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Court of Appeals  
Division III  
State of Washington

No. 30089-7-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

NIBARDO ANDRADE MENDOZA,  
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT  
Honorable Ruth E. Reukauf, Suppression Hearing  
Honorable F. James Gavin, Trial

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in concluding,

The second warrant for the home and business of the defendant was valid. The information challenged by the defendant concerning statements by a neighbor that the defendant was seen by him on the property ... [was] not [a] material misrepresentation impacting the validity of the warrant.

Findings and Ruling on Suppression Hearing, Conclusion of Law at CP 254.

2. The defendant was denied effective assistance of counsel by defense counsel's failure motion to suppress evidence based on lack of probable cause to obtain the search warrant for his residence and business.

3. The trial court erred in entering the finding that "[t]he jury found that Count 1 was a major violation of the uniform controlled substance act." Judgment and Sentence, ¶ 2.6, at CP 242.

4. The trial court erred in imposing an exceptional sentence.

5. The absence of a standard guiding the determination of whether "substantial and compelling reasons" support an exceptional sentence violates the Fourteenth Amendment Due Process Clause.

6. The record does not support the finding that Mr. Andrade has the current or future ability to pay legal financial obligations.

*Issues Pertaining to Assignments of Error*

1. Were both parts of the Strickland test for ineffective assistance of counsel met by defense counsel's failure to challenge lack of probable cause to issue the search warrant for Mr. Andrade's home and business addresses because the supporting affidavit contained no facts to indicate that criminal activity was connected with these addresses?

2. Is a defendant's constitutional right to jury trial violated where the trial court, not the jury, made the factual determination that the offense was a major violation of the Uniform Controlled Substances Act?

3. Does a sentencing court act without authority when it imposes an exceptional sentence based on a judicial finding that is not among the exclusive factors specified by the legislature by which a trial court can impose an aggravated exceptional sentence without a finding of fact by the jury?

4. A penal statute which fails to set forth objective guidelines to guard against arbitrary application is vague and violates the Fourteenth Amendment's Due Process Clause. Neither the SRA nor case law provide an objective framework which a sentencing judge can employ to determine when substantial and compelling reasons exist to support an exceptional sentence. Nor does such a framework exist to guide appellate review of

the imposition of an exceptional sentence. Does the absence of objective standards deprive Mr. Andrade of due process and his right to appeal his exceptional sentence?

5. Should the finding that Mr. Andrade has the current or future ability to pay legal financial obligations be stricken from the Judgment and Sentence as clearly erroneous, where it is not supported in the record?

## **B. STATEMENT OF THE CASE**

Nibardo Andrade Mendoza<sup>1</sup> was found guilty by a jury of manufacture of a controlled substance—marijuana and possession of a controlled substance—marijuana over 40 grams. CP 241. The charges arose generally from police discovery of a large marijuana grow operation at 231 Carvo Road, in Yakima Washington. CP 1–2. Acting on information provided by firemen fighting a major fire in the area, police secured the area and later executed a telephonic search warrant of the building structures. Yakima County Deputy Sheriff Robert Tucker subsequently submitted a lengthy affidavit<sup>2</sup> and obtained search warrants

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<sup>1</sup> The information and Judgment and Sentence show the defendant’s name as “Nibardo Andrade Mendoza”. CP 3, 241. Because the defendant refers to himself as “Nibardo Andrade”, he will be referred to herein as Mr. Andrade. 3 RP 305

<sup>2</sup> Affidavit for Search Warrant, CP 61–68.

for Andrade's home<sup>3</sup> and a business address<sup>4</sup>. See CP 103–04, 1 RP 39.<sup>5</sup>

Approximately nine months prior to trial, defense counsel moved under CrR 3.6 to suppress evidence of the grow operation at 231 Carvo Road, claiming lack of probable cause to search the greenhouse and surrounding structures without a warrant. CP 6–34, 35–102. In part, counsel asserted that several statements found in Det. Tucker's (subsequent) lengthy affidavit were material omissions and misrepresentations sufficient to void probable cause to search at 231 Carvo Road. CP 35–43. A hearing was held. 1 RP 1–103. The court denied the motion to suppress, and entered written Findings and Rulings on Suppression Hearing. 1 RP 89–103; CP 252–54. In its motion, defense counsel had not challenged the lengthy affidavit and resulting search warrants obtained as to the home and business addresses. Nevertheless the court entered the following conclusion of law:

The second warrant for the home and business of the defendant was valid. The information challenged by the defendant concerning statements by a neighbor that the defendant was seen by him on the [231 Carvo Road] property and that the firefighters

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<sup>3</sup> Search Warrant for 2603 West King Court, Yakima WA - CP 260–61  
Return of Search Warrant for 2603 West King Court CP 262–63

<sup>4</sup> Search Warrant for 908 North 9<sup>th</sup> Avenue, Yakima WA - CP 264–65  
Return of Search Warrant for 908 North 9<sup>th</sup> Avenue CP 266–67

<sup>5</sup> The transcripts, contained in three volumes, are numbered sequentially but the title page to each volume does not disclose the page range within it. Therefore, citations to the record will include reference to the volume number, e.g. "1 RP \_\_\_\_".

entered the [231 Carvo Road] property looking for water were not material misrepresentation[s] impacting the validity of the warrant.

CP 254.<sup>6</sup>

At trial, the following pertinent evidence was presented.

On July 18, 2010, police were advised of a possible marijuana grow operation at 231 Carvo Road by fire personnel, who were fighting a big fire in the area. 2 RP 189; CP 64. County records listed Andrade and his wife Martha Andrade as the property owners. 2 RP 189–90; 3 RP 306. After arriving and smelling marijuana near the shop and greenhouse buildings, Deputy Tucker obtained a telephonic search warrant. 2 RP 191. Inside the greenhouse, police found a number of large marijuana plants each capable of producing a pound of marijuana worth \$1,000 to \$1,500 a pound, with an estimated value of three and a half million dollars. 2 RP 192–93. The deputy said there was one growing season a year, but estimated the operation had been ongoing for at least three years. 2 RP 193–94, 199, 229.

