant's attorney as a witness. After hearing this testimony, the trial court denied the

defendant's motion and proceeded to sentencing. The defendant then appealed, arguing that his appointed counsel's refusal to pursue the motion denied him the right to counsel under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. The Court of Appeals agreed, stating as follows:

A defendant has a constitutional right to appointed counsel at all critical stages of a criminal prosecution. A stage is critical if it presents a possibility of prejudice to the defendant. Ample authority from other jurisdictions supports appellant's contention that a plea withdrawal hearing is a critical stage, and the State concedes this point. We find this authority persuasive, and hold that a plea withdrawal hearing is a critical stage giving rise to the right to assistance of counsel.

*State v. Harell*, 80 Wn.App. at 804 (footnotes omitted).

By contrast, in *State v. Winston*, 105 Wn.App. 318, 19 P.3d 495 (2001), the defendant plead guilty to burglary and was sentenced. Twelve months later, he brought a motion to withdraw his guilty plea. The court denied both the motion, as well as the defendant's request for appointed counsel to represent him. The defendant then appealed, arguing that the trial court's failure to appoint counsel to represent him on the motion denied him the right to appointed counsel as an indigent under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. However, since the defendant had made the request as part of a post-conviction proceeding, the appellate court found no right to appointed counsel.

In the case at bar, the latter case would initially appear to control, since the defendant brought his CrR 7.8(b) motion more than 21 years after the mandate was issued in his original appeal. However, upon a careful review of the defendant's motion, it is apparent that the substance of the defendant's request is that the trial court hold a new sentencing hearing in order to implement the original decision of the court of appeals. Since the original decision of the Court of Appeals had the effect of vacating the trial court's original indeterminate sentence, under the *Harrell* decision, the defendant was entitled to the appointment of counsel to represent him. As a result, the trial court's failure to appoint counsel denied the defendant his rights under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

**IV. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A JURY DETERMINATION OF ALL OF THE FACTS NECESSARY FOR PUNISHMENT UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT FAILED TO VACATE THE DEFENDANT'S EXCEPTIONAL SENTENCE.**

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that under the Sixth Amendment “[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.” The

court subsequently clarified this rule in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and held that the term “prescribed statutory maximum” meant the “standard range” for the offense not the “statutory maximum” for the offense. These two cases left open the question of whether or not it was still possible to impose an exceptional sentence under the Washington Sentencing Reform Act, particularly for those exceptional sentences which were reversed for *Apprendi* and *Blakely* violations.

In *State v. Hughes*, 154 Wn.2d 119, 110 P.3d 192 (2005), the Washington Supreme Court addressed this question. In this case, the state argued that the trial court had inherent authority to empanel sentencing juries for those exceptional sentences reversed under *Apprendi* and *Blakely* even though the RCW 9.94A did not establish a procedural basis for such actions. The state also argued that errors under *Apprendi* and *Blakely* could be harmless beyond a reasonable doubt under appropriate facts. The defense responded that (1) *Apprendi* and *Blakely* made Washington’s statutory scheme for imposing exceptional sentences unconstitutional on its face, (2) that no inherent judicial authority existed to establish procedures for empaneling sentencing juries, and (3) the failure to submit aggravating factors to the jury constituted a structural error that could never be harmless beyond a reasonable doubt. The Washington Supreme Court agreed with

each of the defense arguments.

Following the court's decision in *Hughes*, two things happened. First, the legislature adopted new procedures for imposing exceptional sentences in light of *Apprendi* and *Blakely*. Second, the United States Supreme Court accepted review in *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 2551, 165 L.Ed.2d 466 (2006), in order to review that portion of the Washington Supreme Court's decision in *Hughes* wherein the court held that *Apprendi* and *Blakely* errors could never be harmless beyond a reasonable doubt. In that case the court abrogated this finding in *Hughes* and held that errors in failing to submit aggravating factors to the jury could well be harmless beyond a reasonable doubt in the same manner that failing to include all of the elements of the crime in a "to convict" instruction could be harmless beyond a reasonable doubt.

Following entry of the decision in *Recuenco*, the Washington Supreme Court issued its opinion in *State v. Womac*, 160 Wn.2d 643, 160 P.3d 140 (2007), which addressed, *inter alia*, the harmless error analysis for cases with *Blakely* errors. In *Womac*, a jury convicted the defendant of homicide by abuse, second degree felony murder, and first degree assault against his four-month-old son. The trial court, pre-*Blakely*, imposed an exceptional sentence based upon findings of particular vulnerability and abuse of position of trust. The defendant then appealed, arguing that

sentencing him on the felony murder and first degree assault charges along with the homicide by abuse violated double jeopardy. While the appeal was pending, the United States Supreme Court issued its decision in *Blakely* and the Washington Supreme Court issued its decision in *Hughes*. Based upon these cases the Court of Appeals rejected the state's harmless error analysis and remanded for sentencing within the standard range. The court also provisionally ordered dismissal of the convictions on the felony murder and assault charges.

