

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

No. 41461-9-II

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

STATE OF WASHINGTON,
Respondent,
v.
NEIL GRENNING,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
The Honorable James Orlando, Judge

OPENING BRIEF OF APPELLANT

RITA J. GRIFFITH
Attorney for Appellant

RITA J. GRIFFITH, PLLC
4616 25th Avenue NE, #453
Seattle, WA 98105
206-547-1742

PM 3-17-14

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in reimposing the exceptional sentence on remand.

2. The trial court erred in reimposing the exceptional sentence based on its own fact- finding at the initial sentencing hearing.

3. RCW 9.94A.712 does not apply to Mr. Grenning's exceptional sentence or provide a basis for judicial fact finding in support of an exceptional sentence.

4. The trial court erred in relying on the sexual motivation verdict to support exceptional consecutive sentences for crimes other than the applicable second degree assault.

5. The trial court erred in relying on the "free crimes/multiple counts" aggravating factor.

6. The state failed to provide constitutionally adequate notice of aggravating factors.

7. The trial court erred in finding that the multiple offense policy of the Sentencing Reform Act (SRA) resulted in a sentence that was clearly too lenient in light of the act's policies.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Would Mr. Grenning's state and federal constitutional rights to due process of law be violated if judicial fact-finding in support of his

exceptional sentence were upheld under RCW 9.94A.712 where the Legislature specified that this provision would apply only to crimes committed on or after September 1, 2001, and the charging period for his convictions included time before that date?

2. Should the law of the case doctrine not be applied to prevent consideration of whether RCW 9.94A.712 applies in Mr. Grenning's case where the first appeal holding that RCW 9.94A.712 did apply was entered without briefing from the parties and without consideration of the fact that the charging period included time before the statute applied and where a new sentencing hearing was held after the decision?

3. Should Mr. Grenning's exceptional sentence, except for the consecutive sentence for his second degree assault conviction, be reversed where it was otherwise based on findings which had to be made by the jury and there was no procedure for impaneling a jury to find the aggravating factors at the time he was originally sentenced, and the trial judge merely deleted references to the dismissed counts and entered the same findings at his resentencing hearing?

4. Was the sexual motivation verdict found by the jury for the second degree assault conviction an invalid basis for exceptional consecutive sentences for convictions other than the second degree assault?

5. Was the “free crime/multiple offense” aggravating factor an invalid basis for an exceptional sentence where the state never provided notice that it would seek to establish or rely on this aggravator, where this was an invalid factor at the time of the original sentencing and where it would violate state and federal prohibitions against ex post facto laws to apply the statute creating this factor to Mr. Grenning?

6. Does Mr. Grenning’s exceptional sentence deny him his state and federal constitutional rights to due process, confrontation and compulsory process where (a) the state did not provide him notice until after trial of its intent to seek an exceptional sentence and the aggravating factors which it would seek to establish, (b) the trial court relied on the trial evidence to find aggravating factors at the initial sentencing and (c) the state never sought to impanel a jury on remand?

7. Do Const. art. 1, §§ 21 and 22 require that a jury rather than a judge find the “clearly too lenient” aggravating factor in order to impose consecutive sentences based on that factor?

8. Was *State v. Vance*, approving judicial fact-finding for consecutive exceptional sentences, wrongly decided?

C. STATEMENT OF THE CASE

1. Procedural history

Appellant Neil Grenning was charged with and convicted, by jury

verdict, of multiple sex offenses against two children and multiple counts of possession of depictions of minors engaged in sexually explicit conduct:

Counts I through XLIII (R.W. victim) -- rape of a child in the first degree, sexual exploitation of a minor, child molestation in the first degree, and one count of assault of a child in the second degree committed with sexual motivation;

Counts XLIII through LXIII -- possession of depictions of minors engaged in sexually explicit conduct, committed with sexual motivation; and

Counts LXIII through LXXII (B.H. victim) -- rape and attempted rape of a child in the first degree, sexual exploitation of a minor, child molestation in the first degree. CP 5-33. 61-87.

After the verdicts were entered on June 21, 2004, the state filed a Notice of Intent to Seek an Exceptional Sentence and a pleading entitled Special Allegations of Aggravating Factors: deliberate cruelty, particular vulnerability, abuse of a position of trust, multiple incidents of abuse, commission of second degree assault with sexual motivation, an ongoing pattern of sexual abuse, and a presumptive sentence that is too lenient in light of the purposes of the Sentencing Reform Act and RCW 9.94A.535. CP 35-38, 61-87. The state gave no notice that it would be seeking an exceptional sentence because “the defendant’s high offender score results in some of the current offenses going unpunished,” as is now set out in RCW

9.94A.535(2)(c) (amended by the laws of 2005).

At the sentencing hearing, the prosecutor maintained that “[f]rom day one in this case the State put the defense on notice that the State intended to seek an exceptional sentence”; and because the United States Supreme Court issued its decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), after the verdict but before sentencing, asked that a jury be impaneled to determine whether the recently-alleged aggravating factors had been proven.¹ RP 990-991.

In response, defense counsel objected that the aggravating factors had to be pled and proved and that the state’s “bantering back and forth what they may or may not do . . . is not sufficient to comply with the constitution as far as sufficient notice.” RP 991. Defense counsel also argued that the aggravating factors had to be charged in the information and that there were “additional pieces of evidence that I likely would have introduced” had counsel had notice of the aggravating factors,² RP 992-993.

¹ *Blakely* held that the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), 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,” applies to the fact necessary to support an exceptional sentence under Washington’s Sentencing Reform Act. *Blakely*, 120 S. Ct. at 2536-2537; *Apprendi*, 530 U.S. at 490.

² Defense counsel used “position of trust” as an example, which was not ultimately found by the jury. The court’s findings, however, relied entirely on evidence adduced at trial, and the defense had no opportunity

The trial court ruled that it would be “legislating from the bench” to impanel a jury to consider aggravating factors. RP 995. The trial court nevertheless imposed an exceptional sentence of 1,404 months, computed by imposing the high end of the standard range on each type of crime against each victim with the sentences imposed for each type of crime to run consecutively to the sentences on each other type of crime. CP 61-97. In support of the exceptional sentence the court stated that it:

has the authority to impose an exceptional sentence as there were multiple victims found by the jury beyond a reasonable doubt. There were multiple offenses found by a jury beyond a reasonable doubt.

Those factors I think bring what occurred in this case in line with *Apprendi* and the *Blakely* decision.