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<sup>6</sup> Assignment of Error 1. Defense counsel did not challenge the “second” (actually, two separate warrants) warrant for the home and business. Counsel only challenged the initial search and subsequent search by telephonic warrant of the 231 Carvo Road property. As part of his argument, he challenged some statements made by Detective Tucker in the 8-page affidavit in support of search warrants that were later executed at the defendant’s residence and business addresses. CP 35–43. This apparently confused the Court (and the State as the drafter of the findings on the motion to suppress).

The two buildings apparently had some sort of living quarters, which looked recently occupied by males. In those areas, police found an envelope with a phone number on it, a receipt for Ross [store], a March 2007 “High Times” magazine with the address label/cover removed, a Grower’s Supply catalogue addressed to “Nibardo Andrade or Current Occupant, FloraCare, 231 Carvo Road, Yakima WA”, a power bill issued to Julio Cesar Torres, a bus ticket for a Mr. Areano, and unidentified “dominion” paperwork for a female as well as two or three other people. “231 Carvo Road” was the only address shown on all of the paperwork that was found. 2 RP 194–97, 230–04, 210, 244–47; CP 66 (lines 13–14). Police found bags of gardening soil at the grow operation. 2 RP 210.

On July 23, 2010, police obtained and executed search warrants at Andrade’s house at 2603 King’s Court and another address of 908 North Eighth Avenue. 2 RP 183, 201, 217. Andrade was arrested and brought to his home in handcuffs as police were serving the search warrant. CP 227, ¶ 1. Andrade asked why he was being arrested, and police said it was because marijuana had been found on his property. Andrade, thinking this helped explain why the renters avoided having him come to the 231 Carvo Road property to do things or to pick up rent, remarked that he’d suspected

within the last few months that there might be a marijuana grow operation going on. 2 RP 175–76; 3 RP 323.

Inside, police found a 2009 “High Times” magazine which Andrade said he’d bought to get growing tips for the other plants he grew, and numerous other horticulture books in his home office. 2 RP 207, 245, 253. They found receipts from Lowes for bags of Organic Choice gardening soil. 2 RP 208–09, 247. Police found keys, two of which opened a door to the 231 Carvo Road shop. 2 RP 202, 243. In file cabinets, police found residential lease agreements for the 231 Carvo Road property between Andrade and Carlos Martinez (2007), Endoc Mendoza (2008), Ruben Sosa (2009) and Luis Algonso Areano-Areano (2010), a well as a Mexican Consular card for Luis Alfonso Areano-Areano and an identification card from Baja California or Mexico for Ruben Medina Sosa. Police unsuccessfully tried to locate these four lessees. 2 RP 213–13, 249–50. Police found no money or marijuana at the residence. 2 RP 233, 249. Outside the house, police found multiple empty plant pots and a large roll of tarp that appeared to be a new greenhouse cover. 2 RP 214, 248. Andrade had ordered the roof plastic after the renters told him they needed to make repairs; they’d asked that it be delivered to his house and they would pick it up. 3 RP 328.

The State examined Andrade about some scribbled notes in Spanish found in a notebook in his house, with “Ranch Lease for 2010” on the top of the page. It suggested monthly payment amounts that varied over the year according to growing season, referenced a bonus asked of \$1,000 for each ten pounds of production, and mentioned some things he would fix or pay for and other things as conditions of the renters. It represented Andrade’s random thoughts regarding his intentions to sell the 231 Carvo Road ranch property and to be very flexible to whoever wanted to buy it. The notes were never given to any renters. 3 RP 343–45, 352–57, 360–61.

During execution of the warrant, police talked to Andrade’s nephew, Jesus Andrade Jr. Detective Robert Hubbard testified that Jesus mentioned a time in 2008 when he’d gone with his uncle to the property and Andrade told him not to go into the greenhouse because it was rented to an unknown group of guys who were growing marijuana and Andrade wanted to keep Jesus away from it. 3 RP 271–76. Andrade agreed to be escorted by police to show them place of employment at two Montessori Schools, where he was the landscaping/groundskeeper. 2 RP 184–85.

Nibardo Andrade testified he and his wife bought the 231 Carvo Road property in 2005, intending to produce flowers for his business Flora

Care Nursery and products for his landscaping business. He opened the nursery in 2006. When plans with his now ex-wife fell through and he was losing money, he closed the business in 2007. Some of his landscape customers—especially the Montessori Schools—were keeping him busy and he also worked as a social worker at Memorial Hospital. 3 RP 306–07, 309, 330. Andrade moved back to the city after living briefly at the 231 Carvo Road property, and kept some grounds keeping equipment, plants, soil and supplies at the school and also at the house at the King’s Court address. 2 RP 184–85; 3 RP 308, 310–11. He used the garden soil at the school’s greenhouse and also at his house to move plants from 1 gallon to 5 gallon containers. 3 RP 312.

Andrade was busy with all his jobs. Beginning in late 2007 he rented out the 231 Carvo Road property, to various people who wanted to grow food or products to sell at area farmers’ markets. The renters often brought the rent into town to give to him. 3 RP 308–09, 314–17. Monthly rent was paid in cash, for which Andrade gave receipts. 3 RP 333. During execution of the search warrant, police found no rent receipts or records of case receipts. RP 365–66.

John Ferry, a neighbor near the 231 Carvo Road address, met Andrade in 2006 or so, and they shared a joint well with a third neighbor.

Ferry primarily had once a year contact with Andrade in order to turn on the irrigation water. He'd called Andrade about two weeks prior to the incident about a water line problem and testified that upon Ferry's return from work in Seattle a week later, the problem had been fixed. He'd seen Andrade at the property only rarely in recent years, and when the greenhouse roof needed replacement someone other than Andrade did it. He had last seen Andrade there perhaps six months prior to the incident. 3 RP 298–304.

