

FILED
FEB 16 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON

NO. 75800-0

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

RONALD HALL,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF AMICUS CURIAE, THE WASHINGTON ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

James E. Lobsenz
Sheryl G. McCloud
Attorneys for Amicus Curiae

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	i
A. INTRODUCTION.....	1
B. ARTICLE 4, § 16 ABSOLUTELY PROHIBITS JUDGES FROM INTERFERING WITH THE JURY'S FACT FINDING ROLE. ALTHOUGH FEDERAL JUDGES ARE ALLOWED TO ASSIST JURIES IN THEIR FACT FINDING BY COMMENTING UPON THE EVIDENCE, OUR STATE CONSTITUTION ABSOLUTELY FORBIDS THIS. <u>BLAKELY</u> ERROR ALSO VIOLATES ARTICLE 4, § 16. THEREFORE, IN THIS STATE A <u>BLAKELY</u> ERROR IS A <i>STRUCTURAL</i> ERROR BECAUSE OUR STATE CONSTITUTION EXPLICITLY DENIES JUDGES ANY POWER TO USURP, OR EVEN TO INFLUENCE, THE EXCLUSIVE POWER OF JURIES TO FIND THE FACTS	4
C. THIS COURT HAS RECENTLY DECIDED THAT ART. 4, § 16 JUDICIAL COMMENT ERROR IS <i>NOT</i> SUBJECT TO <u>NEDER</u> -TYPE HARMLESS ERROR ANALYSIS. <i>A FORTIORI</i> , THE COMPLETE JUDICIAL USURPATION OF THE JURY'S EXCLUSIVE POWER TO DECIDE THE FACTS IS ALSO NOT SUBJECT TO <u>NEDER</u> -TYPE HARMLESS ERROR ANALYSIS.....	9
D. UNDER THE <u>LEVY</u> RULE OF PRESUMPTIVE PREJUDICE, REVERSAL IS ALWAYS REQUIRED FOR A VIOLATION OF ART. 4 § 16, UNLESS THERE IS "AN AFFIRMATIVE SHOWING THAT NO PREJUDICE COULD HAVE RESULTED."	11

E. ALL CASES INFECTED WITH BLAKELY ERROR MUST BE REVERSED BECAUSE IN ALL SUCH CASES THE TRIAL JUDGE “TOOK A FUNDAMENTAL FACTUAL DETERMINATION AWAY FROM THE JURY,” AND THUS THE LEVY AFFIRMATIVE SHOWING CAN NEVER BE MADE14

F. CONCLUSION15

TABLE OF AUTHORITIES

Page

STATE CASES

<u>Berger Engineering Co. v. Hopkins</u> , 54 Wn.2d 300, 340 P.2d 777 (1959).....	4
<u>McClaine v. Territory of Washington</u> , 1 Wash. 345, 25 P. 453 (1890).....	2
<u>Pasco v. Mace</u> , Wn.2d 87, 653 P.2d 618 (1982).....	6
<u>Sofie v. Fibreboard Corp.</u> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	6
<u>State v. Becker</u> , 132 Wn.2d 54, 935 P.2d 1321 (1997).....	12,14
<u>State v. Elmore</u> , 139 Wn.2d 250, 985 P.2d 289 (1999).....	7
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	2, 5
<u>State v. Hyde</u> , 20 Wash. 234, 55 P. 49 (1898).....	8, 9, 11
<u>State v. Jackman</u> , 156 Wn.2d 736, 132 P.3d 136 (2006).....	3, 12-14
<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	2, 3, 5, 10-12, 15, 16
<u>State v. Strasburg</u> , 60 Wash. 106, 110 P. 1020 (1910).....	6