RP 1031. Further the court stated it relied on the jury’s findings that the second degree assault and possession of depictions counts were committed with sexual motivation. RP 1031. Finally, the court stated that the high offender score justified the exceptional sentence. RP 1039. The court entered written Findings of Fact and Conclusions of Law Regarding Exceptional Sentence, reflecting the finding of aggravating factors. CP 40-60; 88-89. Specifically, the court found that it could impose an exceptional sentence based on the jury verdicts and for free crimes and the multiple

to present evidence on any of these factors.

offense policy (Conclusions XII, XV); the victimization of more than one child (Conclusion XIV); the commission of multiple counts of each charged crimes making the conduct more egregious and resulting in a sentence that was clearly too lenient with some conduct going unpunished (Conclusions XVI-XVIII; XX-XXII), the commission of multiple penetrations making the conduct more egregious (Conclusions XXIII-XXVIII), and the sexual motivation finding for the second degree assault (Conclusion XIX) CP 40-60, 88-89.

On appeal, this Court reversed Mr. Grenning's twenty convictions for possession of depictions of minors because of the state's failure to provide necessary discovery. *State v. Grenning*, 142 Wn. App. 518, 174 P.3d 706 (2008). This Court affirmed Mr. Grenning's exceptional sentences, however, based on two grounds: (a) jury findings supporting exceptional minimum terms are not required for sentences imposed under RCW 9.94A.712,³ for sex-related crimes; and (b) the jury found the second degree assault was committed with sexual motivation, an aggravating factor which allowed the trial court to impose an exceptional sentence. *Grenning*. 142

³ RCW 9.94A.712, is now codified at RCW 9.94A.507, and provides that an offender who is convicted of rape of a child or child molestation in the first degree or second degree assault with sexual motivation, shall be sentenced to an indeterminate sentence of up to the statutory maximum for that offense. Under *State v. Clarke*, 156 Wn.2d 880, 892, 134 P.2d 188 (2006), *Blakely* does not apply to an exceptional minimum term set by the court under RCW 9.94A.712.

Wn. App. at 544.

The state had never argued to this Court, before the decision, that the exceptional sentence should be upheld under RCW 9.94A.712. The state instead conceded that the multiple offense policy aggravating factor and the defendant's conduct being more egregious than the typical case aggravator were improper under *State v. Hughes*, 154 Wn.2d 118, 1136-137, 110 P.3d 192 (2005), because not found by a jury. Brief of Respondent (filed in *State v. Grenning*, 32426-1-II) at 68-71. The state argued that the sexual motivation verdicts alone were sufficient to support the exceptional sentences. *Id.*

Mr. Grenning challenged the decision upholding the exceptional sentence under section .712 in a Motion to Reconsider, but the Motion to Reconsider was denied.

The Washington Supreme Court granted the state's petition for review on the discovery violation issue only, and affirmed the decision of the Court of Appeals. *State v. Grenning*, 169 Wn.2d 47, 234 P.3d 169 (2010).

On remand, the state elected not to retry the counts of depictions of children. At resentencing Judge Orlando merely removed those convictions from the judgment and sentence and reduced the total sentence by 12 months and reentered the findings and conclusions in support of the exceptional sentence as originally entered with references to the dismissed counts

removed. CP 171-200.

A timely Notice of Appeal followed. CP 39.

2. The sentencing hearing

During the sentencing hearing, defense counsel objected to consideration of an exceptional sentence on notice grounds:

Your honor, we would object to any seeking by the State of an exceptional sentence. There's been no notice – no notice of any intent to seek an exceptional sentence in any of the charging documents. Under Article 1, Section 22 and Section 25 of the Washington Constitution, we would object because there was no notice provided in the charging documents that we believe is necessary.

RP(sentencing) 6. In response, the court stated in error that “the State did file a Notice of Intent to seek exceptional sentence *well in advance of the trial* and sentencing date in this case.” RP(sentencing) at 16.

Defense counsel also objected to sentencing under RCW 9.94A.712 relied on by the Court of Appeals to uphold the original exceptional sentence. RP(sentencing) 7. Counsel noted that section .712 applies only to crimes committed on or after September 1, 2001, and that the charging periods in Mr. Grenning's case began before that date. Given that the jurors were not asked to determine when the crimes occurred, under the rule of lenity and *State v. Aho*, 137 Wn.2d 736, 975 P.2d 512 (1999), Mr. Grenning had to be sentenced under RCW 9.94A.589 and .535 rather than RCW 9.94A.712. RP(sentencing) 7-8. Under .589 and .535 consecutive

sentences could only be imposed based on findings of aggravating circumstances by jurors rather than the court. RP(sentencing) at 7-8.

Counsel also noted that the two-strikes policy of the SRA contemplated that a person would get a second chance before being sentenced to serve the rest of his life in prison. RP(sentencing) 9-10.

In response, the trial court stated that “based upon his [Mr. Grenning’s] offender’s score of 96 and the prior findings that the sentences should run consecutive in large part because there were multiple acts committed” and that “[t]here was a special jury verdict finding that he committed the second degree assault of a child with sexual motivation, which is a statutory aggravating factor, and the Court can then impose the consecutive sentences.” RP(sentencing) at 14.

D. SUMMARY OF ARGUMENT

Mr. Grenning’s exceptional sentence cannot be upheld under RCW 9.94A.712, the indeterminate sentencing provisions for sex offenses. The Legislature specified that this provision would apply only to crimes committed on or after September 1, 2001. Under the controlling authority of *Aho*, 137 Wn.2d at 743, where the legislature specifies the effective date of a statute, the statute cannot apply to conduct which may have – given the charging period – taken place before the effective date. Because Mr.

Grenning was convicted of crimes pre-dating September 1, 2001, RCW 9.94A.712 does not apply.

Moreover, RCW 9.94A.712 cannot apply to justify consecutive sentences for Mr. Grennings convictions for sexual exploitation of a minor because that crime is not included in the list of crimes governed by the statute.

The law of the case doctrine should not preclude review on this issue since, when this Court reached its decision on whether .712 is applicable, it did so without briefing from the parties on the issue and without consideration of *Aho*. This undermines the correctness of the prior decision. Moreover, a second sentencing hearing took place after the initial decision and, if Mr. Grenning is not allowed to challenge the erroneous application of .712, he would be denied a remedy on appeal.

Because .712 does not apply to Mr. Grenning's sentence, there was no basis for upholding it after the initial sentencing. The findings which supported the exceptional sentence, except for the sexual motivation verdict for the second degree assault conviction, had to be found by a jury under controlling authority at the time of the initial sentencing and appeal. Because the trial judge exercised no discretion on resentencing and merely re-entered the earlier findings and conclusions in support of the exceptional sentence, after removing references to the dismissed counts, there is no basis

for upholding his exceptional sentence after remand. No further notice was given, no jury was impaneled and no facts were found on remand.