Another neighbor, Richard White, first met Andrade in 2008 when he'd see Andrade working regularly at his nursery. He last saw Andrade at the 231 Carvo Road property at the beginning of 2009, and testified the renters grew beautiful corn and then did not harvest it. White did not see Andrade at all in 2010. During this time, he saw other people and cars occasionally at the property. 3 RP 288–95.

The jury was instructed as to accomplice liability regarding both counts.<sup>7</sup> The jury was also instructed as to the aggravating factor in pertinent part:

**Instruction No. 17.** If you find the defendant guilty of the crime of Manufacture of a Controlled Substance, Marijuana in Count 1, then

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<sup>7</sup> CP 171 (Instruction 7 - definition), 171 (Instruction 11 – to convict of count 1), 178 (Instruction 14 – to convict count 2).

you must determine if the following aggravated circumstance exists as to that count:

Whether the crime was a major violation of the Uniform Controlled Substances Act

CP 182.

Instruction No. 19. A major trafficking violation of the Uniformed Controlled Substances Act is one which is more onerous than the typical offense. The presence of the following factor may identify the offense charged in Count 1 as a major trafficking violation:

Whether the offense involved the manufacture of controlled substances for use by other parties

CP 184. The jury was given the following special verdict form:

We, the jury, having found the defendant guilty of the crime of Manufacture of a Controlled Substance, Marijuana, return a special verdict by answering as follows:

QUESTION: Did the offense involve the manufacture of controlled substances for use by other parties?

ANSWER: \_\_\_\_\_

( No or Yes)

CP 189.

The jury found Andrade guilty on both counts: Manufacture of a Controlled Substance—Marijuana and Possession of a Controlled Substance—Marijuana, more than 40 grams. CP 187–88. The jury answered “yes” to the special verdict. CP 189.

The court imposed an exceptional sentence of 36 months on count 1<sup>8</sup> based on the special verdict finding, and a concurrent high-end standard range sentence of 6 months on count 2. CP 242–43. The court incorporated findings in support of the exceptional sentence at ¶2.6 of the Judgment and Sentence:

The jury found that Count 1 was a major violation of the uniform controlled substance act. The uncontested evidence at trial established that there were over 2,500 marijuana plants which were producing a pound of marijuana product worth between \$1,000 to \$1,500 a pound. That results in a value of 2.5 to 3.75 million dollars[ ' ] worth of marijuana.

CP 242.

As a condition of sentence, the court made the following finding:

¶ 2.7 **Financial Ability:** The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The Court finds that the defendant has the present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753.

CP 242 (bolding original).

This appeal followed. CP 249-51.

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<sup>8</sup> Andrade's offender score was 0–6 months. CP 242.

## C. ARGUMENT

**1. Both parts of the Strickland test for ineffective assistance of counsel are met by defense counsel's failure to challenge lack of probable cause to issue the search warrant for Andrade's home and business addresses because the supporting affidavit contained no facts to indicate that criminal activity was connected with these addresses.<sup>9</sup>**

a. Issuance of a search warrant requires probable cause. An issuing magistrate's determination that a warrant should issue is reviewed for abuse of discretion. State v. Remboldt, 64 Wn. App. 505, 509, 827 P.2d 282, *rev. denied*, 119 Wn.2d 1005 (1992). This determination generally should be given great deference. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). On review, the court views an application for a search warrant 'in the light of common sense, with doubts resolved in favor of the warrant.' Young, 123 Wn.2d at 195.

A search warrant may issue only upon a determination of probable cause, based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location. State v. Smith, 93 Wn.2d 329, 352, 610 P.2d 869, *cert. denied*, 449 U.S. 873 (1980). Probable cause exists if the

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<sup>9</sup> Assignment of Error 2.

affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Accordingly, probable cause requires (1) a nexus between criminal activity and the item to be seized, and also (2) a nexus between the item to be seized and the place to be searched. Thein, 138 Wn.2d at 140 (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). A search warrant for documents generally is given closer scrutiny than one for physical objects because of the potential for intrusion into personal privacy. State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997) (addressing the particularity requirement) (citing Anderson v. Maryland, 427 U.S. 463, 482 n. 11, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976) and 2 Wayne R. LaFare, Search and Seizure sec. 4.6(d), at 569 (3d ed. 1996)), *cert. denied*, 523 U.S. 1008 (1998).

Generalized statements of belief regarding the common habits of drug dealers are insufficient to support a warrant. *See* Thein, 138 Wn.2d at 138. “An ‘officer's belief that persons who cultivate marijuana often keep records and materials in safe houses is not, in our judgment, a sufficient basis for the issuance of a warrant to search a residence of a

person connected to the grow operation.” Thein, 138 Wn.2d at 143 (quoting State v. Olson, 73 Wn. App. 348, 357, 869 P.3d 110, *rev. denied*, 124 Wn.2d 1029 (1994)). And, it is unreasonable to infer evidence is likely to be found in a certain location simply because police do not know where else to look for it. Thein, 138 Wn.2d at 150.

“[T]he existence of probable cause is to be evaluated on a case-by-case basis. Thus, general rules must be applied to specific factual situations. In each case, ‘the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness.’ General, exploratory searches are unreasonable, unauthorized, and invalid.” Thein, 138 Wn.2d at 150 (internal citations and footnote omitted).

b. Insufficient nexus to establish probable cause. Here, the criminal activity at issue is the cultivation of marijuana plants at the 231 Carvo Road address. The legal issue is whether a reasonable person, taking the facts set forth in the Affidavit for Search Warrant at face value, would believe that Andrade was involved in criminal activity and that substantiation of a possible marijuana grow or other evidence of a crime was likely to be found at his residence or place of business. *See Goble*, 88 Wn. App. at 509. Under the controlling authority of State v. Thein, there

is insufficient nexus to tie supposed criminal activity to this defendant and these two addresses. A motion to suppress the evidence flowing from the illegal search would have been successful.