FEDERAL CASES

Blakely v. Washington,
124 S. Ct. 2531 (2004)..... 1-3, 8, 11, 14-16

Byrd v. Blue Ridge Rural Electric,
356 U.S. 525, 540 (1958).....5

Chapman v. California,
386 U.S. 18, 24 (1967).....10

Quercia v. United States,
289 U.S. 466 (1933).....5

Neder v. United States,
527 U.S. 1 (1999).....2, 9, 10

Simmons v. United States,
142 U.S. 148 (1891).....6

Washington v. Recuenco,
126 S.Ct. 478 (2006).....1

A. INTRODUCTION

The United States Supreme Court remanded this case to this court for further consideration in light of Washington v. Recuenco, 548 U.S. ___, 126 S.Ct. 478, 163 L.Ed.2d 362 (2006). In the present case, petitioner Hall argued that the constitutional error committed by failing to submit to a jury a factual question that increases the maximum punishment that can be imposed could never be harmless.¹ Hall argued that such error was structural error. In Recuenco, the U.S. Supreme Court partially rejected this same argument, holding that such an error could be harmless as a matter of *federal* constitutional law, but expressly stated that the Washington Supreme Court was free to decide “as a matter of state law” whether the error might nevertheless be structural error that could never be deemed harmless in this State because of greater protections afforded by the Washington Constitution. 126 S.Ct. at 2251, & n.1.

Following the remand from the U.S. Supreme Court, this Court asked the parties to submit supplemental briefs on the issue of whether Blakely error could ever be deemed harmless in this State. In the petitioner’s supplemental brief, he argues that the state constitutional right to jury trial, guaranteed by Article 1, § 21, “prohibits Washington from

¹ In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court held that the failure to submit such factual questions to the jury violates the Sixth Amendment right to jury trial. This type of error is generally referred to as “Blakely” error.

finding the error in judicial fact-finding on aggravating factors to be considered harmless error.” *Supplemental Brief of Petitioner*, at 21. Petitioner Hall presents a Gunwall² analysis of Article 1, § 21, and, citing cases like McClaine v. Territory of Washington, 1 Wash. 345, 25 P. 453 (1890), he correctly notes that historically, under state law Washington courts did not engage in harmless error analysis when an element of an offense was not presented to the jury for its determination. The Washington Association of Criminal Defense Lawyers (“WACDL”) agrees with petitioner, and supports his argument that article 1, § 21 dictates that in Washington State the commission of Blakely error is structural error and can never be harmless.

In this amicus curiae brief, WACDL presents additional arguments as to why this error is structural error and can never be deemed harmless by a Washington court. In addition to art. 1, § 21, another provision of the Washington Constitution, art. 4, § 16, also compels this conclusion.

Recently, in State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006), a case involving improper judicial comment on the evidence in violation of art. 4, § 16, this Court rejected *both* structural error and conventional Neder-type harmless error as the proper standards for appellate court review. Instead, this Court held that the proper standard

² State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

was a third test of presumptive prejudice, and that reversal was required in all cases except where the record affirmatively showed that prejudice could not have resulted from the error.

This amicus brief is devoted to a discussion of this Court's art. IV, § 16 jurisprudence, and its relevance to the issues now before this Court: (a) Whether Blakely error should be reviewed as structural error which always necessitates reversal, or (b) as the type of state constitutional error which triggers the presumptive prejudice test of Levy. Amicus respectfully submits that in the final analysis, it makes no difference which of these two appellate tests this Court chooses to apply. If this Court decides that Blakely error is structural error, then all tainted exceptional sentences must be vacated. If this Court decides that Blakely error triggers the Levy presumptive prejudice test, vacation of all such exceptional sentences will also be required. The affirmative showing required by Levy to avoid reversal can never be met in any case involving Blakely error, because in all such cases a disputed factual issue was taken away from jury consideration. Accordingly, in all Blakely error cases, as in State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006), the error can never be deemed harmless, and vacation of all such tainted exceptional sentences is constitutionally required.

