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COURT OF APPEALS
DIVISION II

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41612-3-II

STATE OF WASHINGTON
BY  DEPUTY

WASHINGTON STATE COURT OF APPEALS, DIVISION II

State of Washington
Respondent

v.

MATTHEW V. PRICE

Appellant

41612-3-II

On Appeal from the Superior Court of Grays Harbor County

10-1-00301-3

The Honorable Gordon Godfrey

BRIEF OF APPELLANT

Jordan B. McCabe, WSBA No. 27211
Attorney for Appellant Matthew Price

LAW OFFICE OF JORDAN McCABE
PO Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

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II. ASSIGNMENTS OF ERROR & ISSUES

A. Assignments of Error

1. The State failed to prove Appellant's custodial statements were admissible under the Fifth Amendment and Miranda.¹
2. The court violated the Double Jeopardy prohibitions of art. 1, § 9 and the Fifth Amendment and erroneously applied the burglary anti-merger statute in convicting Appellant for burglary with intent to commit theft and for possession of the stolen goods.
3. The sentencing court misinterpreted the same criminal conduct statute.
4. The evidence was insufficient to prove possession of stolen property.
5. The State failed to prove the existence of prior misdemeanors.
6. The sentencing court violated the Sixth Amendment and the SRA by imposing an exceptional sentence based solely on an independent, non-jury finding that unscored misdemeanors rendered a standard range sentence clearly too lenient.
7. The sentencing court lacked jurisdiction to impose an exceptional sentence because the State failed to provide pretrial notice of its intention to seek an exceptional sentence as required by the Sentencing Reform Act, RCW 9.94A (SRA).
8. The sentencing court violated the Separation of Powers doctrine and usurped the powers of the Legislature and the Executive by effectively judicially nullifying the legislative intent that the Department of Corrections may award significant earned release time.
9. The sentencing court abused its discretion in refusing to consider a DOSA sentencing alternative.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

B. Issues Pertaining to Assignments of Error

1. Where Appellant challenges the admissibility of incriminating statements obtained after he was jailed for an indefinite period in another county, does the State have an affirmative burden to prove the statements are not tainted by prior Miranda violations?
2. Does the Double Jeopardy doctrine prohibit multiple punishments for burglary with intent to commit theft and possession of the stolen goods for an accomplice as well as for a principal?
3. Are burglary based on intent to commit theft and possession of stolen property same criminal conduct for sentencing purposes?
4. May the court impose an exceptional sentence based on unsupported allegations of prior criminal history?
6. May the court make an independent finding that prior misdemeanors render a standard range sentence clearly too lenient?
7. Does the State's failure to give the defense pretrial notice of its intent to seek an exceptional sentence deprive the sentencing court of jurisdiction to impose an exceptional sentence?
8. Does the Separation of Powers doctrine preclude a court from judicially nullifying a Legislative scheme whereby the DOC awards earned release time?
9. May a sentencing court summarily refuse to consider a possible DOSA for an eligible defendant?

III. STATEMENT OF THE CASE

In the small hours of July 24, 2010, Tony's Short Stop, a Shell station convenience store in Montesano, Washington, was burglarized. RP 35.² It was undisputed that an individual named Michael Simpson broke into the store and stole around \$3,000 in miscellaneous property consisting mainly of scratch lottery tickets and cigarettes. RP 35, 150, 152.

Appellant Matthew V. Price also was charged and tried separately to a jury for second degree burglary and second degree possession of stolen property. The State alleged that Price, either as a principal or as Simpson's accomplice, broke into the store and entered unlawfully with intent to commit a crime of theft. RCW 9A.52.030(1) and RCW 9A.08.020. Count 1, CP 3.³ The State also charged that Price, either as a principal or as Simpson's accomplice, possessed stolen property worth more than \$750. RCW 9A.56.160(1)(a) and RCW 9A.08.020. Count 2, CP 3-4.⁴

² The verbatim report of proceedings of the CrR 3.5 hearing and the trial are in a single continuously-paginated volume designated RP. The sentencing is in a separate volume designated SRP.