In his eight-page Affidavit for Search Warrant, Detective Tucker (“affiant”) first identifies his training and experience<sup>10</sup> and then describes what was found at the marijuana grow, as summarized below.

231 Carvo Road property. On July 18, 2010, police executed a telephonic search warrant of a shop and greenhouse located at this property, which was purchased by Andrade and his wife in 2005. Inside, police found evidence of a large marijuana grow operation, including processed and un-harvested marijuana plants, marijuana seeds, grow light equipment, and some discarded stems and leaves from marijuana plants in a small blue barrel.<sup>11</sup>

The two buildings apparently had some sort of living quarters. In those areas, police found some recent receipts, a power bill issued to Julio Cesar Torres, unidentified “dominion” paperwork in the name of Victor Javier Arrelano, and tax information that had been recently sent in the name of Mr. Andrade. “231 Carvo Road” was the only address shown on

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<sup>10</sup> CP 61 (lines 13–42), 62 (lines 1–7).

<sup>11</sup> CP 64 (line 12), 65 (lines 30–40), 66 (lines 16–26, 67 (lines 20–23)).

all of the paperwork that was found.<sup>12</sup>

In the Affidavit for Search Warrant, affiant next makes a multitude of general statements regarding his beliefs regarding the common habits of drug dealers.<sup>13</sup> Affiant asserts he has probable cause to believe that evidence of such common illegal “violations” is being kept at residences located at 2603 West King Court and 908 North 9<sup>th</sup> Avenue.<sup>14</sup>

In the last five pages of his affidavit, affiant itemizes the facts and circumstances he claims amount to probable cause to search those addresses. CP 64–68. In relevant part, the information provided by affiant can be summarized as follows.

After investigation, affiant believes police had probable cause to search two additional locations, based on the following information:

2603 West King Court property

- ✓ Andrade is listed as the grantor of a deed of trust on this property, in favor of Federal Home Loan Mortgage Corp.<sup>15</sup>
- ✓ The Auditor’s Office shows Andrade owns this address and that it may be in foreclosure although he is still residing there<sup>16</sup>
- ✓ Police received information the Andrade was paying the utility bills at this address<sup>17</sup>

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<sup>12</sup> CP 66 (lines 1–19).

<sup>13</sup> CP 62 (lines 9–43), 63 (lines 1–20).

<sup>14</sup> CP 63 (lines 28–31), 64 (line 1).

<sup>15</sup> CP 62 (lines 37–39).

<sup>16</sup> CP 67 (lines 31–33).

<sup>17</sup> CP 67 (lines 28–29).

- ✓ Department of Licensing shows this as Andrade's address, and that he has several vehicles registered at this address<sup>18</sup>
- ✓ Police saw a car in the driveway that was registered to Andrade at this address<sup>19</sup>
- ✓ Police saw a small blue barrel in the back yard, similar to the barrel observed at the greenhouse property<sup>20</sup>

908 North 9<sup>th</sup> Avenue property

- ✓ Jesus Andrade is listed as owner of this property<sup>21</sup>
- ✓ This is a prior address for Andrade<sup>22</sup>
- ✓ Police did not see any cars belonging to Andrade at this address<sup>23</sup>, although a car located there appeared to match a vehicle seen in pictures posted on the Auditor's Office site of the driveway at the 2603 West King Court address<sup>24</sup>
- ✓ Andrade holds a business license for a landscaping business called FloraCare Nursery, and is shown as operating it out of this residence address<sup>25</sup>
- ✓ Police saw a small blue barrel in the back yard, similar to the barrel observed at the greenhouse property<sup>26</sup>

Miscellaneous additional information

- ✓ A criminal history check on Andrade shows that he has two prior

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<sup>18</sup> CP 66 (lines 38–40).

<sup>19</sup> CP 67 (lines 25–28)

<sup>20</sup> CP 67 (lines 20–23)

<sup>21</sup> CP 64 (line 8).

<sup>22</sup> CP 66 (lines 41–43).

<sup>23</sup> CP 67 (lines 17–18).

<sup>24</sup> CP 67 (lines 33–36).

<sup>25</sup> CP 67 (lines 1–7).

<sup>26</sup> CP 67 (lines 20–23)

felony convictions for drug-related crimes in 1988 [twenty-two years prior to the current incident]. Affiant noted that the crimes were committed in Okanogan County, which “also has a very large amount of marijuana growing operations.” CP 67 (lines 9–13) (bracketed comment added).

- ✓ John Ferry, a neighbor of the 231 Carvo Road property saw Andrade at that property approximately a week before the July 18, 2010 incident, tending a waterline on the property – but could not confirm that Andrade had entered either building<sup>27</sup>
- ✓ John Ferry has seen two other Hispanic males on the 231 Carvo Road Property<sup>28</sup>
- ✓ Jenny Reed, another neighbor, at some unknown time went to the 231 Carvo Road property and was met by two unknown Hispanic males<sup>29</sup>
- ✓ Yet another neighbor at some unknown time observed the marijuana grow at the 231 Carvo Road property during a windstorm when a piece of the plastic roof blew off and the grow was clearly visible from their residence<sup>30</sup>
- ✓ Several neighbors indicated a landscaping business had at some unknown time been operated at the 231 Carvo Road property.<sup>31</sup>

Detective Tucker concludes his recitation of facts and

circumstances as follows:

[Affiant] believes that drug trafficking/manufacturing is a continuous pattern of illegal acts and not just an isolated event. [Affiant] believes that Andrade is in possession of additional quantities of marijuana and drug paraphernalia for packaging, cutting, weighing, harvesting/growing equipment. [Affiant]

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<sup>27</sup> CP 67 (lines 38–42).

<sup>28</sup> CP 67, (lines 42–43).

<sup>29</sup> CP 67 (lines 44–45).

<sup>30</sup> CP 67 (lines 45–46) through 68 (lines 1–2).