B. ARTICLE 4, § 16 ABSOLUTELY PROHIBITS JUDGES FROM INTERFERING WITH THE JURY'S FACT FINDING ROLE. ALTHOUGH FEDERAL JUDGES ARE ALLOWED TO ASSIST JURIES IN THEIR FACT FINDING BY COMMENTING UPON THE EVIDENCE, OUR STATE CONSTITUTION ABSOLUTELY FORBIDS THIS. BLAKELY ERROR ALSO VIOLATES ARTICLE 4, § 16. THEREFORE, IN THIS STATE A BLAKELY ERROR IS A *STRUCTURAL* ERROR BECAUSE OUR STATE CONSTITUTION EXPLICITLY DENIES JUDGES ANY POWER TO USURP, OR EVEN TO INFLUENCE, THE EXCLUSIVE POWER OF JURIES TO FIND THE FACTS.

It is well settled that the Washington Constitution prohibits appellate judges from making findings of fact, and prohibits trial court judges from even commenting upon factual questions before the jury. As this Court stated in Berger Engineering Co. v. Hopkins, 54 Wn.2d 300, 308, 340 P.2d 777 (1959): "This court is not a fact-finding branch of the judicial system of this state." And yet the Respondent would have this Court excuse the violation of the rights to a jury trial and to proof beyond a reasonable doubt, by making an appellate judicial finding that *if* the particular factual questions had been submitted to a jury in this case, these hypothetical jurors would necessarily have made the same finding of fact that the sentencing judge made (while employing the wrong burden of proof rule).

But our State Constitution prohibits judges from even *commenting* upon such factual questions, much less usurping the jury's role and deciding them for the jury. Art. IV, § 16, of the Washington Constitution

provides that "judges shall not charge juries with respect to matters of fact, nor comment thereon"

As this Court has recently noted, there is no federal constitutional counterpart to article 4, § 16. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).³ On the contrary, federal judges *are* allowed to comment on the evidence. See, e.g., Byrd v. Blue Ridge Rural Electric, 356 U.S. 525, 540 (1958):

The trial judge in the federal system has powers denied the judges of many States to comment on the weight of evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence.

Thus, in the federal system trial judges are *allowed* to do exactly what Washington state court judges are expressly *forbidden* to do. In Quercia v. United States, 289 U.S. 466, 469 (1933), the Court stated that the federal trial judge was within his rights to tell the jury what he thought about the evidence and what conclusions he would draw from it:

It is within [the trial judge's] province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion, by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of facts are submitted to their determination.

³ Accordingly, there is no occasion for conducting a Gunwall analysis, because there is no federal constitutional provision that article 4, § 16 can be compared to.

Accord Simmons v. United States, 142 U.S. 148, 155 (1891).⁴

If a trial court judge cannot even "comment" on a question of fact, then *a fortiori* art. 4, § 16 prohibits an appellate court (which did *not* observe witness demeanor or hear any live testimony) from making any determination that the "overwhelming evidence" in support of a particular fact was so strong that a jury *would* necessarily have found that fact to have been proved, if that factual issue had been submitted to it as constitutionally required by both the Sixth Amendment, art. 1, § 22, and art. 4, § 16.

In Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982), State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910), and Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989), this Court held that in comparing and defining the scope of the state and federal constitutional rights to a jury trial, courts should look at "the circumstances existing at the time of their enactment." Pasco, 98 Wn.2d at 97. One of the "circumstances existing at the time" art. 1, § 21 was enacted, was that art. 4, § 16 was enacted at the same time as well. Thus the scope of the state constitutional right to a jury trial should be considered with this fact in mind: unlike federal judges, who possessed the power to comment on the

⁴ "[I]t is so well settled, by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he

evidence, state court judges were *denied* this power. “The purpose of article IV, section 16 is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.” State v. Elmore, 139 Wn.2d 250, 275, 985 P.2d 289 (1999). It would make no sense to hold that while judges are forbidden from *influencing* jury factual determinations by means of commenting upon the evidence, appellate judges are not forbidden from *supplanting juries entirely* by making a determination that the evidence was so overwhelming that the appellate court can ignore the fact that *no jury ever made any determination* on the factual point in question.