The sexual motivation verdict, while potentially justifying a consecutive sentence for second degree assault, could not be the basis to justify consecutive sentences adding up to over 1,300 months on other convictions for other offenses. RCW 9.94A.537(6). And since the state never gave notice of intent to seek an exceptional sentence for “defendant’s high offender score results in some of the current offenses going unpunished,” that aggravator could not be a basis to support an exceptional sentence. At the least some sort of notice had to be provided prior to sentencing and it was not. Moreover, RCW 9.94A.535 was not amended to include this aggravator until after the crimes Mr. Grenning was charged with were committed; and, because the Washington Supreme Court had found this to be an improper factor prior to the amendment of the statute, to increase his punishment based on the later statute would violate ex post facto prohibitions.

Further, the notice of aggravating factors, provided by the state after trial, was inadequate to satisfy due process. The evidence relied on by the court in imposing an exceptional sentence was introduced at trial. Mr. Grenning never had an opportunity to defend himself on these factors. Under *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007), in any event, notice

of aggravating factors was too late after trial. Post-verdict notice is adequate only where, unlike Mr. Grenning's case, a new jury is impaneled and a trial on the aggravating factors provided. *State v. Powell*, 167 Wn.2d 672, 223 P.3d 493 (2009).

Finally, if this Court concludes that the trial court, rather than a jury had a right to determine a "free crimes and multiple convictions" aggravator and that the failure to provide notice of this aggravating factor prior to trial can be excused, this Court should still not follow the holdings in *Oregon v. Ice*, 555 U.S. 160, 172 L. Ed. 2d 517 (2009), on independent state grounds. Additionally, *State v. Vance*, 168 Wn.2d 754, 230 P.3d 1055 (2008), which upheld judicial finding for consecutive sentences, was wrongly decided.

E. ARGUMENT

1. IMPOSING EXCEPTIONAL SENTENCES UNDER RCW 9.94A.712, TO CRIMES COMMITTED BEFORE ITS EFFECTIVE DATE, WOULD VIOLATE MR. GRENNING'S STATE AND FEDERAL RIGHTS TO DUE PROCESS.

a. RCW 9.94A.712 does not apply.

Because the charging periods for Mr. Grenning's convictions started before the effective date of RCW 9.94A.712, and the jury was not asked to determine when within the charging period the crimes were committed, defense counsel argued at resentencing that .712 should not apply, as this Court had found it did in his first appeal. RP(resentencing) 6-7; *State v.*

Grenning, 142 Wn. App. at 544. It is not entirely clear from the record whether the trial court determined that it could enter findings under the authority of .712 at either sentencing hearing.⁴ If so, the trial court erred because .712 should not apply to Mr. Grenning's sentences.

RCW 9.94A.712, by legislative directive, applies only to crimes committed on or before September 1, 2001. As set out in the judgment and sentence, each conviction, except for the possession of depictions of minors convictions – which were reversed on appeal and dismissed on remand -- had charging periods which started before September 1, 2001.⁵

The jury was not asked to determine a specific date within the charging period on which each crime was committed. The judgment and sentence as well as the trial court's written findings of fact in support of its exceptional sentence listed the date of each crime as the entire charging period. CP 61-87, 40-60, 171-200, 164-165.

⁴ In reimposing an exceptional sentence, the trial court cited as its reasons for doing so (a) Mr. Grenning's offender score of 96; (b) "the prior findings that the sentences should run consecutive in large part because there were multiple acts committed"; and (c) the jury's finding of sexual motivation for the second degree assault conviction. RP(resentencing) 16. The court noted "[t]hat has already been up to the Court of Appeals." RP(resentencing) 16. The court then re-entered the same findings and conclusions supporting the exceptional sentence that it had entered at the original sentencing with a few corrections to delete reference to the convictions for possession of depictions of children. CP 164-165. The trial court made no express reference to RCW 9.94A.712.

⁵ The charging periods were April 1, 2001 to September 30, 2001, and July 1, 2001 to March 3, 2002. CP 61-87.

Because the jury was not required to find that each crime was committed on or after September 1, 2001, the trial court's authority for determining facts supporting the exceptional sentence cannot be based on RCW 9.94.712. To apply that statute to crimes committed before its effective date would violate due process of law. *State v. Aho*, 137 Wn.2d 736, 743, 975 P.2d 512 (1999).

In *Aho*, the court reversed convictions for child molestation because the charging period for the convictions included a period before the effective date of the child molestation statute. *Aho*, 137 Wn.2d at 736. The charging period in that case was from January 1987 through December 31, 1992, and the effective date of the statute was not until July 1, 1988. The court held:

[C]onvictions . . . cannot be upheld where the jury might have found Aho guilty based on acts occurring before July 1, 1988 [the effective date of the statute]. Given the legislative directive [setting the effective date], the statute absolutely cannot be applied to that period.

Aho, 137 Wn.2d at 736.

The *Aho* court went on to determine that review was not precluded by the invited error doctrine because defense counsel had been ineffective in failing to object to the instructions allowing the jury to find Aho guilty of a crime before the effective date of the statute creating the crime. *Aho*, at 745.

In *State v. Hartzell*, 108 Wn. App. 934, 33 P.3d 1096 (2001), the court upheld convictions for child molestation where the charging period

included time before the effective date of the statute, but only because Mr. Hartzell had acknowledged, in his plea statement, sufficient evidence to convict after the effective date. The *Hartzell* court, however, reversed the community placement and good time credit award which were based on amendments to the Sentencing Reform Act, and it could not be determined from the record that the crimes had been committed after the effective dates of the amendments. *Hartzell*, 108 Wn. Ap. At 945.

Here, as in *Aho* and *Hartzell* due process is violated if RCW 9.94A.712 is held to authorize allowing the trial court to make the factual findings necessary to support an exceptional sentence for acts which took place before the effective date of that statute.

b. The invited error doctrine should not preclude review.

As in *Aho*, the invited error doctrine should not preclude review in Mr. Grenning's case, although for different reasons. Unlike in *Aho*, trial counsel did not invite the error by proposing or agreeing to a jury instruction. The error was not an instructional error at all. The error was in ruling or holding that indeterminate sentences should be imposed, not a matter to be determined at trial or by the jury. No error was invited.⁶

⁶ If counsel had invited the error, counsel would be ineffective, as in *Aho*, and the invited error doctrine would not preclude review.

c. A challenge to reliance on .712 to authorize judicial fact-finding should not be precluded by the law of the case doctrine.