<sup>31</sup> CP 67 (lines 1–3).

additionally believes that Andrade will be in possession of documentation indicating dominion and control of the residence at 2603 West King Court in Yakima and 231 Carvo Road in Yakima along with documents related to the distribution/manufacturing of controlled substances such as crib notes, phone numbers, addresses and names of associates in the drug trafficking organization, which can be stored inside of cellular telephones.

All of the above evidence and information gathered from 231 Carvo Road and subsequent investigation, and the reasonable inferences drawn therefrom, fails to establish the required nexus between illegal drug activity and Andrade's residence at 2603 West King Court and business address at 908 North 9<sup>th</sup> Avenue. There is no incriminating evidence linking drug activity to either address. The only evidence linking the 231 Carvo Road operation to the residence and business addresses is innocuous: a small blue barrel (reasonably likely some sort of composting container widely available to the public) and Andrade's name.

Even assuming Andrade was involved in a marijuana grow operation as principal or accomplice at the 231 Carvo Road property, none of the evidence found at 231 Carvo Road, nor any of the information obtained through investigation, linked this activity to the 2603 West King Court residence or 908 North 9<sup>th</sup> Avenue business address.

Nor is it reasonable to infer evidence is likely to be found at 2603 West King Court and 908 North 9<sup>th</sup> Avenue simply because police do not

know where else to look for it. “By this rationale, lack of investigation and fewer details might result in a warrant, whereas thorough investigation revealing more about the suspect[s] - and, therefore, potentially more places to look - would not.” Thein, 138 Wn.2d at 150 (bracketed material added). As in Thein, the record here establishes there *were* other places to look and suspects to investigate. The affidavit contains evidence that police found dominion evidence for a Victor Javier Arrelano and a recent power bill addressed to Julio Cesar Torres at the greenhouse address at 231 Carvo Road.<sup>32</sup> No neighbors saw Andrade there recently and at least two neighbors saw two Hispanic males other than Andrade at that location.<sup>33</sup> Although he apparently didn’t follow up on it, affiant had located official address information for Mr. Torres.<sup>34</sup> On these facts, it was just as probable that either or both Arrelano and Torres were solely responsible for cultivating the marijuana crop as it was that Mr. Andrade would be. *See* Thein, 138 Wn.2d at 150–51.

The facts of this case are indistinguishable from those in Thein. In both cases the police had probable cause to believe that the targets were involved in illegal activity (Thein, because informants told police that he was a dealer; Andrade, because the marijuana and associated items were in

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<sup>32</sup> CP 66 (lines 5–6 and 10–13).

<sup>33</sup> CP 67 (lines 42–45).

plain view at property he owned and may have recently visited). But in neither case did the police establish a sufficient connection between the place to be searched (here, Andrade's residence and business addresses) with the illegal activity. And in both Thein and this case, the affiant merely relied on "generalized statements of belief regarding the common habits of drug dealers." See Thein, 138 Wn.2d at 138. Under Thein, such opinions are insufficient to support a warrant. An "officer's belief that persons who cultivate marijuana often keep records and materials in safe houses is not, in our judgment, a sufficient basis for the issuance of a warrant to search a residence of a person connected to the grow operation." Thein, 138 Wn.2d at 143 (quoting Olson, 73 Wn. App. at 357).

There was not a sufficient nexus between the 231 Carvo Road criminal activity and the items to be seized from Andrade's residence and business addresses. The finding of probable cause must be grounded in fact. Thein, 138 Wn.2d at 147. The facts in the affidavit in support of the search warrant are not disputed. Based on the facts and all reasonable inferences made thereon, the magistrate abused his discretion in finding probable cause to issue a search warrant for 2603 West King Court and 908 North 9<sup>th</sup> Avenue. Had a motion been brought challenging probable

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<sup>34</sup> CP 66 (lines 32–35).

cause, the search warrant would have been found to be deficient and all evidence flowing from its execution would have been suppressed.

c. Ineffective assistance of counsel. Andrade's trial counsel provided constitutionally ineffective assistance by failing to argue there was no probable cause to support the issuance of search warrants for Andrade's residence and business address. Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). In Strickland, the Court established a two-part test for ineffective assistance of counsel. First, the defendant must show deficient performance. In this assessment, the appellate court will presume the defendant was properly represented. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992). Deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). But the failure to bring a motion to suppress evidence is constitutionally deficient if there is no reasonable basis or strategic reason for the failure. State v. Klinger, 96 Wn.App. 619, 623, 980 P.2d 282 (1999). Where the record demonstrates a motion to suppress would likely

be granted, the failure to move for suppression is prejudicial. State v. Rainey, 107 Wn. App. 129, 136, 28 P.3d 10 (2001).

Second, the defendant must show prejudice--"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Here, there was no evidence of principal liability. The only issue was whether Andrade was liable as an accomplice to the grow operation. As conceded by the prosecutor, this case was overwhelmingly based on circumstantial evidence. 3 RP 283. Although counsel moved to suppress evidence, his argument was based on lack of probable cause to search at the 231 Carvo Road grow operation. Counsel failed to challenge the lack of probable cause to support the subsequent search warrants.

The trial court record is, however, sufficient to permit this court to independently evaluate the law and the evidence that would have supported suppression on that basis, as argued above. Absent the evidence gathered under the challenged search warrants, the State had little basis to support its theory of accomplice liability. Instead, the fruits of the illegal

search provided evidence essential—albeit circumstantial—to support Andrade’s convictions. This included numerous yearly leases, rent payments in cash, no financial records, a nephew’s statement suggesting Andrade may have known of the grow operation for a few years, some sort of reference to renters’ payment of a bonus based on production located in a scribbled draft of a lease agreement, etc. There was no conceivable advantage strategically in not moving to suppress all evidence recovered in these searches for which there was no probable cause. Therefore, counsel’s failure to move to suppress on this basis meets the first prong of the Strickland test as being clearly deficient.