In assessing the historical circumstances surrounding the adoption of art. 4, § 16, it is worth considering a decision written only 9 years after the adoption of the state constitution in which this Court expressly *condemned* the practice of trying to determine whether the effect of an impermissible judicial comment on the evidence was prejudicial to the accused:

[T]he law will not stop to consider what the effect of such invasion [of the defendant’s rights] may be in a particular case. The practice is not to be tolerated. It can make no difference that the testimony as given by [the witness] on the stand was correctly stated to the jury by the judge. As well might it be claimed that in a case where the evidence clearly called for conviction the judge might sua sponte

thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination.”

discharge the jury, and proceed to a judgment of conviction.
The vice consists in doing what the constitution forbids to be done, and, in dealing with error of this character, courts will not consider the probable consequences of the error.

State v. Hyde, 20 Wash. 234, 236, 55 P. 49 (1898) (bold italics added). If this Court prohibits appellate court consideration of the “probable consequences” of a trial judge having made a comment on the evidence to a jury which did decide a factual issue, certainly it should also prohibit appellate court consideration of the “probable consequences” that would have ensued if the judge had submitted the factual question to a jury for its determination, as he should have, under both the state and federal constitutions. Thus Court should conclude that art. 4, § 16 also prohibits applying harmless error analysis to a Blakely error.

Instead, this Court should conclude that under the Washington Constitution, Blakely error constitutes “structural error” which *always* requires reversal. Blakely error violates both art. 4 § 16 and art. 1 § 21 (as well as the Sixth Amendment to the United States Constitution). These state constitutional provisions “structure” all criminal trials in this state. They define the limits of the powers of trial and appellate judges, and they forbid judges to even attempt to influence, much less usurp, the exclusive fact finding power of the jury. Because these state constitutional provisions “structure” all criminal trials in this state, the violation of these state constitutional guarantees constitute *structural* errors.

Historically, this Court refused to even “consider what the effect of such invasion [of the defendant’s rights] may be in a particular case,” stating that such a practice would “not be tolerated.” Hyde, 20 Wash. at 236. And yet the prosecution specifically asks this Court to engage in precisely the type of analysis which this Court stated in Hyde it would never engage in. The State asks this Court to apply harmless error analysis to these errors, even though this Court held over 100 years ago that “in dealing with error of this character, courts will *not* consider the probable consequences of the error.” Hyde, at 236. To apply harmless error analysis would be “doing what the constitution forbids to be done.” Id. Since the Washington State Constitution forbids trial judges to decide factual questions, this Court should hold that in this State, Blakely errors are structural errors which must always result in setting aside the factual finding that was not made by a jury.

C. THIS COURT HAS RECENTLY DECIDED THAT ART. 4, § 16 JUDICIAL COMMENT ERROR IS *NOT* SUBJECT TO NEDER-TYPE HARMLESS ERROR ANALYSIS. *A FORTIORI*, THE COMPLETE JUDICIAL USURPATION OF THE JURY’S EXCLUSIVE POWER TO DECIDE THE FACTS IS ALSO NOT SUBJECT TO NEDER-TYPE HARMLESS ERROR ANALYSIS.

The Respondent argues that the error in petitioner Hall’s case is subject to harmless error analysis and relies upon Neder v. United States, 527 U.S. 1 (1999). The Respondent argues that Blakely error is harmless

“if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Supplemental Brief of Respondent*, at 7, citing Neder, 527 U.S. at 15, quoting Chapman v. California, 386 U.S. 18, 24 (1967).

Both parties, however, fail to note that this Court has already held that this Neder type harmless error rule is *not* applicable to state constitutional errors such as a judicial comment on the evidence in violation of art. 4, § 16. In State v. Levy, 156 Wn.2d 709, 724-725, 132 P.3d 1076 (2006), this Court *rejected* the prosecution’s argument that the Neder harmless error test applied to judicial-comment-on-the-evidence in violation of art. 4 § 16:

We hold that the Neder harmless error analysis ***does not apply*** to judicial comment claims, although it is properly applied in other criminal contexts.

Levy, 156 Wn.2d at 725 (bold italics added).

With trial-type errors, the Neder harmless error analysis asks the court to determine whether the result could have been the same without the error, which is a different standard than the presumption of prejudice we apply in our judicial comment cases under article IV, section 16.