Although this Court found in the first appeal that the trial court was entitled to find aggravating factors because Mr. Grenning was sentenced under RCW 9.94A.712, a challenge to any asserted claim that that statute authorizes the current exceptional sentence should not be precluded by the law of the case doctrine. In the former appeal, the state never argued that .712 authorized the judicial fact-finding in the case. The issue was never briefed until a motion to reconsider, which was denied in a one-line order, and therefore the merits were never addressed.

The law of the case doctrine permits, but does not require, an appellate court to refuse to address an issue raised in a prior appeal. *State v. Elmore*, 154 Wn. App. 885, 896, 228 P.3d 760 (2010); *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-264, 759 P.2d 1196 (1988); RAP 2.5(c)(2).

The doctrine does not apply where the prior decision was clearly erroneous. *Elmore*, at 896; *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005). “The Supreme Court has also refused to apply the doctrine after a de novo sentencing hearing, reasoning that to deny a defendant’s challenge on the merits would deny him his rightful remedy and would not serve the ends of justice.” *Id.* (citing *State v. Harrison*, 148 Wn.2d 550, 562-63, 61 P.3d 1104 (2003)).

Here, the prior decision upholding the exceptional sentence under RCW 9.94A.712 did not consider that the statute did not apply because the charging period began before the effective date of the statute, or the controlling authority of *Aho*. For that reason, the prior decision was clearly erroneous. Moreover, there was an intervening, potentially de novo sentencing hearing and to deny a challenge on the merits of this issue would deny Mr. Grenning his right to appeal and would not serve the ends of justice. The law of the case doctrine should not apply.

2. BECAUSE THERE WAS NO AUTHORITY, OTHER THAN RCW 9.94A.712 AUTHORIZING THE JUDICIAL FINDING OF THE AGGRAVATING FACTORS AT THE INITIAL SENTENCING, AND THE TRIAL COURT RELIED ON THE SAME JUDICIAL FINDINGS AT RESENTENCING, THOSE AGGRAVATING FACTORS CANNOT SUPPORT THE EXCEPTIONAL SENTENCE WHICH WAS RE-IMPOSED ON REMAND.

At the time the jury entered verdicts against Mr. Grenning, there was no provision for submitting to the jury aggravating factors in support of an exceptional sentence. *See In re Personal Restraint of Hall*, 163 Wn.2d 346, 181 P.3d 799 (2008). The trial court recognized this at Mr. Grenning's initial sentencing and correctly declined to impanel a jury to consider aggravating factors. The trial court, instead, relied on aggravating factors in support of the exceptional sentence which it concluded could be found by a judge rather than a jury. RP 1031, 1039. With the exception of the sexual

motivation finding, the trial court was in error. All of the other factors relied on by the trial court had to be submitted to a jury under *Blakely*.

In *State v. Hughes*, 154 Wn.2d 118, 136-137, 110 P.3d 192 (2005) (abrogated on grounds regarding harmless error by *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)), the Washington Supreme Court held that under *Blakely*, a jury – not a judge - had to find all of the aggravating factors alleged by the state, including the determination that the application of the SRA “results in a sentence that is clearly too lenient.” Similarly, the finding that multiple victims and multiple incidents made the crimes more egregious had to be found by a jury.⁷ *Id.* The *Hughes* Court expressly held that an exceptional sentence could not be based solely on the existence of prior convictions and factual findings beyond the fact of prior convictions had to be found by a jury to support an exceptional sentence. *Id.* And *State v. VanBuren*, 123 Wn. App. 634, 98 P.2d 1235 (2004), the case relied on by the trial court, held on remand from the Washington Supreme Court that consecutive sentences imposed because a standard range sentence under the multiple offense policy of the SRA would

⁷ The fact of multiple incidents or multiple victims alone cannot support and exceptional sentence where each and every incident against each victim is charged in a separate count. *State v. Tunell*, 51 Wn. App. 274, 753 P.2d 543, *review denied*, 110 Wn.2d 1036 (1988); *State v. Pittman*, 54 Wn. App. 58, 772 P.2d 516 (1989); *State v. McAlpin*, 108 Wn.2d 458, 740 P.2d 824 (1987); *State v. Nordby*, 106 Wn.2d 514, 723 P.2d 117 (1986).

result in a sentence that was “clearly too lenient” had to be found by a jury. *State v. VanBuren*, 136 Wn. App. 577, 150 P.3d 597 (2007). This result was dictated by the decision in *In re Personal Restraint of Van Delft*, 158 Wn.2d 731, 147 P.3d 573 (2006).

The state, in fact, correctly conceded in the first appeal that only the sexual motivation factor found by the jury supported the exceptional sentence. In affirming Mr. Grenning’s exceptional sentence in his first appeal, this Court also implicitly agreed that the court’s aggravating factors, other than the finding of sexual motivation, were improper. This Court relied on RCW 9.94A.712 and singled out the jury finding of sexual motivation as the only other basis for upholding the exceptional sentence. *State v. Grenning*, 142 Wn. App. at 544.

On resentencing, the trial court merely adopted wholesale its former findings and conclusions noting that they had been upheld on appeal. RP(resentencing) 16. Those aggravating factors were improper factors for the judge to have found at the first sentencing and should not be held to support the same exceptional sentence on remand.

3. NEITHER THE FINDING OF SEXUAL MOTIVATION FOR THE SECOND DEGREE ASSAULT NOR THE “FREE CRIMES/MULTIPLE OFFENSE” AGGRAVATING FACTOR CAN SUPPORT THE EXCEPTIONAL SENTENCE IMPOSED.

- a. The sexual motivation factor cannot support an exceptional sentence for other counts.**

The jury found that the one count of second degree assault, out of the 51 remaining counts, was committed with sexual motivation. Admittedly that finding supports an exceptional sentence for the assault count, and would authorize an exceptional sentence of up to the statutory maximum of 120 months for that count or the running of that count consecutive to all of the other counts as an exceptional sentence. But the factor which applies to one count only cannot justify an exceptional sentence for other counts or provide a basis to run other counts consecutively. Otherwise the sentencing judge could impose greater punishment than the statutory maximum. A person convicted of second degree assault cannot be punished for more than 120 months and the court can not use the sexual motivation aggravating factor which applies only to the assault to justify a 1300-month exceptional sentence for convictions other than the assault. Aggravating factors must relate to the crime for which the exceptional sentence is imposed. RCW 9.94A.537(6) (“the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the *maximum allowed under RCW*

9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence”) (emphasis added); *State v. McClure*, 64 Wn. App. 528, P.2d 290 (1992) (“the single aggravating factor, infliction of multiple injuries, applies to only one of the two offenses and is insufficient to support both consecutive sentencing and imposition of a term longer than the standard range for the assault”); *State v. Spisak*, 66 Wn. App. 813, 821, 834 P.2d 57 (1992) (“when a sexual motivation finding has been made, the *underlying crime* becomes sex offense for which *an* exceptional sentence may be imposed”) (emphasis added).