³ Although Chapter 9A.56 RCW includes numerous "crimes of theft," including possession of stolen property, the only crime of theft defined in the jury instructions was theft. Instr. 10, CP 61.

⁴ "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen. RCW 9A.56.140(1). Possession of stolen property worth more than \$750 is possession of stolen in the second degree. RCW 9A.56.160(1)(a).

Price admitted being present but claimed he tried repeatedly to talk Simpson out of committing burglary. RP 113, 115, 117. He denied entering the store or actively participating in the crime. But, viewing the evidence and reasonable inferences in favor of the conviction, the jury could have found either that Price acted as a lookout while Simpson did the burglary as sole principal, or that Price was one of two figures caught on surveillance video inside the store during the burglary and was therefore a principal. RP 86, 150.

Price argued unsuccessfully that the burglary and possession charges merged for double jeopardy purposes and that the burglary anti-merger statute did not apply. RP 23; SRP 2-3. Alternatively, he asked the sentencing court to find the burglary and possession were same criminal conduct for sentencing purposes. SRP 2.

Price admitted that, after the burglary and theft were completed, he accepted a small amount of lottery tickets and cigarettes from Simpson in payment of a \$40 debt. RP 122. He asked the jury to convict him solely of 3rd degree possession of stolen property, a gross misdemeanor. (RCW 9A.56.170(1) & (2). RP 166.

The jury was instructed that mere presence and knowledge of criminal activity were not enough for conviction as an accomplice. Instruction 4, CP 59. They were also instructed that second degree

possession of stolen property necessarily includes third degree possession of stolen property as a lesser included offense. Instruction 16, CP 63.

The jury found Price guilty of second degree burglary and second degree possession of stolen property. CP 69-70.

At sentencing, Price asked to be considered for DOSA because he had committed his crimes while under the influence of methamphetamine. SRP 2, 4. The court categorically refused to discuss DOSA. SRP 3.

The State claimed, without supporting evidence, that Price had a significant prior criminal history, including numerous misdemeanors. The court determined Price's offender score was 5 on Count 1 and 4 on Count 2. Accordingly, the standard range was 17 to 22 months on Count 1 and 3-8 months on Count 2. CP 97.

The court accepted the State's unsupported allegations regarding criminal history and made an independent finding that unscored misdemeanors rendered a standard range sentence clearly too lenient. CP 97; SRP 7. The court lamented the passing of "the good old days" when Price's misdemeanor record would have qualified him as a habitual criminal, "and you'd have been doing life. Man, you'd have been doing so many lives by now you would have never got out." SRP 6-7.

The court also complained that Price would be eligible for what the judge called the "Blue Light Special", whereby the Legislature has

empowered the Department of Corrections (DOC) to grant up to fifty percent earned release time.⁵ “You know, he’ll be out before you get the court of appeal’s [sic] decision back.” SRP 7.

Accordingly, the court sentenced Price to exceptional sentences of five years on both counts to be served concurrently. CP 97; SRP 7.

Price filed timely notice of appeal. CP 108. Price has moved under RAP 18.15 for accelerated review of his sentence.

IV. ARGUMENT

1. THE STATE FAILED TO PROVE PRICE’S CUSTODIAL STATEMENTS WERE OBTAINED IN COMPLIANCE WITH MIRANDA.

The court held a CrR 3.5 suppression hearing regarding Price’s statements to the Montesano police while he was incarcerated in the Jefferson County jail on an unrelated matter. RP 5-17. The State showed that the Montesano officers complied with Miranda, and the court admitted his statements, which were used to incriminate him at trial. RP 16. But the State did not meet its burden to show that Price’s admissions were not tainted by Miranda violations previously committed by Jefferson County. It was error for the court to presume that a constitutionally

⁵ RCW 9.94A.729(3)(c).

sufficient Miranda inquiry did not encompass the circumstances of Price's custody from the outset.