At this point the defendant obtained review from the Washington Supreme Court on issues concerning his conviction. The court then ordered further briefing to address whether, in light of the decision in *Recuenco*, the Court of Appeals acted properly when it remanded the case for resentencing within the standard range. The parties complied with this request, with the state arguing that given the undisputed age of the victim, the trial court's failure to submit the aggravating factors of particular vulnerability and abuse of position of trust was harmless beyond a reasonable doubt. In addressing this issue, the court first performed the following analysis on the *Recuenco* decision.

In *Recuenco*, the United States Supreme Court abrogated *Hughes*, holding failure to submit a sentencing factor to the jury is not structural error and may be subject to harmless error analysis. The Court held, “[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury” may be subject to harmless

error analysis, observing, “[o]nly in rare cases has this Court held that an error is structural, and thus requires automatic reversal.” The Court concluded we erred in *State v. Recuenco* by relying on *Hughes* for the proposition that a *Blakely* error can never be harmless. In light of *Washington v. Recuenco*, we must now determine whether the Court of Appeals properly remanded for resentencing Womac within the standard range.

In *Recuenco* the United States Supreme Court opined “[i]f ... Washington law does not provide for a procedure by which [Recuenco’s] jury could have made a finding pertaining to his possession of a firearm, that merely suggests that respondent will be able to demonstrate that the *Blakely* violation in this particular case was not harmless.” Following this reasoning, Womac argues, “[b]ecause state law does not and did not provide for a jury to be empaneled to make the factual findings necessary to support the exceptional sentence in this case, the error cannot be said to be harmless beyond a reasonable doubt.”

*State v. Womac*, 160 P.3d at 49-50 (citations and footnotes omitted; brackets in original).

Based upon the court’s statement in *Recuenco* and the fact that Washington did not have a statutory scheme in place for juries to find aggravating factors at the time of the defendant’s trial, the court found that the error in failing to submit the two aggravating factors to the jury was not harmless beyond a reasonable doubt. The court held:

As explained by *Hughes*, former RCW 9.94A.535 “explicitly direct[ed] the trial court to make the necessary factual findings” to support an exceptional sentence “and d[id] not include any provision allowing a jury to make those determinations during trial, during a separate sentencing phase, or on remand.” *Hughes* also declared, “no procedure is currently in place allowing juries to be convened for the purpose of deciding aggravating factors either after conviction or on remand after an appeal.” Our recent decision in *State v. Pillatos*

confirmed “trial courts do not have inherent authority to empanel sentencing juries.”

Furthermore, the new sentencing provisions, Laws of 2005, chapter 68 (providing for a procedure whereby facts supporting aggravated circumstances are proved to a jury beyond a reasonable doubt), do not apply to Womac. *Pillatos* held the new sentencing provisions apply only to “pending criminal matters where trials have not begun or pleas not yet accepted.” As Womac correctly observes, even if the new sentencing provisions applied to him, 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 sentencing range; and it is too late for the State to comply with that requirement. In addition, RCW 9.94A.537(2) requires a jury to find the existence of facts supporting aggravating circumstances, and as discussed above, state law does not authorize impaneling a new jury to make such findings.

Accordingly, we hold that because there was no legal procedure whereby Womac’s jury could have made the findings necessary to support his exceptional sentence, the error was not harmless.

*State v. Womac*, 160 P.3d at 50 (citations omitted; brackets in original).

In the case at bar, the trial court imposed an indeterminate sentence of life with a minimum mandatory time to serve that was in excess of the standard range based upon its own finding that there were three aggravating facts present in the case. The court did not submit the existence of these facts to the jury for its determination, and the defendant did not waive his right to have the jury determine these issues. Thus, in the case at bar, the trial court violated the defendant’s rights under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, as interpreted in *Apprendi* and *Blakely* and their progeny to have the jury determine all facts

necessary to justify the punishment the court imposed. In this case, the only issue is whether or not these decisions apply retroactively. As a review of the decision in *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009), indicates, the *Blakely* decision does apply retroactively in the case at bar.

In *State v. Kilgore, supra*, a jury convicted the defendant on three child rape charges and four child molestation charges. Based upon its own findings of aggravating facts, the trial court imposed an exceptional sentence of concurrent 560 month sentences on each count. The defendant then appealed, and the court reversed two of the charges and remanded for retrial. However, the court affirmed the other convictions as well as the exceptional sentences on those remaining counts. Following the filing of the mandate, the State elected not to retry the two charges that had been reversed. After the mandate issued terminating direct review, but before the trial court corrected Kilgore's judgment and sentence to vacate the convictions and sentences on the reversed counts, the United States Supreme Court issued the decision in *Blakely*.