The sexual motivation factor justifies no more than a 120-month sentence or a sentence for second degree assault consecutive to other convictions. It cannot justify other convictions running consecutively to each other.

- b. **The free-crimes/multiple convictions aggravator cannot support an exceptional sentence because, under former RCW 9.94A.535, it had to be found by a jury; the state never gave notice of its intent to seek an exceptional sentence based on current RCW 94A.535(2)(c) and to apply the current statute to Mr. Grenning would be ex post facto.**

The “free crimes/multiple offense” aggravator cannot validly support an exceptional sentence for Mr. Grenning because that aggravating factor, as

it was set forth in former RCW 9.94A.535(2)(i), the law in effect at the time his crimes were committed, had to be found by jury to be constitutional.

In *State v. Alvarado*, 164 Wn.2d 556, 192 P.3d 345 (2008), the Washington Supreme Court distinguished former RCW 9.94A.535(2)(i) (2003), from RCW 9.94A.535(c)(2), the current statute, as amended in 2005.

Under former .535(2)(i), the judge could impose an exceptional sentence after finding that:

The operation of the multiple offense policy of RCW 9.94A. 589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

Under the current RCW 9.94A.535(c)(2), amended in 2005, the judge can impose an exceptional sentence after finding that:

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

Citing *Hughes* and *State v. Ose*, 156 Wn.2d 140, 149, 124 P.3d 635 (2005), the *Alvarado* Court reiterated that “[t]he ‘clearly too lenient’ determination [from former .535(2)(i)] is based upon factual conclusions that must be made by a jury to meet Sixth Amendment muster.” *Alvarado*, 164 Wn.2d at 564. The court then held that the amended RCW 9.94A.535(c)(2) differs from the former statute by providing that unpunished current offenses automatically justify an exceptional sentence without any further fact finding

beyond offender score. *Id.*, at 566-567. The court then upheld the amended statute as providing for an exceptional sentence based on the trial judge's finding that a high offender score resulted in current offense going unpunished. *Id.* at 569.

Mr. Grenning has to be sentenced under former RCW 9.94A.535(2)(i) rather than RCW 9.94A.535(c)(2). RCW 9.94A.345 ("any sentence imposed shall be determined in accordance with the law in effect when the current offense was committed"). A jury has to make the .535(2)(i) findings.⁸

In fact, to apply the current .535(c)(2), "current offenses going unpunished" aggravator to Mr. Grenning would violate the prohibition against ex post facto laws. The Ex Post Facto Clause is violated where a statute increases the quantum of punishment after the offense was committed. *Weaver v. Graham*, 450 U.S. 24, 29, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981); *In re Stamphill*, 134 Wn.2d 165, 169-170, 949 P.2d 365 (1998). "In the context of an act already criminally punishable, disadvantage means

⁸ It is apparent from the written Findings of Fact and Conclusions of Law Regarding Exceptional Sentence, that the trial court made findings which, under *Blakely*, had to be found by a jury. For example, in Finding XIV, that the multiple victims made the conduct more egregious, there is a reference to an analogy to "RCW 9.94A.535(2)(d)(i)"; XV refers to "free crimes" as being "inconsistent with the purposes of the Sentencing Reform Act" and "clearly too lenient." These findings are echoed throughout the findings. CP 40-60

the statute alters the standard of punishment that existed under the prior law.” *State v. Schmidt*, 143 Wn.2d 673, 658, 23 P.3d 452 (2001). Here applying an aggravating factor to increase a sentence where that aggravating factor was not authorized as a basis for an exceptional sentence under prior law violates ex post facto prohibitions.

Further, RCW 9.94A.535(c)(2) cannot apply to Mr. Grenning because the state never gave notice that it would seek an exceptional sentence based on that provision, only that “the Multiple Offense Policy of 9.94A.589 results in a presumptive sentence that is clearly too lenient in light and purposes of the Sentencing Reform Act contrary to [former] RCW 9.94A.535.” CP 35-38. At the least, the state must give notice that it is seeking an exceptional sentence based on an aggravating factor prior to the sentencing proceeding in which an aggravating factor is to be considered and found. *State v. Powell*, 167 Wn.2d 672, 223 P.3d 495 (2009). Here the state gave belated notice after trial but before the initial sentencing, but this notice did not include the “unpunished” aggravator. No further notice was provided before resentencing. Because no notice of .535(c)(2) was ever provided, it cannot constitutionally support an exceptional sentence.

The “free crimes/multiple offense” aggravator cannot support an exceptional sentence for Mr. Grenning.

4. IMPOSING EXCEPTIONAL SENTENCES WITHOUT HAVING PROVIDED SUFFICIENT NOTICE PRIOR TO TRIAL VIOLATED MR. GRENNING'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO APPEAR AND DEFEND AT TRIAL.

At the initial sentencing, defense counsel objected to the lack of notice of aggravating factors prior to trial and objected that the defense had no opportunity to introduce evidence relevant to the aggravating factors during trial. RP 991-993. This is of particular importance because the trial judge heard no new evidence in entering the findings of fact in support of the exceptional sentence, but relied on evidence presented at trial.

In its findings of fact, the court relied on evidence from the trial that there were two victims, their ages, the number of occasions of abuse and what it found to be the specific circumstances of each occasion, and on its finding that "the defendant had the time and opportunity to pause, reflect, and either cease" or proceed. CP 40-60, 88-89, 164-165. Thus, the trial court relied on evidence from a trial in which the defense had no notice of the aggravating factors the court would consider or opportunity to defend against those factors.

The trial court failed to acknowledge at sentencing all of these factual findings it entered in its written findings and conclusions which the jurors were not asked to make. The trial court stated orally that it was

enough to justify the exceptional sentence simply because a jury had convicted Mr. Grenning of multiple counts involving multiple victims. It found it:

has the authority to impose an exceptional sentence as there were multiple victims found by the jury beyond a reasonable doubt. There were multiple offenses found by a jury beyond a reasonable doubt.

Those factors I think bring what occurred in this case in line with *Apprendi* and the *Blakely* decision.⁹

RP 1031. The reliance on facts found from the trial evidence by the court denied Mr. Grenning his most basic right to appear and defend at trial and due process of law.