Wash. Const. art. 1, § 9 provides that “[n]o person shall be compelled in any criminal case to give evidence against himself[.]” This constitutional guarantee receives the same interpretation that the United States Supreme Court gives the Fifth Amendment. *State v. Gocken*, 127 Wn.2d 95, 105, 107, 896 P.2d 1267 (1995). But Washington courts “liberally construe the right against self-incrimination.” *State v. Easter*, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996).

The State bears the burden of proving by a preponderance of the evidence that a defendant's confession was voluntary. *State v Braun*, 82 Wn. 2d 157, 162, 509 Pd 742 (1973). The standard of proof to establish a knowing and intelligent waiver of the right to remain silent is rigorous. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004); *Miranda*, 384 U.S. at 475. The State must meet the heavy burden of demonstrating (a) that the police fully advised the suspect of his rights; (b) that he understood his rights; and (c) that he (i) knowingly and (ii) intelligently and (iii) voluntarily decided to waive those rights. *State v. Reuben*, 62 Wn. App. 620, 625, 814 P.2d 1177, *cert denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991). The court then must determine voluntariness from the

totality of the circumstances under which a defendant confessed. *State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996).

This Court must determine whether substantial evidence supports the suppression court's findings of fact, and whether those findings support the conclusions of law.⁶ *State v. Athan*, 160 Wn.2d 354, 380, 158 P.3d 27 (2007); *State v. Broadaway*, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Substantial evidence is evidence of sufficient quantity that a rational fair-minded person could believe the finding to be true. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

If the suspect is in custody, self-incriminating statements are presumed to be involuntary and to violate the Fifth Amendment, unless the State can show otherwise. The suspect may waive his rights and agree to speak with law enforcement, but if he has no attorney, the State bears a "heavy burden" of showing that the waiver was knowing, voluntary, and intelligent. The trial court must consider all the circumstances in deciding whether a Miranda waiver was voluntary. *State v. Earls*, 116 Wn.2d 364, 378-79, 805 P.2d 211 (1991). The State must prove the voluntariness of the waiver by a preponderance of the evidence. *Earls*, 116 Wn.2d at 379.

Here, the court did not consider all the circumstances, because the State failed to produce any evidence establishing that the conditions of

⁶ The court entered no Findings and Conclusions as required by CrR 3.5.

Price's custody in Jefferson County prior to the arrival of the Montesano police were not such as to taint his statements by prior misconduct by the Jefferson authorities. For instance, when a person is taken into custody he must be advised of the right to a lawyer immediately. *State v. Copeland*, 130 Wn.2d 244, 282, 922 P.2d 1304 (1996). Instead of presuming that Price's statements were involuntary until proven otherwise, the court here presumed that nothing had happened prior to the Montesano interrogation to call voluntariness into question. The State simply did not bother to inquire.

Accordingly, the record is insufficient for this Court to conclude that Price's statements to the Montesano police were not tainted, and it was error to admit the statements.

Admitting an incriminating statement in violation of *Miranda* cannot be deemed harmless unless the untainted evidence is so overwhelming as necessarily to lead to a finding of guilt. *State v. Ng*, 110 Wn.2d 32, 38, 750 P.2d 632 (1988), citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986); *see Reuben*, 62 Wn. App. at 626-27.

Here, without Price's admissions, the untainted evidence consisted primarily of the unsupported allegations of Simpson's girlfriend who had an interest in implicating Price because her plea deal included an

agreement to testify against him. RP 68. This leaves ample room for reasonable doubt.

The remedy for a Miranda violation is to reverse and remand for a new trial. *See State v. Valdez*, 82 Wn. App. 294, 298, 917 P.2d 1098, *review denied*, 130 Wn.2d 1011, 928 P.2d 416 (1996).