Levy, 156 Wn.2d at 725.

At the same time, this Court *also* rejected the defendant’s argument that judicial-comment-on-the evidence was structural error: “A structural error taints the entire proceeding, whereas a judicial comment

may not be prejudicial if the record affirmatively shows that no prejudice occurred.” Id.⁵ Instead, this Court held that Art. 4, § 16 error is presumed to be prejudicial, and that to avoid reversal the record must affirmatively show that it was impossible for the defendant to have been prejudiced:

A judicial comment is presumed prejudicial and is only not prejudicial if the record affirmatively shows no prejudice could have resulted.

Levy, 156 Wn.2d at 725.

D. UNDER THE LEVY RULE OF PRESUMPTIVE PREJUDICE, REVERSAL IS ALWAYS REQUIRED FOR A VIOLATION OF ART. 4 § 16, UNLESS THERE IS “AN AFFIRMATIVE SHOWING THAT NO PREJUDICE COULD HAVE RESULTED.”

Assuming, for the sake of argument, that this Court decides to apply the Levy rule to Blakely errors, it would make no difference. All exceptional sentences with Blakely errors would still have to be vacated, because the showing required to avoid reversal by the Levy rule could never be made.

⁵ This Court’s decision in Levy does not mention this Court’s 19th century decision in State v. Hyde, 20 Wash. 234, 55 P. 49 (1898), and it appears that the parties in Levy failed to bring it to this Court’s attention. If Hyde had been cited to this Court, this Court might well have decided that judicial-comment-on-the evidence error *is* a structural error, since that is the view that this Court took over a century ago. But the question of whether this Court should reconsider its Levy rejection of structural error analysis for judicial-comment-on-the-evidence violations is not presented by this case, because this is not a judicial-*comment*-on-the-evidence case. This is a case of judicial fact finding, where there was no jury determination of the fact at issue. Thus, the error committed was not that the judge spoke words which may have influenced the jury’s decision, but rather that there was no jury at all. The holding of Levy that improper judicial comment is not structural error, does not control the question of whether improper judicial fact finding is

The Levy rule requires reversal unless “the record affirmatively shows no prejudice could have resulted.” Levy, 156 Wn.2d at 725. But no matter how overwhelming the evidence in support of a factual finding may be, the record can *never* affirmatively show that it was *impossible* for the jury to have avoided making that finding. This finding can simply never be made because the factual issue was never submitted to the jury at all. As this Court noted in State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006) and State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997), when a trial judge “removes” a factual issue from the jury entirely, the record simply cannot meet the test of “affirmatively showing” that the jury would necessarily have found that fact.

In Jackman, the trial judge instructed the jury that the victims were minors. In Becker, the trial judge instructed the jury that the drugs in question were sold near a school. In both cases, then, the trial judge “removed” a factual issue from the jury’s determination. Jackman’s jury never got to decide whether the victims were minors. Becker’s jury never got to decide if the youth program housed in a building was, in fact, a school. In both cases, this Court held that the defendant had been prejudiced by the trial judge’s actions. In Jackman, this Court explained

structural error. This Court can, and should conclude that the latter type of error *is* structural error, even if it judicial-comment-on-the-evidence error is not.

why the presumption of prejudice and the requirement of reversal could not be refuted:

Under the test outlined in Levy, the record must affirmatively show that no prejudice could have resulted. Levy, 156 Wn.2d at 725, 132 P.3d 1083-1084. In Becker, we ruled that when the trial court referred to a youth program as a school, ***it took a fundamental factual determination away from the jury.***

Jackman, 156 Wn.2d at 745 (bold italics added).

This Court noted that Jackman never challenged the fact that his victims were minors. Id. “Nevertheless, it is still conceivable that the jury could have determined that the boys were not minors at the time of the events, if the court had not specified the birth dates in the jury instructions.” Id. This Court concluded that because the trial judge “removed the facts from the jury’s consideration,” the prosecution could not meet the Levy test to rebut the presumption of prejudice:

We conclude that ***because*** the jury instructions state the victims’ birth dates and ***removed those facts from the jury’s consideration,*** the record does not affirmatively show that no prejudice could have resulted.