It is well-established that due process requires that an accused person be apprised of all the essential elements of the crime with which he is charged in the information. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). Sentencing enhancements are the same as elements and

⁹ In fact, multiple incidents or multiple victims alone cannot support an exceptional sentence where each and every incident against each victim is charged in a separate count. *State v. Tunell*, 51 Wn. App. 274, 753 P.2d 543, review denied, 110 Wn.2d 1036 (1988); *State v. Pittman*, 54 Wn. App. 58, 772 P.2d 516 (1989); *State v. NcAlpin*, 108 Wn.2d 458, 740 P.2d 824 (1987); *State v. Nordby*, 106 Wn.2d 514, 723 P.2d 117 (1986). Multiple victims is not a proper aggravating factor where multiple charges are filed. *State v. Smith*, 67 Wn. App. 81, 834 P.2d 26 (1992),

must be charged in the information. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008); *Washington v. Recuenco*, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (holding that there is no distinction between the right to a jury trial on sentencing factors and elements of the crime). It is also a constitutional requirement that aggravating factors must also be set out in the information. *State v. Powell*, 167 Wn.2d 672, 223 P.3d 495 (2009); *State v. Siers*, 158 Wn. App. 686, 244 P.2d 15 (2010).

As held by the United States Supreme Court in *Washington v. Texas*, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967), the right to offer evidence in one's own behalf is a fundamental component of due process of law.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's This right is a fundamental element of the due process of law.

“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 690, 90 L. Ed. 636, 106 S. Ct. 2142 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984)).

The Legislature recognized the importance of pretrial notice when it enacted RCW .537, effective in 2005, “to conform the sentencing reform act, chapter 9.94A. RCW to comply with the ruling in *Blakely v. Washington*, 542 U.S. ----- (2004).” RCW 9.94A.537 provided a procedure for impaneling a jury to consider aggravating factors to support an exceptional sentence if the state provided notice to an accused person prior to *trial or entry of a guilty plea*.

(1) At any time prior to trial or entry of the guilty plea if the substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

In *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2005), the Court held that this statute applied to any case in which the accused had not yet gone to trial or entered a plea. In other words, the statute applied only to those who could receive pre-trial notice.

After *Pillatos*, the Legislature again amended the statute to provide for a jury to be impaneled to consider aggravating factors for persons whose exceptional sentences were reversed under *Blakely*. Effective April 18, 2007, a new section of RCW 9.94A.537 provides that:

(2) 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 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.

Just as the prior amendment does not apply to Mr. Grenning or the defendants in *Pilatos* – because they did not receive notice of aggravating factors prior to trial or entry of a guilty plea, the 2007 amendment does not apply to Mr. Grenning because the state did not seek to impanel a jury to try him on aggravating factors nor indeed did it seek any hearing to determine whether aggravating factors had been established on remand.

In *State v. Powell*, 167 Wn.2d 672, 223 P.3d 495 (2009), a majority of the Court – three dissenting justices and two concurring justices – agreed that as a matter of constitutional law aggravating factors must be pled in the information. *Powell*, 167 Wn.2d at 695 (Owens, J. dissenting, joined by Justices Sanders and Chambers); 689-90 (Justices Stephens and C. Johnson concurring in result, but agreeing with the dissent that aggravating factors have to be included in the information).

The plurality opinion concluded that constitutional due process required *some form of pretrial notice* of the aggravating circumstances the state would attempt to prove *prior to the proceeding in which the state seeks to prove those circumstances*, but not that the aggravating factors did not have to be included in the information. *Powell*, 167 Wn.2d at 681-688 (Alexander C.J., with Justices Fairhust, Madsen and J. Johnson concurring).

Justices Stephens and C. Johnson concurred with the plurality in Mr. Powell's case for defendants whose cases were remanded for a new sentencing after their sentences were reversed under *Blakely*.

Thus, under *Powell*, post-verdict notice might have been sufficient had the state sought a jury trial on aggravating factors and given Mr. Grenning the opportunity to defend at that sentencing trial. Because, however, the state failed to give him notice of the aggravating factors before trial, which was the proceeding in which the evidence was presented that the trial court relied on for the aggravating factors, the notice was insufficient under *Blakely*, *Pillatos*, and *Powell* as well as under RCW 9.94A. 537.

By relying on the trial evidence as factual support for aggravating factors, the court denied Mr. Grenning meaningful notice of what he had to defend against at trial. This was fundamentally unfair and denied him his right to due process, as well as his right to confrontation of witnesses and compulsory process. Even if the aggravating factors found by the trial court had been proper factors to be found by a judge rather than a jury, the court's findings were still improper because of the lack of notice to Mr. Grenning.

5. THE IMPOSITION OF CONSECUTIVE TERMS CANNOT BE UPHELD BASED ON JUDICIAL FINDINGS UNDER *OREGON V. ICE* BECAUSE SUCH FINDINGS WOULD VIOLATE THE WASHINGTON CONSTITUTIONAL RIGHT TO A JURY TRIAL AND BECAUSE *STATE V. VANCE* WAS WRONGLY DECIDED.¹⁰

In *Oregon v. Ice*, 555 U.S.160, 129 S. Ct. 711, 715, 172 L. Ed. 2d 517 (2009), the United States Supreme Court upheld an Oregon statute which permits a judge, rather than a jury, to enter specific findings to support consecutive rather than presumptively concurrent sentences. The Supreme Court held “in light of historic practice and the authority of states over their criminal justice systems, that the Sixth Amendment does not exclude Oregon’s choice” to allow a judge to impose consecutive sentences where the crimes are not the “same continuous and uninterrupted course of conduct” and the judge finds either that “the crimes were indicative of the defendant’s willingness to commit more than one criminal offense or caused or created a risk of greater or qualitatively different . . . harm to the victim or to a different victim.” *Id.* (quoting O.R.S. § 137.123). In particular, the Court noted the question it resolved as:

When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions,

¹⁰ Based on the above arguments, Mr. Grenning asserts that he is entitled to a remand for resentencing to a standard range sentence. This argument is presented in case this Court determines that it should consider the decision in *Oregon v. Ice* as relevant to Mr. Grenning’s case.

does the Sixth Amendment mandate jury determination of any fact necessary to the imposition of consecutive, in lieu of concurrent, sentences?

Ice, 129 S. Ct. at 714. The Supreme Court expressly did not hold that all state statutes permitting judges to determine whether sentences should be imposed concurrently or consecutively were in harmony with *Blakely* and *Apprendi*. *Ice*, 129 S. Ct. at 719.