2. CONVICTING PRICE OF BOTH BURGLARY
AND POSSESSION OF STOLEN PROPERTY
VIOLATED DOUBLE JEOPARDY.

Price was convicted and sentenced on Count I, unlawfully entering or remaining in a building with intent to commit theft, and also on Count II, possession of the fruits of the theft. This was error.

A double jeopardy argument is a legal question that this Court reviews de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). An appellant can raise a double jeopardy issue for the first time on appeal because the error is manifest and affects a constitutional right. RAP 2.5 (a); *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000).

The double jeopardy clauses of Article I, section 9 of the Washington Constitution and the Fifth Amendment of the federal constitution prohibit multiple punishments for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9; *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); *State v. Wilder*, 4 Wn. App.

850, 486 P.2d 319 (1971). Double jeopardy applies equally to multiple convictions with concurrent sentences. *State v. Calle*, 125 Wn.2d 769, 773, 888 P.2d 155 (1995).

Washington's double jeopardy criteria are well-established. Where a defendant's conduct supports charges under two different criminal statutes, the number one consideration is whether the Legislature intended to authorize multiple punishments or a single unit of prosecution. *State v. Williams*, 156 Wn. App. 482, 493, 234 P.3d 1174, *review denied*, 245 P.3d 773 (2010). Multiple convictions can withstand a double jeopardy challenge only if each is a separate unit of prosecution, which may be an act or a course of conduct. *State v. Allen*, 150 Wn. App. 300, 313, 207 P.3d 483 (2009). Sometimes, the Legislative intent regarding the unit of prosecution is explicit. That is the case here.

(i) Where the State necessarily proves one offense in order to prove another offense, the Legislature did not intend two convictions for a single act and the two offenses are one and the same for double jeopardy purposes. *In re Personal Restraint Petition of Burchfield*, 111 Wn. App. 892, 46 P.3d 840 (2002).

Here, a person cannot commit theft of property without possessing the stolen property. Accordingly, burglary with intent to commit theft is indistinguishable from burglary with intent to possess stolen property.

(ii) Offenses that occur in the same chapter of the RCW are presumed to constitute a single unit of prosecution. *Calle*, 125 Wn.2d at 779-80. Here, the Legislature put theft and possession of stolen property in the same chapter of the RCW. 'Theft' is found at RCW 9A.56.020(1)(a) (to wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services.) Possessing stolen property is at RCW 9A.56.140(1) (knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen.) Therefore, the offenses presumptively merge, and the Legislature is presumed not to have intended separate punishment.

Acts of Theft and Their Fruits: Beyond the doctrines of merger and double jeopardy, where a party is a principal thief, he or she may not also be convicted of receiving or possessing stolen goods. *State v. Melick*, 131 Wn. App. 835, 840-41, 129 P.3d 816 (2006); *State v. Hancock*, 44 Wn. App. 297, 300-01, 721 P.2d 1006 (1986). This is because one person cannot take from another and give possession to himself. *Melick*, 131 Wn. App. at 843. Where the acts of both taking and possessing the stolen item are charged and a conviction results, the trial court should vacate one of the convictions before sentencing. *See Melick*, 131 Wn. App. at 843-44; *Hancock*, 44 Wn. App. at 301-02.

It is hornbook law that a thief cannot be charged with committing two offenses—that is, stealing and receiving the goods he has stolen. And this is so for the commonsensical, if not obvious, reason that a man who takes property does not at the same time give himself the property he has taken. In short, taking and receiving, as a contemporaneous—indeed a coincidental—phenomenon, constitute one transaction in life and, therefore, not two transactions in law.

State v. Flint, 4 Wn. App. 545, 547, 483 P.2d 170 (1971), quoting *Milanovich*, 365 U.S. at 558-559, Frankfurter, J. dissenting (and citing ancient precedents.⁷) This argument did not help Flint because he was connected with the burglary only circumstantially. *Flint*, 4 Wn. App. at 548. Price, by contrast was convicted both of the burglary and the possession.