The second Strickland prong is also met. Without the information obtained in the illegal search, the remaining evidence was insufficient to support conviction of Andrade as a principal or an accomplice to manufacture and possession of marijuana. There was no direct evidence that Andrade participated in the grow operation or aided someone else in growing marijuana. After excision of the fruits of the illegal search, the only remaining circumstantial evidence consisted of Andrade’s name as property owner and blue compost-like barrels found at the three locations. There is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. Thomas, 109 Wn.2d at 226.

Therefore, counsel's error was so serious as to deprive the defendant of a fair trial.

**2. In light of constitutional right to jury trial, a jury's determination that the offense involved the manufacture of controlled substances for use by other parties did not support an exceptional sentence based on the aggravating circumstance that the current offenses constituted a major violation of the Uniform Controlled Substances Act which was more onerous than the typical offense.<sup>35</sup>**

a. The jury's special verdict finding does not support imposition of an exceptional sentence. In reaction to the decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S.Ct.2531, 2533 (2004), the Washington Legislature effected substantive changes to sentencing law in Washington, including a requirement that an exclusive list of aggravating factors must be proven to a jury.<sup>36</sup> RCW 9.94A.537(3); *see also* Blakely, 542 U.S. at 302 n.5 (Sixth Amendment requires "every fact which is legally essential to the punishment must be charged in the indictment and proved to a jury."). The existence of an aggravating factor is a factual

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<sup>35</sup> Assignment of Error 3 and 4.

<sup>36</sup> The 2005 amendment to the SRA, codified at RCW 9.94A.535 and .537, is commonly referred to as the "*Blakely* fix." (Washington Laws 2005, c. 68 § 7, effective April 15, 2005)

question, not a question of law. State v. Suleiman, 158 Wn.2d 280, 292-93, 143 P.3d 795 (2006). Thus, unless one of the listed aggravating factors is established solely by the jury verdict or the defendant's stipulation, it cannot be used to support an exceptional sentence. State v. Flores, 164 Wn.2d 1, 20, 186 P.3d 103 (2008).

A trial court is authorized to impose an exceptional sentence provided there is a jury finding that the State had proved beyond a reasonable doubt that:

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following *may* identify a current offense as a major VUCSA: ...

(iii) The current offense involved the manufacture of controlled substances for use by other parties; ...

RCW 9.94A.535(3)(e)(iii) (capitals original, emphasis added); RCW 9.94A.537(3). The jury was therefore required to make a finding as to the existence of this factor. RCW 9.94A.535(3)(e); RCW 9.94A.537(3).

Here—contrary to the court’s finding at ¶2.6 of the Judgment and Sentence<sup>37</sup>—the jury did not find that “Count 1 was a major violation of

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<sup>37</sup> CP 242.

the uniform controlled substance act”<sup>38</sup> and did not find that any violation “was more onerous than the typical violation of its statutory definition”, both of which the State was required to prove. RCW 9.94A.535(3)(e)(iii).

Instead, by special verdict, the jury was simply asked “Did the offense involve the manufacture of controlled substances for use by other parties? The jury answered the question “yes”. CP 189. The jury was not asked to make the factual determination that “the current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition.”<sup>39</sup> Nor did Andrade stipulate to the aggravating factor. CP 242. Since the jury did not find the aggravating circumstance listed in RCW 9.94A.535(3)(e), there was no basis to support the imposition of an exceptional sentence.

In Flores, the Washington Supreme Court considered this same issue, whether an exceptional sentence based on a judicial finding of the aggravating factor of a "major VUCSA" can withstand constitutional

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<sup>38</sup> Assignment of Error 3.

<sup>39</sup> The State proposed the wording of this special verdict interrogatory. CP 158. *Cf.*, the wording of the pattern jury instruction instead tracks the language of the statute, RCW 9.94A.535(3)(e): “We, the jury, having found the defendant guilty of (fill in the offense), return a special verdict by answering as follows: QUESTION: [Was the crime a major violation of the Uniform Controlled Substance Act?]”. 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.50 (3d Ed, 2008).

scrutiny, following Blakely. In Flores, the jury found Mr. Flores guilty of seven drug transactions. Enacted pre-Blakely, former RCW 9.94A.535 allowed a judge to make the judicial finding that a major violation of the uniform controlled substances act had taken place. After considering supplemental briefing on the newly decided cases of Crawford and Blakely, the Court of Appeals affirmed the imposition of an exceptional sentence based on the judge-made findings. Flores, 164 Wn.2d at 5.

The Supreme Court reversed. It rejected the State's argument that the jury's verdict sufficiently supports a finding of a "major VUCSA," under former RCW 9.94A.535(2)(e)(i)<sup>40</sup>, because the jury convicted Flores of more than three unlawful drug transactions. "[T]he 'major VUCSA' aggravator allows, but does not compel, an exceptional sentence when the defendant commits multiple violations ('[t]he presence of ANY of the following *may* identify a current offense as a major VUCSA'). Former

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<sup>40</sup> At the time Flores was sentenced, a trial court could impose an exceptional sentence if [t]he current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

- (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so.

Former RCW 9.94A.535(2)(e).

RCW 9.94A.535(2)(e) (emphasis added). Thus, the trial court had to make factual determinations in order to justify the exceptional sentence. In particular, the trial court had to infer the offenses were ‘more onerous than the typical offense’. Id. In drawing that inference--an inference the State correctly observes is sufficiently supported (but not compelled) by the jury verdict--the trial court made a factual determination that must be made by a jury. Compare State v. Cubias, 155 Wn.2d 549, 120 P.3d 929 (2005) (finding no Blakely violation where the jury verdict necessarily implies the defendant committed multiple serious violent offenses, triggering the imposition of a mandatory consecutive sentence). The ‘statutory maximum’ is the maximum that a judge may impose ‘without any additional findings.’ Suleiman, 158 Wn.2d at 289, 143 P.3d 795 (emphasis added) (quoting Blakely, 542 U.S. at 303-04, 124 S.Ct. 2531). Because the jury verdict does not necessarily imply Flores' multiple offenses were a ‘major VUCSA, the exceptional sentence is based on a finding made by the judge, not the jury.’ Flores, 164 Wn.2d at 22–23.