Once this case was called in court to vacate the convictions and sentences on the two reversed counts, the defendant argued that the court should resentence him within the standard range based upon the *Blakely* decision. The trial court refused, and the defendant appealed. The court of appeals affirmed, and the defendant obtained review before the Washington

State Supreme Court, arguing that the trial court and the court of appeals had erred when they held that the case was final for purposes of retroactivity when *Blakely* was decided.

In reviewing the defendant's arguments on retroactivity, the court began with the following rule:

*Blakely* applies only to cases pending on direct review or not yet final. Therefore, "[t]he critical issue in applying the current retroactivity analysis is whether the case was final when the new rule was announced." We define finality for purposes of retroactive application of a new rule of law as the point at which "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.' "

*State v. Kilgore*, 167 Wn.2d at 395-396 (citations omitted).

In applying this standard, the court noted that the trial court had affirmed the defendant's sentences on the remaining counts regardless of the fact that it had reversed two of the counts and remanded for retrial. Thus, the trial court's act of striking the reversed convictions and their attendant sentences after the state decided not to retry them had no effect upon the validity of the sentences on the remaining counts. As a result, the convictions and sentences that were affirmed became final for the purposes of retroactivity analysis once the time for filing a petition for writ of certiorari ran out after the court of appeals filed the mandate. Since this was prior to the filing of the decision in *Blakely*, the defendant was not entitled to the

retroactive application of the holding in *Blakely*.

By contrast, in the case at bar, the trial court imposed an indeterminate sentence upon the defendant of life in prison with a minimum time to serve of 600 months. As the court noted, since the defendant had committed his crime after the effective date of the Sentencing Reform Act, this sentence was not authorized by law. However, the court of appeals further held that since the trial court had entered findings of fact that did justify a determinate sentence of 600 months, which the trial court had set as the minimum for the indeterminate sentence, the appropriate remedy was to remand to have the trial court vacate the indeterminate life sentence and impose a determinate sentence of 600 months.

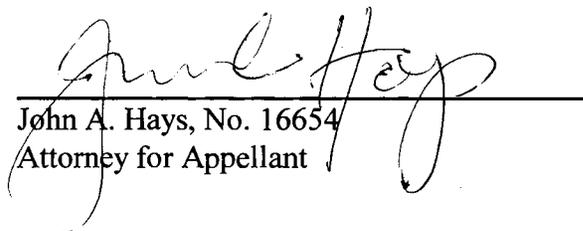
Unlike *Kilgore*, in which the court of appeals had affirmed the sentences at issue, in the case at bar, the effect of the court of appeals' decision was to vacate the defendant's indeterminate life sentence. Thus, the defendant's sentence was not final for the purposes of retroactivity analysis under *Kilgore* until that point in time that the trial court actually struck the defendant's indeterminate sentence and properly imposed a determinate sentence. Since this did not occur until long after the entry of the decision in *Blakely*, the defendant is entitled to the application of that case. As a result, this court should vacate the recent amendment to the defendant's sentence and remand with instructions to resentence within the standard range.

**CONCLUSION**

The defendant's sentence should be vacated and the case remanded with instructions to honor the defendant's affidavit of prejudice, and to have an elected judge of the Lewis County Superior Court or a properly appointed judge *pro tempore* resentence the defendant within the standard range.

DATED this 13<sup>th</sup> day of December, 2010.

Respectfully submitted,

  
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John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**WASHINGTON CONSTITUTION  
ARTICLE 4, §7**

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**RCW4.12.050**  
**Affidavit of Prejudice**

(1) Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: AND PROVIDED FURTHER, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

(2) This section does not apply to water right adjudications filed under chapter 90.03 or 90.44 RCW. Disqualification of judges in water right adjudications is governed by RCW 90.03.620.

COURT OF APPEALS  
DIVISION II  
DATED 13 DEC 2008  
STATE OF WASHINGTON  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II**

**STATE OF WASHINGTON,  
Respondent,**

**APPEAL NO: 40745-1**

**vs.**

**AFFIRMATION OF SERVICE**

**CHARLES HAWKINS,  
Appellant.**

**STATE OF WASHINGTON        )  
  ) vs.  
COUNTY OF LEWIS            )**

**CATHY RUSSELL**, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **December 13, 2010**, I personally placed in the mail the following documents

- 1. **BRIEF OF APPELLANT**
- 2. **AFFIRMATION OF SERVICE**
- 3. **SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS**

to the following:

**MICHAEL GOLDEN  
LEWIS COUNTY PROS. ATTY  
345 W. MAIN ST.  
CHEHALIS, WA 98532**

**CHARLES HAWKINS - #263451  
AIRWAY HEIGHTS CORR CTR.  
P.O. BOX 1809  
AIRWAY HEIGHTS, WA 99001**

Dated this 13<sup>TH</sup> day of **DECEMBER, 2010** at **LONGVIEW, Washington.**

  
\_\_\_\_\_  
**CATHY RUSSELL**  
**LEGAL ASSISTANT TO JOHN A. HAYS**