Where the acts of both stealing and possessing or receiving the stolen item are charged and multiple convictions result, the trial court should vacate one of the convictions before sentencing. *Melick*, 131 Wn. App. at 840-41; *Hancock*, 44 Wn. App. at 300-01. The *Milanovich* rule applies equally to principals and accomplices. One who is either a principal in the taking or who participates as an accomplice engages in a single transaction and therefore commits a single offense. Accordingly, the jury must be told that the taking and possession constitute a single transaction and only one crime. *Milanovich*, 365 U.S. at 555.

⁷ *Regina v. Coggins*, 12 Cox C.C. 517; *Regina v. Perkins*, 2 Den.C.C. 458, 169 Eng.Rep. 582; *Rex v. Owen*, 1 Moody C.C. 96, 168 Eng.Rep. 1200.

Lenity: If the intent of the Legislature with regard to the unit of prosecution is not clear, the ambiguity must be resolved in favor of the criminal defendant so that the State cannot turn a single transaction or course of conduct into multiple offenses. *State v. Leyda*, 157 Wn.2d 335, 343, 138 P.3d 610 (2006), citing *State v. Tvedt*, 153 Wn.2d 705, 710-11, 107 P.3d 728 (2005).

Both Convictions Must Be Reversed: It is error not to instruct the jury that it can convict either of burglary or of possessing the fruits of the burglary but not both. *Milanovich*, 365 U.S. at 555. Where an accused is prosecuted in one cause on alternative counts for either the primary theft or the secondary receiving, the jury must be instructed that it can return a guilty verdict on one count or the other but not both. *Milanovich*, 365 U.S. at 555. In *Milanovich*, because the jury was not so instructed, the Court set aside both convictions. The Court recognized that there was no way of knowing whether a properly instructed jury would have found the defendant guilty of one, both, or neither of the charged offenses.

That is the case here. The reviewing court will not presume either that the jury would have rendered a verdict of guilty on the greater offense or that the court would have imposed an exceptional sentence on that count alone. To do so would usurp the functions of both the jury and the sentencing judge. *Milanovich*, 365 U.S. at 555-556.

Here, it was error not to instruct Price's jury that it could convict him either of theft-burglary or of possessing the fruits of the theft and burglary but not both. The Court should reverse Price's convictions for second degree burglary and second degree possession of stolen property and remand for a new trial.

3. THE BURGLARY AND POSSESSION WERE
SAME CRIMINAL CONDUCT FOR
SENTENCING PURPOSES.

The *Milanovich* principle is embodied in the SRA in the same course of conduct provisions of RCW 9.94A.400(1)(a).

RCW 9.94A.400(1)(a) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant's offender score." *State v. Tili*, 139 Wn.2d 107, 118, 985 P.2d 365 (1999). For this purpose, "same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.400(1)(a). This provision reflects the intent of the legislature to limit the consequences of multiple convictions arising out of the same criminal act. *Tili*, 139 Wn.2d at 119, quoting *Calle*, 125 Wn.2d at 781-82.

RCW 9.94A.400(1)(a) Trumps the Burglary Anti-Merger Statute.

Even where the burglary anti-merger statute applies, "the more specific

sentencing statute, RCW 9.94A.400(1)(a), must be applied to the other crimes if they encompass the same course of criminal conduct.”

Tresenriter, 101 Wn. App. at 495-96, quoting *State v. Simonson*, 91 Wn. App. 874, 960 P.2d 955 (1998). This reflects the rule of statutory construction that the terms of a specific statute control over those of a conflicting general statute. *Tresenriter*, 101 Wn. App. at 495.

At minimum, the Court should remand with instructions to vacate the second degree possession of stolen property conviction and adjust Price’s offender score accordingly.