This case is indistinguishable from Flores. By special verdict, the jury answered affirmatively that the current offense involved the manufacture of controlled substances for use by other parties. However, the trial court had to make the factual inference that this offense was

“more onerous than the typical offense” and thus a major violation of the Uniform Controlled Substances Act. The trial court made a factual determination that instead must be made by a jury. The court erred in imposing an exceptional sentence because the trial court, not the jury, made the factual determination that the offense was "a major VUCSA". The matter must be reversed and remanded for imposition of a standard range sentence. Flores, 164 Wn.2d at 25.

b. The finding regarding “the size of the marijuana operation” is not a valid aggravating factor that may be found by a court under RCW 9.94A.535(2). The list of factors by which trial courts can impose an aggravated exceptional sentence without a finding of fact by a jury is exclusive. RCW 9.94A.535(2); State v. Mutch, 171 Wn.2d 646, 656, 254 P.3d 803 (2011). RCW 9.94A.535(2) provides as follows:

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

- (a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.
- (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history 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.

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

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

A trial court must enter written findings of fact and conclusions of law in support of an exceptional sentence. RCW 9.94A.535; In re Personal Restraint of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). "Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range." Breedlove, 138 Wn.2d at 311.

Here, the sentencing court incorporated findings in support of the exceptional sentence at ¶2.6 of the Judgment and Sentence:

The jury found that Count 1 was a major violation of the uniform controlled substance act.

CP 242. As discussed above, this finding was *not* made by the jury. The court continued:

The uncontested evidence at trial established that there were over 2,500 marijuana plants which were producing a pound of marijuana product worth between \$1,000 to \$1,500 a pound. That

results in a value of 2.5 to 3.75 million dollars[ ’] worth of marijuana.

CP 242. This finding is not among the exclusive factors specified by the legislature by which a trial court can impose an aggravated exceptional sentence without a finding of fact by the jury. RCW 9.94A.535(2); Mutch, 171 Wn.2d at 656. As such, the court’s imposition of an exceptional sentence based on its judicial finding of “the size of the marijuana operation”<sup>41</sup> is unauthorized and therefore invalid as a matter of law.

**3. Because there is no objective definition of what constitutes a “substantial and compelling reason”, the statutes governing the imposition and review of an exceptional sentence deprive Mr. Andrade of due process and a meaningful review upon appeal.**<sup>42</sup>

The vagueness doctrine of the 14<sup>th</sup> Amendment due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for

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<sup>41</sup> CP 242 at ¶3.2.

<sup>42</sup> Assignment of Error 5.

resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 108-09. A "statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The vagueness doctrine is most concerned with ensuring the existence of minimal guidelines to govern enforcement. Kolender v. Lawson, 461 U.S. 352, 358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983); O'Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988).

In addition to due process protections, "In criminal prosecutions the accused shall have ... the right to appeal ... ." Const. art. I, §22; State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959). An individual also has a statutory right to appeal an exceptional sentence. RCW 9.94A.585(2). Mr. Andrade asserts that because the provisions of the Sentencing Reform Act governing the imposition and appeal of an exceptional sentence are without any meaningful standard governing their application, he is deprived of due process and of his right to appeal.

a. The requirement that a sentencing court determine that substantial and compelling reasons exist to warrant an exceptional sentence is wholly subjective. Due Process requires objective guidelines to guard against arbitrary application of penal statutes. *See, Kolender*, 461 U.S. at 358. The provisions of the SRA governing the imposition of an exceptional sentence, particularly RCW 9.94A.535 and RCW 9.94A.537, as applied to Mr. Andrade, lack any articulable guidelines.

With a few narrow exceptions, RCW 9.94A.537 requires the facts establishing an aggravating factor be found by a jury beyond a reasonable doubt. *See also* RCW 9.94A.535(2) (outlining aggravating factors which may be found by judge); *see also* Blakely, 542 U.S. at 302 n.5, 124 S.Ct. 2531 (Sixth Amendment requires "every fact which is legally essential to the punishment must be charged in the indictment and proved to a jury."). Where a jury has properly found an aggravating factor exists, RCW 9.94A.535 provides in relevant part:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Prior to Blakely, an aggravating factor was legally sufficient, i.e., substantial and compelling, so long as it was not considered by the

legislature in setting the standard range and differentiated the present crime from other crimes of the same category. *See State v. Grewe*, 117Wn.2d 211,216, 813 P.2d 1238 (1991). But to apply that same analytical framework post-Blakely would either be contrary to the plain language of RCW 9.94A.535 or would presuppose a judicial fact-finding in violation of the Sixth Amendment. Nonetheless, that is the analysis which RCW 9.94A.585(4) still requires. The statute still directs

... the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

Thus, to comply with the Sixth Amendment, the legislature has required a jury determine the facts necessary to support the exceptional sentence. RCW 9.4A.535(4). At the same time, however, the legislature has maintained the requirement that the trial court determine substantial and compelling reasons exist. Because the trial judge no longer finds the facts upon which to rest an exceptional sentence, the focus of the substantial and compelling analysis employed by the trial court and reviewed by this Court cannot be a factual one.

Prior to Blakely, the SRA listed 14 nonexclusive aggravating factors and authorized courts to rely upon nonstatutory aggravators. Former RCW 9.94A.535 (2004). Following Blakely the SRA was fundamentally altered to eliminate nonstatutory aggravating factors, and to limit the imposition of exceptional sentences above the standard range to the 35 factors specifically listed.<sup>43</sup> RCW 9.94A.535(3) and (4). Under the former scheme, the analysis of whether there were substantial and compelling reasons existed primarily to ensure that nonstatutory factors were legally sufficient to warrant an exceptional sentence, i.e., not considered by the legislature in setting the standard range. However, in light of the present exclusivity of the statutory aggravating factors, that analysis is no longer meaningful, as the legislature has necessarily made that determination by including a given factor among the 35.

