

FILED  
June 18, 2012  
Court of Appeals  
Division III  
State of Washington

NO. 303420-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

JAMES STEPHEN DUVALL, JR., Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 09-1-01226-5

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BRIEF OF RESPONDENT

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ANDY MILLER  
Prosecuting Attorney  
for Benton County

MEGAN A. WHITMIRE, Deputy  
Prosecuting Attorney  
BAR NO. 29933  
OFFICE ID 91004

7122 West Okanogan Place  
Bldg. A  
Kennewick WA 99336  
(509) 735-3591

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### **RESPONSE TO ASSIGNMENT OF ERROR**

The substantial and compelling reasons for the court's imposition of an exceptional sentence upward are properly included in its Findings of Facts and Conclusions of Law. (CP 55).

### **STATEMENT OF FACTS**

The State agrees with the defendant's rendition of facts contained at pages 2-3 of his brief.

### **ARGUMENT**

In his brief, the defendant cites to cases addressing the necessity of specific findings whenever the court imposes an exceptional sentence. (App. Brief, 6). These cases, however, were published prior to *Blakely*. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The exception being the defendant's citation to *Blakely* itself, of course. The defendant relies upon these cases for the proposition that the trial court failed to enter specific findings of fact to support

"substantial and compelling" reasons to justify its exceptional sentence. The defendant's reliance on these cases, including *Blakely*, is misguided.

Prior to *Blakely*, a trial court could impose an exceptional sentence based upon its own factual findings. *State v. Hale*, 146 Wn. App. 299, 189 P.3d 829 (2008). For example, after hearing the evidence in this case, the trial court could have found that the defendant acted with deliberate cruelty based upon the fact that he continually beat an unconscious victim's face into the concrete; then, after walking away, returned to kick the victim while the victim lie motionless in a pool of his own blood. See generally, *Blakely v. Washington*, 542 U.S. 296; *State v. Hale*, 146 Wn. App. 299.

After *Blakely*, however, it is improper for the court to base an exceptional sentence upon its own factual findings. *Id.* In fact, should a court attempt to base such a sentence on its own

factual findings, it risks encroaching upon the jealously guarded territory of the jury, in violation of *Blakely*. *Id.* Instead, when the State seeks an exceptional sentence that requires a factual finding, the jury is asked to decide whether specific, statutorily mandated, facts exist. If the jury so finds, the court has a "substantial and compelling" reason to impose an exceptional sentence should it wish to do so. *Id.*

*Hale*, published out of Division II, is an example of a case decided after *Blakely*, where the court addresses the very issue presented by the defendant in this case. *Hale*, 146 Wn. App. 299. The trial court in *Hale* imposed an exceptional sentence based upon the jury's finding that the crimes committed were done so against a law enforcement officer performing his official duties pursuant to former RCW 9.94A.535(3)(v). *Id.*, at 303-304. The trial

court's Findings of Fact and Conclusions of Law

were described as follows:

[T]he trial court carefully worded its findings to reiterate the jury's special verdict and avoided entering any additional findings that would have violated Hales right to have a jury find beyond a reasonable doubt any factor used to increase his sentence. The trial court's findings of facts noted that the jury found Hale guilty and returned a special verdict, and recited verbatim the jury's special verdict. Then it concluded, as a matter of law, that (1) the jury found the aggravating circumstances, (2) 'the facts found by the jury in the special interrogatory are substantial and compelling reasons justifying an exceptional sentence,' (3) a sentence above the standard range was 'in the interest of justice and [was] consistent with the purposes of the Sentencing Reform Act,' and (4) the exceptional sentence was 'appropriate to ensure that punishment is proportionate to the seriousness of the offense.'

*Id.*, at 308 (Citations omitted).

Admittedly, the trial court's conclusions of law in this case do not include the phrase "substantial and compelling." However, there is no authority that requires inclusion of such language, and that conclusion is implicit in the

language that is included in the court's findings and conclusions.

The Court in *Hale* noted:

We will not add to or subtract from the clear language of the statute even if we believe the legislature intended something else but did not adequately express it. We will, however, add or subtract language if doing so is required to make the statute rational. And we will avoid a literal reading of the statute if it would result in an unlikely, absurd, or strained interpretation. Here, the Legislature's requirement that the trial court enter findings and conclusions when the jury finds the aggravating circumstances beyond a reasonable doubt teeters on a strained interpretation. No such strained interpretation results when the court enters findings after imposing a sentence below the standard range or when the defendant waived the jury's findings. First, in an innocuous effort to justify its exceptional sentence, the trial court may come dangerously close to making additional findings to support the exceptional sentence in contravention of *Blakely*. Alternatively, the trial court, as here, will consume valuable judicial resources by entering findings that reiterate the jury's special verdict in its findings and conclusions when it imposes an exceptional sentence. Absent legislative directive, it may suffice for the trial court to attach the jury's verdict to the judgment and

sentence, instead of entering findings and conclusions, when the jury finds aggravating circumstances and it imposes an exceptional sentence. We do not decide that issue here because the trial court entered findings and conclusions at our direction.

*Id.*, at 306, FN4, (citations omitted).

While the Findings of Fact and Conclusions of Law in this case may be more economically drafted than those in *Hale*, they provide the proper basis for an exceptional sentence nonetheless. The jury's factual finding that the defendant acted with "deliberate cruelty" is the "substantial and compelling" reason for the exceptional sentence, and the court's findings of fact and conclusions of law make that clear.

#### **CONCLUSION**

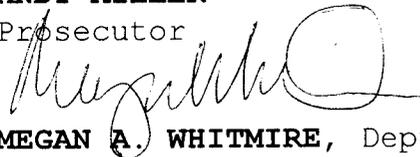
The trial court's written Findings of Fact and Conclusions of Law properly provide the court's basis for the defendant's eighteen-month exceptional sentence. In providing this basis, they do not contain an attempt by the court to assume facts relied upon by the jury in reaching

the special verdict; nor an attempt to supplement facts found by the court itself to support its conclusion that substantial and compelling reasons exist. To do so is unnecessary and contrary to case law. Accordingly, the defendant's sentence should be upheld.

**RESPECTFULLY SUBMITTED** this 18th day of June 2012.

**ANDY MILLER**

Prosecutor

A handwritten signature in black ink, appearing to read 'Andy Miller', written over the typed name and title.

**MEGAN A. WHITMIRE**, Deputy

Prosecuting Attorney

State Bar No. 29933

OFC ID No. 91004

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

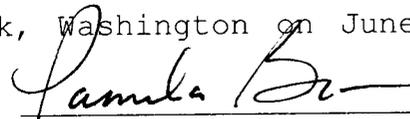
Noel James Pitner  
Ewing Anderson, P.S.  
522 W. Riverside Ave, Ste 800  
Spokane, WA 99201-0519

E-mail service by agreement was made to the following parties:  
npitner@ewinganderson.com  
sgleason@ewinganderson.com

James Stephen Duvall, Jr.  
1909 Hoxie Apt. B  
Richland, WA 99354

U.S. Regular Mail, Postage Prepaid

Signed at Kennewick, Washington on June 18, 2012.

  
\_\_\_\_\_  
Pamela Bradshaw  
Legal Assistant