4. THE EVIDENCE WAS INSUFFICIENT TO CONVICT PRICE OF SECOND DEGREE POSSESSION OF STOLEN PROPERTY.

Even if the State could lawfully convict and punish Price for possession of stolen property, the evidence was insufficient to sustain that conviction.

Evidence is sufficient to support a conviction when any rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all inferences reasonably to be drawn from it. *Thomas*, 150

Wn.2d at 874. As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

Here, the State alleged that Price was guilty of possession because he aided or encouraged Simpson's possession of the stolen property by asking Simpson or Stutesman to share some of the proceeds. But this occurred after the burglary and theft were completed. Accordingly, it is insufficient to establish guilt as an accomplice.

Accomplice liability attaches solely to conduct occurring before or during the crime, not after it is completed. *See, State v. Robinson*, 73 Wn. App. 851, 872 P.2d 43 (1994) (reversed, because when the principal got back into defendant's car after stealing a purse, the robbery was complete.)

Likewise, here, the State sought to convict Price of possession of loot valued at over \$750 based on his having requested a share in the fruits of the crime after Simpson completed the theft and left the building.

The remedy is to reverse. "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

5. THE STATE DID NOT PRODUCE ANY EVIDENCE OF PRIOR CRIMINAL HISTORY.

The State must prove the prior criminal history. The State did not do that here. The sentencing court imposed an exceptional sentence based on the State's unsupported and unstipulated claim that Price had unscored misdemeanors.

The State's "bare assertions, unsupported by evidence" are insufficient to prove prior convictions. *State v. Hunley*, ___ Wn.2d. ___, ___ P.3d ___, 2011 WL 1856074, Slip Op. at 3. (*Hunley*) (overruling RCW 9.94A.500(1)). Either the State must produce proof by a preponderance of prior criminal history or the defendant must affirmatively acknowledge State's summary. *Hunley* at 3. Passive acquiescence to the State's hand-waving allegations of criminal history does not waive the right to appeal an erroneous sentence. *Hunley*, Slip. Op. 39676-9-II at . The record here contains no proof (by certified copies or otherwise) of any prior convictions, either felony or misdemeanor. And Price did not stipulate to any criminal history. (A document alleging prior misdemeanors found its way into the superior court file, but it was not admitted or presented to the sentencing court.) The remedy is to remand for resentencing.

6. THE COURT VIOLATED THE SIXTH AMENDMENT AND THE SRA BY BASING AN EXCEPTIONAL SENTENCE ON A NON-JURY FINDING THAT UNSCORED MISDEMEANORS RENDERED THE STANDARD RANGE CLEARLY TOO LENIENT.

In reviewing an exceptional sentence, the Court applies the “clearly erroneous” standard to determine whether the court’s reasons are substantial and compelling. *State v. Hale*, 146 Wn. App. 299, 307, 189 P.3d 829 (2008). The facts supporting aggravating circumstances must be proved to a jury beyond a reasonable doubt. The jury’s verdict on the aggravating factor must be unanimous, and by special interrogatory. RCW 9.94A.537(3). Here, the court tripled the top of the standard range on Count I and imposed the statutory maximum on Count 2 based on the judge’s independent opinion that Price’s prior misdemeanors rendered the standard range clearly too lenient. This was clearly erroneous because only a jury can make such a finding.

The “clearly too lenient” determination is a factual determination, rather than a legal one. *State v. Saltz*, 137 Wn. App. 576, 581, 154 P.3d 282 (2007); *State v. Hughes*, 154 Wn.2d 118, 137-40, 110 P.3d 192 (2005), abrogated on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (as discussed in *State v. Alvarado*, 164 Wn.2d 556, 564, 192 P.3d 345 (2008). *Alvarado*

unequivocally holds that the ‘clearly too lenient’ factor associated with unscored misdemeanors involves a factual determination that can be made only by a jury. *Alvarado*, 164 Wn.2d 566-67.