As yet another holdover of the pre-Blakely scheme, if the trial court imposes an exceptional sentence, the court is still required to "set forth its reasons in written findings of fact and conclusions of law." RCW 9.94A.535. Post-Blakely, it is clear the trial court cannot engage in any judicial fact-finding. Further, the trial judge cannot know what facts the

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<sup>43</sup> Because the imposition of a sentence below the standard range does not implicate the same Sixth Amendment concerns, courts remain free to rely upon nonstatutory mitigating factors.

jury ultimately found or relied upon in reaching its verdict. While it is apparent this statute was intended to provide the necessary appellate record (*see* RCW 9.94A.585(4) (directing reviewing court to assess the adequacy of court's stated reasons)), it is not clear now what "fact(s)" the court could find nor what conclusions the court could draw.

Thus, a trial court's determination that substantial and compelling reasons exist is no longer factual, and is no longer necessary to ensure the legal sufficiency of an aggravating factor. But the court is still required to make a finding that substantial and compelling reasons exist. Following the post-Blakely revisions to the SRA, and because of the Sixth Amendment prohibition of judicial fact-finding, there is no definable standard by which a trial court may make that finding.

Here, Andrade's challenge to Judge Gavin's ruling is not premised on the fact that a different judge might have reached a different conclusion. Rather, the evil is that a different judge would use different standards, because neither the statutes nor the case law provide a standard. It is this inherent subjectivity in the determination of what the legal standard is that violates due process.

b. The trial court's determination that substantial and compelling reasons exist lacks any objective limitations and is effectively unreviewable. Having excluded the trial judge from either the factual or legal determinations required under the former statute, the present statutory scheme employed by Judge Gavin allows a judge unfettered discretion to impose an exceptional sentence once the jury returns a verdict on an aggravator. After divorcing the trial judge from either the factual or legal determination, the SRA nonetheless vests the trial judge with the sole authority to impose an exceptional sentence.

In the end, a trial judge is tasked with determining if substantial and compelling reasons exist but is barred from making either the factual or legal determinations that define that term. This Court's review is limited to determining whether the judge's stated reasons support the imposition of an exceptional sentence, but it is left with no record to review, as the Court has no insight into the jury's deliberations. Moreover, this Court has no analytical yardstick by which to measure the correctness of the trial court's decision.

Here, the trial court orally did not provide any reasons for imposing an exceptional sentence other than the fact that the jury had returned a special verdict. 3 RP 432. As discussed above, the jury's particular

finding by special verdict *and* the court's additional written findings are insufficient as a matter of law and therefore do not allow a court to even consider whether imposition of an exceptional sentence is warranted based on substantial and compelling reasons. However, even if sufficient, the court did not articulate how or why an exceptional sentence was consistent with the purposes of the SRA. The court offered no indication of what substantial and compelling reasons might exist. In short, the court offered no record that allows this Court to determine the correctness of the decision or that substantial and compelling reasons do in fact exist.

Under the existing substantial and compelling analysis, a jury finding beyond a reasonable doubt of a statutory aggravating factor would always constitute a substantial and compelling reason to impose an exceptional sentence. If that remains the measure either there is nothing for the judge to find, or the statute requires the judge to make a finding of the existence of an aggravating factor. The latter plainly violates the Sixth Amendment, while the former relegates the judge's function to rubberstamping a jury finding.

In a pre-Blakely case, the Supreme Court said

... even though the sentence may be statutorily authorized, when a trial court imposes a sentence which is outside the standard range set by the Legislature, the court must find a substantial and compelling reason to justify the exceptional sentence.

Breedlove, 138 Wn.2d at 305. Thus, the requirement of RCW 9.94A.535 that the trial court determine there are substantial and compelling reasons must be something other than a mere recognition of the jury's finding and cannot be a judicial finding of fact establishing the aggravator[s].

Additionally, the determination that substantial compelling reasons exists cannot be reduced to a process whereby the jury finding simply grants the judge discretion to sentence as he or she wishes. First, this result fails to give effect to the independence of those two determinations. Second, the Supreme Court has reaffirmed post-Blakely that the determination that substantial and compelling reasons exist is a legal determination subject to *de novo* review as opposed to a discretionary or factual decision. See Suleiman, 158 Wn.2d at 291 n.3.

Following Blakely and the substantial revisions of the SRA, there is no longer an objective standard by which a trial or appellate court can determine whether substantial and compelling reasons exist to impose an exceptional sentence. In the absence of an objective standard governing the statute's application to him, the statute is unconstitutionally vague as applied to Andrade.

c. This Court must reverse Andrade's exceptional sentence.

Because of the absence of standards governing the imposition of

Andrade's sentence, and his inability to obtain any meaningful review of the imposition of the sentence, this Court must reverse the sentence imposed.

**4. The finding that Andrade has the current or future ability to pay legal financial obligations is not supported in the record and must be stricken from the Judgment and Sentence.**<sup>44</sup>

The record does not support the trial court's judgment and sentence "finding" that Andrade has the current or future ability to pay legal financial obligations (hereinafter "LFOs"). CP 242 at ¶ 2.7. The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden' imposed by LFOs under the clearly erroneous standard

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<sup>44</sup> Assignment of Error 6.

(bracketed material added) (internal citation omitted).” Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312.

The record here does not show that the trial court took into account Andrade’s financial resources and the nature of the burden of imposing LFOs. 3 RP 432–45. In fact, the record contains no evidence to support the trial court’s finding in ¶ 2.7 that Andrade has the present or future ability to pay LFOs. The finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.<sup>45</sup>

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<sup>45</sup> The reversal of the trial court’s judgment and sentence finding ¶ 2.7 simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Andrade until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ [t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*” Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

**D. CONCLUSION**

For the reasons stated, this Court should remand the matter for retrial or, in the alternative, for resentencing to a standard range sentence and to strike the finding as to ability and means to pay legal financial obligations.

Respectfully submitted on April 30, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 30, 2012, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 1, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of corrected page 44 of brief of appellant:

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