Jackman, 156 Wn.2d at 745 (bold italics added). Accordingly, reversal of the finding of victim minority was constitutionally required.

E. ALL CASES INFECTED WITH BLAKELY ERROR MUST BE REVERSED BECAUSE IN ALL SUCH CASES THE TRIAL JUDGE “TOOK A FUNDAMENTAL FACTUAL DETERMINATION AWAY FROM THE JURY,” AND THUS THE LEVY AFFIRMATIVE SHOWING CAN NEVER BE MADE.

As Jackman demonstrates, judicial comment on the evidence cases will fall into two categories. In most cases the error is committed when the trial judge makes an *oral* comment that states (or implies) what factual finding the judge would make. In these cases the judge does not “remove[] those facts from the jury’s consideration,” he simply *influences* the jury’s consideration by making an improper comment. But in those cases where the judge gives the jury a written instruction informing it that a certain fact has already been found, the judge does “remove” a factual issue from jury determination. In that second class of cases, the Levy presumption of prejudice can never be rebutted and reversal is required.

Blakely error falls into the second category. When a sentencing judge makes a factual finding of an aggravating factor, in violation of the rule of Blakely, the determination of the sentencing factor is “removed” from the jury. In *every* case where a Blakely error was committed, the sentencing judge “took a fundamental factual determination away from the jury.” Jackman, 156 Wn.2d at 725. See also Becker, 132 Wn.2d at 66 (Durham, C.J., concurring) (“By informing the jury in the special verdict form that the Youth Education Program is a school, the trial court

essentially resolved that factual issue. That was an obvious comment on the evidence. *the impact of which can only be remedied by vacating the sentence enhancement*'') (bold italics added).

Thus, the result in this case is exactly the same, regardless of whether this Court views the state constitutional errors as structural errors, or as Levy type errors triggering the presumptive prejudice rule. Either way, all art. 1 § 21 and art. 4 § 16 state constitutional errors committed by judicial usurpation of the jury's fact finding role require automatic reversal of any exceptional sentence predicated upon such a judicial finding of fact.

F. CONCLUSION

Amicus curiae urges this Court to rule that because the Washington Constitution

- (a) provides broader protection of the right to jury trial than its federal constitutional counterpart; and
- (b) (under provisions which have no federal counterpart at all) absolutely prohibits judges from influencing (even unintentionally) the jury's factual determinations, and from usurping the jury's fact finding role by removing disputed factual questions from their consideration;

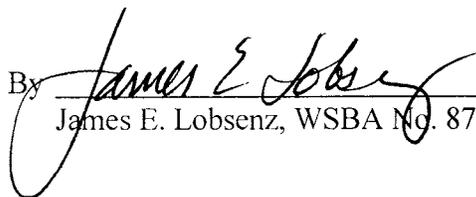
Blakely error must be treated as structural error in this State. Accordingly, all sentences infected with Blakely error must be vacated.

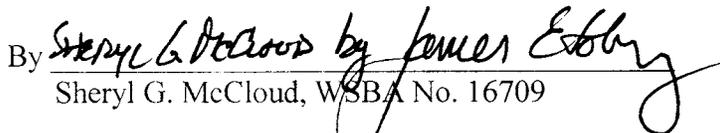
In the alternative, amicus urges this Court to hold that Blakely error implicates state constitutional rights that have no federal counterpart; that violation of these rights is to be evaluated under the Levy rule of presumptive prejudice; and that because Blakely error removes factual determinations from the jury, the Levy presumption of prejudice can never be rebutted in cases where Blakely error has been committed.

Under either analysis, amicus urges this Court to rule that Blakely error can never be found harmless in this state. Accordingly, this Court should vacate petitioner Hall's exceptional sentence.

DATED this 9th day of February, 2007.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSBA No. 8787

By 
Sheryl G. McCloud, WSBA No. 16709

Attorneys for Amicus Curiae, Washington
Association of Criminal Defense Lawyers