Since the judge’s finding here is unsupported by any evidence or argument, the Court should vacate the exceptional sentence and remand for resentencing within the standard range.

Moreover, the court did not enter written findings justifying its imposition of an exceptional sentence as required by RCW 9.94A.535. Where written findings are required by statute, the bench findings are without legal effect. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (an oral opinion has no binding effect unless incorporated into the findings, conclusions, and judgment.)

7. THE STATE’S FAILURE TO PROVIDE
STATUTORILY-REQUIRED NOTICE
DEPRIVED THE COURT OF JURISDICTION TO
IMPOSE AN EXCEPTIONAL SENTENCE.

This Court reviews de novo all challenges to the court’s statutory authority under the SRA. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). And procedural errors, such as lack of proper notice, are questions of law reviewed de novo. *State v. Harris*, 114 Wn.2d 419, 441, 789 P.2d 60 (1990).

The SRA requires the State to notify the defense pretrial of its intent to seek an exceptional sentence.

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

RCW 9.94A.537(1). As a matter of first impression, Price contends that notice is a jurisdictional prerequisite without which the sentencing court is without authority to impose an exceptional sentence.

Statutory notice requirements generally implicate the power of the court to act. Examples of situations in which proper statutory notice is a jurisdictional condition precedent include unlawful detainer. RCW 59.12.030; *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007). Also, notice of appeal. RAP 5.1(a); *State v. Olson*, 74 Wn. App. 126, 128, 872 P.2d 64 (1994).

In some circumstances, substantial compliance with notice requirements is sufficient to preserve jurisdiction. *Matter of Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980) (RCW 51.52.110). This is not such a circumstance. A court's power to incarcerate a person for five years on a standard range sentence of a few months is subject to strict interpretation of the law.

The Sentencing Reform Act is strictly construed. A trial court's sentencing authority is limited to that expressly found in the statutes. The court must strictly follow the statutory provisions, otherwise, the sentence is void. *State v. Phelps*, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002), quoting *State v. Theroff*, 33 Wn. App. 741, 744, 657 P.2d 800, review denied, 99 Wn.2d 1015 (1983).

The remedy is to vacate the exceptional sentence and remand for sentencing within the standard range.

8. THE SENTENCING COURT VIOLATED THE SEPARATION OF POWERS DOCTRINE BY JUDICIALLY NULLIFYING THE STATUTE BY WHICH THE LEGISLATURE AUTHORIZED THE D.O.C. TO AWARD EARNED RELEASE TIME.

The separation of powers doctrine preserves the lawful sphere of activity of each branch of government. *Gronquist v. Department of Corrections*, 159 Wn. App. 576, 586-587, 247 P.3d 436 (2011). To determine whether a trial court has violated separation of powers, this Court must determine whether the action threatens the independence or integrity or invades the prerogatives of another branch of government. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 507, 198 P.3d 1021 (2009).

It well settled that only the legislature, not the judiciary, may balance public policy interests and enact law. Article 2, section 1; *Rousso v. State*, 170 Wn.2d 70, 75, 239 P.3d 1084 (2010), citing *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963). The judiciary may not intrude into the sphere of legislative value judgments. *Ferguson*, 372 U.S. at 729. Especially to be avoided are “conceptions of public policy that the particular Court may happen to entertain.” *Id.*

Specifically, it is the function and responsibility solely of the legislature to set punishments for crime. *State v. Hunter*, 102 Wn. App. 630, 636, 9 P.3d 872, 876 (2000), citing *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). The power of the legislature in this respect is plenary, subject only to constitutional constraints. *See id.*, citing *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). The power to execute a sentence is not a judicial function but is vested by the Legislature in an administrative body. *Id.*

Here, the Legislature has expressed its clear intent that the Department of Corrections will have the power to award deserving inmates earned release time of up to fifty percent. RCW 9.94A.729(3)(c).