In fact, Washington's statute differs from Oregon's statute in just the particulars held to be important to the Supreme Court in *Ice*. In Washington, the Legislature clearly mandated that a consecutive sentence under the SRA's sentencing scheme is equivalent to other exceptional sentences and that consecutive sentences may be imposed for crimes which are not serious violent offenses only under the exceptional sentencing provisions of the act.

RCW 9.94A.535 provides that "[a] departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations of this section." RCW 9.94A.589(1)(a) provides that "sentencing under this subsection *shall* be served concurrently and consecutive sentences may be imposed *only under the exceptional sentence provisions of RCW 9.94A. 535.*" (emphasis added).

In contrast, ORS §137.123 provides that the trial court may impose consecutive sentences "only in accordance with the provisions of this

section,” and sets out the two specific findings which the court can make to justify such consecutive sentences for crimes which are not part of a continuing course of action. Nothing in ORS 137.123 provides that a consecutive sentence is an exceptional sentence or links consecutive sentences to provisions for exceptional sentences.

Nevertheless, in *State v. Vance*, 168 Wn.2d 754, 230 P.3d 1055 (2008), the Washington Supreme Court held that under *Ice*, a judge could make the determination that the multiple offense policy of the SRA would result in a sentence that was clearly too lenient without offending the Sixth Amendment; and the court overruled its contrary decision in *In re Personal Restraint of VanDelft, supra*. The *Vance* court relied upon a perceived similarity between the Oregon statute and former RCW 9.94A.535, without noting that in Washington consecutive sentences are simply one form of exceptional sentence. The court noted, however, that it had not been asked to consider the issue on independent state grounds. *Vance*, 168 Wn.2d at 763.

When consecutive sentences are considered in the entire context of the SRA, it can be seen that *Vance* was wrongly decided.¹¹ Further, based

¹¹ Mr. Grenning recognizes that this Court cannot overrule the decision in *Vance*, but presents this argument to preserve it for a Petition for Review, if this Court rejects his independent state grounds argument and for its relevance to the *Gunwall* analysis.

on independent state grounds, this Court should uphold the right to a jury determination of the aggravating factors used to support an exceptional sentence in the form of consecutive terms—including that the multiple offense policy of the SRA resulted in a sentence which was clearly too lenient.

a. *Vance* was wrongly decided.

In enacting the SRA, the Legislature provided a sentencing scheme aimed at punishment for each offender commensurate with the punishment imposed on others committing similar offenses. RCW 9.94A.010(3). “The previous indeterminate sentencing system focused on rehabilitation . . . [while] the goal of standardized [SRA] sentencing is equality of incarceration time depending on the crime.” *In re Mota*, 114 Wn.2d 465, 788 P.2d 538 (1990).

To achieve proportionality among offenders, the SRA provides standard ranges for crimes based on criminal history and the seriousness level of the offense. RCW 9.94A.510, .515, .520, .525, .530. Criminal history expressly includes other current offenses for persons sentenced for multiple offenses, such that each sentence is increased by all other current offenses. *Id.* The range for crimes with an offender score of 9 – whether from prior criminal history or other current offenses -- is generally two to three times longer than the standard range with an offender score of 0.

RCW 9.94A.510 (*e.g.*, the presumptive range for crimes of serious level XI goes from approximately 7 years to approximately 20 years). Thus, other current offenses are factored into the standard range sentences for each crime and accounted for even where multiple offenses sentenced on the same day are presumptively concurrent. RCW 9.94A.589(1). In cases of two or more serious violent offenses, which are presumptively consecutive, other current offenses which are to be served consecutively do not count as offender score. RCW 9.94A.589.

Unlike Oregon, the Washington Legislature did not provide for consecutive sentences for crimes other than serious violent offenses in any way except under the provisions governing other exceptional sentences. Nor did the Washington Legislature provide any special aggravating factors applicable only to exceptional consecutive terms. Oregon has exceptional sentencing provisions, as does Washington. *See, e.g., State v. Wilson*, 111 Or.App. 147, 826 P.2d 1010 (1992); *State v. Sawarzky*, 195 Or.App. 159, 96 P.3d 1288 (2004). Oregon's statute, however, does not equate consecutive sentences with exceptional or "departure sentences." Consecutive sentences are determined exclusively under ORS § 137.123. *State v. Warren*, 195 Or.App. 666, 98 P.3d 1129 (2004); *State v. Trice I*, Or.App. 15, 21, 933 P.2d 345, *rev. den.* 325 Or 280 (1997). A court commits reversible error if it bases consecutive sentences on other factors

than those set out in 137.123. *State v. Nail*, 304 Or. 356, 366, 745 P.2d 415 (1987); *State v. Heiller*, 106 Or.App. 770, 809 P.2d 730 (1991).

Thus, SRA sentencing does not involve “discrete sentencing prescriptions” for each crime as contemplated by the Supreme Court in *Ice*. There is no evidence that the Legislature intended, in enacting the SRA, to preserve a right to judicial fact finding for consecutive sentencing or to preserve a distinction between consecutive sentences and exceptionally long sentences. On the contrary, the SRA provides that in the case of serious violent offenses, sentences “shall” run consecutively, but in all other instances both consecutive sentences and sentences above the standard range are equally exceptional sentences, which can be justified by considering the same set of aggravating circumstances. RCW 9.94A.589.

As amended, RCW 9.94A.535 now sets out aggravating factors which may be found by the judge as well as aggravators which must be found by a jury. The factors which may be found by a judge, however, unlike under the Oregon statute, apply equally to exceptional sentences above the standard range as well as consecutive sentences.

To allow judges to impose consecutive terms based on their own finding of aggravating circumstances, while requiring jury fact-finding for the same aggravators to impose exceptionally long terms undermines the

proportionality goal of the SRA and infringes on the right to a jury trial on aggravating factors where such a dichotomy was not contemplated by the Legislature in enacting the SRA. In *Ice*, the Supreme Court upheld the statute the Oregon Legislature enacted. In *Vance*, the Washington Supreme Court effectively created a statute that the Legislature never enacted; under *Vance* the state can obtain an exceptional sentence anytime an accused is convicted of multiple crimes simply by structuring it as a consecutive sentence and proving aggravating factors to the judge. *Vance* was wrongly decided and should not apply to Mr. Grenning's consecutive sentences.

b. *Oregon v. Ice* should be rejected on independent state grounds.

The “clearly too lenient” aggravating factor which the court in *Vance* held could be found by the judge when imposing consecutive sentences, if not other exceptional sentences, is similar to other aggravating factors which under *Blakely* must be proven to a jury. *Hughes, supra*. This factor is, under *Washington v. Recuenco* and *State v. Powell*, a sentence enhancement which should be considered equivalent to an element of a crime and must be pled in the information. As such, the right to a jury trial should be secure on aggravating factors.

Moreover, as set forth above, the Legislature did not express any

intent to distinguish between exceptional consecutive sentences and other sentences above the standard range with regard to the right to a jury trial.

- c. **A *Gunwall* analysis demonstrates that a jury must determine that the multiple offense policy results in a sentence that is clearly too lenient in light of the policies of the SRA.**

The state constitutional right to a jury trial includes the right of a person accused of a crime to have a jury determine every substantive fact bearing on the question of guilt or innocence beyond a reasonable doubt. *See generally State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910). This state constitutional right should extend to a jury determination of every fact, except the fact of a prior conviction which was already determined by a jury, necessary to support a criminal sentence.

The Washington Supreme Court held, in *State v. Gunwall*, 106 Wn.2d 54, 58, 61-63, 720 P.2d 808 (1986), that a court must consider certain factors when determining whether Washington's constitution should be interpreted as more protective of individual rights than the federal constitution: (1) textual language, (2) differences between the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. Parties asserting a violation of the state's constitution must brief and discuss these

factors. *Gunwall*, 106 Wn.2d at 62 (citing *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

A party need not provide a *Gunwall* analysis, however, if the Washington Supreme Court has already analyzed the constitutional provision in the context at issue. *State v. Reichbach*, 153 Wn.2d 126, 101 P.3d 80, 84 n.1 (2004) (citing *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998)). The Washington Supreme Court has previously analyzed Article I, Sections 21 and 22, under the *Gunwall* factors and has concluded that the right to a jury trial may be broader under Article I, Sections 21 and 22 than under the Federal Constitution. *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003); *Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982); *State v. Hobble*, 126 Wn.2d 283, 298, 892 P.2d 85 (1995). A review of the *Gunwall* factors supports the right to a jury determination of the “clearly too lenient” sentencing factor.

(i) State Constitutional Textual Language

The first *Gunwall* fact examines the textual language of the state constitution. Unlike the United States Constitution, the Washington Constitution contains two provisions regarding the right to trial by jury: “The right of trial by jury shall remain ‘inviolable....” Article I, Section 21. In addition, Article I, Section 22 provides that “[i]n criminal prosecutions the accused shall have the right to ... have a speedy public trial by an

‘impartial jury.’” Article I, section 21 has no federal equivalent. *State v. Schaaf*, 109 Wn.2d 1, 13 – 14, 743 P.3d 240 (1987). The fact that the Washington Constitution mentions the right to jury trial in two provisions instead of one indicates the general importance of the right under Washington’s State Constitution. *State v. Smith*, 150 Wn.2d at 152.

(i) Differences in the text for the relevant state and federal constitutional provisions

The second *Gunwall* factor examines the difference between the state and federal constitutional texts. The state constitution embodies the jury trial right in two separate provisions. In contrast, the federal constitution contains a single provision: The Sixth Amendment to the United States Constitution provides that “[i]n all criminal trials, the accused shall enjoy the right to a speedy and public trial by an impartial jury.” The federal constitution therefore does not include the “inviolable” language found in Washington’s constitution, which our courts have found critical to the right to the common law practice of 1889. *Sophie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

(ii) State Constitutional and common law history

The state constitution and common law history support the argument that an accused has the right to a jury determination of the “clearly too lenient” aggravating factor insofar as the right that is

considered to be “inviolable” is the right to a trial on offenses. *Smith*. At 150. Aggravating factors under the SRA, which must be found before a sentence above the standard range can be imposed, are functionally the equivalent of elements of the crime which must be pled and proven beyond a reasonable doubt. *Washington v. Recuenco, supra; State v. Powell* (majority of the court so holding); *State v. Siers*, 158 Wn. App. 686, 244 P.3d 15 (2010) (“after *State v. Powell*, the State must include in the information any aggravating factor it intends to prove for purposes of seeking an exceptional sentence above the standard range”).

(iv) Preexisting State law

Under pre-existing state law, *State v. Hughes, supra*, and *In re. VanDelft*, a defendant had a right to a jury trial on the clearly- too- lenient aggravating factor. Moreover, as set out above, in the SRA itself, the Legislature did not distinguish between consecutive sentences and other exceptional sentences and, in fact, expressly equated them and provided a single procedure for imposing any exceptional sentence and a single set of aggravators which must be found to justify either consecutive sentences or sentences longer than the standard range. Under pre-existing post-*Blakely* law, the clearly-too-lenient aggravator had to be proven to a jury. And when the Legislature amended the SRA to include the right to a jury trial on most aggravating factors, it did not distinguish between consecutive

exceptional sentences and exceptional sentences above the standard range; RCW 9.94A.589(1) continues to provide that consecutive sentences for crimes which are not serious violent offenses must be imposed pursuant to exceptional sentencing provisions. Where factors which can be found by a judge are distinguished from factors which must be found by a jury, those distinctions apply equally to consecutive terms and other exceptional terms. RCW 9.94A.535. Pre-existing state law supports an independent interpretation of *Oregon v. Ice*.

(v) Differences in structure between the state and federal Constitutions

The federal constitution serves as a limit of federal power, where the state constitution serves as a protector of fundamental rights. As such, this factor will nearly always support a broader state constitutional right than the corresponding federal right. *See e.g., Gunwall*, 106 Wn.2d at 62; *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

(vi) State interests or local concern

That the scope of the jury-trial right is a matter of particular state interest is apparent from the drafters' inclusion of the right in two constitutional provisions, which the Washington State Supreme Court has concluded secure "a right to a jury trial as liberal" as can be found in this country. *Pasco v. Mace*, 98 Wn.2d 87 n. 6, 653 P.2d 618 (1982).

As the above *Gunwall* analysis shows, the Washington State Constitution requires that the “clearly too lenient” aggravating factor must be proven to a jury.

F. CONCLUSION

Appellant respectfully submits that his exceptional sentence should be reversed and remanded for imposition of a standard range sentence, except that his 120-month sentence for second degree assault can be imposed to run consecutively to other sentences.

DATED this 17th day of March, 2011

Respectfully submitted,


Rita J. Griffith, WSBA 14360

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CERTIFICATE OF SERVICE

I certify that on the 17 day of March, 2011, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following via first class mail/delivery to his office:

Counsel for the Respondent:

Kathleen Proctor

Pierce County Prosecutor's Office

930 Tacoma Avenue S. Rm 946

Tacoma, WA 98402-2171

Neil Grenning

DOC # 872019

Airway Heights Corrections Center

P.O. Box 2049

Airway Heights, WA 99001-2049

Peter J. Guffon 3/17/2011
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