The sentencing court effectively usurped the policy-making power of the legislature by manipulating its sentencing power so as to nullify the earned release policy of which the court clearly disapproves. The judge

remarked that Price would probably be eligible for the “Blue Light Special” of 50 percent earned release time. “You know, he’ll be out before you get the court of appeal’s [sic] decision back.” SRP 7.

The Court should vacate the sentence and remand for a standard range sentence.

9. THE SENTENCING COURT ABUSED ITS DISCRETION IN REFUSING TO CONSIDER A DOSA ALTERNATIVE SENTENCE.

Price asked the sentencing court to consider a DOSA sentencing alternative because he committed crimes generally while under the influence of methamphetamine. SPR 2-4. The State asserted Price did not appear to have a drug problem, and that even if he did, the best treatment was a five-year “inpatient” stint in prison. CP 77, SRP 2. The court summarily refused to consider DOSA, without explanation. SRP 3.

This was a manifest abuse of discretion. Where the defendant’s drug addiction status is not clear, the SRA instructs the court to order a presentencing evaluation to determine the pros and cons of a DOSA sentence. RCW 9.94A.660(4) & (5).

A sentencing court’s decision to deny a DOSA is reviewable in the context of a challenge to the procedure by which sentence was imposed. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). Every

defendant is entitled to ask the sentencing court to consider a sentencing alternative for which he satisfies the preliminary eligibility requirements and to have the judge actually consider his request. *Grayson*, 154 Wn.2d at 342. It is reversible error for the court to refuse categorically to grant an alternative sentence “under any circumstances.” *Id.* at 330.

Here, as in *Grayson*, the court abused its discretion by summarily refusing to exercise the discretion vested by statute and categorically refusing to consider whether a DOSA sentence was appropriate where Price clearly met the foundational requirements of RCW 9.94A.660(1). *Grayson*, 154 Wn.2d at 338.

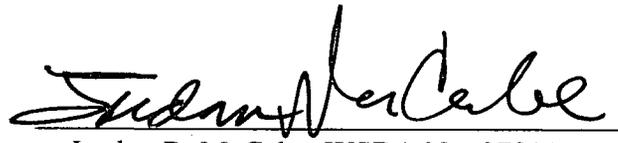
Moreover, the evidence strongly suggests that Price was under the influence of some disorienting substance or condition. He had absolutely no sense of the passage of time, insisting that he wandered around for five hours and visited a Chevron station at 8:45 a.m. before finally leaving the scene at 9:00 a.m. RP 124-25, 126. It turned out that the Chevron station’s surveillance video timer was off and substituted an 8 for a 3 in the hours column. RP 142. Price and Simpson’s girlfriend actually were at the Chevron at 3:45 a.m. and drove away shortly thereafter. A Tony’s employee discovered the theft and called the police at around 5:00 a.m. RP 30.

Instead of ordering an evaluation, the court allowed the prosecutor to determine Price's addiction status without benefit of a hearing or even an opportunity to say a single word in response. SRP 2. The court then followed the State's recommendation to dump the Legislature's DOSA legislation and substitute the prosecutor's sentencing policy that long-term incarceration is the best treatment. SRP 2.

V. CONCLUSION

For the foregoing reasons, Matthew Price asks this Court to reverse his convictions and vacate the judgment and sentence.

Respectfully submitted this 2nd day of June, 2011.

A handwritten signature in black ink, appearing to read "Jordan B. McCabe", written over a horizontal line.

Jordan B. McCabe, WSBA No. 27211
Counsel for Matthew Price

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DIVISION II

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STATE OF WASHINGTON

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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

Edgar M. Korzeniowski
Grays Harbor Prosecutor's Office
102 West Broadway Avenue, Room 102
Montesano, WA 98563-3621

Matthew V. Price, DOC # 336525
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362



June 2, 2011

Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington